

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K.
v.
FAO

135th Session

Judgment No. 4595

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. L. K. against the Food and Agriculture Organization of the United Nations (FAO) on 13 April 2019, the FAO's reply of 12 July 2019, the complainant's rejoinder of 10 September 2019 and the FAO's surrejoinder of 12 December 2019;

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 transfer him to another duty station.

The complainant joined the FAO in April 1983. He worked on short-term assignments until May 1996, at which point he was granted a fixed-term appointment. In July 2002 he was offered a continuing appointment. At the time of the events giving rise to the present complaint, he held the post of Senior Coordinator in the Economic and Social Development Department (ES), at grade P-5, at the Organization's headquarters in Rome, Italy. His post was designated as being "outside the staffing of the Programme of Work and Budget" (PWB), also referred to as a "non-PWB" post.

In December 2016 the Administration announced the launching of the FAO's Geographic Mobility Programme for 2017. Although the complainant's name was not included in the departmental mobility plan submitted by the set deadline of 27 January 2017, the complainant was informed on 24 February 2017 that the Assistant Director-General (ADG/ES), had decided to include him in the list of staff of his department proposed for geographic mobility and that he was eligible to be transferred to the post of Senior Field Programme Officer, at grade P-5, in the FAO's Regional Office in Accra, Ghana.

On 26 February the complainant wrote to the ADG/ES asking that his geographic mobility assignment be deferred for two years for family reasons and he offered to support the new Office of the Chief Statistician during that period.

On 5 March 2017 his assignment to the post in Accra was confirmed with a transfer date preferably by 30 June but no later than 15 December 2017. Nonetheless, on 29 March 2017, he was notified that due to an urgent need to fill the post in Accra, his transfer had to take place by 1 June 2017.

Prior to that, he had presented the Medical Service with a medical certificate confirming that he was suffering from two medical conditions and seeking a one-year postponement of his mobility transfer on medical grounds. In emails of 6 and 7 April 2017, the Medical Service confirmed that it could not recommend a one-year postponement of his transfer on medical grounds. In the event, the Medical Service recommended a six-month postponement of his transfer.

By an email of 10 April 2017 the complainant informed the Administration that his medical conditions needed to be addressed prior to his departure and this could have an impact on the proposed transfer date of 1 June 2017. Expressing the preference for his transfer to be deferred to December 2017, he maintained the position that he was not eligible to be considered for the 2017 Geographic Mobility Programme, as he held a non-PWB post, and that the Guidelines contained in the Annex to the Director-General's Bulletin 2015/07, revised in November 2016, (the Mobility Guidelines), had not been correctly followed.

On 28 April 2017 he was provided with detailed information regarding his prospective transfer to the post in Accra. On 3 May 2017 he inquired about the possible consequences of an eventual refusal to agree to the transfer date of 1 June 2017. The Director, Office of Human Resources (OHR), replied on 5 May 2017 that an eventual failure to comply would be treated as unsatisfactory conduct.

Later that same day, the complainant notified the Director, OHR, that he had to undergo surgery to be followed by a period of convalescence, as a result of which he would likely be on certified sick leave on 1 June 2017 and for several weeks thereafter. On 8 May 2017, the Deputy Director, OHR, replied reconfirming 1 June 2017 as the effective date of the complainant's transfer and asking him to make the necessary arrangements and to contact the Medical Service for all medical issues.

Following unsuccessful discussions with the Administration regarding the possibility of identifying alternative assignments, the complainant wrote to the Deputy Director-General of Programmes (DDP) on 23 May 2017 confirming his willingness to take up the post in Accra, provided his transfer date could be deferred to November or December 2017. The DDP replied on 25 May that the decision remained to transfer the complainant effective 1 June 2017.

By a memorandum of 26 May 2017 addressed to the Director-General, the complainant tendered his resignation with effect from 31 August 2017, citing as a reason the incompatibility between the decision to transfer him effective 1 June 2017 and his family obligations. He separated from the FAO on 31 August 2017.

On 1 June 2017 the complainant filed with the Director-General an appeal against the decision to transfer him with an effective date of 1 June 2017. Further to the rejection of this appeal on 17 July, the complainant filed an appeal with the Appeals Committee on 14 August 2017, requesting that the decision to transfer him under the Geographic Mobility Programme be reversed, that his resignation be cancelled, that he remain or be reinstated in his post and that any future assignment be determined in line with applicable rules and in full consideration of his career and personal interests. Alternatively, he claimed material damages. He also claimed moral damages and costs.

In its opinion of 3 October 2018 the Appeals Committee considered that, as the complainant held a non-PWB post at the time his name was added to the departmental mobility plan, he was not eligible for consideration under the Geographic Mobility Programme. It disagreed that the complainant's transfer necessarily had to take place on 1 June 2017 and considered that more effort could have been made to postpone it to a later date in 2017. The Appeals Committee also considered that the complainant had resigned from the FAO of his own free will and had thus deprived himself of the right to reinstatement. It recommended that the complainant be awarded moral damages and costs.

By a letter of 29 January 2019, the Director-General informed the complainant of his decision to reject his appeal as unfounded. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to cancel his resignation, to reinstate him effective 1 September 2017 and to order the FAO to pay him all the salaries and benefits to which he was entitled at that time, ensuring his continuous participation in the United Nations Joint Staff Pension Fund (UNJSPF) from that date onwards. Alternatively, in the event reinstatement is not possible, he asks the Tribunal to award him damages for (i) the loss of earnings from 1 September 2017 until his mandatory date of retirement on 31 August 2023, amounting to approximately 240,000 United States dollars in total; (ii) the loss of pension entitlements, in the amount of full contributions to the UNJSPF, for the period from 1 September 2017 to 31 August 2023, date of the complainant's mandatory retirement (calculated in the range of 52,038 United States dollars per year). The complainant seeks moral damages for (i) the treatment he suffered; and (ii) the delay in delivering the impugned decision. He seeks costs in the amount of 2,700 euros for the internal appeal proceedings and 5,000 euros for the proceedings before the Tribunal.

The FAO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. In his underlying internal appeal to the Appeals Committee, the complainant challenged the decision to transfer him to Accra, Ghana, to the position of Senior Field Programme Officer, with effect from 1 June 2017, under the FAO's Geographic Mobility Programme for 2017. He was notified of this decision by the ADG/ES on 5 March 2017, which decision was confirmed by letter from the Shared Services Centre on 28 April 2017.

2. Consistent precedent has it that an executive head of an international organization has wide discretionary powers to manage the affairs of the organization pursuant to the policy directives and its rules, and that such decisions are consequently subject to only limited review. The Tribunal will ascertain whether a transfer decision is taken in accordance with the relevant rules on competence, form or procedure; whether it rests upon a mistake of fact or law, or whether it amounts to abuse of authority. The Tribunal will not rule on the appropriateness of the decision as it will not substitute the organization's view with its own (see, for example, Judgment 4427, under 2). An international organization must carefully take into account the interests and dignity of staff members when effecting a transfer to which the staff member concerned is opposed (see, for example, Judgment 4427, under 11). It is incumbent upon an international organization to prove that a procedure which it has put in place has been duly followed, particularly if the implementation thereof is disputed (see, for example, Judgment 3601, under 20). At this juncture, it bears noting that the decision to transfer or reassign the complainant to Accra was made under the FAO's Geographic Mobility Programme and the Mobility Guidelines.

The Tribunal has also stated that every international organization is bound by a duty of care to treat its staff members with dignity and avoid causing them undue and unnecessary injury (see, for example, Judgment 4253, under 3). While the head of an international organization must take into account the organization's interests as well as the staff member's abilities and interests in the exercise of the discretion to transfer a staff member, in cases where the two are at odds, greater

weight may be accorded by the decision-maker to the interests of the organization (see Judgment 2635, under 6).

3. The complainant had stated, in his internal appeal, that on 1 January 2014 he was transferred to an annual fixed-term position outside of the official staffing of the PWB, which position was renewed annually for the biennium 2016-2017 as a “non-PWB” position. When the FAO’s Geographic Mobility Programme was introduced in 2015, as well as during 2016, his position was not considered for the Geographic Mobility Programme and his name did not appear in the list of posts for mobility, which was discussed in the ES Department in 2017. This was consistent with the guiding principle that the Geographic Mobility Programme did not include non-PWB posts unless the incumbent expressed an interest, which he did not do. His name was not included in the mobility proposal of the ES Department submitted by the 27 January 2017 deadline. However, he was informed in February 2017 of the proposal to transfer him under the Geographic Mobility Programme to a position in the FAO’s Regional Office in Accra, Ghana. On 5 March 2017, the ADG/ES confirmed his assignment under the Geographic Mobility Programme, maintaining his P-5 grade with the transfer date “preferably by 30 June but no later than 15 December 2017”. Notwithstanding his requests to defer his transfer on various health and family grounds, and his expressed willingness to be transferred to Accra in November or December 2017, the complainant was subsequently informed that his transfer was to take effect as of 1 June 2017. He therefore submitted his resignation from the FAO on 26 May 2017, with effective date 31 August 2017, and appealed the transfer decision on 1 June 2017.

4. The Appeals Committee rejected the FAO’s argument that, pursuant to paragraph 4 of the Mobility Guidelines, a staff member recruited against a PWB post would be subject to the Geographic Mobility Programme, even if she or he is subsequently transferred to an extra-budgetary or non-PWB post, as the complainant was. The Committee concluded that by virtue of paragraphs 2 to 4 of the Mobility Guidelines, although the complainant was first recruited on a fixed-term

appointment in 1996 in a regular PWB position, he should not have been placed on the departmental mobility plan because he held a non-PWB post when his transfer was proposed. In the impugned decision, the Director-General rejected this conclusion. He insisted that notwithstanding that the complainant held an extra-budgetary or non-PWB, rather than a regular PWB post, at the time when his transfer was proposed, the FAO was entitled to transfer him pursuant to paragraph 4 of the Mobility Guidelines, as he held a regular PWB post when he was first recruited on a fixed-term appointment in 1996.

5. In order to put this issue into context, paragraphs 1-4 of the Mobility Guidelines should be reproduced so far as relevant:

“1. A geographic mobile assignment involves a change in a staff member’s duty station for a period of one year or more. The assignment may be effected under the present programme, upon selection by the relevant selection bodies, by management decision [...]

[...]

2. All staff members encumbering PWB positions from P-1 to D-1 level are expected to assume different functions in the course of their service with the Organization. [...]

3. This Geographic Mobility Programme shall apply to all International Professional staff on a fixed-term or continuing appointment in the Professional and above categories up to and including those at the D-1 level subject to the following exclusions:

[...]

4. Staff members recruited against extra-budgetary funded posts will not be subject to mobility, but will be considered for assignments against extra-budgetary funded posts, if they express an interest.”

6. The Director-General decided that the complainant was liable to be transferred under the Geographic Mobility Programme by reading paragraph 4 in isolation, rather than in the context of the related provisions. The true purport of the word “recruited” in paragraph 4 should be determined particularly in light of paragraphs 1 and 2. It seems apparent in that context that staff members who are expected to assume different functions under the Geographic Mobility Programme (and who accordingly may be transferred or reassigned under that programme) are those who

are encumbering PWB positions in the stated categories and not staff members who held PWB positions at the time that they were first employed with the FAO. In the result, the non-PWB position, which the complainant held at the time of his proposed transfer, did not fall under the Geographic Mobility Programme, unless the complainant expressed an interest. The complainant did not express an interest to be reassigned pursuant to paragraph 4. In fact, he opposed the reassignment and resigned when the FAO maintained the decision to transfer him under the Geographic Mobility Programme. While the Mobility Guidelines did not derogate from the Director-General's power to transfer a staff member under Staff Regulation 301.1.2, as argued by the FAO, they established a policy which was plainly a relevant consideration to be taken into account in the exercise of the Director-General's power. The misinterpretation of the Mobility Guidelines and, therefore, the misapplication of them infected the Director-General's decision because he failed to take into account a relevant consideration. The impugned decision will be set aside.

7. The Appeals Committee correctly concluded that having resigned of his own free will and no longer being in his post, the complainant had deprived himself of the right to be reinstated. On that basis, the Director-General did not err by rejecting the complainant's request to be reinstated, which claim repeated in the present complaint is, accordingly, unfounded.

8. Given that the complainant resigned of his own free will with effect from 31 August 2017, his claims for an award of damages for loss of earnings and loss of pension entitlements for the period from 1 September 2017 until the mandatory date of his retirement on 31 August 2023 have no legal basis and are, accordingly, rejected.

9. On the basis that the FAO violated provisions of the Mobility Guidelines and its duty of care towards the complainant, the Appeals Committee recommended that the FAO award him an adequate sum in moral damages and that it meet the legal costs he incurred in the internal appeal procedure. The Director-General rejected these recommendations in the impugned decision. The complainant repeats in his complaint to

the Tribunal his claims for moral damages for the FAO's violations. As the injury which the FAO's violations caused to the complainant is obvious, he is entitled to moral damages, for which he will be awarded 25,000 United States dollars.

10. The complainant also seeks moral damages for the delay in the internal appeal procedure which commenced on 1 June 2017 and concluded with the issuance of the impugned decision on 29 January 2019. The latter claim will be rejected as unfounded, as the delay was not inordinate and, in any event, the complainant provides no evidence of the effect which any delay had upon him.

11. The complainant claims reimbursement of the legal costs he incurred in the internal appeal procedure. This claim will also be rejected, as he does not show that exceptional circumstances exist to justify such a claim as the case law requires (see, for example, Judgment 4392, under 13).

12. The complainant is, however, entitled to costs in these proceedings, for which he will be awarded 1,000 United States dollars.

DECISION

For the above reasons,

1. The impugned decision is set aside to the extent stated in consideration 6 of this judgment.
2. The FAO shall pay the complainant 25,000 United States dollars in moral damages.
3. The FAO shall pay the complainant 1,000 United States dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 October 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ