

**M. (No. 8)**

**v.**

**FAO**

**137th Session**

**Judgment No. 4773**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 28 January 2020 and corrected on 2 March, the FAO's reply of 16 July 2020, the complainant's rejoinder of 19 October 2020 and the FAO's surrejoinder of 20 January 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 by lateral transfer.

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 FAO informed the complainant that it wished to transfer him from the position he then held (Director, Liaison Office for North America) 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. In the event, the FAO decided, in February 2017, to transfer him to the position of Senior Policy Officer in the FAO Regional Office

for Europe (REU), at grade D-1, based in Budapest, Hungary. The complainant challenged that decision in his first complaint.

In March 2017, shortly after having taken up his duties in Budapest, the complainant wrote to the Deputy Director-General, Operations, asking to be considered for a lateral transfer to the position of Deputy Regional Representative, REU, which, according to him, would become vacant in April 2017 when its incumbent would be transferred to another post. He received no response to that request.

On 7 February 2018, the Director-General appointed Ms Y.S. to the position of Deputy Regional Representative, REU. On 28 March 2018, the complainant submitted a grievance challenging that appointment. He argued, in particular, that the failure to consider him for the Deputy Regional Representative position was a further example of the Organization's prejudice and discrimination against him, that it constituted a "flagrant breach of FAO rules governing competitive and merit-based selection and appointments", including the Recruitment/Interview Guidelines for senior level vacancies (D-1 and above), and that he would clearly have been a better candidate for the position had there been a competitive selection process.

This grievance was rejected on 28 May 2018 and on 4 June 2018, the complainant submitted an appeal to the Appeals Committee. In its report of 18 April 2019, the Appeals Committee found that the appeal was partly irreceivable, in that some of the complainant's claims were the subject of other proceedings. Regarding the contested appointment decision, it concluded that the appeal was unfounded. The Committee emphasized the discretionary authority of the Director-General to make selection and appointment decisions and pointed out that the complainant himself had requested a lateral transfer without competition, thereby acknowledging that such transfers constitute a lawful exercise of the Director-General's discretion.

On 31 October 2019, the Director-General issued his final decision, in which he rejected the complainant's appeal as being without merit, in accordance with the reasoning and recommendation of the Appeals Committee. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award him moral damages in the amount of 300,000 euros for injury suffered due to the FAO's prejudicial and discriminatory conduct, including for the excessive delay in the internal process and the damage to his professional career. He also claims costs, interest at the rate of 5 per cent per annum on all amounts awarded, and such other relief as the Tribunal deems necessary, fair and just.

The FAO asks the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded.

#### CONSIDERATIONS

1. The complainant is a former staff member of the FAO. This judgment concerns a complaint filed by him on 28 January 2020. The complainant has, in total, filed 13 complaints to date, one of which has been withdrawn. Four, including the present complaint, have been dealt with this session.

2. A further four were dealt with last session in the following way. His first complaint, concerning a decision in February 2017 to transfer him to a post 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, concerning an alleged implied decision not to provide him with work between September 2016 and his retirement in December 2018, was not successful (see Judgment 4693).

3. The present complaint, the complainant's eighth, specifically concerns a decision of 7 February 2018 of the Director-General to transfer and appoint another staff member, Ms Y.S., to the post of Deputy Regional Representative in the FAO Regional Office for

Europe (REU). The impugned decision is that of the Director-General of 31 October 2019 rejecting the complainant's internal appeal against the outcome of an initial appeal challenging the decision of 7 February 2018 appointing Ms Y.S. That decision was based on a report of the Appeals Committee of 18 April 2019 recommending the rejection of the internal appeal.

4. The arguments raised by the complainant in this complaint have marked similarities to those raised by him in his fourth complaint (another transfer and appointment case) in which judgment is given this session. However, no request was made to join the proceedings. Nonetheless, the Tribunal's reasons for dismissing the fourth complaint should inform a consideration of this judgment.

5. The complainant had unsuccessfully sought, in writing, a transfer to the post of Deputy Regional Representative, REU, on 15 March 2017. There was no written or other response to this request. However, at the time, the complainant took no subsequent steps to challenge any decision, whether express or implied, not to transfer him to this post.

6. 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 Y.S. or otherwise put in issue the receivability of the complaint insofar as it directly challenges that appointment. However, it cannot be assumed that one member of staff has an unfettered right to challenge the transfer of another member of staff (see Judgment 2670, consideration 5).

7. In his brief, the complainant's pleas are structured in the following way. The pleas commence with an executive summary which includes that the impugned decision was "tainted by gross violations of the applicable rules and legal safeguards in international law pertaining to prejudice, discrimination, equal treatment and abuse of authority exceeding the legal limits of the discretionary power of the head of an organisation".

8. The subsequent detailed pleas contain as a first general heading that the impugned decision is unlawful. Two subheadings follow: the first is that the impugned decision was tainted by gross mistakes of fact and the second is that the impugned decision was tainted by errors of law. Central to the argument of mistakes of fact was the approach of the Appeals Committee, endorsed by the Director-General, that mitigating circumstances surrounding the impugned decision were, as the Committee said, “not technically receivable in its review of [the] appeal”.

9. The second subheading, “errors of law”, contains five subsidiary arguments (as listed numerically). Regrettably the thread of each of these arguments (which, in several respects, is multifaceted) is extremely difficult to follow and, in significant measure, is directed towards impeaching the reasoning of the Appeals Committee (as, it is asserted, was adopted by the Director-General in the impugned decision) rather than directly addressing the legality of the appointment of 7 February 2018. The Tribunal notes, at this point, no relief is sought seeking the remittal of the matter to a newly constituted Appeals Committee to consider the internal appeal afresh, a course which can be adopted in the event there was material failure in the consideration of the internal appeal.

10. The first error of law argument contains disparate contentions including that the Committee dismissed highly relevant material, ignored an argument that there had been unequal treatment of the complainant as compared to Ms Y.S. and the Committee was biased. The second essentially addresses the response (or lack of it) to the request of 15 March 2017, how it was dealt with by the Committee and that, in a way that is not at all clearly articulated, the complainant had been misled and there had been a wilful intent to circumvent the applicable rules. The third involves failure to provide valid reasons. The fourth is that the organisation denied the complainant any opportunity to be heard. The fifth is also a challenge to the impartiality, credibility and “proper functioning” of the Committee.

11. The defendant organisation raises, effectively as a threshold issue, the scope of the inquiry permitted by the complainant's challenge to the impugned decision. It rejects the suggestion that the complainant is entitled to canvas the history of his employment in order to demonstrate that the appointment of Ms Y.S. on 7 February 2018 was the manifestation of, amongst other things, bias, prejudice and discrimination against him revealed by a myriad of events preceding that appointment. The complainant challenges this contention. It is true that the Tribunal said in Judgment 3669, consideration 2:

“The only decision impugned in the internal appeal was that appointment [...] Thus the complainant's complaint to this Tribunal concerns that decision. That is not to say evidence of events in his career cannot, in an evidentiary sense, be relied on in support of allegations of bias or prejudice in relation to the consideration of his candidacy for the position [...] If the evidence is of substance, it can be relied upon.”

12. What, in substance, the complainant is arguing is that in appointing Ms Y.S., the Director-General was making a choice between Ms Y.S. and the complainant (and perhaps others), and the failure to choose the complainant was infected by, amongst other things, bias and prejudice towards him. The difficulty with this argument is that there is no direct evidence that such a choice was being made, as a matter of fact, nor can an inference reasonably be drawn that it was. In some of the earlier judgments referred to in consideration 2 it is revealed that on 27 February 2017 the complainant was transferred to a position of Senior Policy Officer in Budapest. He travelled to Budapest on 11 March 2017. On 26 May 2017, the complainant sent an email to the Assistant Director-General, REU, detailing work he might do, particularly in view of the fact that he had not then received the terms of reference for the position he then occupied. These matters are adverted to in Judgment 4693 (and touched upon in Judgment 4690). It is not possible to infer the complainant would have been seen, as a matter of fact, by the Director-General as a potential appointee to the post of Deputy Regional Representative, REU, at the time of making the decision of 7 February 2018.

13. As the Tribunal observed in Judgment 4690, consideration 13, when addressing the statement made in Judgment 3669 (quoted above) and similar cases:

“There is probably no overarching principle which will determine the admissibility of evidence [about alleged prior bias and prejudice] concerning earlier events in every case. At least in a case such as the present, the question of admissibility should be determined by reference to the specific facts of the case.”

14. In this case, the evidence of the complainant and the arguments based on it about prior bias and prejudice is not, in the circumstances, relevant to the legality of the decision to transfer Ms Y.S. There was no choice being made of the type on which the complainant’s arguments rely. Accordingly, much of the argument of the complainant is not founded and lacks any admissible evidentiary underpinning.

15. Insofar as, additionally, the complainant alleges non-compliance with “rules” concerning the selection of staff, either, as the FAO correctly argues, the provisions do not constitute rules, do not apply to transfers or were not in force at the applicable time.

In his brief, the complainant emphasises that he “does not contest the discretionary power that the Director-General has in matters related to [...] transfers of staff members”, which are expressly provided for in FAO Manual paragraph 311.4.11.

16. The complainant seeks moral damages for the delay in the determination of his internal appeal on the footing that the delay was inordinate. It is true that the appeal took 17 months or thereabouts to resolve. The moral damage the complainant alleges was immense stress, anxiety and harm to his dignity. In the circumstances of this case, particularly given the multiplicity of challenges he was then making to a range of decisions which may well have engendered stress and anxiety, it would be inappropriate to accept the mere assertion that the delay in determining the appeal in this particular matter caused moral

injury of the type alleged. Accordingly moral damages in this respect should not be awarded.

17. The complainant sought an oral hearing, 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.

18. All the arguments of the complainant are unfounded, and the complaint should be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 17 October 2023, 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 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER