

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A. (No. 2)

v.

FAO

(Application for review)

136th Session

Judgment No. 4689

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 4227 filed by Mr K. A. on 3 September 2020, corrected on 16 September, the reply of the Food and Agriculture Organization of the United Nations (FAO) of 7 January 2021, the complainant's rejoinder of 9 April 2021 and the FAO's surrejoinder of 14 July 2021;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. The complainant is a former staff member of the World Food Programme (WFP), an autonomous joint subsidiary programme of the United Nations and the FAO. He was dismissed in October 2015. At material times, he was serving as Deputy Country Director in WFP's Country Office in the Democratic Republic of the Congo. After unsuccessfully seeking internal review of the decision to dismiss him, the complainant filed a second complaint with the Tribunal in September 2018 challenging that decision. His complaint was dismissed by Judgment 4227 delivered in public on 10 February 2020.

2. The complainant has filed an application with the Tribunal for review of Judgment 4227. For a considerable time, the process of review was not expressly recognised in the Tribunal's Statute, but it now is in Article VI by an amendment made by the International Labour Conference on 7 June 2016. However, the settled principles governing the process of review have been developed by the Tribunal over time and before the amendment and continue to apply. As the Tribunal most recently observed in consideration 2 of Judgment 4440: "[P]ursuant to Article VI of its Statute, the Tribunal's judgments are 'final and without appeal' and have *res judicata* authority. They may therefore be reviewed only in exceptional circumstances and on strictly limited grounds. As stated, for example, in Judgments 1178, 1507, 2059, 2158 and 2736, the only admissible grounds for review are failure to take account of material facts, a material error involving no exercise of judgement, an omission to rule on a claim, or the discovery of new facts which the complainant was unable to rely on in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. Pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea, on the other hand, afford no grounds for review (see, for example, Judgments 3001, [consideration] 2, 3452, [consideration] 2, and 3473, [consideration] 3)." For reasons which emerge shortly, it is unnecessary to address one question raised by the FAO, namely whether the application for review is irreceivable having regard to the time taken after Judgment 4227 was delivered, to lodge the review application (see Judgment 1952, consideration 3).

3. The account in Judgment 4227 of the background leading to the WFP's decision to dismiss the complainant will not be repeated but informs specific observations made by the Tribunal in this judgment. The central focus of much of the complainant's pleas is what appears in considerations 7 and 8 of Judgment 4227 as follows:

"7. In its report, the Appeals Committee, whose reasoning the Director-General adopted in substance in the impugned decision, characterised the events surrounding the request for waiver as a 'pivotal piece of evidence'. Its analysis of those events and conclusions about them contained several elements. They included the issue of whether other options were available

on the market and the business linkages between the owner of the technology and the private company established by Mr O.-T. Both issues could have been adequately addressed by not requesting a waiver for the procurement actions, in that the competent internal body would have taken over, absolving the complainant of the responsibility of looking further into these matters. In addition, the complainant started to deliberately construct and report facts to obfuscate the judgement of the internal body considering the waiver when presenting arguments which were framed to sidestep legitimate questions. This evidence demonstrated the complainant's lack of due diligence which was exacerbated by the fact that he had previously been the Director of Audit, aware of procurement procedures and the risk of reputational damage.

8. These conclusions were available on the evidence at the requisite standard (particularly having regard to the analysis in the 'Reply of the Programme' dated 3 October 2016 submitted to the Appeals Committee including, specifically, changes favouring Mr O.-T.'s company made by the complainant to a draft procurement waiver request prepared by a subordinate), as was the overarching conclusion that the conduct of the complainant was misconduct which warranted dismissal."

Under a general heading "THE IMPUGNED JUDGEMENT [of the Tribunal] IS AFFECTED BY FAILURES TO TAKE ACCOUNT OF MATERIAL FACTS AND BY MATERIAL ERRORS" and by reference to the above, two subsidiary arguments are advanced. One is that the complainant did not misrepresent the involvement of an external company when requesting the procurement waiver and the other is that the complainant did not tamper with the procurement waiver request. Importantly, the complainant's pleas proceed on a false premise, namely that various factual conclusions in consideration 7, in particular, involved findings of fact by the Tribunal.

4. But as is clear from the first two sentences of that consideration, the Tribunal was summarising findings made by the Appeals Committee. The only finding of the Tribunal was that the factual findings made by the Appeals Committee were available at the requisite standard on the evidence. Paradoxically, but in a different context, the complainant criticises the Tribunal in his brief for failing to follow its "usual practice of deferring its factual findings to those established by the relevant appeals body after its independent review of the available evidence". Yet that is the very approach adopted by the Tribunal in the

above-quoted considerations. Insofar as the complainant alleges a material error, it involves, in substance, a contention that the Tribunal's conclusion that the Appeals Committee's findings were available on the evidence, was an erroneous one. But as the Tribunal's finding involved an exercise of judgement, it is beyond the grounds of review. But even putting that to one side, for the complainant to fall within the very narrowly framed grounds of review, it would have been necessary for him to establish that the factual findings of the Appeals Committee were not available on the evidence. It is not sufficient for the complainant to seek to demonstrate, as he does, that other factual findings could have been made had the evidence been viewed and assessed differently.

5. It is necessary to address one specific matter arising in this application for review. The complainant furnishes an affidavit sworn by his supervisor at the time of the events in question, to establish the supervisor knew, at the time the procurement waiver request was made, that a former staff member (Mr O.-T.) was potentially to be involved in the provision of the relevant technology and details about the ownership of the technology. In his rejoinder, the complainant eschews reliance on the affidavit as supportive of an argument of some material procedural defect in the internal investigation arising from the fact that the supervisor was not interviewed. Rather, he argues, the affidavit discloses facts which provide an admissible ground for review given that the affidavit contradicts substantive findings of fact made by the Tribunal (in truth, by the Appeals Committee). The affidavit is not admissible in this application for review. It does not contain new facts on which the complainant was unable to rely, as that expression is used in the principles discussed in consideration 2 above. The complainant asserts in his pleas that the evidence of the supervisor was effectively unavailable to him when preparing his second complaint [the complainant's rejoinder was filed on 29 January 2019] because he, the supervisor, was fearful of retaliation if he did and that it was only when he retired in March 2019 this fear dissipated. But there is not a scintilla of evidence to support this assertion. It could have been a matter the supervisor addressed in his affidavit. He did not. For this reason alone, and quite

apart from whether the affidavit was otherwise admissible and supportive of a ground of review, it should be rejected.

6. The complainant has not established any basis, referable to the principles discussed in consideration 2 above, warranting a reconsideration, by way of review, of Judgment 4227 and, accordingly, the application for review should be dismissed.

DECISION

For the above reasons,

The application for review is dismissed.

In witness of this judgment, adopted on 3 May 2023, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, 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

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ