

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M.
v.
FAO*

136th Session

Judgment No. 4690

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 15 August 2019, the FAO's reply of 2 December 2019, the complainant's rejoinder of 5 March 2020 and the FAO's surrejoinder of 28 July 2020;

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 uphold his transfer to Budapest.

The complainant joined the FAO in July 1995. After having served in various posts, he was appointed as Director of the Liaison Office for North America (LOW), at grade D-1, on 1 January 2015.

In April 2016, the complainant was informed that he would be transferred to a post in Haiti, but this never happened as the Chief Medical Officer recommended against the transfer due to the complainant's medical condition. During the months that followed, several other

* Revised version, corrected for an administrative error.

transfers were proposed, to which the complainant objected on medical grounds.

On 22 February 2017, the complainant received an email from the Director of the Office of Human Resources (OHR) informing him of his transfer to Budapest, Hungary, as Senior Policy Officer, at grade D-1. The Director indicated that this post was commensurate with the complainant's professional qualifications, and that the Terms of Reference would be provided to him "in due course". The complainant was invited to submit any observations on the proposed transfer on the following day. On 27 February, he enquired from the Director of OHR as to the number of days' notice usually allocated for a transfer and change of duty station in order to make the required arrangements. He mentioned the unnecessary costs that he had incurred, such as the force majeure compensation he had to pay on a cancelled car lease, and payment of a lump sum for shipment of his household effects from Washington, DC, United States of America to Budapest, requesting reimbursement. While these financial claims were rejected, exceptional approval was given for storage costs for his personal effects and the daily subsistence allowance (DSA) payments for his stay in Washington, DC, pending his move to the new duty station. On 11 March 2017, the complainant travelled to Budapest.

On 10 May 2017, the complainant lodged an appeal with the Director-General against the decision to transfer him from his "position as Director of the FAO Liaison Office for North America (D-1) to a Senior Policy Officer post in the FAO Regional Office for Europe (REU)". In his appeal, he also made various claims concerning events that preceded his transfer to Budapest. This appeal was rejected on 12 July 2017.

On 7 September 2017, the complainant then lodged an appeal with the Appeals Committee. In its report dated 14 December 2018, the Appeals Committee recommended that the decision of 22 February 2017 to transfer the complainant to Budapest should not be set aside and that any consequential claims be dismissed. The Appeals Committee also found that all the claims relating to decisions prior to 22 February 2017 were time-barred and therefore irreceivable. The Committee made

no final determination on the moral damages claimed, as the matters to which these claims related were the subject of a pending complaint before the Office of the Inspector General.

The complainant retired on 31 December 2018.

By a letter of 20 May 2019, the Director-General, endorsing the findings of the Appeals Committee, dismissed the complainant's appeal as unfounded. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. He seeks moral damages in the amount of 400,000 euros, including for the excessive delay in the internal process, and compensation for "unjustifiable expenses" incurred comprising of a car lease and rent of his apartment in a total amount of 37,590 United States dollars. The complainant also seeks exemplary damages in the amount of 300,000 euros, reimbursement of all legal fees in an amount of not less than 15,000 euros, and interest on all amounts awarded at the rate of 5 per cent per annum, from 20 May 2019 through the date of payment. Lastly, he asks the Tribunal to award him any other relief that it deems necessary, just and fair.

The FAO asks the Tribunal to dismiss the complaint as irreceivable in part, and devoid of merit.

CONSIDERATIONS

1. At relevant times the complainant was an official of the Food and Agricultural Organization of the United Nations. On 22 February 2017, he was informed of a decision to transfer him to Budapest, Hungary as Senior Policy Officer, at grade D-1. The complainant did in fact take up the post, travelling from Washington, DC, United States of America, to Budapest on 11 March 2017. He had earlier been stationed in Washington, DC, and working as Director of the FAO Liaison Office for North America (LOW) from 1 January 2015, although on 10 September 2016, he had been transferred, for administrative purposes, to a post in the Sub-Regional Office for Southern Africa in Harare, Zimbabwe.

2. On 10 May 2017, the complainant lodged an appeal against the decision to transfer him to the post in Budapest. That appeal was rejected in a decision of the Assistant Director-General, dated 12 July 2017. He then lodged an appeal with the Appeals Committee on 7 September 2017. The Appeals Committee, in its report of 14 December 2018, recommended that the decision of 22 February 2017 not be set aside and that consequential claims of the complainant be dismissed. These recommendations were accepted by the Director-General in a decision of 20 May 2019. This is the impugned decision in these proceedings.

3. The complainant has requested an oral hearing. However, the written pleadings and the documents produced by the parties are sufficiently detailed to enable the Tribunal to determine the issues raised in these proceedings. It is therefore unnecessary to grant this request.

4. In his pleas, the complainant advances his arguments under several headings though the structure of the brief is not entirely cohesive. He argues, under a general heading, that the impugned decision is unlawful because it was tainted by errors of law, tainted by mistakes of fact, entailed a violation of the applicable law and involved an abuse of authority. Under a second general heading the complainant argues that the FAO is accountable for the material damages he incurred. Under a third general heading he argues that the FAO “acted severely negligently towards him and violated its duty of care towards him”. Under a fourth general heading he argues that he is entitled to moral damages on two bases. Firstly, as a result of the illegality of the impugned decision and secondly, as a result of the excessive delay in the internal appeal process.

5. The Tribunal first considers the complainant’s arguments that the decision to transfer him was tainted by errors of law. In his brief, the complainant sets out potentially relevant provisions of the FAO Manual governing transfers, which appear in Manual Section 311.4. They contain several elements. The first is that an official who is “subject to transfer” must be informed in writing of the proposed action and given the reasons for that action as well as an opportunity to present

possible observations (FAO Manual paragraph 311.4.12). The second is that when considering the transfer of a staff member, the Director-General must take into account not only the requirements of the work programme and the interests of the Organization but also, in relation to the potential transferee, matters including their health, personal situation and the interests of the staff member concerned (FAO Manual paragraph 311.4.11).

6. The requirement that the potential transferee be provided with reasons for the transfer is plainly linked to the right to present possible observations before the decision to transfer is perfected. The complainant contends no reasons were given. This is challenged by the FAO which says, having regard to the email of 22 February 2017 conveying the transfer decision, in substance, three reasons were given. The first was that this transfer to the Budapest duty station accommodated the complainant's medical circumstances which had been evaluated by the FAO's medical service. The second was that the post was commensurate with the complainant's professional qualifications and the third was that the transfer was in the interests of the Organization.

7. The second and third reasons were expressed at a high level of generality as reasons for nominating Budapest as the duty station and, particularly given the requirement in FAO Manual paragraph 311.4.11 to take into account the requirements of the work programme, did not provide the detail the provision implies. At the very least, that matter had to be expressly addressed in the reasons given for the transfer. Moreover, to say that the Budapest duty station accommodated the complainant's medical circumstances is not, in isolation, a reason for transferring him there unless it is suggested, which it is not, that the Budapest duty station was the only duty station to which the complainant could have been transferred and which accommodated his medical circumstances. The Organization failed to do what was required of it, namely to provide him with reasons.

8. The complainant argues that the requirement that he be given an opportunity to present observations was not observed because in the email of 22 February 2017, he was only given effectively 24 hours to do so. While the imposition of that time limit was plainly unreasonable, all the FAO Manual required is that the potential transferee be “given the opportunity to present possible observations”. In fact, he had that opportunity in the days following the notification of the transfer though plainly without the benefit of the reasons and, in this respect, the opportunity was significantly curtailed.

9. It was also curtailed, the Tribunal accepts, because he was not then provided with the Terms of Reference for the new position. In his brief the complainant refers to the failure of the Organization to provide him with the Terms of Reference for the duties of the new post notwithstanding an assurance in the email of 22 February 2017 informing him of the new post, that “the Terms of Reference will be submitted in due course”. He addresses this question more fully in his rejoinder, arguing that a precondition to transfer under FAO Manual paragraph 311.4.11 is that the duties of the new post must be comparable with those then being performed by the transferee, and that would be revealed by the Terms of Reference of the new post which he was never given while in the post. The Tribunal accepts this is so.

10. Further, the complainant argues there had been a breach of the FAO Manual having regard to the status of the position in Budapest to which he was transferred. FAO Manual paragraph 311.3.1 addresses the limited circumstances in which a staff member may be changed to a lower grade level by transfer. The factual underpinning of this argument was that the duties he had been performing until September 2016, as Director LOW, and before the transfer, were not comparable to the duties of the position to which was transferred. It was, so the complainant contends, a de facto demotion. The FAO responds by saying that the transfer was not tantamount to a demotion as the complainant maintained the D-1 grade he previously held, had a more senior reporting line, his salary remained the same and his new responsibilities entailed senior

level managerial competences. The complainant bears the burden of establishing the factual foundation of this argument and has failed to do so.

11. One issue which needs to be addressed is whether the complainant can rely in these proceedings, as he seeks to do, on the circumstances of earlier transfers or attempts to transfer him which preceded his transfer to Budapest as well as other historical events. Specifically, he relies on earlier transfers or attempted transfers to Haiti, Botswana, South Africa and Zimbabwe, though he also relies on other historical material. He disavows any attempt to challenge the legality of those decisions but relies on them “as surrounding objective circumstances, supporting the unlawfulness of the impugned decision”. However, he does rely on this and related material to support a second argument under the heading concerning errors of law, that the decision to transfer him was motivated by improper reasons and was arbitrary and an abuse of authority. He also relies on it under the heading that the impugned decision was tainted by mistakes of fact in which the complainant recounts a range of historical events which point to, on his account, “a pattern of bad faith, lack of duty of care and prejudice on the part of the administration”.

12. It may be accepted that the Tribunal has recognised, at least in relation to certain classes of cases, that evidence of earlier conduct which precedes the conduct actually the subject matter of the complaint, may be relied on to prove the true character of the later and impugned conduct. An obvious example is a case involving an allegation of harassment. The Tribunal has accepted that in such a case the evidence of earlier conduct is admissible (see Judgments 4601, consideration 8, 4288, consideration 3, 4286, consideration 17, 4253, consideration 5, and 4233, consideration 3). But the purpose of that evidence is to enable the correct characterization, if it is in issue, of the impugned conduct. The same can happen in cases where bias and prejudice are alleged (see Judgment 3669, consideration 2).

13. There is probably no overarching principle which will determine the admissibility of evidence 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 these proceedings, the complainant had indicated, in an email of 6 December 2016 that effectively he would countenance a transfer to Europe if medically supportable and that he had been pressing the Organization for a decision about where he would be located, and indeed did so on 22 February 2017 very shortly before the impugned transfer decision was communicated to him.

15. Moreover, he took up the post on 11 March 2017 and at no point did he present “possible observations” about the inappropriateness of the transfer and what might have motivated it, as he was entitled to under FAO Manual paragraph 311.4.12 even if his capacity to do so, as discussed earlier, was curtailed. If he then believed the decision was motivated by bias or ill will, he could have said so and, if necessary, referred, even in a summary way, to his immediate past dealings with the Organization including the attempts to transfer him or actually transferring him, as well as the failure to provide reasons and the Terms of Reference. He could have foreshadowed an appeal. Conceivably, he may have forestalled his actual relocation to Budapest. It is unlikely, given the complainant’s then seniority in the Organization, that he would have felt constrained by the time limit in the email of 22 February 2017. His written communication with the Administration immediately following being informed of the transfer on 22 February 2017, concerned the financial consequences of the transfer and, in this respect, his requests were mainly met. It was not until 10 May 2017, two months after the transfer decision and when he lodged his internal appeal, that he advanced an overarching thesis that the transfer to Budapest was a manifestation of improper and inappropriate conduct on the part of senior colleagues within the Organization which was evident in earlier decisions to transfer him or attempts to transfer him.

16. The proper consideration of these matters would unduly and unreasonably widen the scope of the inquiry the Tribunal would need to undertake to resolve this complaint. Moreover, determining these issues even if determined in the complainant's favour, would have no bearing on the outcome of this complaint. He has otherwise established the transfer decision was unlawful. The complainant has been represented by experienced counsel who has attested to the complainant's pleas. It is true that the complainant seeks, but only by way of relief nominated in the complaint form and at the conclusion of the brief by way of summary, 300,000 euros as exemplary damages. In general, these damages are meant to sanction bias, ill will, malice, bad faith, and other improper purpose (see, for example, Judgment 3092, consideration 16). However, in his pleas (both in his brief and rejoinder) the complainant makes no submission at all about exemplary damages, and he confines his submissions to moral damages. The two are different. Moral damages are to compensate for a moral injury. Exemplary damages are awarded as a sanction for the defendant organisation's conduct. In the absence of pleas expressly addressing a claim for exemplary damages, it would be entirely inappropriate for the Tribunal to award them. In these circumstances, the Tribunal rejects the complainant's evidence concerning earlier transfers or attempts to transfer him and evidence of related historical events.

17. One further argument concerning errors of law can be briefly mentioned. It is that the FAO's accountability policy was violated insofar as it required the Administration to take informed and transparent decisions and communicate them clearly. This argument adds nothing to the argument already addressed, namely that the FAO failed to give reasons to the complainant in order to make "possible observations" on the transfer.

18. Under a second general heading the complainant argues that the FAO is accountable for the material damages he incurred. This will be discussed later when considering the relief claimed.

19. Under a third general heading the complainant argues that the FAO “acted severely negligently towards him and violated its duty of care towards him”. However, the focus of these submissions is not the decision to transfer the complainant to Budapest, the subject matter of this complaint, but rather events before then and, to a limited extent, after. As already discussed, the material founding this submission will not be considered.

20. Under a fourth general heading the complainant argues that he is entitled to moral damages on two bases. Firstly, as a result of the illegality of the impugned decision and secondly, as a result of the excessive delay in the internal appeal process. These matters are addressed shortly.

21. The Tribunal now considers the relief claimed. The decision to transfer the complainant to Budapest did not respect the applicable rules (in the FAO Manual) and therefore, in this respect, was unlawful. The complainant requests that this transfer decision be quashed “with full retroactive effect, and all legal effects that flow therefrom”. No attempt is made to identify those legal effects. In any event, whether there remains an operative decision to transfer the complainant is now of no obvious legal or practical consequence, given that the transfer was effected, the complainant remained in Budapest in the post to which he had been transferred for almost two years, and the complainant has now retired and left the service of the FAO. In these circumstances, in accordance with Article VIII of the Statute of the Tribunal, the decision will not be quashed.

22. The complainant’s claim for moral damages is problematic. He obviously believes and asserts that he was treated extremely badly by the Organization during the few years preceding his retirement in December 2018 including by the decision to transfer him to Budapest. However, these proceedings concern only this decision to transfer him. They are not a vehicle for a wide-ranging inquiry into how he was treated resulting in a broadly-based award of compensation for this alleged mistreatment. A possible inquiry of that type may have arisen

had he successfully pursued a claim of harassment including abuse of authority. The Tribunal is aware that such a claim was made but failed for reasons discussed in another judgment given this session (see Judgment 4691). The complainant has failed to provide supporting evidence in respect of his claim that he suffered a moral injury as a result of the decision to transfer him to Budapest (see Judgment 4642, consideration 9, for a detailed definition of moral injury). The complainant also seeks moral damages for the time it took to resolve his internal appeal. Having regard to the subject matter of the appeal and the detailed factual matters advanced by the complainant, the time taken was not excessive. Accordingly, no moral damages are awarded.

23. The complainant also seeks compensation for expenses he has incurred, and income forgone as a consequence of the unlawful conduct of the Organization in transferring him to Budapest, in a total amount of 37,590 United States dollars. He particularises this as expenses arising from a car lease and the rent and rental penalty fees for an apartment. It is true, as the FAO points out, that an international civil servant in the position of the complainant can be transferred and this may impact upon personal financial and related arrangements then in place and the Organization cannot be responsible for all the financial ramifications of a transfer. The FAO also submits that no such liability arises under the FAO Staff Regulations, Rules and Manual. But this analysis presupposes a transfer which was lawful. In the present case, it was not. Accordingly, the FAO should be held accountable for the losses suffered by the complainant reasonably arising from its unlawful conduct. The FAO did not contest the calculation of the losses but rather only its liability in point of principle. The complainant is entitled, by way of compensation, to 37,590 United States dollars, plus interest.

24. The complainant is entitled to costs which are assessed in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 20 May 2019 is set aside.
2. The FAO shall pay the complainant 37,590 United States dollars, plus interest, as material damages.
3. The FAO shall pay the complainant 8,000 euros costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 18 May 2023, 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 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ