

F. (No. 2)

v.

IFAD

131st Session

Judgment No. 4341

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr C. A. F. against the International Fund for Agricultural Development (IFAD) on 19 November 2018 and corrected on 26 November 2018, IFAD's reply of 11 April 2019, the complainant's rejoinder of 20 June, IFAD's surrejoinder of 30 September, the complainant's further submissions of 19 November 2019 and IFAD's final comments thereon of 2 March 2020;

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 not to shortlist him for the position of General Counsel.

On 7 April 2017 IFAD issued Vacancy Announcement No. 1526 concerning the grade D-2 position of General Counsel in the Office of the General Counsel (LEG). The complainant, who held a grade P-4 position in LEG, applied for the position on 20 May. On 6 July he was informed that he had not been shortlisted. Ms M. was appointed as General Counsel.

On 28 July 2017 the complainant requested a Mandatory Administrative Review of the decision not to include him on the shortlist of candidates. He asked that the competition be cancelled and reopened.

On 26 September the Director of the Human Resources Division (HRD) informed him that the decision had been confirmed. The complainant then filed a Request for Facilitation. The Director of HRD replied on 26 October that, in view of the remedy sought by the complainant, the matter was not one which could be resolved through facilitation. The complainant was invited to lodge an appeal with the Joint Appeals Board and informed that IFAD would not oppose the late filing of the appeal provided that it was filed before 15 December 2017.

The complainant lodged his appeal on 27 November 2017, asking the Board to request that the complete file of the selection process be made available to him and that persons involved in the selection process be required to provide statements. He also asked the Board to recommend that the appointment be cancelled and that the selection process be rerun. The Board issued its report on 11 July 2018. It considered that, since the complainant had participated in the competition willingly and without objection to the process, he did not have any “legally protected interest” that would allow him to question the validity of the recruitment procedure. Therefore the Board concluded that it could not examine the merits of the appeal. It added however that the complainant’s allegations that the recruitment process and decision were tainted by gender bias or discrimination based on nationality “would be rejected as unfounded”. In a letter dated 11 September 2018 the President informed the complainant that he had decided to “endorse the [Board]’s recommendation” and to dismiss his appeal. That is the impugned decision.

The complainant asks the Tribunal to order that the complete file of the selection process be disclosed without any redactions, to set aside the impugned decision, to cancel the appointment of Ms M. and to order that a new competition be opened. He also asks the Tribunal to award him 60,000 United States dollars in moral damages, exemplary damages and 2,000 dollars costs for his internal appeal and this complaint.

IFAD contends that the complaint is partly irreceivable. It asks the Tribunal to dismiss it in its entirety.

At the request of the Tribunal, IFAD forwarded a copy of the complaint to Ms M. and invited her to comment. She provided her comments on 11 April 2019.

CONSIDERATIONS

1. In 2017, the complainant was a member of the staff of IFAD. On 20 May 2017 he applied for the position of General Counsel. As it transpired, he was the only internal candidate. He was not included in the shortlist of candidates and was informed of this on 6 July 2017. Later in July 2017 he submitted a Request for a Mandatory Administrative Review that was not successful. A subsequent Request for Facilitation was rejected. On 27 November 2017, the complainant filed an appeal with the Joint Appeals Board.

2. In a report dated 11 July 2018, the Board concluded that as the complainant did “not have a legally protected interest in the matter, the [Board could not] proceed in examining the merits of the appeal”. As the Board explained, this conclusion was founded on the fact that the complainant had participated in the recruitment process willingly and without objection. However the Board volunteered “in order to define [its] position in the case at hand”, the complainant’s “allegations that the recruitment process and decision [were] tainted by gender bias or discrimination based on nationality ha[d] not been proven and would be rejected as unfounded, primarily in view of the Administration’s broad discretionary powers in procedures leading to appointments at the highest levels of the Organization”. The Board made no express recommendation that the appeal be dismissed though implicit in what it said was that it was recommending it should be.

3. By letter dated 11 September 2018, the President dismissed the appeal and, in substance, repeated the observations of the Board set out in the preceding consideration. Neither the Board nor the President engaged in any detailed examination of the evidence. They did not make all relevant findings of fact or address, other than in the most superficial way, the complainant’s arguments and, additionally, the arguments of the Administration. A number of the arguments of the complainant before the Board were of substance. That is not to say he should have or would have succeeded had they been considered by the Board in a meaningful way, but the complainant was entitled to have them considered nonetheless (see Judgment 4063, consideration 5).

4. In his pleas, the complainant traverses a range of issues though IFAD, in relation to a number of them, challenges his right to do so in these proceedings. But one issue is decisive and IFAD does not

challenge the complainant's right to raise it. The complainant argues that the recommendation of the Board was based on grossly inadequate reasoning, referring to Judgment 3995, consideration 4. The Tribunal accepts this is correct. It is to be recalled that the Board said it would not consider the complainant's case on the merits because he had participated willingly and without objection in the selection process along the way. This led the Board to conclude, for no discernible reason, the complainant did not have a legally protected interest in the matter. The case law of the Tribunal repeatedly establishes that a staff member who has been unsuccessful in a competition has the legal right to challenge the lawfulness of the competition (see Judgments 1832, consideration 3(b)(2), and 3449, consideration 2) and internal appeals bodies have a corresponding duty to consider the challenge (see, for example, Judgment 3590, consideration 2). IFAD does not point to any normative legal document within the organisation that would fetter or limit that right to challenge the competition by way of internal appeal.

5. Moreover the fact that the complainant did not raise issues or objections during the process is of no legal consequence. Steps were taken in the selection process before the decision was made not to shortlist the complainant and ultimately the decision to appoint another person. The complainant could not directly or immediately challenge those steps legally (see, for example, Judgment 3876, consideration 5). Moreover it could scarcely be expected that the complainant should run the risk of compromising his candidature by complaining about the conduct of those engaged in the selection process or otherwise complaining about the process at the time his application was being assessed.

6. The approach of the Board involved an error of law and its effective adoption by the President is tainted by the same error (see Judgment 3490, consideration 18). IFAD defends the President's approach by saying firstly, he had no power to refer the matter back to the Board and secondly and in any event the President "appraised the [Board]'s Report and recommendations in light of all the documentation he had at his disposal in relation to the [c]omplainant's appeal". If the President did not have power to refer the matter back to the Board, he had an obligation to motivate his decision to dismiss the appeal in the face of no motivation of substance from the Board itself. The President did not do so.

7. As the complainant points out in his pleas, citing Judgment 3424, internal appeal bodies play a fundamental role in the resolution of disputes between organisations and their staff. It can be expected the members of the body have extensive knowledge of the functioning of the organisation and can bring that knowledge to bear in its consideration of the dispute. It is appropriate that the impugned decision of the President be set aside and the matter remitted to IFAD for the purpose of permitting a differently constituted Joint Appeals Board to consider the complainant's appeal afresh.

8. The complainant's right of appeal has been materially compromised by the course adopted by the Board and the President. He is entitled to moral damages in the sum of 5,000 United States dollars. IFAD argues this claim for moral damages is irreceivable, as internal means of redress have not been exhausted. But it is a claim arising immediately and directly from the internal appeal process itself and is receivable in the Tribunal.

The complainant sought his costs for his internal appeal but the circumstances are not exceptional and the request should be refused (see Judgments 4157, consideration 14, and 4217, consideration 12). While the complainant was not represented, he is nonetheless entitled to limited costs in these proceedings assessed in the sum of 800 United States dollars.

All other claims should be dismissed.

DECISION

For the above reasons,

1. The impugned decision of the President of IFAD of 11 September 2018 is set aside.
2. The matter is remitted to IFAD for the purpose identified in consideration 7 above.
3. IFAD shall pay the complainant 5,000 United States dollars as moral damages.
4. IFAD shall also pay the complainant 800 United States dollars as costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 21 October 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ