

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

B. Z.

v.

IFAD

134th Session

Judgment No. 4542

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms R. B. Z. against the International Fund for Agricultural Development (IFAD) on 6 June 2017 and corrected on 13 July, IFAD's reply of 6 November 2017, the complainant's rejoinder of 19 February 2018 and IFAD's surrejoinder of 6 April 2018;

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 her performance evaluation during her probationary period.

On 1 February 2014 the complainant joined the IFAD Office in Bujumbura, Burundi, as a Country Programme Manager (CPM) at grade P-4 in the East and Southern Africa Division under a short-term appointment until August 2014. Following a selection process, she was later appointed for a two-year fixed term in the same position from 4 September 2014 until 4 September 2016 and was designated as IFAD Representative in Burundi. Her contract of employment included a description of her duties in Attachment III and stated that she could not have any expectation of continuous employment or conversion to any

other type of appointment and that possible extensions of her appointment were conditional on successful performance and satisfactory conduct, among other factors. In addition, confirmation of her appointment depended on the satisfactory completion of a 12-month probationary period, ending on 4 September 2015. A work plan was drawn up by her regional director and supervisor at the time. It was signed by the complainant on 19 September 2014.

At the end of the first five months of her probationary period, the complainant received a generally positive mid-point assessment report from her then regional director and supervisor, which she signed on 1 February 2015. However, a number of recommendations were made to enable the complainant to improve her performance.

From May 2015 the complainant, who was worried about the political uncertainty in Burundi caused by a failed coup d'état on 15 May 2015 and the upcoming presidential elections on 15 July 2015, carried out various missions away from her usual duty station in Bujumbura, with her managers' agreement. In July 2015, in view of the deterioration in her health as assessed by the Chief Medical Officer of the United Nations Food and Agriculture Organization (FAO) on 9 July 2015 and confirmed by her doctor in Bujumbura, the complainant requested permission from her new regional director and supervisor, in post since 1 April 2015, to return to IFAD headquarters in Rome. Her supervisor agreed to this request on an exceptional basis, stating that he would discuss the situation with her when she arrived. A meeting was held on 23 July 2015 at which the complainant was asked to confirm in writing that she would remain in Bujumbura unless ordered to evacuate by the United Nations Department of Safety and Security, in accordance with the applicable rules for IFAD. On 29 July 2015 her supervisor, explaining that he had received instructions to this effect from his superiors, asked her to return to her usual duty station at the end of her annual leave, due to finish on 17 August. The complainant replied that she had already arranged her return tickets to Bujumbura. She confirmed that she agreed to deal with the insecurity in Burundi and to remain at her duty station in Bujumbura unless an evacuation order,

as referred to above, was issued or she was duly authorised by her managers to travel.

On 6 August 2015 her supervisor sent her the probationary report, in which he proposed that the probationary period be extended by six months, until 4 March 2016. The complainant inserted her observations and the report was finalised. She explicitly agreed to a six-month extension of her probationary period. On 28 September 2015 her supervisor sent her a performance improvement plan (PIP) for this six-month period, running from 5 September 2015 to 4 March 2016. This plan, which was dated 22 September 2015 and provided for continuous feedback on her work and the delivery of monthly progress reports, was duly signed and approved by the complainant. On 2 October the complainant sent her supervisor a detailed work plan covering the rest of 2015. She received a copy of this first finalised PIP by email on 30 October 2015.

Shortly before, on 29 July 2015, the complainant had received a draft mid-term performance review for 2015. This was later removed from her personal file as she was still on probation at the time and had been placed on a PIP.

A probationary report was drawn up at the end of the 18-month period. It was signed on 16 May 2016 by the complainant's supervisor and on 26 May 2016 by her head of department. Given that the probationary period had come to an end and the prescribed maximum duration had been reached on 4 March 2016, the complainant's appointment was confirmed on that date pursuant to IFAD Staff Rule 2.5. However, in view of the weaknesses identified in crucial competencies required for the role of CPM and the fact that, under the applicable rules, the probationary period could not be further extended, it was decided that the complainant would be placed on a new PIP from the date of confirmation of her appointment until 3 March 2017.

In June 2016 the complainant submitted a request for facilitation.

By letter of 23 September 2016, forwarded to the complainant the following day, the facilitator notified her that the facilitation process had failed. However, she informed the complainant that several points had been or were being deleted from her probationary report and that

her mid-term performance review for 2015 would be removed from her personal file as it should not have been drawn up.

On 23 October 2016 the complainant wrote to the Appeals Process Coordinator to lodge an appeal against the final evaluation of her probationary period. The Coordinator acknowledged receipt of the message on 26 October and informed the complainant that, to lodge an internal appeal, a statement of appeal should be submitted to the Joint Appeals Board (JAB) through its secretary, who was copied in that email. On 22 November 2016 the complainant lodged an appeal with the JAB, seeking, inter alia, the rescission of the decision (which, according to the complainant, was dated 13 October 2016) to place her on a new performance improvement period, the second PIP covering the period from 4 September 2016 to 3 March 2017, and the decision of 2 September 2016 to extend her employment contract only until 3 March 2017. She also requested an extension of her appointment until 3 September 2018.

In a brief dated 8 December 2016, the administration challenged the receivability of the appeal on the grounds that the complainant had not lodged it within the prescribed time limit of one month of notification of the failure of the facilitation procedure. The JAB delivered its report on 31 January 2017. It found that the appeal was irreceivable *ratione temporis* because it had not been sent to the competent authority in good time and was time-barred. It also considered that the appeal was partly irreceivable because it was, inter alia, directed against a decision still under discussion by the parties, namely the second PIP, eventually signed on 2 and 15 September 2016 by the supervisor and the complainant and covering the period from 4 September 2016 to 3 March 2017. The JAB further considered that the appeal was unfounded in any event, and therefore recommended that it be rejected. The President of IFAD endorsed those recommendations in a letter of 20 February 2017, which constitutes the impugned decision.

The complainant requests the Tribunal to set aside the President's decision of 20 February 2017, and also the probationary reports of August 2015 and May 2016 and the first PIP of 22 September 2015, and to order IFAD to draw the appropriate conclusions from the judgment setting aside the impugned decision and the documents at issue by

withdrawing these documents from her personal file and/or destroying them. She also claims compensation of at least 25,000 euros for the injury she considers she has suffered and an award of 7,000 euros in costs.

IFAD asks the Tribunal to dismiss the complaint as irreceivable because the complainant failed to exhaust internal remedies. Subsidiarily, IFAD submits that the complaint is unfounded.

CONSIDERATIONS

1. The complainant seeks the setting aside of the decision of the President of IFAD of 20 February 2017. In that decision, the President dismissed the complainant's appeal, which – apart from a point which has become moot – was directed against the imposition of a second PIP and the extension of her contract of employment by a period of only six months. The President thereby endorsed the recommendations of the JAB, which had found the appeal irreceivable.

The complainant further seeks the setting aside of several documents drawn up prior to that decision, namely the probationary report of 16 May 2016, the first PIP and the probationary report of 22 August 2015. At the outset, the Tribunal notes that those documents were never challenged in internal appeal proceedings before the JAB. The claims directed against them are therefore irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal for failure to exhaust the internal means of redress.

2. In the main, IFAD argues that the claim for the setting aside of the decision of 20 February 2017 should in any event be dismissed, since the internal appeal lodged with the JAB was irreceivable owing to a failure to observe the time limit for lodging an appeal of one month from notification of termination of the mandatory facilitation procedure. IFAD further submits that the Tribunal's case law cited by the complainant in support of her complaint – which, according to her, establishes that her appeal to the JAB was receivable because the internal appeal that she had previously incorrectly lodged with the Appeals Process Coordinator should have been taken into account – is not

applicable in this case. It contends that the complainant only cites the Tribunal's case law partially and that the facts of the case are different.

3. Firstly, the Tribunal observes that the parties agree on the following facts: the failure of the facilitation process was recorded in the letter of 23 September 2016, which was forwarded to the complainant the following day; the complainant incorrectly submitted her internal appeal to the Appeals Process Coordinator on 23 October 2016, almost 30 days later; on 26 October the Coordinator informed the complainant, with a copy to the Secretary of the JAB, that under sections 10.21.5 and 10.22 of Chapter 10 of the Human Resources Implementing Procedures, her internal appeal should be addressed to the JAB; and the complainant did not actually lodge an appeal with the JAB until 22 November 2016, almost 60 days after she was notified that the facilitation procedure had failed.

In these circumstances, the complainant plainly lodged her internal appeal with the JAB after the one-month time limit prescribed by section 10.21.5(a) of Chapter 10 of the Implementing Procedures.

However, the Tribunal's settled case law states that an appeal submitted to the wrong authority within the prescribed time limit is not irreceivable on that account, because it is for that authority, in such circumstances, to forward it to the authority which is competent, within the organisation, to hear it (see Judgments 1832, consideration 6, 2017, consideration 6, 2345, consideration 1(b), 2882, consideration 6, 3027, consideration 7, 3423, consideration 9(b), 3424, consideration 8(b), 3425, consideration 7, and 3595, consideration 10). In such a situation, it is therefore not sufficient for the incompetent authority merely to inform the complainant that it is not competent and to suggest that she or he apply to the competent authority (see Judgment 3595, consideration 10).

In the present case and as the complainant states:

- the internal appeal she lodged on 23 October 2016 with the Appeals Process Coordinator was an appeal, even if it was misdirected;
- the mistake regarding the person with whom the appeal should be lodged has no bearing on the date of its lodging;

- the appeal was in fact lodged within one month of the notification of the decision to terminate the facilitation process, as provided for in section 10.21.5 of Chapter 10 of the Implementing Procedures;
- the person with whom the appeal was lodged appears to have forwarded it on her own initiative to the competent authority, as she was required to do under the Tribunal’s case law;
- the mere fact that the complainant was also informed of her mistake regarding the person with whom her internal appeal should be lodged does not therefore have a bearing on the finding that her internal appeal was lodged on 23 October 2016;
- pursuant to section 10.22.3 of Chapter 10 of the Implementing Procedures, the Secretary of the JAB should have invited the complainant to supplement her appeal within one month of the receipt of the appeal, which the Secretary failed to do; and
- the complainant wrote again to the Secretary of the JAB on 22 November 2016, which may be regarded as an indication of her wish to supplement her first appeal of 23 October 2016, even though she had not yet been invited to do so by the Secretary of the JAB.

4. It follows from all of the foregoing that the complainant’s internal appeal was receivable. Contrary to what IFAD submits, the complaint before the Tribunal is therefore receivable under Article VII, paragraph 1, of the Statute of the Tribunal to the extent that it seeks the setting aside of the decision of 20 February 2017. In addition, the decision of 20 February 2017 is tainted by an error of law in that it rejected the complainant’s appeal as time-barred.

5. However, the Tribunal observes that, as the JAB also noted, on the date on which the appeal was lodged with the JAB the decisions to place the complainant on a second PIP and to extend her appointment by six months until 3 March 2017 had not yet been challenged in the preliminary dispute resolution procedures prescribed by the applicable provisions. The appeal was therefore irreceivable on the ground that it was premature.

The Tribunal considers that this ground of irreceivability should be substituted for the one wrongly identified in the impugned decision. In these circumstances, the Tribunal will not set aside that decision and will dismiss the complaint.

6. However, since the impugned decision was affected by an error of law that the complainant was entitled to challenge, she should be awarded costs, which the Tribunal sets at 4,000 euros.

DECISION

For the above reasons,

1. IFAD shall pay the complainant costs in the amount of 4,000 euros.
2. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ