

M. (No. 9)

v.

FAO

137th Session

Judgment No. 4774

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth 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 2020, 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 decision to appoint another official to a post at grade D-2.

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.

On 25 April 2018, the Director-General announced the appointment of Mr S.L. as Director of the Office of Human Resources (OHR). The complainant, on 21 May 2018, filed a letter of grievance with the Director-General challenging this appointment. His grievance was rejected and on 20 August 2018, he lodged an appeal with the Appeals Committee alleging, in particular, that he had been unlawfully denied the right to compete for the position, which had been filled by directly appointing an official who, following his participation in a selection process for another position, had been placed on a roster of candidates suitable for appointment to D-2 positions. The Appeals Committee issued its report on 21 August 2019. It 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, the Committee observed that it could not substitute its judgement on the relative merits of candidates in a selection process for that of the Director-General, and it therefore rejected the complainant's arguments aimed at establishing that he was a better candidate for the disputed position. Noting that the procedure whereby prequalified candidates could be appointed to positions from an employment roster was provided for in FAO Manual Section 305, it found no violation of the rules and procedures governing selection and appointment and recommended that the appeal be rejected. Nevertheless, the Committee also recommended "that in the interests of fairness and transparency, appropriate selection and appointment procedures for positions at the D1 and above level be formulated and published without delay".

On 31 October 2019, the Director-General issued his final decision, in which he endorsed the findings of the Committee and concluded that the decision to appoint Mr S.L. was validly taken in accordance with the rules and procedures of the Organization. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision as well as the decision to appoint Mr S.L. He claims moral damages, including for excessive delay in the internal process, in the

amount of 200,000 euros, material damages in the amount of 400,000 euros, costs of at least 15,000 euros, interest at the rate of 5 per cent per annum on all amounts awarded, and such other relief as the Tribunal deems necessary, just and fair.

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 ninth, specifically concerns a decision of the Director-General of 25 April 2018 to appoint another staff member, Mr S.L., to the post of Director of the Office of Human Resources (OHR). 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 25 April 2018 appointing Mr S.L. That decision was based on

a report of the Appeals Committee of 21 August 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 (concerning the transfer of another staff member) 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 defendant organisation does not raise as an issue the question of whether the complainant has a cause of action concerning the appointment of Mr S.L. 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 appointment of another member of staff (see Judgment 2670, consideration 5). In this regard the Tribunal notes that, according to FAO Manual paragraph 305.2.5, the OHR maintains professional employment rosters, which list the names of candidates who have been endorsed but not selected for a specific post. That provision relevantly provides that "Division Directors/Head of Office may recommend a candidate from the professional employment roster for appointment to another vacant post at the same grade or at a lower grade, instead of issuing a vacancy announcement".

6. The detailed pleas in the brief 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".

7. The second subheading, “errors of law”, contains arguments mainly 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 25 April 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.

8. 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 Mr S.L. on 25 April 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.”

9. What, in substance, the complainant is arguing is that in appointing Mr S.L., the Director-General was making a choice between Mr S.L. 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 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 of

the FAO Regional Office for Europe (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). Moreover, unlike Mr S.L., the complainant was not on the professional employment roster as a candidate eligible for appointment to a vacant post at grade D-2. 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 Director, OHR, at the time of making the decision of 25 April 2018.

10. As the Tribunal observed in Judgment 4690, consideration 13, when addressing the statement 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.”

11. In this case, the evidence of the complainant and the arguments based on it about prior bias and prejudice are not, in the circumstances, relevant to the legality of the decision to appoint Mr S.L. 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.

12. Insofar as, additionally, the complainant alleges non-compliance with rules concerning the selection of staff, either, as the FAO correctly argues, relevant provisions were complied with or were not in force at the applicable time.

13. 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. However no moral injury has been identified let alone proved as it must be (see, for example, Judgment 4606, consideration 16, and

the case law cited therein). Accordingly moral damages in this respect should not be awarded.

14. 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.

15. 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