

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K.
v.
FAO

123rd Session

Judgment No. 3742

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. K. against the Food and Agriculture Organization of the United Nations (FAO) on 30 June 2014, the FAO's reply of 17 October, the complainant's rejoinder of 15 December 2014, the FAO's surrejoinder of 9 April 2015, the complainant's further submissions of 6 June and the FAO's comments thereon of 17 July 2015;

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 contests the direct appointment of Ms S. to the position of Director, Office of Support to Decentralization (OSD).

The complainant joined the FAO in August 1985 as an Economist at grade P-3 and in February 2010 held the position of Principal Officer, OSD, at grade D-1. As from June 2013 the title of the position of Principal Officer, OSD, was replaced with that of Deputy Director, OSD.

By Bulletin No. 2012/67 of 17 December 2012, the Director-General announced his decision to appoint Ms S. to the position of Director, OSD, at grade D-2, effective 27 December 2012. The position of Director, OSD, had become vacant following the appointment of the previous incumbent, Mr G., to the position of Deputy Director-General (DDG),

Operations. On 8 March 2013 the complainant lodged an appeal with the Director-General against the decision to appoint Ms S. He argued that this decision was contrary to the FAO's Recruitment Guidelines for senior level positions (D-1 level and above), as well as established practice, as no vacancy announcement had been issued, and requested redress for material and moral damages. His appeal to the Director-General was rejected and on 15 May 2013 he filed an appeal with the Appeals Committee requesting that the decision to appoint Ms S. be quashed, that a vacancy announcement for the post in question be issued and that he be awarded 200,000 euros for potential loss of earnings and pension, 100,000 euros in moral damages and 5,000 euros in costs. He also requested that the Administration produce all relevant documents.

On 5 September 2013 the complainant was notified of the decision to abolish his position of Deputy Director, OSD, as part of a transformation process whereby a number of positions at the D-1 level and below were being abolished. Soon after, on 20 September 2013, he wrote to the Chairman of the Appeals Committee to inform him of the abolition of his position and to assert that this development reinforced his request for damages, especially since he had not been given the opportunity to apply for the D-2 position of Director, OSD.

After holding a hearing on 2 December 2013, the Appeals Committee delivered its report on 30 December 2013. It concluded that the Recruitment Guidelines for senior level posts applied to the filling of the position of Director, OSD, and that the Administration's failure to issue a vacancy announcement for that position amounted to a breach of the Guidelines and of established procedure. However, the Appeals Committee also concluded that the complainant had not shown that he had suffered any injury which would entitle him to material or moral damages. As regards the complainant's request for the production of documents, it concluded that it was irrelevant in the light of its findings. It recommended that the Director-General award the complainant partial costs but that he dismiss all other claims. It also recommended that the Recruitment Guidelines for senior level posts be revised to state the circumstances in which they applied. By a letter of 8 April 2014, the Director-General notified the complainant of his decision to dismiss his appeal in its

entirety. That is the impugned decision. The complainant separated from the FAO on 31 December 2014 after having accepted a termination package following the abolition of his position.

In his complaint, the complainant asks the Tribunal to quash the impugned decision, to reverse the Director-General's decision to appoint Ms S. to the post of Director, OSD, to order the FAO to issue a vacancy announcement for that post, and to run a new selection process based on applicable legal principles. He claims damages for the loss of salary and allowances in the amount of 365,000 United States dollars, moral damages in the amount of 100,000 euros and 5,000 euros in costs for the internal appeal proceedings and the proceedings before the Tribunal. He also asks the Tribunal to order the FAO to produce: (i) documentation as to which relevant management posts are considered analogous to that of Director, OSD; (ii) the report of the review process comparing candidates who had applied for analogous managerial posts; and (iii) the reports and recommendations of the interview panels on the complainant's and Ms S.'s candidatures for other Director's posts, which the Administration considered analogous to that of Director, OSD. In his rejoinder, the complainant asks the Tribunal to allow him to complete his initial claims by adding a claim for damages in the amount of 200,000 euros for the loss of earnings and pension that he would have received had he been promoted to the post of Director, OSD.

The FAO submits that any claim relating to the abolition of the complainant's post is irreceivable. It asserts that there is no legal basis for allowing the complainant to enter a claim for damages in his rejoinder that was not included in the complaint. As regards his request for the production of documents, it states that it has already produced all documents and information which are not confidential or irrelevant to the selection process in question. It invites the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. This complaint centrally challenges a direct appointment to a senior post in the FAO, without a competitive process. The complainant seeks the setting aside of the impugned decision, dated 8 April 2014, to

dismiss his internal appeal “against the decision to appoint the Director of the Office of Support to Decentralization (OSD), at the D-2 level, without following the Organization’s own guidelines and established practices”. The complainant was at the D-1 level at the time, and, according to him, he was the most senior officer in the OSD then and the only one at the D-1 level. The Director OSD was promoted to the post of DDG, Operations in early December 2012 and Ms S., who was at the time an FAO Regional Representative at the D-1 level, was appointed to the Director OSD post without the issuance of a vacancy notice.

In his internal appeal the complainant contended that he was thereby deprived of a chance to compete for that post and lost an opportunity for promotion to the D-2 level. He insisted that the FAO’s recruitment guidelines and consistent practice required such a competition and the FAO’s failure to have one meant that he “suffered material damage in terms of potentially higher income and pension benefits [and] also [...] moral damage by not being given a chance to compete despite a long and strong work record in OSD and in other Divisions of FAO”.

2. After he filed his internal appeal, the complainant sought to insert the issue of the subsequent abolition of his post as a basis for seeking increased damages. The Tribunal finds that the issue of the abolition of his post, which he has not challenged, has no connection with his challenge to the direct appointment of Ms S., which is at issue in the present complaint, and that it would be an abuse of process to permit him to raise the abolition issue as a basis to seek an increase of damages. Accordingly, as the Appeals Committee stated, no connection could be drawn between any alleged harm to the complainant on account of the abolition of his post and the non-issuance of a vacancy notice, which is challenged in the present complaint. The Tribunal will not therefore consider the request for increased damages on the basis of the abolition of the complainant’s post.

3. A challenge to a direct appointment is essentially a challenge to a selection process, which the Tribunal approaches with some restraint. Such a decision is subject to only limited review. It is well established that staff appointments and promotions by an international organisation

are decisions which lie within the discretion of its executive head. However, the discretion must be exercised within the bounds of legality. The Tribunal explained this in Judgment 3537, under 10:

“The Tribunal cannot substitute its evaluation for that of the [organization] and will only interfere with a selection decision if that decision was taken without authority; if it was based on an error of law or fact, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts; if it was taken in breach of a rule of form or of procedure; or if there was an abuse of authority (see Judgments 2060, under 4, and 2457, under 6).”

4. The Appeals Committee found that the FAO breached its own rules and guidelines by not issuing a vacancy announcement and conducting a competition for the subject post. The Tribunal observes that in arriving at that conclusion the Appeals Committee mentioned a number of FAO provisions, but emphasised the applicability of the preambular paragraph of the “Recruitment/Interview Guidelines for senior level vacancies (D-1 and above)”. That provision relevantly states as follows:

“As soon as it is known or confirmed that a post at the D-1 or above level will become vacant (either because the incumbent will be reaching mandatory retirement age or has submitted his or her resignation), the following measures are to be taken:

- (a) The Office of Human Resources (OHR) in consultation with the Department or office concerned immediately commences preparation for the issuance of a vacancy announcement. [...]

The Appeals Committee concluded that notwithstanding this wording, the provision should not be read to apply exclusively to vacancies arising from mandatory retirement or resignation but in the absence of any other guidelines must also apply to other situations where such a vacancy arises.

The Tribunal does not agree with the Appeals Committee’s reasoning that the inclusion of the instances which are specifically provided for in brackets conduces to an expansive meaning. There is nothing in the provision which suggests the applicability of the *ejusdem generis* rule. The words of the provision are clear and must be so interpreted on the primary rule of interpretation that words which are unambiguous are to be given their obvious and ordinary meaning (see Judgments 1222, under 4, 3213, under 6, and 3707, under 4). The Tribunal therefore finds that the inclusion of the instances in brackets was meant to specify that

the Recruitment/Interview Guidelines for vacancies in the D-1 level and above apply only in instances of mandatory retirement or resignation and not to the promotion of staff at those levels as in the present case.

5. The Director-General's discretion to appoint, promote and assign or transfer staff is wide, but it is not unfettered. Thus, Rule XL, paragraphs 1 and 4, of the General Rules provide as follows:

"1. The staff of the Organization shall be appointed by the Director-General, having regard to paragraph 3 of Article VIII of the Constitution. Selection and remuneration shall be made without regard to race, nationality, creed or sex. [...]

[...]

4. Except as provided in paragraph 1 of this Rule, the Director-General shall act in his unfettered judgement in appointing, assigning and promoting staff personnel, and shall not be bound to accept advice or request from any other source."

Notwithstanding that Staff Rule 302.4.93 states that "[w]hen a post becomes vacant, first consideration shall be given to the possibility of promoting a properly-qualified staff member", this does not in itself enable an appointment or promotion to be done without a competitive process. It is noteworthy, for example, that the more paramount provision, Article VIII, paragraph 1, of the Constitution of the FAO provides as follows:

"The staff of the Organization shall be appointed by the Director-General **in accordance with such procedure as may be determined by rules made by the Conference.**" (Emphasis added.)

Further, paragraph 3 of the same Article states that:

"In appointing the staff, the Director-General shall, **subject to the paramount importance of securing the highest standards of efficiency and of technical competence**, pay due regard to the importance of selecting personnel recruited on as wide a geographical basis as is possible." (Emphasis added.)

Staff Regulation 301.4.2 mirrors this provision and relevantly states:

"**The paramount consideration in the appointment, transfer, or promotion of the staff shall be the necessity for securing the highest standards of efficiency, competence and integrity.** Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible." (Emphasis added.)

Staff Regulation 301.4.4 states as follows:

“Subject to the provisions of Rule XXXIX(2) of the General Rules of the Organization, and without prejudice to the recruitment of fresh talent at all levels, **the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the Organization.** This consideration shall also apply on a reciprocal basis to the United Nations and to the specialized agencies brought into relationship with the Organization.” (Emphasis added.)

While, quite critically, Manual Section 301.4.3 states that:

“The selection and compensation of staff shall be without distinction as to race, sex or religion. **So far as practicable, selection shall be made on a competitive basis.**” (Emphasis added.)

6. In Judgments 2620, 2959 and 3288 the Tribunal construed similar provisions to those reproduced in consideration 5 foregoing to mean, essentially, that while the Director-General has a wide discretion to appoint, promote and assign staff, selection, appointment and promotion shall normally be on a competitive basis. This norm will only be obviated by an expressed blanket exemption of posts from the competitive recruitment process. This, the Tribunal reasoned, is because the provisions are expressly worded to secure the highest standards of efficiency, competence and integrity and, in particular, given that the provisions which are similar to Manual Section 301.4.3 state that “[s]o far as practicable, selection shall be made on a competitive basis”. This is also notwithstanding the preferences that are to be accorded to persons who are already in the service of the Organization and on the basis of gender. The competitive process is also in the interest of transparency.

7. The FAO submits that it was impracticable to issue a vacancy announcement and to conduct a competitive process for the subject post because “the circumstances existing at the time when the position of Director, OSD became vacant were such that the Director-General could reasonably conclude that recruitment through competition would not be practicable”.

8. The FAO’s case to support the foregoing submission may be summarized as follows: the vacancy for the post of DDG, Operations,

was published on 25 September 2012. The deadline for applications was 26 October 2012. Ninety applications were received. Four persons were shortlisted and interviewed. The Director-General's recommendation to appoint the then Director, OSD to the post of DDG, Operations, was subject to confirmation by the FAO's Council, which confirmed the appointment on 3 December 2012. It was then necessary to fill his vacant post immediately. That vacant position could not have been advertised before his appointment as DDG, Operations, was confirmed. This meant that there was a "very small window" to advertise the vacant Director, OSD post. The direct recruitment of Ms S. to fill that post therefore arose out of an unforeseeable event and circumstances which made a competitive process to fill the post impracticable. The Director-General could have so appointed her pursuant to paragraph (n) of the Recruitment Guidelines because she had been interviewed for an analogous position less than 12 months prior. The fact that she travelled from Vietnam to Rome in early December 2012 does not mean that her appointment to the post was planned or foreseen. At the time of her appointment the FAO's Vision for the Structure and Functioning of Decentralization Offices for the transformation of the FAO was fully underway and actions were being undertaken to accelerate the reform process under that initiative. It was necessary to have the post filled as a matter of urgency after the confirmation of the appointment to the post of DDG, Operations, as the initiative was then a priority and the role of Director, OSD was critical to its success. The conduct of a lengthy selection process for that post would have been counterproductive and could have derailed the initiative.

9. The Tribunal notes that paragraph (n) of the Recruitment Guidelines states as follows:

"The Director-General may appoint a candidate who, during the period of the last twelve months, applied for an analogous managerial position, or a higher managerial position, and was duly interviewed in that context in accordance with this procedure."

However, as stated in consideration 4 of this judgment, the clear purport of the pre-ambulatory paragraph of the Recruitment Guidelines is that the Guidelines relate to the recruitment process where a post at

the D-1 level or above becomes vacant because of mandatory retirement or resignation. It does not relate to recruitment or promotion as in the present case. The Director-General could not rely on paragraph (n) of the Recruitment Guidelines as the basis for the direct appointment of Ms S. so as to avoid the normal method of appointment to D-1 and above posts by way of a competition.

10. As a precursor to determining whether the circumstances which the FAO cites to show that it would have been impracticable to issue a vacancy notice and to conduct a competition for the appointment to the post of Director, OSD, were relevant, consideration 9 of Judgment 2620 upon which the FAO relies, and also consideration 10, will be reproduced. Considerations 6 and 7 of Judgment 2959 will also be reproduced for the guidance which they may provide.

11. The relevant statements from considerations 9 and 10 of Judgment 2620 state as follows:

“9. [...] There must be something in the circumstances of the vacancy upon the basis of which the Director-General might reasonably conclude that a competition is not practicable. For example, there may be a need to fill the vacancy quickly to relieve a backlog of work or to satisfy existing or future work commitments. However, the WHO makes no such claim. Presumably, that is because the post in question became vacant approximately nine months before Dr C.’s appointment was announced and approximately 11 months before she took up her functions. Moreover, the WHO was able to fill the post for most of that time by appointing the lead complainant to it on an interim basis.

10. Although the WHO relies on the words ‘[s]o far as is practicable’ of Regulation 4.3, it does so only on the basis that a direct appointment is, in principle, quicker than a competitive appointment. In this regard, it relies on the statement in Judgment 535 that ‘an immediate appointment is of course quicker than an appointment following a competition and that according to [the] circumstances, several months may be gained’. In this context, it is said that, as there was a need to review the needs of the Department as well as the post description, it cannot ‘be seriously argued that a competition would have been as quick as a direct appointment’. The fact that a direct appointment will be quicker than a competitive appointment does not, without more, provide a basis for a decision that a competition is not practicable. If that is all that were required, it would render the general requirement for a competition in Staff Regulation 4.3 nugatory.”

12. The Tribunal reasoned as follows in considerations 6 and 7 of Judgment 2959:

“6. The Tribunal is of the opinion that the impugned decision violated the complainant’s right to compete for a post, as Regulation 4.3 provides no explicit and specific exemption from the requirement that selection be made on a competitive basis for the post of Chief of Cabinet, and the ‘impracticability’ of the competitive selection process cannot be based on the post itself. Furthermore, the Director-General did not provide any reasons why he considered a competition as not practicable in the appointing of Mr E. to the vacant post. This demonstrates a lack of transparency in the appointment. The decision violated provisions which are designed to ensure a certain level of transparency and competition for all posts. Specifically, Article 11 of Administrative Directive AD/PER/29/Rev.2 and Articles 8 and 10 of Administrative Directive AD/PER/37/Rev.1 respectively provide that vacancy notices shall be posted, that when vacancies are open to external candidates such notices shall be posted both internally and externally, and that full regard shall be given to internal candidates in the competitive selection process. Contrary to the Organisation’s arguments, the above-mentioned directives are not inconsistent with the authority of the Director-General. Rather, they serve to reinforce the necessity for transparency in the appointment process.

7. As mentioned above, the expression ‘so far as practicable’ cannot be interpreted to mean that for certain specific posts a competitive selection process can automatically be considered as not practicable (*ubi lex voluit dixit, ubi noluit tacuit*). In Judgment 2620, referring to the same expression ‘so far as practicable’, the Tribunal held that:

‘those words confer power on the Director-General to determine whether or not a competition is practicable. However, that is not a general or unfettered discretion. There must be something in the circumstances of the vacancy upon the basis of which the Director-General might reasonably conclude that a competition is not practicable.’

Again, the Tribunal notes that the ‘impracticability’ cannot refer to particular posts (as in that case the exception to the general rule should be explicitly expressed), but instead must relate to particular situations such as a ‘need to fill a vacancy quickly to relieve a backlog of work or to satisfy existing or future work commitments’ (see Judgment 2620, under 9). In the present case, the Organisation relies on the unique nature of the position of the Chief of Cabinet and ‘the responsibilities to be performed by the post holder’ as justification for the need for the Director-General to select the appointee to this position without holding a competition. However, as observed by the Appeals Council, there is nothing to prevent the Director-General from contacting particular employees he finds suitable and encouraging them to apply for the

position, thereby maintaining transparency in the competitive selection process, and appointing a fully qualified candidate to the post.”

13. The circumstances which the FAO provides to support its case that it was impracticable to issue a vacancy notice and to conduct a competition for the subject post are unconvincing. They do not bring the actions of the FAO within the ambit of consideration 9 of Judgment 2620. This is notwithstanding the FAO’s insistence that the continued implementation of the Vision made an appointment to the post urgent. This is a statement with no details from which to deduce whether it was genuine. To the contrary, there is the fact of the presence of Ms S. in Rome prior to the confirmation of Mr D.G. ‘s appointment to the post of DDG, Operations. There is nothing which shows that an appropriate acting appointment could not have been made, purely as an interim measure, pending the conduct of a competitive process to fill the post.

The Tribunal further notes the Appeals Committee’s finding, which the FAO has not controverted, that D-2 level posts were advertised, save in a few cases where there were lateral transfers from D-2 posts, but there were no instances of promotion to a D-2 level post.

14. In the foregoing premises, the claim that the FAO breached its own rules when it directly appointed Ms S. to the vacant post without a competitive process is well founded and the impugned decision will accordingly be set aside. However, this is not a case in which a claim for material damages arises.

The impugned decision will be set aside on the understanding that the FAO shall shield the selected candidate, Ms S., from any injury that may flow from the setting aside of the impugned decision and the resultant quashing of an appointment which she had accepted in good faith (see Judgments 1477, under 11, and 2336, under 4). As there has already been held another competition for this post as a result of Ms S.’s appointment to another post, no order will be made for a new competition for the subject post.

15. The procedural irregularity which has resulted in setting aside the impugned decision caused the complainant a moral injury which will be redressed by an award of 15,000 euros. He will also be awarded 1,000 euros in costs.

16. The complainant requests documents and information, which all relate to the issue of analogous managerial positions. That request will be denied as it has been found, in consideration 9 of this judgment, that this issue is irrelevant to the central question which arises in the present complaint.

It is however observed that the FAO provided information to the Appeals Committee, at the latter's request. The Appeals Committee did not request the same information which the complainant sought. It requested clarification as to which version of the Guidelines was in effect during the period when the subject post was being filled, as well as information on the procedure followed to appoint candidates to senior positions pursuant to paragraph (n) of the Recruitment Guidelines. The FAO provided the information to the Appeals Committee. However, the Appeals Committee did not provide that information to the complainant, in breach of its duty of procedural fairness. It is well established in the Tribunal's case law that a "staff member must as a general rule have access to all evidence on which the authority bases (or intends to base) its decision against him" (see Judgment 3264, under 15). The complainant will be awarded moral damages in the amount of 1,000 euros in the circumstances.

DECISION

For the above reasons,

1. The impugned decision, contained in the Director-General's letter dated 8 April 2014, is set aside.
2. The FAO shall ensure that the formerly selected candidate, Ms S., is shielded from any injury that may flow from the setting aside of the impugned decision and the resultant quashing of an appointment which she had accepted in good faith.

3. The FAO shall pay the complainant a total of 16,000 euros in moral damages.
4. The FAO shall also pay the complainant 1,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 21 October 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 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ