

M. (No. 7)

v.

FAO

138th Session

Judgment No. 4853

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 20 January 2020 and corrected on 27 January, the FAO's reply of 6 May 2020, the complainant's rejoinder of 7 August 2020 and the FAO's surrejoinder of 7 December 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 direct appointment, ad interim, of Mr F. to the position of Director, Agricultural Development Economics Division (ESA).

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 Administration informed the complainant that it wished to transfer him from the position he then held (Director, Liaison Office for North America, at grade D-1) 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 Deputy Director, ESA,

at grade D-1. Ultimately, in February 2017, the Administration decided to transfer the complainant to the position of Senior Policy Officer, FAO Regional Office for Europe and Central Asia (REU) – a decision that the complainant challenged in his first complaint to the Tribunal.

In April 2017, the FAO issued a vacancy announcement for the position of Director, ESA, at grade D-2. The complainant did not apply for this position. The Professional Staff Selection Committee made its recommendation in July 2017, further to which an offer of appointment was made to one of the candidates considered for appointment, but this offer was turned down. The vacancy announcement was subsequently cancelled and the Director-General decided to directly appoint Mr F. as Director, ESA, on an ad interim basis.

On 2 July 2018, the complainant appealed to the Director-General the decision to directly appoint Mr F. to the position of Director, ESA, and he sought material and moral damages. Further to the rejection of his appeal on 3 August 2018, the complainant lodged an appeal to the Appeals Committee on 16 August 2018.

In its report of 17 September 2019, the Appeals Committee considered that, as the complainant had not applied for the position of Director, ESA, he did not have a cause of action to challenge Mr F.'s appointment and it therefore recommended that the appeal be rejected as irreceivable. The Committee also made a recommendation of a general nature, namely that the FAO issue a clear and proper human resources policy and procedures regarding ad interim appointments, including of individuals whose age exceeds the mandatory age of separation.

By a letter of 31 October 2019, the Director-General informed the complainant that he concurred with the Appeals Committee and had thus decided to reject his appeal and to take note of the Committee's recommendation of a general nature. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as the earlier decision to appoint Mr F. to the position of Director, ESA, and to draw all legal consequences therefrom. He claims 200,000 euros in material damages for unjustly demoting him to a lower-grade post, leaving him without any work for over two years,

banning him from promotions and compromising his professional reputation and future employment. He also claims 200,000 euros in moral damages for the injury he suffered due to the FAO's discriminatory conduct, including the excessive delay in the internal appeal process. He seeks reimbursement of legal costs in an amount not less than 15,000 euros. He also seeks interest at the rate of 5 per cent per annum from 31 October 2019 through the date that all amounts ordered by the Tribunal have been paid in full. Lastly, he seeks such other relief as the Tribunal deems necessary, just and fair.

The FAO submits that the complainant has no cause of action to challenge the appointment of Mr F. as Director ad interim, ESA, and it asks the Tribunal to dismiss the complaint and all claims for relief.

CONSIDERATIONS

1. The complainant is a former staff member of the FAO. This judgment concerns a complaint filed by him on 20 January 2020, his seventh complaint. The complainant has, in total, filed thirteen complaints to date. Four, including the present complaint, have been dealt with at this session. One, his tenth, has not been pursued.

2. Four complaints were dealt with at the last session (137th Session) in the following way. His fourth complaint, concerning a decision to appoint another official, by way of lateral transfer, to the position of Director, FAO Liaison Office in Brussels, was not successful (see Judgment 4771). His fifth complaint, concerning a decision to appoint another candidate to the position of Director, Investment Centre Division, following a competitive selection process, was partially successful and resulted in an award of 15,000 euros in moral damages (see Judgment 4772). His eighth complaint, concerning a decision to appoint, by way of lateral transfer, another official to the position of Deputy Regional Representative, FAO Regional Office for Europe and Central Asia (REU), was not successful (see Judgment 4773). His ninth complaint, concerning a decision to appoint another official

to the position of Director, Office of Human Resources, was not successful (see Judgment 4774).

3. A further four complaints were dealt with at the 136th Session in the following way. His first complaint, concerning a decision to transfer him to the post of Senior Policy Officer, REU, 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, against an alleged implied decision not to provide him with any terms of reference or work between September 2016 and his retirement in December 2018, was not successful (see Judgment 4693).

4. The present complaint concerns, specifically, a decision of the Director-General in spring 2018 to appoint Mr F. as Director, ad interim, Agricultural Development Economics Division (ESA). The impugned decision is the Director-General's decision of 31 October 2019, rejecting the complainant's internal appeal against the outcome of an initial appeal challenging the decision to appoint Mr F. The impugned decision was based on a report of the Appeals Committee of 17 September 2019, recommending the rejection of the internal appeal as not receivable "for lack of cause of action".

5. Unlike the position it has adopted in the proceedings concerning other complaints, the defendant Organization does raise as an issue in this complaint the question of whether the complainant has a cause of action concerning the appointment of Mr F. and, thus, puts in issue the receivability of this complaint. In raising this issue, the FAO seeks to rely on case law concerning circumstances where there has been a competition, and argues that the complainant did not participate in the competition for the post and, accordingly, could not challenge the appointment of Mr F. In the present case, while it is true that initially

there was a competition, in which the complainant did not compete but could have, the ultimate appointment involved a direct appointment after the competition was cancelled. However, the case law concerning a complainant challenging an appointment following a competition in which they did not compete and, accordingly, have no cause of action, informs the scope of the applicable principles, both when considering appointments following a competition and appointments which do not. Those principles should be coherent and consistent. Thus, it is desirable to consider, in these circumstances, whether the complainant has a cause of action and whether his complaint is receivable.

6. It is convenient to address this issue at the outset. The Organization argues the complaint is irreceivable and refers to Judgments 3536, consideration 4, and 3449, consideration 2. The gist of the argument is that an official cannot challenge an appointment to a post after a competition if the official did not compete.

In resisting the argument of the Organization that the complainant has no cause of action, the complainant refers to Judgment 3206 which, in turn, refers to Judgments 1272, 2832 and 2959. In Judgment 3206, consideration 11, the Tribunal said:

“[A]ny staff member who is eligible to occupy a post has [a] cause of action in seeking the setting aside of the decision to give that post to another person, irrespective of his or her real chances of successful appointment to the post in question [...]”

The Tribunal also said in consideration 13 of the same judgment:

“Contrary to the Organization’s submissions, recognition of [the appointment’s] unlawful nature cannot, in itself, be regarded as a sufficient response to the complainant’s request that the disputed appointment be withdrawn. In effect, although in the circumstances of the case this withdrawal would be essentially symbolic, the complainant retains at least a moral interest in ensuring that this appointment disappears altogether from the legal order.”

But, as shortly discussed, in formulating statements of principle such as this, it is necessary to accommodate the scope of the Tribunal’s jurisdiction under its Statute, which is limited.

7. In Judgment 1272, the first of the series of judgments cited in Judgment 3206 and which is foundational to the later case law, the Tribunal is recorded as observing (in the English version of the judgment), at consideration 12, that a complainant “does derive a cause of action from an appointment by an organisation and it does not, as the WTO seems to think, depend on his being a serious contender for the post or caring deeply about it. All that is required is that he want the vacant post and, whatever his qualifications for it or his prospects of success may be, the Tribunal will acknowledge the cause of action by enforcing any rights the organisation may have infringed.” Thus, there appears to be a linkage between the cause of action and the complainant’s desire to occupy the relevant position and his legal rights associated with achieving this outcome by pointing to any legal flaws in the process of appointing someone else to the position. It must immediately be acknowledged that the observations attributed to the Tribunal in the English version of Judgment 1272, identifying this linkage, are not to be found in the French version which was the original and authoritative judgment.

The accuracy of the translation of the French original may be doubted. In other circumstances, the legal significance of this might need to be explored. However, the English version of Judgment 1272, and what the judgment stands for as well as the underlying principle, have been discussed in cases since. In Judgment 3644, consideration 7, the Tribunal said:

“The principle in Judgment 1272 can be summarised as being that standing depends on the complainant wanting the position even though she or he may not be a serious contender and might not care deeply about it and irrespective of the complainant’s qualifications or prospects of success. However there are other judgments of the Tribunal that may well take a broader view of the standing of an individual to challenge the appointment of a person to a position which might not require a complainant to demonstrate interest in the position but simply eligibility to occupy the position (see, for example, Judgment 2832, consideration 8).”

8. Returning, for the moment, to cases where an appointment is challenged in circumstances where there has been no competition, but a direct appointment, the rationale for recognising a right of another

staff member to challenge the appointment is illustrated by Judgment 1968. In that case, the defendant organisation argued that a decision to promote a colleague (without competition) did not adversely affect the complainant who challenged the appointment, and his complaint was thus irreceivable. This argument was rejected by the Tribunal. The contested appointment was made on the basis that the appointee was an exceptional case. The Tribunal said, in consideration 6 of that judgment, in rejecting an argument that the complainant was not qualified: “[H]e too can claim that he has a right to be considered as an exceptional case and was therefore adversely affected by the impugned decision. Both were at the same grade, in the same career stream, and both are entitled to expect that promotions will only be made fairly and objectively, based on merit and in accordance with law.” An unstated premise was that the complainant may have been interested in an appointment to the position fortified by the fact that he had maintained an internal grievance and, ultimately, a complaint to the Tribunal.

9. It is tolerably clear that the case law establishes, in the context of the filling of a post following a competition, that a person who has not participated in the competition does not have a cause of action to challenge the competition (see, for example, in recent Judgment 4702, consideration 3). Indeed, if a person participates in the competition but was admitted to it erroneously, they have no cause of action if they were not eligible for the position (see Judgment 4087, considerations 6 and 7). One obvious rationale for this approach is that participation in the competition is a manifestation of interest in the position on the part of the complainant, with corresponding injury to that person if not appointed, who can then challenge the lawfulness of the competition and appointment. It would be an extremely curious result that a complainant who did not have an interest in a position (either immediate or longer term and thus risk of immediate or future injury) filled by appointment without competition, rather than by competition, had a significantly broader basis for challenging the appointment. The obvious question which arises is what is the credible basis for confining standing to challenge an appointment following a competition to those who participated in the competition, but not confining standing in a similar

or analogous situation concerning an appointment without competition. If the latter is confined only by eligibility for appointment, the obvious question which arises is why would that not also be so of an appointment following a competition. The coherent answer lies in whether the complainant had an interest in the lawfulness of the filling of the position. That would derive from having an interest, either immediate or longer term, in the filling of the position.

10. The touchstone of the Tribunal's jurisdiction is its Statute. Having regard to Article II, it concerns non-observance, in substance or in form, of the terms of appointment of officials and other provisions of the Staff Regulations. The relevant impugned decision must adversely affect the complainant's rights or interests, or cause her or him injury, or be likely to cause injury (see, for example, Judgment 2670, consideration 5). This concerns legal rights or interests. As the Tribunal said in Judgment 4672, consideration 4:

“The Tribunal's jurisdiction centres on whether there has been a reviewable administrative decision which, in turn, implies any act by an officer of an organisation which has a legal effect (see Judgments 4499, consideration 8, 3141, consideration 21, and 532, consideration 3).”

11. Plainly, if there is evidence that a staff member has manifested an interest in a position, then she or he has an interest in the preservation of the position for possible future appointment to it. That interest may be expressed, for example, by the staff member applying for the position in a competition. An interest might be inferred from all the circumstances, which might include that occupying the position would be a logical career progression or development for the staff member concerned. But, in the absence of evidence of interest, it is very difficult to discern what legal interest the staff member has in ensuring that the position, if filled, has been filled lawfully. Put slightly differently, it is difficult to discern what legal effect the appointment of another person to a position has on a staff member who has no interest in that position, even though she or he is qualified to be appointed to it.

12. In the present case, the complainant clearly did not aspire to occupy the post of Director, ESA, in April 2017, when the vacancy notice was published. He did not apply for the position. He then had no legally enforceable interest in the steps which were, or were not taken, to fill the position. That is to say, any legal flaws in the selection process did not affect his rights or interests nor cause him injury. These facts would sustain an inference that in spring 2018, when the post was filled, his lack of interest in the position continued. It is true, and the Tribunal must recognise, that this was one year later. However, the complainant does not contend in his pleas that by spring 2018 he then had an interest in the position. Nor did the objective circumstances sustain an inference that he had. Accordingly, any procedural or other defects in the appointment of Mr F. in spring 2018 did not adversely affect his legal rights, or interests, or cause him injury.

13. The complainant sought oral proceedings, 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.

14. The complainant has no cause of action and the complaint is irreceivable. The complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 25 April 2024, 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 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER