

112th Session

Judgment No. 3084

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R.C. W. against the Food and Agriculture Organization of the United Nations (FAO) on 9 March 2010, the FAO's reply of 21 June, the complainant's rejoinder of 23 August and the Organization's surrejoinder dated 6 December 2010;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a national of the United States of America born in 1946, is a former official of the FAO who retired in March 2008. He joined the Organization at its Headquarters in Rome as a Nutrition Officer at grade P-2 in August 1977 under a three-year fixed-term appointment which was extended on a regular basis. In September 1982 he obtained a continuing appointment and was promoted to the post of Nutrition Officer in the Nutrition Planning Support Group at grade P-3. He was subsequently promoted to grade P-4 in March 1987. In November 1993 he was transferred to

the FAO Representation in Harare, Zimbabwe, as a Chief Technical Adviser at grade P-5, and in April 1997 he was transferred back to his former post of Nutrition Officer in the Nutrition Assessment and Planning Service at grade P-4 at FAO Headquarters.

In February 2004 the complainant was elected for a two-year term as President of the Federation of International Civil Servants' Associations (FICSA) and he was released from his duties with the Organization for the duration of his term of office. He was re-elected for a second two-year term in February 2006 and was again released from his duties.

By a memorandum of 8 October 2007 the Director of the Nutrition and Consumer Protection Division submitted a request to the Deputy Director-General through the Assistant Director-General for an *ad personam* promotion of the complainant to grade P-5. He stated that when the complainant had been elected President of FICSA in 2004 the Division had been in the process of initiating a request to upgrade his post, but the process had been delayed. Subsequently, the Human Resources Development Service had determined that an evaluation of the post was not practical because it would have to take place during a period when the complainant had been released from his duties, and also because he was due to retire in March 2008, one month after the completion of his second term as President of FICSA. The Director further stated that, as consideration had been given to conducting a desk audit of the complainant's post as early as 2002, he was requesting that the latter's promotion, if granted, should be made retroactive to January 2005. On 31 March 2008 the complainant separated from service.

On 27 May 2008 the complainant was informed orally that the request for an *ad personam* promotion had been rejected. By an e-mail of 5 June the Director of the Nutrition and Consumer Protection Division informed the complainant in writing that the Director-General had refused to grant him an *ad personam* promotion. On 4 August the complainant lodged an appeal with the Director-General, challenging that decision as well as the FAO's failure to act on his numerous requests for reclassification of his post since 2002. He requested a

promotion to grade P-5 with retroactive effect from 1 January 2002 and “payment of the difference in salary and the actuarial value of a pension [he] would have reached on retirement at the P-5 level”. By a letter of 31 October 2008 from the Assistant Director-General of the Department of Human, Financial and Physical Resources, he was informed that his claim with respect to the alleged failure of the Organization to act on his repeated requests for post reclassification was considered time-barred, and that there was no valid reason to set aside the decision not to grant him an *ad personam* promotion. Consequently, his appeal was dismissed as without merit.

On 5 January 2009 the complainant lodged an appeal with the Appeals Committee against the decision of 31 October 2008. In its report dated 12 August 2009 the Committee noted that the complainant had attempted to have his post reclassified as early as 2002, but that the Administration had failed to provide clear, correct and consistent guidance regarding the prescribed procedures for reclassification. In this respect, the Committee considered that there had been no specific decision taken at any time by the Administration against which the complainant could have lodged an appeal. It concluded that, despite numerous attempts by the complainant to have his post reclassified, an official request supported by the appropriate documentation had never been forwarded to the Human Resources Management Division and, as a result, the Organization had been unable to take any action. As for the decision to reject the request for an *ad personam* promotion, the Appeals Committee held that this was a prerogative of the Director-General and that it therefore “[could] not make a judgement in this respect”. It thus recommended that the complainant’s appeal should be dismissed as unfounded and that his claims should be rejected *in toto*. By a letter of 14 December 2009 the Director-General informed the complainant that, in accordance with the recommendation of the Appeals Committee, he had rejected his appeal and his claims for redress. That is the impugned decision.

B. The complainant submits that his claims related to the FAO’s failure to act on his requests for the reclassification of his post are receivable. He points out that, although the Organization objected to

those claims on the grounds of receivability during the internal appeal process, neither the Appeals Committee nor the Director-General commented on those objections. He contends that, as his appeal was decided on its merits, according to the Tribunal's case law the FAO is now estopped from objecting to the receivability of his complaint. He submits that, although he made numerous requests for the reclassification of his post between 2002 and 2007, he did not receive an appealable decision until 5 June 2008, when he was informed that the Director-General had rejected the request for an *ad personam* promotion. In addition, he points out that the Tribunal has previously held that exceptions may be made to applicable time limits when an organisation, by misleading a complainant, has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith. He asserts that in 2003 he was given erroneous information regarding the possibility of reclassifying his post. Also, in 2005 the Chief of the Human Resources Development Service decided not to proceed with a desk audit to evaluate his post and that decision was communicated to him three months after it had been taken, and after he had agreed to run for a second term as President of FICSA. Furthermore, referring to the case law, he submits that he was justified in not lodging an appeal during the period when the Director-General was considering the request for an *ad personam* promotion.

On the merits, he contends that the FAO failed in its statutory duty to properly classify his post despite his best efforts to follow the prescribed procedures. He produces copies of exchanges that he had with various members of the Administration between 2002 and 2007 regarding his requests for reclassification and he asserts that he informed both the Director of the Human Resources Management Division and the Chief of the Human Resources Development Service about the difficulties he was encountering. Moreover, the FAO's responsibility in this matter is, in his view, magnified in light of the fact that the Director of the Nutrition and Consumer Protection Division, in consultation with the Chief of the Human Resources Development Service, decided to abandon the last attempt he had made to obtain a desk audit of his post in favour of a request for an *ad personam* promotion.

He submits that the Organization improperly based its refusal to proceed with a desk audit in 2005 on the fact that he was serving as President of FICSA. As a consequence, his career progression ceased during the four years that he was released from his duties and this is an unacceptable burden to place on individuals engaging in recognised staff representative activities. Lastly, he contends that the FAO misled him regarding opportunities for reclassification, as his supervisors erroneously advised him that no post upgrades were being requested for 2004-2005. Had he known that this was not the case, he would have urged his supervisors to act on his behalf at that time.

The complainant asks the Tribunal to quash the impugned decision and to order the FAO to promote him to grade P-5 with retroactive effect from 1 January 2002 and to pay him the corresponding difference in salary, pension fund contributions, allowances and entitlements between grade P-4 and grade P-5 from that date until 31 March 2008, plus interest at 8 per cent per annum. In the alternative, he asks the Tribunal to order the Organization to conduct a desk audit to determine the proper grade of his post as of 1 January 2002 and to grant him the aforementioned relief if the audit establishes that his post should have been graded at P-5 with effect from that date. He claims 5,000 euros in costs.

C. In its reply the Organization acknowledges that the complainant had several discussions with his supervisors and division directors regarding the classification of his post and that he made several attempts to initiate a post reclassification as well as a desk audit. However, he did not follow through on his requests and he did not abide by the procedures outlined in the Staff Rules and the FAO Administrative Manual with respect to post reclassification. No complete request was ever forwarded to the Human Resources Management Division and, consequently, the FAO was not in a position to reclassify his post. It disputes his assertion that there was no appealable decision prior to the Director-General's refusal to grant him an *ad personam* promotion and submits that he could have challenged the various actions and decisions taken by his supervisors between 2002 and 2007 within the respective 90-day time limits. As he failed to

do so, his related claims are time-barred and therefore irreceivable. Also, his argument that the Appeals Committee and the Director-General treated his appeal as receivable is erroneous, as the letter of 31 October 2008 clearly stated the contrary. In addition, the complainant has raised new claims in the complaint which are irreceivable for failure to exhaust the internal means of redress.

On the merits, the FAO points out that the Director-General has a discretion to grant *ad personam* promotions and his decision is subject to only limited review by the Tribunal. The complainant has not demonstrated that in this case the decision was taken without authority, in breach of a rule of form or of procedure or that there was a mistake of fact or law, that an essential fact was overlooked, that there was an abuse of authority or that a clearly mistaken conclusion was drawn from the facts.

The Organization disputes the complainant's allegation that he was misled by the Administration. In its view, his supervisors acted in good faith and he was regularly updated on his situation and informed of actions or decisions relating to the possible reclassification of his post.

D. In his rejoinder the complainant presses his pleas. He denies that he failed to follow through on his requests for reclassification. He states that he completed the prescribed forms on a number of occasions but the Administration did not forward them to the Human Resources Development Service. Instead, his division director, the Office of the Assistant Director-General and the Human Resources Development Service persuaded him that requesting an *ad personam* promotion was the solution to his situation.

E. In its surrejoinder the FAO maintains its position in full. It submits that the complainant has not demonstrated that the Director-General's decision not to grant him an *ad personam* promotion constitutes a breach of his terms of appointment or of any relevant rules.

CONSIDERATIONS

1. The complainant is a former FAO official. He joined the Organization in 1977 and separated from service at the end of March 2008 upon reaching the mandatory retirement age. Between February 2004 and early 2008, he served as President of FICSA and was released from his FAO duties on a full-time basis. At the time of his separation from service, he held a grade P-4 post.

2. The complainant contends that since 2002, owing to the increase in the duties and roles assigned to him, he tried to have his post reclassified from grade P-4 to grade P-5. Ultimately, in June 2007, the newly appointed Director of the Nutrition and Consumer Protection Division reviewed a revised application for reclassification completed by the complainant and found that his work involved tasks and supervisory responsibilities consistent with a P-5 rather than a P-4 position. He advised the complainant that he should pursue an *ad personam* promotion instead of continuing his efforts to obtain a reclassification of his post.

3. On 8 October 2007 the Director of the Nutrition and Consumer Protection Division submitted a request to the Deputy Director-General through the Assistant Director-General for an *ad personam* promotion to grade P-5 on behalf of the complainant and asked that it be backdated to June 2005. In support of the request, he noted that a desk audit of the complainant's post had not been possible while he had been serving as President of FICSA and observed that, in light of his duties, the complainant deserved advancement and would likely have received an upgrading to P-5 had he not been elected President of FICSA.

4. On 27 May 2008 the complainant was informed orally that the request for an *ad personam* promotion had been rejected; this was confirmed by an e-mail of 5 June. By a letter of 4 August 2008 to the Director-General he appealed that decision and alleged that the FAO

had failed to act upon repeated requests for the reclassification of his post. In a letter of 31 October 2008 the Assistant Director-General of the Department of Human, Financial and Physical Resources advised the complainant of the Director-General's decision to dismiss the appeal. The Assistant Director-General stated that an *ad personam* promotion was an "optional and exceptional" discretionary measure and that there was no valid reason to set aside the decision refusing it. With respect to post reclassification, he noted that although responsibility for the lack of action lay with the complainant's Division, the appeal was irreceivable as time-barred. He pointed out that the complainant should have lodged an appeal in 2005 or 2006 regarding the failure to take timely action.

5. The complainant appealed this decision before the Appeals Committee, which issued its report on 12 August 2009 and forwarded it to the Director-General. The Committee, holding that an *ad personam* promotion decision was a discretionary prerogative of the Director-General, declined to make any finding in this regard.

6. As to the question of the alleged "prior failure[s] to act on repeated requests for post reclassification", the Appeals Committee considered that managerial inaction had delayed the complainant's efforts to obtain a promotion; that he had attempted in good faith to follow the Manual and the applicable Staff Rules; that he had not received adequate assistance in his efforts to comply with the Organization's procedures, and that the Administration had failed to take a specific decision against which he could have lodged an appeal. However, the Committee also found that while the complainant had prepared the required staffing action request form on three separate occasions, it had never been submitted to the Human Resources Management Division in accordance with the relevant provisions in the Manual. The Committee considered that it could not assume that the complainant's post would have been reclassified had the classification process been completed. It concluded that, "despite the numerous attempts made by the [complainant], in the final analysis the official request with required documentation was never provided to [Human Resources Management Division]; consequently, the

Organization was not in a position to take action.” The Committee recommended that the appeal should be rejected as unfounded and that the related claims should be rejected *in toto*.

7. On 14 December 2009 the Director-General accepted the Appeals Committee’s recommendations and dismissed the appeal. That is the decision impugned before the Tribunal.

8. The FAO advances two main arguments on the merits. First, it points out that the granting of an *ad personam* promotion falls outside the normal processes found in the Manual and arises from the Director-General’s broad powers of administration of the Organization and its staff, as provided for in the Constitution and the General Rules of the Organization. It refers to the statement in Judgment 1973, under 5, that “[t]he granting of personal promotion is a discretionary decision which, as firm precedent has it, is subject to only limited review and will stand unless it shows a fatal flaw”. In the present case, the complainant has not identified any basis upon which the decision rejecting the promotion should be set aside. The Organization submits that it was never in a position to take action in relation to a reclassification of the complainant’s post owing to his failure to submit a complete request for a post reclassification, as prescribed by the Manual. Additionally, the complainant’s own inaction at various times contributed significantly to any delay.

9. Second, the FAO contends that the part of the complaint related to its alleged “failure to act on repeated requests for reclassification” is time-barred. It argues that there were a number of actions and decisions taken by the complainant’s supervisors in relation to the reclassification process against which he could have initiated an internal appeal within the time limits prescribed by the Staff Rules. As he failed to do so at the appropriate time, this aspect of the complaint is now irreceivable. It also submits that claims made for the first time in this complaint are irreceivable.

10. Turning to the question of receivability, although the Organization asserts that there were a number of actions or decisions that could have been appealed, it identifies only one “decision” in its submissions. It notes that in March 2003, in response to the complainant’s request to have his post reclassification included in the budget planning for 2004-2005, the complainant’s service chief informed him of the division director’s belief that the request was too late for inclusion in the 2004-2005 programme of work. The FAO argues that if the complainant believed this was incorrect he could have launched an appeal at the time.

11. The Tribunal rejects this argument. While it is clear that “a decision does not require any particular formality and may be constituted by any communication that is reasonably capable of being understood to constitute a decision on the matter” (see Judgment 2629, under 6), the communication to the complainant was no more than an expression of the division director’s “belief” regarding a particular circumstance and not a decision. The Tribunal agrees with the Appeals Committee’s finding with respect to the complainant’s attempts to have his post reclassified that no decision was taken at any time by the Administration against which an appeal could have been lodged.

12. The FAO also submits that a number of the complainant’s claims, detailed under B above, were not previously raised during the internal appeal process and are therefore irreceivable. In his internal appeal, the complainant requested a retroactive promotion to P-5 effective 1 January 2002, together with the relevant retroactive payment of salary and pension benefits. The claim in this respect, which he submitted to the Tribunal, is simply a reformulation of the claim he made in the internal appeal. Although his claims related to the performance of a desk audit were not specifically made in his internal appeal, they are incidental to the claim for retroactive payment of salary and pension benefits and arise from the Appeals Committee’s observation that it could not be assumed that a desk audit

would have resulted in a promotion to P-5. As to the claim for costs, it is well established in the case law of the Tribunal that a complainant who is successful in whole or in part is entitled to costs without having made an express claim for costs (see Judgment 262, under 5, and Judgment 320, under 19). The Tribunal concludes that, with the exception of the complainant's claim for interest, his claims are receivable. As will become evident below, a consideration of the receivability of the interest claim is unnecessary.

13. Turning to the merits of the complaint, in particular the rejection of the complainant's request for an *ad personam* promotion, as noted above the Appeals Committee found that, since such a decision was discretionary, it could not deal with this aspect of the appeal. In this regard, the Committee erred in law. The fact that a decision to grant an *ad personam* promotion lies at the discretion of the Director-General does not preclude appellate review, albeit a limited review of whether the decision involves an error of law or fact or a failure to have regard to a material fact; whether a plainly wrong conclusion was drawn from the facts; whether the decision was taken in breach of a rule of form or procedure or whether there was an abuse of authority (see Judgment 2834, under 7). As the Director-General endorsed the Appeals Committee's opinion, his decision is also tainted by error of law.

14. The decision not to grant the promotion is problematic for another reason. It is true that the complainant does not allege a reviewable error in relation to this decision itself. However, this is not surprising since the complainant was never given reasons for the decision. In Judgment 2839, under 11, in connection with a decision to reassign a staff member, the Tribunal made the following observation:

"Moreover, the staff member is entitled to be informed of the reasons for the reassignment. In addition to ensuring transparency in decision making, providing the reasons for the reassignment permits a staff member to assess the courses of action that may be taken, including the lodging of an appeal, and it also permits a review of the lawfulness of the decision on appeal".

These observations and findings are equally applicable to the present case.

15. In the circumstances, the FAO's failure to provide a reason for the decision is a particularly egregious error given that the complainant accepted in good faith the advice of the Director of the Nutrition and Consumer Protection Division and the Assistant Director-General that proceeding with a request for an *ad personam* promotion, instead of submitting a request for an upgrading of his post to the Human Resources Management Division, was the preferable course of action in order to overcome a number of administrative problems that were not the fault of the complainant. This warrants an award of moral damages in the amount of 10,000 euros.

16. With respect to the part of the complaint regarding the reclassification of the complainant's post, the FAO takes the position that, owing to the complainant's failure to follow the procedures for a post reclassification specified in the Staff Rules and the Manual, the Organization was not in a position to take any action to reclassify the post. It asserts that no official request for the reclassification of the post was ever made. In support of its position, the FAO points to the Appeals Committee's finding that the staffing action request form had been prepared by the complainant, but had never been submitted by him to the Human Resources Management Division. This statement is inaccurate. The Committee did observe that the staffing action request form had never been submitted to the Human Resources Management Division. However, it did not cast the blame on the complainant.

17. On reading the submissions, it is evident that the complainant's supervisors were supportive of his request for a post reclassification throughout. While the complainant maintains that starting in 2002 he attempted to have his post upgraded, he did not initiate a request as required by the Manual until May 2005. Although at various times the complainant could have been more diligent in following up on the progress of his request and could have been more insistent on some action being taken, in the end, when the

documentation was ready for submission to the Human Resources Management Division, in accordance with the Manual it had to be submitted by the complainant's division director.

18. Further, contrary to the defendant's assertions, the fact that the request for reclassification was not submitted was not the result of the complainant's inaction. Rather, the request was not submitted to the Human Resources Management Division because the complainant's supervisors were of the view that the *ad personam* promotion request was the best way to achieve the desired end. By the time the request was denied, the complainant was retired and could not initiate another request.

19. There is no doubt that the complainant's supervisors were acting in good faith and supported the upgrading of his post. However, as the Appeals Committee found, the complainant's attempts to have his post reclassified were hampered by "managerial inaction due to uncertainty regarding procedures, and from a series of intricacies within the Division, all aggravated by shifts in administrative structures and hierarchical transitions which were beyond the control of all parties concerned". It must also be added that the complainant was at a disadvantage in attempting to obtain a post reclassification because the Administration either took no action or delayed any action owing to his involvement in FICSA. In this regard, an organisation must ensure that a staff member is not disadvantaged on the grounds of his or her participation in staff representation activities. As the Tribunal stated in Judgment 2704, under 6, "[t]he principle of freedom of association is infringed if a person is subject to a detriment or disability [...] because of his or her activities within a staff association [...]".

20. As the complainant is retired, a direction to the FAO to conduct a post-reclassification exercise is not feasible. Also, given the passage of time and the retirement of those having first-hand knowledge of the relevant circumstances, there is no longer an adequate base on which the Director-General could exercise his

discretion in relation to the request for the *ad personam* promotion, and there is nothing to be gained by remitting the matter to the Director-General for reconsideration.

21. However, through the composite inaction and actions of his supervisors, the complainant lost a valuable opportunity that is particularly significant in view of his supervisors' support for having his post upgraded. In considering the value of the lost opportunity, regard must also be had to the lost opportunity in terms of future pension entitlements. In addition to the moral damages specified above, the complainant is entitled to material compensation in the amount of 50,000 euros. He is also entitled to costs in the amount of 750 euros. All other claims will be dismissed.

DECISION

For the above reasons,

1. The Director-General's decision of 14 December 2009 is set aside.
2. The FAO shall pay the complainant moral damages in the amount of 10,000 euros.
3. It shall also pay him material compensation in the amount of 50,000 euros.
4. The Organization shall pay the complainant costs in the amount of 750 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2011, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Mary G. Gaudron
Dolores M. Hansen
Catherine Comtet