

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

O.
v.
FAO

135th Session

Judgment No. 4596

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. F. O. against the Food and Agriculture Organization of the United Nations (FAO) on 31 October 2019 and corrected on 18 November, the FAO's reply of 16 March 2020, corrected on 18 May, the complainant's rejoinder of 28 August 2020 and the FAO's surrejoinder of 1 December 2020;

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 contests the decision not to pay him a termination indemnity upon the expiry of his fixed-term appointment.

In August 2005 the complainant joined the Country Office of the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – in Ecuador under a service contract. On 1 November 2006 he was appointed National Officer on a fixed-term appointment, which was subsequently extended several times. From 2014, the maximum duration of his appointment's extensions was 6 months.

In early 2016 a Staffing and Structure Review (“SSR”) of the Office was organised but its completion was delayed due to exceptional circumstances in the country. Staff members were so informed on 12 May 2016 by the Country Director, who explained that, for the time being, appointments would be extended by two months only, that was to say until 31 August 2016, because the Office’s regular budget was limited. He added that “[u]pon [his] return and together with the management team, a decision [would] be made and [he] hoped to be able to renew the contracts for a longer period”. The complainant signed his terms of employment as Logistics Officer, grade NO-B, on 30 June 2016.

On 20 July 2016 the SSR Committee validated the proposed new structure which entailed, amongst other things, the abolition of the complainant’s post. Two days later, the complainant was informed that his post was abolished as the current budget for 2016-2017 was not sufficient to cover the salaries and operating expenses of the Office with the current structure. Consequently, his fixed-term appointment would not be renewed beyond its expiry date. He was however invited to apply for new vacancies, but he did not. At the end of July, he asked the Administration if he was entitled to the termination indemnity. On 5 August 2016 the Country Director replied that he was not, because his appointment had merely expired, it had not been terminated.

After his appointment had expired, the complainant submitted an appeal on 19 September 2016 to the WFP’s Executive Director, challenging the refusal to pay him the termination indemnity. This appeal was rejected on 29 December 2016, and on 10 February 2017 he filed an appeal with the Appeals Committee, asking that the FAO Director-General reverse the decision not to pay him the termination indemnity and grant him material and moral damages together with costs.

In its report of 15 July 2019, the Appeals Committee considered that the explanation given to justify the Executive Director’s late reply to the complainant’s appeal was unacceptable, and therefore decided to ignore that reply. But, it agreed to examine the statements submitted by the WFP, which partly reproduced it. It recommended that the WFP abide by deadlines relating to the filing of appeals and expressed deep

concern at the apparent imbalance between the two parties, specifically in connection with the consequences of not meeting deadlines when filing submissions. However, it did not recommend awarding the complainant damages as it could not come to a determination of the amount to be paid, given that the complainant had failed to make a specific request in that respect. On the substance of the appeal, the Appeals Committee found that the decision not to pay the termination indemnity was sound as the WFP had not terminated his fixed-term appointment before its expiry date.

By a letter of 8 August 2019, the FAO Director-General notified the complainant that his appeal was rejected. He stressed that, based on FAO Staff Regulation 301.15.72 and section II.1.3.3 of the WFP Human Resources Manual, no termination indemnity was due when a fixed-term appointment expired according to its terms. The Director-General rejected the allegation that the complainant's appointment was extended for two months to avoid paying him the termination indemnity. He stressed that, in May 2016, all staff members were informed that appointments would be extended only for two months given the critical financial situation of the Country Office. He added that any claim made concerning the conditions of his last appointment was time-barred as the complainant had failed to challenge it within the prescribed time-limits. Regarding the WFP Executive Director's late reply to the complainant's appeal, he considered that although this was regrettable, it did not prejudice the complainant's right to appeal and did not prevent the Appeals Committee from recommending that his appeal be rejected. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, and to award him moral and exemplary damages. He also claims 5,000 euros in costs for the proceedings before the Tribunal and for the internal proceedings, and he asks the Tribunal to order the production of information and documents relating to the abolition of posts.

The FAO asks the Tribunal to reject the complaint as irreceivable insofar as it concerns the decision to extend the complainant's appointment by two months, and otherwise devoid of merit.

CONSIDERATIONS

1. The complainant impugns the FAO Director-General's decision of 8 August 2019, which accepted the recommendations of the Appeals Committee of 15 July 2019, confirming the 5 August 2016 decision not to pay him the termination indemnity on the ground that his fixed-term appointment had expired, not been terminated, and accordingly rejecting his appeal.

2. The FAO argues that the complaint is irreceivable insofar as the complainant challenges the decision to extend his appointment for two months, as his internal appeal was time-barred in that respect for not being submitted within 90 days from the date of receipt of the extension decision on 12 May 2016.

3. The Tribunal notes that the complainant does not impugn before the Tribunal the decision to extend his appointment by two months only, but merely relies on that fact to support his claim for payment of the termination indemnity. He clearly states in his rejoinder that the "crux of his complaint" is "not that he should have had a longer career with the WFP" but rather "the manner by which his service was ended". The issue of receivability does not need to be considered in the present case.

4. On the merits, the complainant advances three pleas. The first plea is that extension of his appointment for two months and the decision not to renew it was in breach of FAO Staff Rules. Citing the Tribunal's case law in Judgments 1596 and 469, he states that the appointment was deliberately set to expire at the conclusion of the SSR and, therefore, to avoid paying him the termination indemnity. He adds that he is not contesting the abolition of his post; the crux of his complaint is that "the manner by which his service was ended after a decade of exemplary service was illegal and undignified". Relying on Judgment 896, consideration 8, he submits that abolition of posts should always be implemented through termination of contract and should always trigger the payment of the termination indemnity. He also argues that FAO

Staff Rule 302.4.102 creates a general rule that all fixed-term contracts must be at least one year in duration, and no relevant exception applies to this case. Since his post was abolished following the SSR, he should be entitled to the termination indemnity under Staff Rules 302.9.111, 302.9.112, and Staff Regulation 301.15.1.

5. At the material time, FAO Staff Regulation 301.15, entitled “Termination indemnity”, relevantly stated as follows:

“Staff members whose appointments are terminated shall be paid an indemnity in accordance with the following provisions:

301.15.1 Except as provided in Staff Regulations 301.15.6 and 301.15.7, the published schedule in this Annex shall apply to staff members whose appointments are terminated upon abolition of post, reduction of staff, or in the interest of the good administration of the Organization:

[...]

301.15.7 No termination indemnity shall be paid to:

[...]

.15.72 A staff member whose fixed-term appointment is completed on the expiration date or terminated during the probationary period specified in the letter of appointment;

[...]”

FAO Staff Rule 302.4.1, entitled “Letter of Appointment”, relevantly states as follows:

“302.4.1 Letter of Appointment. The letter of appointment addressed to every staff member contains expressly or by reference all the terms and conditions of employment. All entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment.”

FAO Staff Rule 302.4.102 on appointment relevantly states as follows:

“Fixed-term Appointment. A fixed-term appointment shall be an appointment for a continuous period of one year or more and shall have a specified expiration date. Such an appointment is subject to a probationary period of one year, which may be extended to 18 months.”

FAO Staff Rule 302.4.103 provides:

“Short-term Appointment. A short-term appointment shall be an appointment for a period of less than one year, ending on a date specified in the letter of appointment.”

FAO Staff Rule 302.9.7 provides:

“Expiration of fixed-term appointment. A fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. Separation as a result of the expiration of any such appointment shall not be regarded as a termination of appointment within the meaning of the Staff Regulations and Staff Rules.”

6. FAO Staff Rule 302.9.1, entitled “Termination”, relevantly states as follows:

“9.111 Definition. A termination within the meaning of the Staff Regulations is a separation initiated by the Organization, other than retirement on pension or full compensation for age or disability and other than summary dismissal for serious misconduct.

9.112 Criteria for Preference in Retention. If the necessities of service require that the appointments of staff members be terminated as a result of abolition of posts reasonable efforts shall be made to reassign, staff members with continuing appointments subject to the availability of suitable posts in which their services can be effectively utilized. The paramount consideration is the need to secure the highest standards of efficiency, competence and integrity with due regard to the performance, qualifications and experience of the staff member concerned.”

7. WFP Human Resources Manual Section II.1.3.3 relevantly provides that “[f]ixed-term appointments do not carry any expectation of, or imply any right to, extension or conversion to any other type of appointment; such appointments expire according to their terms, without notice or indemnity”. Although not expressly referring to that provision, a similar wording was used in the complainant’s terms of appointment signed on 30 June 2016, with an expiration date of 31 August 2016.

8. According to the above-mentioned provisions, particularly, Staff Regulation 301.15.1 that the complainant relies upon, staff members whose appointments are terminated upon abolition of post, are entitled to termination indemnity subject to expressly prescribed exceptions.

One of the exceptions refers to Staff Regulation 301.15.72 providing that no termination indemnity shall be paid where the fixed-term appointment concludes on the expiration date. The rationale lies in the very nature of a fixed-term appointment, stipulated by Staff Rules 302.4.102 and 302.9.7, which expires automatically at the specified expiration date agreed by the staff member and the Organization, and whose completion at the expiration date shall not be regarded as a “termination” of appointment, “a separation initiated by the Organization” (Staff Rule 302.9.111). In the present case, although his post was abolished on 5 August 2016, the complainant’s fixed-term contract did not terminate, but automatically ended on the expiration date of 31 August 2016. The complainant’s terms of appointment that he signed on 30 June 2016 and which indicated that the appointment expired on 31 August 2016 state according to its terms, “without notice or indemnity”. Accordingly, the complainant’s own situation falls within the scope of Staff Regulation 301.15.7, which excludes an entitlement to the termination indemnity (see Judgment 1524, consideration 6). In Judgment 2171, consideration 4, the Tribunal held that UNESCO Staff Rule 109.3 (similar to FAO Staff Rule 302.9.7) provides that a fixed-term appointment “shall expire automatically and without notice or indemnity on the expiration date specified in the letter of appointment” and separation as the result of the expiration of any such appointment “shall not be deemed to be a termination within the meaning of the Staff Regulations and Rules”. Nonetheless, the Tribunal notes that, in Judgment 896, it held that, “[w]hen his post is abolished someone with a fixed-term appointment is ordinarily entitled to fair compensation or other redress”. However, Judgment 896 concerns another organization that does not seem to have particular rules on termination indemnity like the FAO, nor does the complainant specify the circumstances parallel with the present case.

9. Regarding the duration of a fixed-term appointment extension, contrary to the complainant’s assertion, the plain meaning of Staff Rule 302.4.102 does not create a general rule that an extension of a fixed-term appointment shall be no less than one year. Rather, by clarifying the meaning of a similar provision in ILO Staff Regulations 4.6(d) that

“[a]ppointments for a fixed term shall be of not less than one year and of not more than five years”, the Tribunal has, in Judgment 3448, consideration 5, established that “[t]his provision contains nothing that entitles the complainant to a twelve-month contract extension. Neither is there any statement in the Tribunal’s case law that there is a right or entitlement to an extension of this character.” The Tribunal’s case law also states that an organisation enjoys wide discretion in deciding whether or not to renew a fixed-term appointment (see, for example, Judgment 4231, consideration 3). The decision not to extend the complainant’s appointment after 31 August following restructuring and abolition of post shall be respected. The complainant’s allegation that the FAO violated applicable rules regarding the extension is therefore unfounded.

10. The complainant further relies on Judgments 469 and 1596 to support his case that the FAO deliberately exercised its power of renewal to avoid paying him the termination indemnity. The Tribunal notes that, in a case involving the Staff Rules of the Pan-American Health Organization (PAHO), it held in Judgment 469:

“[...] it must not be assumed that the power of non-renewal under [Staff Rule] 1040 could properly be used to prolong an appointment for a period just long enough to survive the abolition of the post and with the sole object of avoiding payment of an indemnity under [Staff Rule] 1050.”

But the provision that the Tribunal examined in that case was PAHO Staff Rule 1050, which expressly provided that an indemnity shall be paid to the staff member whose appointment for a post of limited duration is terminated prior to its expiration date if that post is abolished.

Again, in Judgment 1596, consideration 26, the Tribunal interpreted EFTA (European Free Trade Association) Staff Regulation 12.5(c), in which the only criterion for the reckoning of the indemnity is the length of service. Since FAO Staff Regulations and Rules are different insofar as they provide that a fixed-term appointment automatically completes at its expiration date without any termination indemnity being due, irrespective of whether the post was abolished or not, these two cases are therefore distinguishable.

11. The complainant does not cite any provision which would have conferred on him a right to receive the termination indemnity in the present circumstances, nor does he provide any evidence to prove that either the last appointment extension of two months or the decision not to extend his appointment beyond 31 August 2016 was in breach of applicable rules. His first plea is therefore unfounded.

12. In his second plea, the complainant alleges that the equal treatment principle was violated. He alleges that several posts in the Ecuador Country Office were abolished in 2010 and that staff whose fixed-term appointments were “terminated” were granted the termination indemnity; the same applied to staff working in the Afghanistan Country Office when their posts were abolished in 2016, and more recently with respect to the Palestine Country Office. He argues that he had an acquired right to have the United Nations Development Programme (UNDP) legal framework, which, according to him, provided for the payment of the termination indemnity, passed with him to the WFP legal framework. He asks the Tribunal to order the FAO to produce information concerning the elements that were shared with staff in respect of the above-mentioned restructuring, and documents regarding the abolition of posts related to the restructuring of the Ecuador Country Office in 2010 and of the Afghanistan Country Office in 2016. Given that the FAO does not contest the facts in relation to which the complainant seeks the supporting information and documents, it is not appropriate to grant the complainant’s request.

13. The Tribunal finds that the impugned decision does not breach the principle of equal treatment. First, as stated in Judgment 3917, consideration 3, the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgments 3787, consideration 3, 3029, consideration 14, 2313, consideration 5, 2194, consideration 6(a), or 1990, consideration 7). Second, in both Afghanistan 2016 SSR and Palestine 2018 exercises, the contexts in which the termination indemnities were paid to the staff

affected are not similar to the present case as their fixed-term appointments had been terminated prior to the expiration date, instead of the automatic expiry. Third, regarding Ecuador 2010 SSR, although made in the same Country Office as the present case, the practice that staff members whose posts were abolished were paid termination indemnities so long as they had five years of service at the time of their separation was ended, following the transfer of locally recruited staff from UNDP to FAO-WFP conditions of service in July 2014. The complainant argues that article 4 of the appointment letter of 12 June 2014 is a “boilerplate” provision of no consequence because the Locally-Recruited Staff Transfer Project was advertised as a “no loss” exercise for staff members. The Tribunal accepts the argument advanced by the FAO that the appointment letter of 12 June 2014, signed by the complainant, which states that the complainant’s fixed-term appointment shall be governed by FAO Staff Regulations and Staff Rules, has effected the change of legal framework from UNDP to FAO. Moreover, paragraph 4 of article 4 specifically provides that “[s]eparation upon expiration of fixed term appointment [...] is not considered a termination of appointment under the FAO Staff Regulation and Rules. Accordingly, the Programme has no obligation to provide notice or pay a termination indemnity in those circumstances.”

14. The complainant cannot rely on the notion of acquired rights to support his claim, either. According to the Tribunal’s case law, summarised in Judgment 4195, consideration 7, “[i]n Judgment 61 [...] the Tribunal held that the amendment of a rule to an official’s detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment’ (see Judgment 832, under 13).” In the present case, the complainant, by entering into the contract, was fully aware of and consented to the conditions relating to the termination indemnity stated in the appointment letter.

15. In his third plea the complainant submits that the FAO breached its duty of care. He alleges that the WFP Executive Director replied to his appeal with a 40-day delay, beyond the time limit of 60 days provided by

Manual Section VIII.2.3.1b. He adds that the length of the internal appeal proceedings, lasting almost two years, violated Staff Rules 303.1.321 and 303.1.37. He therefore asks for moral damages as well as exemplary damages for the pain and distress suffered.

16. With regard to alleged delays, the Tribunal finds that the FAO Director-General in the impugned decision has acknowledged delay in reply of the Executive Director of the WFP and expressed his regrets. The Appeals Committee, when submitting its report to the FAO Director-General almost six months after the completion of the hearing, also failed to abide by the time limit of three weeks after the completion of the hearings set in FAO Staff Rule 303.1.37. However, the complainant has not articulated the adverse impact which the alleged delays had on him (see, for example, Judgments 4392, consideration 12, 4231, consideration 15, and 4147, consideration 13). The claim for moral damages for procedural delays is therefore unfounded.

17. With regard to the claim for exemplary damages, the complainant has provided no evidence or analysis to establish that there was bias, ill will, malice, bad faith, or other improper purpose on which to base an award of exemplary damages (see, for example, Judgments 4286, consideration 19, and 3419, consideration 8). Accordingly, no exemplary damages will be awarded.

18. It follows from the foregoing that the complaint must be dismissed in its entirety, including his claim for costs for these proceedings. The complainant's claim for costs of the internal appeal shall also be dismissed, as the Tribunal's case law stipulates that "such costs may only be awarded under exceptional circumstances" (see Judgment 4487, consideration 16), which do not exist in the present case.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 26 October 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, 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

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ