

M. (No. 4)

v.

FAO

137th Session

Judgment No. 4771

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 3 October 2019 and corrected on 7 November 2019, the FAO's reply of 19 February 2020, the complainant's rejoinder of 4 June 2020 and the FAO's surrejoinder of 7 August 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 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, including that of Director, FAO Liaison Office in Brussels (LOB). The Organization decided, in February 2017, to transfer him to

the position of Senior Policy Officer in the FAO Regional Office for Europe (REU) – a decision that he challenged in his first complaint.

On 24 November 2017, the Director-General announced that he had decided to appoint Mr D. as Director, LOB. This appointment took the form of a lateral transfer, that is to say, the transfer of a staff member from one post to another with no change in grade. On 8 February 2018, the complainant submitted a letter of grievance to the Director-General challenging this appointment. He argued, in particular, that he would have been “an extremely strong candidate” for the position, that the Organization’s refusal to transfer him to that position in May 2016 was a manifestation of “continuing malevolence, prejudice and discrimination” against him, and that the appointment of Mr D. without a competitive recruitment process was contrary to the applicable rules, including the Recruitment/Interview Guidelines for senior level vacancies (D-1 and above).

This grievance was rejected on 9 April 2018 and on 13 April, the complainant submitted an appeal to the Appeals Committee. In its report of 14 June 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 found that, as the appointment of Mr D. was by lateral transfer, there was no legal requirement for the issuance of a vacancy announcement. Moreover, the Recruitment/Interview Guidelines for senior level vacancies (D-1 and above) did not apply.

On 5 July 2019, the Director-General issued his final decision, endorsing the findings of the Appeals Committee. He noted 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. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and the decision to appoint Mr D., and to award him moral damages in the amount of 350,000 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 exemplary damages in the amount of 300,000 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 3 October 2019. 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 fourth, specifically concerns a decision of the Director-General of 24 November 2017 to transfer and appoint another staff member, Mr D., to the post of Director, FAO Liaison Office in Brussels (LOB). The impugned decision is that of the Director-General of 5 July 2019 rejecting the

complainant's internal appeal against the outcome of an initial appeal challenging the decision of 24 November 2017 appointing Mr D.

4. The complainant had unsuccessfully sought a transfer to the post of Director, LOB on 2 May 2016 (a year and a half before the appointment of Mr D.) but, at the time, took no subsequent steps to challenge any decision, whether express (though it must be accepted that nothing in the material before the Tribunal suggests that any express decision was made) or implied, not to transfer him to this post. There are multiple cases in the Tribunal's case law involving a challenge to the rejection of a request for transfer (see, for example, Judgments 4266, 3484 and 3164).

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 D. 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).

6. In his brief, the complainant's pleas are structured in the following way. The pleas commence with an executive summary which includes that the decision of 24 November 2017 was "biased, personally prejudicial and irrefutably breached the complainant's fundamental rights to equal treatment and procedural fairness" and was unlawful "for violation of applicable and essential legal safeguards governing the international civil service pertaining to prejudice, discrimination, equal treatment and abuse of authority exceeding the legal limits of the discretionary power of the head of an organisation".

7. These contentions can compendiously be described as mostly allegations of bad faith. The Tribunal recalls that there is a long line of case law establishing that bad faith must be proved by the party that pleads it, and cannot be presumed (see, for example, Judgment 4682, consideration 3).

8. The subsequent detailed pleas following the executive summary 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 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 six subsidiary arguments. The first is that the defendant organisation’s submission to the Appeals Committee was one day later than provided for in the relevant rules and, accordingly, was irreceivable. The second is non-compliance with the rules in relation to the complainant’s request in May 2016 to be laterally transferred. The third involves failure to provide valid reasons or otherwise motivate multiple decisions concerning the complainant. The fourth is a failure to determine who, as between the complainant and Mr D., was best qualified for the position. The fifth involves a failure of the Appeals Committee to provide adequate reasons for its conclusion that the complainant was given reasons for his non-transfer on or about 2 May 2016. The sixth involves a failure on the part of the organisation to consult with the complainant.

10. 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, including not transferring him to the position of Director, LOB in May 2016, in order to demonstrate that the appointment of Mr D. on 24 November 2017 was the manifestation of, amongst other things, bias, prejudice and discrimination against him revealed by a myriad of events preceding that appointment. The complainant answers this argument by referring to case law including Judgment 3669, consideration 2, in which the Tribunal said:

“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.”

11. What, in substance, the complainant is arguing is that in appointing Mr D., the Director-General was making a choice between Mr D. and the complainant (and perhaps others) and the failure to choose the complainant was infected by, amongst other things, bias and prejudice towards him. Implicit in this argument is that the complainant was or should have been viewed as a potential appointee. 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.

12. The Tribunal recalls that in 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). It is not possible to infer the complainant would have been seen as a potential transferee to the position of Director, LOB by the Director-General at the time of making the decision of 24 November 2017. It is true that the complainant lodged an appeal with the Director-General on 10 May 2017 against his transfer to Budapest. But that appeal was rejected by the Assistant Director-General on 12 July 2017. Thus, at that time and until 24 November 2017, it is probable that the Director-General was aware that the complainant occupied a post which he was likely to remain in until his retirement the following year. It may be accepted that on 7 September 2017 the complainant lodged an internal appeal to the Appeals Committee concerning his Budapest appointment, but that

fact alone cannot be assumed to have disturbed the likely view of the Director-General referred to in the preceding sentence.

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 are not, in the circumstances, relevant to the legality of the decision to transfer Mr D. There was no choice being made of the type on which the complainant’s arguments appear to 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. His submission that the Statement of the organisation in the internal appeal was filed one day after the expiry of the time limit provided for in Staff Rule 331.3.41(a) is irrelevant, since non-compliance with a time limit of this kind would not have any bearing on the lawfulness of the decision taken at the end of the appeal proceedings (see Judgment 4584, consideration 4, and the case law cited therein) and, in any event, the complainant has not shown that he suffered any injury as a result of this late submission.

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 14 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