

F. (No. 3)

v.

IFAD

131st Session

Judgment No. 4342

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr C. A. F. against the International Fund for Agricultural Development (IFAD) on 13 December 2018, containing an application for the fast-track procedure, and IFAD's letter of 29 January 2019 informing the Registrar of the Tribunal that it rejected the complainant's application;

Considering the complainant's complaint corrected on 5 February 2019, IFAD's reply of 20 May, the complainant's rejoinder of 4 July, IFAD's surrejoinder of 11 October, 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 select him for the position of Deputy General Counsel.

On 10 October 2017 Information Circular IC/HRD/BOD/01/2017 introduced temporary measures applicable to vacancy announcements for all international professional positions up to the P-5 level inclusive and all General Service positions at IFAD Headquarters. The Circular provided that all these vacancies would be open to staff members holding a fixed-term or an indefinite appointment only. As an exception

to these measures, the Office of the General Counsel (LEG) requested that the vacancy for the position of Deputy General Counsel be advertised externally in order to “attract a strong pool of qualified candidates”. This request having been allowed, Vacancy Announcement No. 1608 concerning the grade P-5 position of Deputy General Counsel in LEG was issued on 29 March 2018. The complainant, who held a grade P-4 position in LEG under an indefinite appointment, applied for the position on 13 April. By an email of 12 June 2018 he was informed that he had not been selected for the position. Ms C. was appointed as Deputy General Counsel.

On 4 July the complainant requested a Mandatory Administrative Review of the decision not to select him for the position of Deputy General Counsel, asking that the competition be cancelled and reopened. On 1 August he was informed that the selection process and the appointment decision had been confirmed.

The complainant lodged an appeal on 7 August, asking the Joint Appeals Board to recommend that the selection process be cancelled and rerun. The Board issued its findings on 25 October 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 allegation that the recruitment decision was tainted with procedural irregularities was unfounded. In a letter dated 10 December 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 the disclosure of the decision to make an exception to the requirements of IC/HRD/BOD/01/2017, without any redactions, together with evidence establishing the date on which the decision was made. He also asks the Tribunal to set aside the impugned decision, to cancel the appointment of Ms C. and to order that a new competition be opened. Moreover he seeks the payment of 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 as unfounded.

At the request of the Tribunal, IFAD forwarded a copy of the complaint to Ms C. and invited her to comment. She provided her comments on 15 May 2019.

CONSIDERATIONS

1. In 2018, the complainant was a member of the staff of IFAD. On 13 April 2018 he applied for the position of Deputy General Counsel. For reasons which will be apparent shortly, it is unnecessary to detail the events which led to the appointment of another person to the position. Suffice it to note that on 12 June 2018 he was informed he had not been selected for the position.

2. This is the complainant's third complaint that is, together with his second complaint, being considered by the Tribunal at this session. There is an overlap between the legal and factual issues but neither the complainant nor IFAD sought the joinder of the two complaints. There will be no joinder.

3. In July 2018, after he was advised that his application had not been successful, the complainant submitted a Request for a Mandatory Administrative Review that was not successful. On 7 August 2018, the complainant filed an appeal with the Joint Appeals Board.

4. In a report dated 25 October 2018, the Board quoted extracts from its report of 11 July 2018 concerning the complainant (discussed in Judgment 4341 also concerning him and delivered at the same time as this judgment) containing the conclusion 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:

"However, in order to be thorough and exhaustive in stating the [Board]'s position in the current case, the [Board] wishes to confirm that the [complainant]'s allegation that the hiring decision was tainted by procedural irregularities is unfounded. This is especially true in view of the broad discretionary power that the Administration retains in procedures leading to appointments at the highest levels of the Organization. Furthermore, it is a known and general principle of law that procedural irregularities can lead to the annulment of a decision only when it is proven that, should the procedure be repeated, the outcome of the exercise would be different."

5. By letter dated 10 December 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).

6. 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.

7. 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 select the complainant and ultimately the decision to appoint another person. The complainant could not directly or immediately challenge those preliminary 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.

8. The report of the Board contains one further error involving the broad generalisation that there is a “broad discretionary power that the Administration retains in procedures leading to appointments at the highest levels of the Organization”. It is true that the Tribunal has consistently emphasised the broad discretionary power of an organisation to appoint a person to a position and all the more so if it is a senior position (see, for example, Judgments 4208, consideration 2, and 2897, consideration 5). But in his brief submitted to the Board, the complainant made a number of quite specific complaints in support of his statement of appeal about the procedure followed referring, in particular, either to an Information Circular specifying temporary measures to fill positions through vacancy announcements or to the staff recruitment and appointment procedures in the Human Resources Implementing Procedures (HRIP). The reply of IFAD in the internal appeal contained the overarching argument that “the applicable rules and procedures governing the selection appointment of staff members, as set out in the Human Resources Policy, the Staff Rules, the HRIP and other applicable IFAD instruments, were fully complied with”. It may be that, properly construed, the provisions relied upon by the complainant either did not apply or had been satisfied. But it is not an adequate answer simply to say there is flexibility about procedure in relation to the filling of senior positions. The arguments had to be addressed.

9. The approach of the Board involved an error of law and a subsidiary error and its effective adoption by the President is tainted by the same errors (see Judgment 3490, consideration 18). 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.

10. 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.

11. 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. 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 10 December 2018 is set aside.
2. The matter is remitted to IFAD for the purpose identified in consideration 10 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