

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. L.

v.

FAO

137th Session

Judgment No. 4776

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. F. S. L. against the Food and Agriculture Organization of the United Nations (FAO) on 26 April 2020, the FAO's reply of 28 July 2020, the complainant's rejoinder of 8 September 2020, the FAO's surrejoinder of 4 January 2021, the complainant's additional submissions of 12 February 2021 and the FAO's final comments of 22 March 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision to close his harassment complaint after a preliminary review.

At the material time the complainant was Director of the Office of Human Resources (OHR) in the FAO. On 10 July 2019, the Inspector General notified him that the Office of the Inspector General (OIG) was conducting an investigation into allegations of unsatisfactory conduct on his part. He explained that the OIG had received information that the complainant may have engaged in acts of sexual harassment. He then explained the procedure that would be followed. Shortly after, on

12 July 2019, the complainant was interviewed by the senior investigator and a second investigator.

On 16 July 2019, the Inspector General issued a notification for access to electronic data thereby informing the Deputy Director-General of Operations that the OIG intended to search electronic data associated with the complainant's user account. He explained that there were reasonable grounds to believe that the data may contain information related to the alleged incidents of sexual harassment currently under investigation.

On 1 August 2019, the newly elected Director-General took office. Shortly after, the complainant was informed that he was placed on special leave with pay effective 8 August 2019. On the following days, 6 and 7 August 2019, articles were published in an Italian newspaper indicating that the Director-General had suspended the complainant from duty pending investigation into allegations of sexual harassment, corruption in hiring and abuse of power. On 7 August 2019, managers were informed that Mr A. was appointed Director ad interim of OHR effective 8 August. The complainant was suspended with pay pending investigation on 21 August 2019.

On 30 August 2019, the complainant filed an internal complaint of harassment with the OIG alleging harassment and abuse of authority on the part of the senior investigator, OIG, starting in November 2018 and continuing until August 2019. He argued that the senior investigator targeted him by focusing on some allegations of sexual harassment raised against him without guaranteeing the impartial, objective and thorough investigation which the legal framework required. The complainant asked the FAO to take action to investigate his complaint, to take adequate and immediate measures to stop the harassment and abuse, and to determine that he was a victim of harassment and abuse. On 9 October 2019, the complainant was interviewed by an external investigator in the context of the preliminary review of his harassment complaint.

By a memorandum of 20 November 2019, the Inspector General ad interim informed the complainant that the external investigator assessed each of the 13 alleged harassment actions he had listed in his

harassment complaint as well as the other allegations he raised in the course of the review. The external investigator reviewed the relevant case materials, interviewed the various individuals involved and issued the preliminary review report on 17 October 2019. The latter concluded that the complainant had prematurely contested some decisions or actions as the investigation was still pending on the allegations of harassment raised against him, and found that the actions and decisions of the senior investigator were procedurally correct. Consequently, there was no evidence on the basis of the preliminary review that the senior investigator engaged in improper conduct that would harm the complainant. The external investigator therefore recommended closing the case without further investigation. The Inspector General ad interim concurred with that recommendation, and therefore closed the matter.

On 3 December 2019, the complainant asked to be provided with the records of his interviews and those of the witnesses that were heard, and to be given a copy of the preliminary review report of the external investigator. The Inspector General ad interim replied soon afterwards that he had stated in his memorandum of 20 November 2019 the information on which he had relied to make his decision. He indicated that the preliminary review report was an OIG internal document and, therefore, was not shared with him nor with the alleged offender. The Inspector General ad interim added that there was no official recording of the interviews conducted because it was a preliminary review and not an investigation. On 13 December 2019, the complainant filed an appeal against the decision of 20 November 2019 to close his harassment complaint without further investigation.

By a letter of 27 January 2020, the complainant was notified that the Director-General had dismissed his appeal as unfounded. The findings and conclusions of the preliminary review of his harassment complaint were soundly based as was the decision of the Inspector General ad interim to close the complaint without further investigation. He added that the decision constituted a final decision that he could appeal before the Tribunal if he wished. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, and to order the FAO to provide him with a copy of the preliminary investigation report. He also asks the Tribunal to order the FAO to arrange for a full investigation of his complaint to be carried out promptly, thoroughly and objectively.

If the Tribunal considers that a full investigation is not necessary, he asks the Tribunal to find that he has suffered harassment and abuse of authority. He seeks moral damages in an amount of 100,000 euros for the damages to his health, career, reputation and personal life in particular. Lastly, he claims costs.

The FAO asks the Tribunal to dismiss the complaint. Some of his allegations are outside the scope of the impugned decision and are therefore irreceivable. The complaint is otherwise unfounded. The FAO indicates that it has provided the preliminary investigation report as an annex to the reply. It adds that since the complainant has provided medical certificates to the Tribunal for *in camera* review only, it denies that he has suffered any injury to his health in relation to the preliminary review.

CONSIDERATIONS

1. The complainant is a former member of staff of the FAO. At material times between July 2019 and January 2020, he was the Director of the Office of Human Resources. On 26 April 2020, he filed a complaint with the Tribunal impugning a decision of the Director-General communicated to him by letter dated 27 January 2020. In that decision, the Director-General dismissed an appeal against an earlier decision of 20 November 2019 to close a harassment complaint the complainant had lodged in August 2019.

2. The relevant background may be briefly summarised. On 10 July 2019, the complainant was sent a memorandum from the Inspector General informing him that his Office (OIG) was investigating allegations of unsatisfactory conduct in the form of acts of sexual harassment and explaining what, in part, that might entail. On

30 August 2019, the complainant lodged a complaint alleging harassment and abuse of authority by Mr F., a senior investigator with the OIG investigating the complaint of sexual harassment. That first-mentioned complaint was investigated (the preliminary investigation) by an external investigator who provided a preliminary review report of 17 October 2019 which founded the decision of 20 November 2019 to close the complaint of the complainant. While the events surrounding the complaint of sexual harassment against the complainant and the events surrounding the consideration of his subsequent complaint relating to the closure decision cannot be entirely divorced, it is necessary to be mindful that these proceedings concern that latter complaint only.

3. The grounds on which the complainant generally challenges the decision to close the investigation are based on challenging several steps taken by the external investigator in undertaking the preliminary investigation leading to his conclusion there was “no *prima facie* case of wrongdoing” or challenging his failure to take certain steps including what, in substance, is a contention that the external investigator failed to take into account relevant considerations. Additionally, the complainant challenges the conduct of the Organization in making the decision to close the investigation including a failure to provide him with the preliminary investigation report before doing so.

4. In his brief, the complainant’s contentions appear under numbered headings. Apart from an introduction, the first is that some facts were overlooked in the investigation and internal appeal process. The second is that obligations of confidentiality had been breached. The third is that a refusal to provide transcripts and the preliminary review report was unlawful. The fourth was that his complaint of verbal aggression was not appropriately investigated. The fifth was that the duration of the preliminary investigation was excessive. The sixth was that there were contradictions between interviews conducted in July 2019 and in January 2020 which remained to be examined. The seventh was that the senior investigator was in a position of conflict of interest, and this was not adequately considered.

5. It is convenient to address at the outset one of the contentions of the complainant which is decisive. Before making the decision to close the complainant's complaint, the Organization did not provide him with a copy of the preliminary review report of the external investigator nor a summary of its findings though a summary of it was to be found in the memorandum of 20 November 2019 communicating the Inspector General ad interim's decision to close the complaint. The Inspector General ad interim later justified, in an email of 9 December 2019, the Organization's position of non-disclosure on the basis that "preliminary review reports as such are confidential internal documents of OIG, which are neither shared with the complainant nor with the alleged offender".

6. In a broadly analogous recent case in which a complaint of psychological harassment was closed on the basis of an investigation report (but not a preliminary investigation report), the Tribunal concluded that the complainant, amongst others (relevantly the members of the Joint Committee for Disputes), should have been provided with "the findings or content of the investigation report – or at least a redacted copy thereof" (see Judgment 4471, consideration 15). This was said to be a reflection of the Tribunal's settled case law, namely that a staff member must, as a general rule, have access to all the evidence on which the competent authority bases its decision concerning her or him (Judgments 4471, consideration 14, and 4217, consideration 4). As also revealed in Judgments 4471 and 4663, consideration 7, the subsequent provision of the report does not repair the legal effect of its non-provision before the impugned decision was made.

7. However, the FAO contends in these proceedings that a distinction needs to be drawn between a preliminary inquiry into a claim of harassment and the ultimate investigation of a claim. Reference is made to Judgments 3640, consideration 5, 3777, consideration 15, and 4034, considerations 7 and following. In Judgment 4034, the complainant had lodged an internal complaint of moral harassment. A preliminary assessment was made of the complaint by the ad interim Ethics Adviser who concluded the incidents reported by the complainant did not

constitute moral harassment. The complainant was subsequently informed that a decision had been made to dismiss her internal complaint. The complainant impugned the dismissal decision in the proceedings in the Tribunal. The ad interim Ethics Adviser interviewed the complainant and an official (the interviewed official) who was in charge of the Bureau of Strategic Planning at the time of the preliminary examination of whether there was *prima facie* evidence of harassment.

The ad interim Ethics Adviser did not provide the complainant with a copy of the response of the interviewed official and thus did not give the complainant an opportunity to comment on that evidence before making her preliminary assessment. The complainant argued, in substance, that the defendant organisation had not applied the adversarial principle. By reference to the applicable provisions in the Human Resources Manual, the Tribunal said, in consideration 8:

“These provisions make it plain that the preliminary assessment precedes the investigation during which the real examination of the internal complaint begins. In the present case, the complainant does not dispute the Organization’s contention that she was interviewed by the Ethics Adviser during the preliminary assessment. The fact that she did not receive the response of the official in charge of the Bureau of Strategic Planning to her allegations of harassment at a stage when the investigation had not started does not constitute a flaw. This plea is hence unfounded.”

In the present case the equivalent applicable provisions are found in the FAO’s Policy on the Prevention of Harassment, Sexual Harassment and Abuse of Authority. Under a heading “The formal complaint process” a multi-step procedure to deal with complaints is established. Paragraph 30 provides that upon receipt of the formal complaint, the OIG is to conduct a preliminary review in accordance with the FAO Guidelines. Paragraph 31 provides that the “OIG will consider whether the behaviour presented in the complaint meets the criteria for harassment” and the “OIG may, based on the information provided by the complainant, determine that the issue presented does not meet the criteria for harassment”. While it is not said so expressly, a necessary implication is that if a conclusion is reached that “the issue presented does not meet the criteria for harassment” then the complaint can be closed. This is fortified by a further provision in paragraph 31 to

the effect that if the OIG finds there is no credible case for harassment, the “complainant may appeal such finding through the applicable recourse mechanism”. Later, in paragraph 35, provision is made for a “full investigation” and plainly on the basis that the complaint had not been closed following the preliminary review.

8. The Guidelines referred to in the preceding consideration are the “Guidelines for Internal Administrative Investigations by the Office of the Inspector General”. In large measure they mirror the procedure discussed in the preceding consideration. Under a heading “Preliminary review” the Guidelines describe the purpose of the preliminary review (“to assess [the] credibility [of a complaint] and to determine whether a full investigation is warranted”), how it is conducted (“generally includ[ing] an interview of the complainant and a review of the documents submitted by the complainant”) and the consequences of a negative assessment (“[i]f, as a result of a preliminary review, OIG concludes that a complaint does not warrant an investigation, the matter is closed”). Thus, the Guidelines make express what is implicit in the Policy (as just discussed), namely that a complaint can be closed following a preliminary review.

9. Returning to the passage from Judgment 4034 quoted above, it is necessary to consider, in this case whether, by parity of reasoning, there was no need for the FAO to apply the adversarial principle and thus, if so, the FAO was not obliged to provide the complainant with a copy of the preliminary review report when it was requested.

10. A fundamental difficulty with the contention of the FAO is that while the review by the external investigator may have been nominally a preliminary review and so described, in substance it was not. In the specific circumstances of this case, the external investigator travelled beyond the bounds of what was contemplated as ordinarily the scope of a preliminary review of the type comprehended in the Policy and Guidelines. The clear purpose of the preliminary review is to enable the OIG to review the complaint submitted by the complainant (containing, as it must by paragraph 28 of the Policy, particulars of the conduct

constituting harassment or abuse of authority), interview the complainant if necessary and review documents provided by the complainant. This is being done for the purpose of ascertaining whether the case advanced by the complainant could, if made out in a full investigation, constitute harassment or abuse of authority. There will doubtless be cases where a complainant misconceives what constitutes harassment or an abuse of authority and this would be apparent in a preliminary review. In those circumstances no purpose would be served in devoting time and resources to a full investigation. There may be other bases for concluding that no purpose would be served by undertaking a full investigation but what they might be is not obvious. But that opinion is to be formed mainly by reference to the complaint, any interview of the complainant and documents submitted by the complainant. These are all matters necessarily within the knowledge of the complainant, no apparent purpose would be served by providing them to the complainant and it would be entirely unnecessary to disclose them to her or him.

11. It is clear from the preliminary review report of 17 November 2019 (appended by the FAO to its reply) that, in relation to various issues raised in the complaint, the external investigator interviewed a range of individuals and, by reference to what they said, effectively made findings of fact and rejected contentions of the complainant. At least in this respect the preliminary review transmogrified into a full investigation. In these circumstances the complainant was entitled to be provided with a copy of the preliminary review report, as he requested on 3 December 2019 after having been informed on 20 November 2019 that the Inspector General ad interim had decided to close his harassment complaint. Consistent with Judgment 4471, he was entitled to review the report and, in particular, what was said in the report about the results of interviews by the external examiner with others and the conclusions reached.

12. The impugned decision was unlawful and the Tribunal will set it aside. However, the Tribunal will not remit the matter to the Organization for further consideration. No purpose would be served now in doing so in the present case. The senior investigator, the subject

of the allegations of harassment and abuse of authority, completed his investigation which precipitated events leading to the complainant's summary dismissal. The decision to dismiss him is presently the subject of another complaint before the Tribunal. The complainant has had the opportunity to ventilate, in those proceedings, any deficiencies in the investigation process, if they were relevant to the lawfulness of the decision to dismiss.

13. It is unnecessary to consider the other bases on which the complainant has impugned the lawfulness of the decision to close his complaint of harassment and abuse of authority.

14. The complainant seeks moral damages for reasons including the failure to carry out a formal investigation, the long duration of the preliminary investigation, the effect of the harassment and abuse of authority on his health, his professional career, reputation and personal life. This last-mentioned claim is based on the premise that he was the subject of harassment and abuse of authority. This is untested and unproved. As to the other aspects of his claim for moral damages, their foundation is simply asserted and not proved. This is insufficient (see, for example, Judgment 4644, consideration 7).

15. As the complainant succeeds, he is entitled to costs, which are assessed in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The FAO shall pay the complainant 8,000 euros costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER