

**M. (No. 11)**

**v.**

**FAO**

**138th Session**

**Judgment No. 4854**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 3 July 2020 and corrected on 6 August, the FAO's reply of 28 October 2020, the complainant's rejoinder of 2 February 2021 and the FAO's surrejoinder of 21 April 2021;

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

Having examined the written submissions;

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

The complainant challenges the appointment of another official to the position of Director, Office of Strategy, Planning and Resources Management (OSP), following a competitive selection process.

Facts relevant to this case are to be found in Judgments 4690 and 4691, delivered in public on 7 July 2023, concerning the complainant's first and second complaints, respectively. Suffice it to recall that in April 2016, the Administration informed the complainant that it wished to transfer him from the position he then held (Director, Liaison Office for North America, at grade D-1) to another position. During the months that followed, various options were considered, some of which proved unsuitable for medical reasons, and the complainant himself expressed an interest in several positions. Ultimately, in February 2017,

the Administration decided to transfer the complainant to the position of Senior Policy Officer, FAO Regional Office for Europe and Central Asia (REU) – a decision that the complainant challenged in his first complaint to the Tribunal.

In June 2018, the FAO issued a vacancy announcement for the position of Director, OSP, at grade D-2. The complainant applied for this position, was shortlisted, and was interviewed on 7 September 2018. Prior to his interview, on 6 September 2018, he wrote to the Office of Human Resources (OHR) and asked to be provided with a copy of the rules and procedures applicable to the selection and recruitment for positions at the D-1 level and above, stating that he could no longer locate them on the FAO intranet. He reiterated this request during his interview and was referred to the Director, OHR. The next day, on 8 September 2018, he wrote to the Director, OHR, to ask again for a copy of the rules and procedures applicable to the selection and recruitment for positions at the D-1 level and above, noting that OHR staff had unsuccessfully tried to locate them. By an email of 7 December 2018, he was informed that another candidate had been selected for the position of Director, OSP.

On 10 December 2018, the Director-General announced his decision to appoint Ms C. to the position of Director, OSP, effective 1 January 2019. The complainant appealed this decision to the Director-General on 25 December 2018 alleging that: (i) the selection process lacked due process and transparency, mainly due to the FAO's failure to formulate and issue rules governing the selection and recruitment for positions at the D-1 level and above, the Administration had revoked the earlier Recruitment/Interview Guidelines for senior level vacancies in an abrupt and arbitrary manner without issuing new ones; (ii) the presence of retired staff members on the Interview Panel was in breach of the FAO's Policy on the Use of Retirees and the principle *tu patere legem quam ipse fecisti*; and (iii) the presence of the former Director, OSP, on the Interview Panel represented a conflict of interest, given his long-standing professional and personal relationship with Ms C. Following the rejection of his appeal to the Director-General on 21 February 2019, the complainant lodged, on 11 March 2019, an appeal to the Appeals

Committee maintaining, in the main, the allegations made in his appeal to the Director-General.

The Appeals Committee issued its report on 15 November 2019. Recalling the fundamental tenet of the rule of law that laws should be open and clear, general in form, universal in application and knowable to all, the Committee concurred that there was no semblance of transparency in selection processes for positions at the D-1 level and above. It specifically noted that the selection process for the position of Director, OSP, “responded to no known selection procedures” which, in its opinion, left a legal vacuum, and concluded that: (i) the absence of specific competitive selection procedures for senior level positions amounted to a breach of the administrative requirement that such procedures exist and are knowable to staff at large; (ii) it did not have sufficient information to determine whether the presence of retirees on recruitment panels for senior level positions violated the Policy on the Use of Retirees and whether there was a procedural flaw in this regard; (iii) the complainant had not sufficiently substantiated that the presence of the former Director, OSP, on the Interview Panel represented a conflict of interest. Considering that the setting aside of the contested appointment and a repetition of the selection process would not be feasible as the complainant had already retired from the Organization, the Committee recommended that the FAO award him appropriate moral damages for having failed in its duty of care towards him, by ignoring his requests for information and for breaching its fundamental obligation to formulate and issue selection procedures for positions at the D-1 level and above. In the interest of fairness and transparency, the Committee also recommended that the FAO formulate and publish such procedures to replace those previously in force. It further recommended that the FAO provide clarification on the proper use of retirees, specifically regarding their participation in selection and interview panels. Lastly, noting that the complainant had filed a total of sixteen appeals, the Committee recommended that the FAO consider the option of mediation as an alternative to litigation before the Tribunal.

By a letter of 7 April 2020, the Director-General informed the complainant that he had decided to reject his appeal in its entirety, as the decision to appoint Ms C. as Director, OSP, was validly taken and the selection process leading to that appointment was lawful. This is the impugned decision in the present complaint (the complainant's eleventh).

The complainant asks the Tribunal to set aside the impugned decision, drawing all legal consequences therefrom, and to declare the decision to select and appoint Ms C. to the position of Director, OSP, illegal and irregular. He claims 300,000 euros in material and moral damages for the FAO's long-term discriminatory and prejudicial conduct and for the Appeals Committee's gross procedural failures in the selection process, which denied him an equal opportunity for promotion and career advancement. He also claims reimbursement of the legal costs he incurred, as well as interest on all awarded amounts at the rate of 5 per cent per annum from 7 December 2018 through the date all such amounts are paid in full. Lastly, he claims such other relief as the Tribunal deems necessary, just and fair.

The FAO asks the Tribunal to dismiss the complaint, to the extent that it is receivable, as unfounded.

## CONSIDERATIONS

1. The complainant is a former staff member of the FAO. This judgment concerns a complaint filed by him on 3 July 2020, his eleventh complaint. The complainant has, in total, filed thirteen complaints to date. Four, including the present complaint, have been dealt with at this session. One, his tenth, has not been pursued.

2. Four complaints were dealt with at the last session (137th Session) in the following way. His fourth complaint, concerning a decision to appoint another official, by way of lateral transfer, to the position of Director, FAO Liaison Office in Brussels, was not successful (see Judgment 4771). His fifth complaint, concerning a decision to appoint another candidate to the position of Director,

Investment Centre Division, following a competitive selection process, was partially successful and resulted in an award of 15,000 euros in moral damages (see Judgment 4772). His eighth complaint, concerning a decision to appoint, by way of lateral transfer, another official to the position of Deputy Regional Representative, FAO Regional Office for Europe and Central Asia (REU), was not successful (see Judgment 4773). His ninth complaint, concerning a decision to appoint another official to the position of Director, Office of Human Resources, was not successful (see Judgment 4774).

3. A further four complaints were dealt with at the 136th Session in the following way. His first complaint, concerning a decision to transfer him to the post of Senior Policy Officer, REU, in Budapest, was partially successful (see Judgment 4690). His second complaint, concerning a decision in October 2017 to close a complaint by him of harassment and abuse of authority was substantially successful and resulted in an award of 60,000 euros in moral damages (see Judgment 4691). His third complaint, concerning an alleged implied decision of the Office of the Inspector General to reject his grievance, was not successful (see Judgment 4692). His thirteenth complaint, against an alleged implied decision not to provide him with any terms of reference or work between September 2016 and his retirement in December 2018, was not successful (see Judgment 4693).

4. Some of the reasoning in this judgment is repeated in the judgment on the complainant's twelfth complaint.

5. The present complaint concerns, specifically, the Director-General's decision of 10 December 2018 to appoint, another staff member, Ms C. to the post of Director, Office of Strategy, Planning and Resources Management (OPS), after a competition in which the complainant participated and was shortlisted. The impugned decision is the Director-General's decision of 7 April 2020, rejecting the complainant's internal appeal against the outcome of an initial appeal challenging the decision of 10 December 2018 to appoint Ms C. The

impugned decision followed a report of the Appeals Committee of 15 November 2019.

6. The arguments raised by the complainant in this complaint have similarities to those raised by him in his twelfth complaint, in which judgment is given at this session. However, no request was made to join the proceedings. Nonetheless, the Tribunal's reasons for dismissing this complaint should inform a consideration of its judgment in the complainant's twelfth complaint.

7. The defendant organisation does not raise as an issue the question of whether the complainant has a cause of action concerning the appointment of Ms C. or otherwise puts in issue the receivability of the complaint insofar as it directly challenges that appointment.

8. There was a material deviation between the reasoning and conclusions in the impugned decision of the Director-General and the reasoning, conclusions and recommendations of the Appeals Committee in its report. One of the contentions of the complainant in his pleas in these proceedings is that the Director-General did not, in the impugned decision, motivate or adequately motivate his conclusions to the extent they differed from those of the Appeals Committee and which led him to reject the recommendations of the Appeals Committee. It is well established in the Tribunal's case law that the executive head of an international organization, when taking a decision on an internal appeal that departs from the recommendations made by the appeals body, to the detriment of the employee concerned, must adequately state the reasons for not following those recommendations (see, for example, Judgment 4062, consideration 3, and the case law cited therein).

9. It is convenient to commence by considering this contention. The Director-General rejected the appeal in its entirety. He did so notwithstanding a recommendation by the Appeals Committee that the complainant be awarded an appropriate amount of moral damages to be determined by the Organization. Thus, the rejection of this recommendation was to the complainant's detriment. The recommendation that moral

damages be awarded was based on a conclusion of the Appeals Committee that the Organization had failed in its duty of care towards the complainant, “both by ignoring his request for information, and for breaching its fundamental obligation to formulate and issue selection procedures for positions at D1 and above level, which the [complainant] and other interested staff would have the right to be aware of”.

10. The analysis of the Appeals Committee leading to its conclusions on these two topics is as follows. On the first point, ignoring the complainant’s request for information, the Appeals Committee said:

“7. Prior to the interview [scheduled for 7 September 2018], on 6 September 2018, the [complainant] wrote an email to the [Human Resources (HR)] Officer, Office of Human Resources (OHR) requesting to be provided with ‘the latest copy of the selection process for D1 and above which can no longer be located on the intranet’. He also requested to have details of the panel composition.

8. The [complainant] did not receive a reply to his above email message and attended his interview on 7 September 2018. [...]

9. On 8 September 2018, the [complainant] wrote to the then Director, OHR to inform him that whilst he had requested information on the applicable selection procedures at his interview the day before, he had not received such information from the members of the panel. He stated also that the OHR members of the panel mentioned that whilst they ‘had tried to locate the current rules and procedures they had been unsuccessful’, and that the panel Chair then invited him to refer to the Director, OHR to follow-up on his query.”

And later in its report, the Appeals Committee said:

“25. [...] The [complainant] had made requests for information on the applicable selection procedures but had received no reply from the Organization. The Committee considered that the Organization erred in not providing the [complainant] with appropriate information in that regard. It could have at the very least replied to his communications and, as such, the Committee considered that it failed in its duty of care towards the [complainant].”

11. On the second point, the Organization’s breach of its fundamental obligation to formulate and issue selection procedures, the Appeals Committee said, amongst other things:

“27. [T]he selection process in question responded to no known selection procedures and this, in the opinion of the Committee, [...] left a legal vacuum. [...]

28. [T]he Committee did agree with the [complainant’s] claim that there was no semblance of transparency in the selection processes for D1 level and above positions. Without applicable selection procedures to evaluate the facts against, it could not be concluded with certainty that no procedural flaw took place. In conclusion, the Committee found that the lack of selection procedures for positions at D1 level and above represented a breach of the administrative requirement that specific competitive selection procedures for senior level positions exist and that they be knowable to staff at large.”

12. It appears not to be an issue, at least by the time these proceedings were commenced, that there were no specific written procedures expressly governing the appointment by competition to positions at the D-1 level and above.

13. The reasoning of the Director-General in the impugned decision on these two points was as follows. On the first point, the Director-General said:

“I note that, in your appeal concerning the selection process for the position of Director of the Investment Centre (TCI), D-2 (Appeal Case No. 782), which followed the same steps, the Committee did not consider this process to be flawed. In particular, the Committee ‘found that there was no evidence’ of any ground to set aside the decision and ‘noted that a [Vacancy Announcement] was announced for the post of Director, TCI and that a competitive selection process ensued in which the [complainant] was one of several candidates interviewed, and that a final decision was taken by the appropriate authority’. I also observe that, despite your requests for information during the process, you were well aware of the procedures by the time you participated in the competition for the post of Director, OSP.”

14. On the second point, the Director-General did not specifically address, and expressly challenge, the conclusion of the Appeals Committee that “the selection process in question responded to no known selection procedures and this, in the opinion of the Committee, [...] left a legal vacuum”, beyond referring to provisions of general application in the FAO Constitution, the General Rules of the



Organization and the Staff Regulations, and stating that there were no mandatory requirements for such procedures.

15. The Director-General's statement on the Appeals Committee's conclusions on the first point really does not answer the proposition that there was no response to the complainant's request of 6 September 2018. That was a finding of fact by the Appeals Committee which is not challenged. Even if it be true (though it may be doubted), as asserted by the Director-General, that the complainant knew of the procedures, this did not absolve the Organization from responding to his request. The response could have been that the complainant knew and this is what he knew. But a response was necessary. There is no adequate motivation in the impugned decision for rejecting the recommendation of the Appeals Committee and the conclusion on which it was based.

16. On the second point, there is no effective answer provided to the Appeals Committee's conclusion (which seems to be correct) that "the selection process in question responded to no known selection procedures and this, in the opinion of the Committee, [...] left a legal vacuum". A general reference to normative legal documents of wide application does not answer the conclusion of the Appeals Committee on which its recommendation was based. What the Director-General appears to be relying on is the fact that there were procedures followed in conducting the competition and filling the position. Doubtless, this is correct. But the point being made by the Appeals Committee, which remained unanswered, was the need (as the Appeals Committee viewed it) to have, in advance, procedures in writing on how the competition would be conducted, and a selection ultimately made.

17. Accordingly, and in the result, the Director-General has not sufficiently motivated his decision to reject the conclusion and associated recommendation of the Appeals Committee that the Organization had breached its duty of care towards the complainant and should pay the complainant moral damages. Often, in cases of this type, the matter is remitted to the organisation to enable the executive head to motivate her or his decision. However, in the present case, the complainant has

retired from the Organization and no apparent purpose would be served by requiring further reasons. Citing Judgment 4157, consideration 7, the Organization says that no moral damages should be awarded, as there is no evidence of moral injury. However, in this case, the moral injury occasioned by a failure to motivate a decision rejecting recommendations of an internal appeal body, is tolerably clear as is the Organization's breach of its duty of care, as found by the Appeals Committee. The complainant is entitled to moral damages, which the Tribunal assesses in the sum of 20,000 euros.

18. Insofar as the complainant also alleges a range of deficiencies in the selection process, including the participation of the former Director, OPS, in the Interview Panel and the participation of retirees, the rejection of those contentions by the Appeals Committee, or its view in relation to the participation of retirees that it was unclear, and thus unproven, whether they could participate, are correct and its reasoning need not be repeated. Insofar as the complainant alleges that his non-selection was motivated by bad faith, prejudice and discrimination, this has not been proven and cannot be presumed (see Judgment 4352, consideration 17, and the case law cited therein). It is to be recalled that the ultimate decision to appoint Ms C. was based on the recommendation of the Interview Panel and it would be necessary for the complainant to have established, in these proceedings, that its consideration and recommendation was infected by bias, prejudice or discrimination of the type alleged against the Organization more generally. There is not a scintilla of evidence that this was so.

19. Save for the argument that the Director-General failed to motivate his decision, the complainant's contentions are unfounded and should be rejected. The complainant is entitled to costs assessed in the sum of 10,000 euros.

20. The complainant sought oral proceedings, but the Tribunal is satisfied it is in a position to make a fair and balanced decision having regard to the written material provided by the parties.

DECISION

For the above reasons,

1. The FAO shall pay the complainant 20,000 euros moral damages.
2. The FAO shall pay the complainant 10,000 euros costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 25 April 2024, 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 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER