

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R.
v.
FAO

122nd Session

Judgment No. 3653

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. R. against the Food and Agriculture Organization of the United Nations (FAO) on 8 June 2013 and corrected on 3 September, the FAO's reply of 16 December 2013, the complainant's rejoinder of 11 February 2014 and the FAO's surrejoinder of 5 May 2014;

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 challenges the decision not to appoint him to a post of Office Assistant advertised in 2008. He also challenges the decision not to renew his contract, the decision not to compensate him for "extra-contractual" work and the decision not to compensate him on account of defamation by his former supervisor and for exposure to asbestos.

In November 2008 the complainant applied for a position of Office Assistant (Information Technology) at the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO. The post was located at the WFP United Nations Humanitarian Response Depot (UNHRD) Office in Brindisi, Italy. He was interviewed

for the post, but not selected. In December 2008 he enquired with the Human Resources Division (HR) regarding the reasons for his non-selection. On 19 December HR replied that he had met the minimum qualifications for the post, but that the WFP had made no commitment to him.

In April 2009 the complainant joined the WFP as an Office Assistant (Information Technology) at the WFP/UNHRD Office in Brindisi under a three-month Temporary Assistance Unit (TAU) contract. He was separated upon the expiry of his appointment on 20 July 2009.

On 31 July 2010 the complainant asked HR to provide him with the full interview record for the 2008 selection process, including the interview panel's evaluation. In August he was informed that the documents requested included confidential information pertaining to other candidates which could not be shared with him.

Meanwhile, on 2 August 2010, the complainant wrote to Mr S., the UNHRD Network Coordinator in Brindisi, questioning the regularity of the 2008 selection process. He also expressed grievances in relation to his temporary employment in 2009. According to him, he had not been remunerated for "extra-contractual" work done to develop and design a new UNHRD website under the Coordinator's "oral promise" that his contract would be renewed at a higher grade. He also stated that at the end of April 2009 he had been exposed to asbestos in UNHRD buildings inside a former air base. He expressed a willingness to reach an amicable settlement.

On 12 October 2010 the complainant sent a letter to the WFP HR Director. He reiterated his claims and added that the UNHRD Network Coordinator in Brindisi had defamed him in an email of 13 October 2009 sent to UNHRD staff members. He requested immediate reinstatement in the post he had unsuccessfully applied to in 2008 and that the period of separation from UNHRD be considered as special leave with full pay. On 12 November 2010 the HR Director replied that, with respect to the 2008 selection process, he had already been provided with explanations in December 2008 and in August 2010. Regarding the "extra-contractual" work allegedly performed, she underlined the absence of evidence of any promise of contract extension and recalled that his appointment did not

carry any expectation or right to extension or conversion to any other type of appointment. Concerning his alleged exposure to asbestos, she informed him that Italian authorities had undertaken an inspection of the facilities in May 2009 and had found that the presence of airborne asbestos particles was inferior to the maximum limits permitted by Italian law. There was no evidence that he had filed a report of accident, illness or death pursuant to Section 342 of the FAO Manual within the prescribed time limit. He was informed that, if he had any medical claim that directly linked the alleged exposure to asbestos to a specific medical condition, he should contact the FAO/WFP Medical Office directly.

By a letter dated 9 February 2011 the complainant lodged an appeal with the FAO Director-General against the HR Director's letter of 12 November 2010. He reiterated his claims and additionally requested 10,000 euros for his work on the website, a statement of apology from the WFP/UNHRD, moral damages as well as medical and attorney fees. His letter of appeal was forwarded to the WFP Executive Director. By a letter of 30 March 2011 the complainant was informed that his appeal was dismissed in its entirety.

On 11 June 2011 the complainant filed an internal appeal with the FAO Appeals Committee. In its report of 20 July 2012 the Appeals Committee concluded that his claim regarding his non-selection to the post of Office Assistant in 2008 was irreceivable on the grounds that he was not a staff member, nor had he ever been one, when the selection process took place, and that it was also time-barred. There was no written evidence that the complainant had been promised a new contract by Mr S. in exchange for his work on the website and his claim against the non-renewal of his contract in July 2009 was also time-barred. The Appeals Committee recommended that the WFP determine whether the complainant was entitled to any overtime under the applicable rules and, if so, to pay him the amount due with interest. It also recommended that he be considered as having complied with the requirements set out in Manual paragraph 342.6.1 entitled "Reporting Death, Injury or Illness", in particular the requirement of immediately submitting a report to the Medical Office in the event of injury or illness which appears to be attributable to the performance of official duties. The Appeals Committee

recommended dismissing all other requests and claims. Having made the above findings, the Appeals Committee found it unnecessary to hear the complainant.

By a letter of 18 February 2013 the complainant was informed that the Director-General of the FAO had decided to accept the Appeals Committee's recommendations. The letter indicated that he would be contacted shortly concerning the payment of overtime, and stated that, should the complainant at any time suffer from illness that could be directly attributed to his employment at the WFP/UNHRD Office, he could file a claim that would be considered pursuant to the applicable rules.

By a letter of 13 May 2013 the complainant was informed that, following a review of WFP's records, no overtime was either requested by or authorized for him during his appointment, as required by the applicable rules. Consequently, no overtime compensation was due. That is the impugned decision.

The complainant filed his complaint on 8 June 2013, asking for 10,000 euros, plus interest, for his work on the website and a written apology from the WFP for the defamation and harassment suffered. He also claims 300,000 euros for the "moral, statutory and psychological damages sustained", 100,000 euros in punitive damages, as well as 5,000 euros in costs. In his rejoinder he also asks for the destruction of any adverse material in his personal file.

The FAO submits that the complainant's claims are irreceivable on several grounds and entirely unfounded.

CONSIDERATIONS

1. The complainant challenges his non-selection for the post of Office Assistant (Information technology) in the WFP/UNHRD Office in Brindisi, Italy, for which he had applied in November 2008. Another candidate was selected for that post in December 2008 and the complainant enquired of HR as to the reasons for his non-selection. The complainant was however appointed as an Office Assistant at the WFP/UNHRD Office under a three-month Temporary Assistance Unit (TAU) contract

from 22 April to 20 July 2009. Under the terms of his contract, he was to render support to the organisation's implementation of the Logistics Development Unit's (LDU) trainings. His specific responsibilities included being the liaison between the LDU organisation team in Rome and UNHRD team in Brindisi. After his separation from the WFP at the end of that temporary contract, he again raised the issue of his non-selection for the post for which he had applied in 2008. In a letter dated 2 August 2010 he questioned the selection process and his non-selection for the post in 2008 and raised this as his first claim in his Memorandum of Appeal to the Appeals Committee dated 11 June 2011.

His second and third claims in that Memorandum were that he was never compensated for the extra-contractual work that he did to develop and design a new website for the Office at the request of Mr S., who orally promised him that his contract would be renewed beyond its expiry date on 20 July 2009 to permit him to continue the work on the website. He alleged that Mr S. reneged on the promise. Mr S. was the UNHRD Network Coordinator at the material time. In the fourth place, the complainant claimed that Mr S. had made defamatory comments about him (the complainant) and his father in an email of 13 October 2009, and, in the fifth place, he claimed that at the end of April 2009 he was deliberately exposed to asbestos while attending trainings in UNHRD buildings inside a former air base in Italy. These claims were also contained in the complainant's initial request for review of 2 August 2010.

2. The FAO raises receivability as a threshold issue. It submits that all of the complainant's claims are time-barred, and that, in any event, the complainant has no standing to bring the claim concerning his non-selection for the post for which he had applied in November 2008 as he was neither a staff member nor former staff member of the WFP at the time the decision was made.

3. The FAO's Staff Regulation 301.11.1 permits staff members to lodge an internal appeal "regarding a grievance arising out of disciplinary action or arising out of an administrative decision which [they] allege to be in conflict, either in substance or in form, with the terms of their

appointment or with any pertinent Staff Regulation, Staff Rule or administrative directive”. FAO Manual paragraph 331.4 confers the same right on former staff members. According to Staff Regulation 301.11.2 the Tribunal shall “hear and pass judgment upon applications from staff members alleging non-observance of their terms and conditions of appointment, including all pertinent Regulations and Rules”. Moreover, pursuant to Article II, paragraph 5, of its Statute, the Tribunal is “competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations”.

4. There is, however, no provision under which the Tribunal is competent to hear the claim concerning the complainant’s non-selection for the post for which he had applied in November 2008. As he was not selected for the post, he did not become a WFP staff member from that application and therefore obtained no right to lodge an internal appeal under Staff Regulation 301.11.1 to challenge the non-selection. Because of his non-selection, he had not entered into a contractual relationship with the WFP. Accordingly, by virtue of Article II, paragraph 5, of the Tribunal’s Statute, he has no standing to bring a claim before the Tribunal alleging the non-observance of the terms and conditions of an appointment which he did not have. This position was explained in Judgment 1509, consideration 16, in which the Tribunal held that the complainant was “no more than an outside applicant for employment” and the organisation’s decision was “in fact a refusal to recruit him”, which decision raises no question of non-observance of his terms of appointment or of its Staff Regulations and Staff Rules.

By extension, the complainant could not have become, under Manual paragraph 331.4, a former staff member with a right which he had not obtained as a staff member, in the first place, to challenge his non-selection for the post. His subsequent temporary employment could not have retroactively conferred such a right upon him. It conferred upon him the right to challenge decisions that arose out of his temporary appointment that concerned the non-observance of his terms and conditions of appointment, including any alleged breach of all pertinent Staff Regulations and Staff Rules under that temporary appointment.

Accordingly, the claim concerning the complainant's non-selection for the post for which he applied in 2008 must be dismissed as irreceivable.

5. Under Staff Rule 303.1.311, an internal appeal must be lodged with the Director-General within 90 days of receipt of the decision impugned. The internal appeal, which the complainant lodged with the FAO Director-General, is dated 9 February 2011. The reply to it is dated 30 March 2011. The complainant's temporary contract ended on 20 July 2009.

6. The complainant states that he only became aware in March 2011 of the alleged defamatory remarks made by Mr S. in the email of 13 October 2009, which he states amounts to harassment. However, it is observed that the complainant wrote a letter, dated 12 October 2010, to the WFP HR Director, and that he referred therein to the email of 13 October 2009 and indicated that he had attached it to the letter as Exhibit B. Even if it is taken that he became aware of the email on 12 October 2010 his internal appeal to the Director-General dated 9 February 2011 would still be time-barred. This aspect of the complaint is irreceivable as the complainant failed to exhaust the internal remedies (see, for example, Judgments 3439, consideration 4, and 3311, consideration 6, and the case law cited therein).

To the extent that the complainant appears to claim that he had suffered discrimination and persecution during his temporary appointment, that claim must also be dismissed as irreceivable as it is time-barred. This is because it relates to the period of his temporary appointment which ended on 20 July 2009, while his purported claim was made in his internal appeal to the Director-General dated 9 February 2011. The claim in relation to the complainant's alleged exposure to dangerous levels of asbestos in April 2009 is also time-barred and must accordingly be dismissed as irreceivable, given that his internal appeal to the Director-General is dated 9 February 2011.

7. The complainant insists that his claim that relates to his design and development of the website is within the time limit. This, he asserts, is because Staff Rule 302.3.171 and Manual paragraph 308.5.7 set a two-

year time limit within which he may claim payment for overtime work. Staff Rule 302.3.171 provides that the right of a staff member to claim any allowance, grant or payment existing but unpaid shall lapse two years after the date on which the entitlement arose. The Tribunal notes the complainant's statement that he worked on the website at his supervisor's request because the latter promised to renew his contract in return. There is no evidence that the payment of overtime was discussed. The Appeals Committee found that there was sufficient evidence that the complainant had worked overtime on the website. It accordingly recommended that WFP should determine "the number of hours the [complainant] worked in excess of his established working week, and retroactively approve and pay him, with interest, any overtime due to him in accordance with the applicable rules for his work performed on the UNHRD website". The Tribunal holds, as the Appeals Committee did, that if the complainant was entitled to be paid overtime for his work on the website, the time for the payment had not elapsed under Staff Rule 302.3.171 and Manual paragraph 308.5.7.

8. The Director-General accepted the Appeals Committee's recommendation, but subsequently, in the letter of 13 May 2013, informed the complainant that upon investigation no overtime payment was due to him under the applicable rules. This decision was correct since, as the letter explained, Manual Section 325.4.1 requires all overtime work to be authorized in advance and there was no record of such authorization. The claim for the payment of overtime is therefore unfounded and must be dismissed on its merits for this reason, and, additionally, as the complainant has provided no evidence that he submitted a request for overtime work, as Manual paragraph 325.4.21 requires.

9. The complainant presented a new claim in his rejoinder (the destruction of any adverse material in his personal file). However, as the Tribunal has consistently held, a complainant may not in his or her rejoinder enter new claims not contained in his or her original submissions. Consequently, this new claim must in any case be dismissed (see Judgment 3207, consideration 6, and the case law cited therein).

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ