

M. (No. 5)

v.

FAO

137th Session

Judgment No. 4772

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 4 October 2019 and corrected on 7 November 2019, the FAO's reply of 19 February 2020, the complainant's rejoinder of 26 May 2020 and the FAO's surrejoinder of 12 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 decision to appoint another candidate to the position of Director, Investment Centre Division (TCI) following a competitive selection process.

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. In the event, the FAO decided, in February 2017, to transfer

him to the position of Senior Policy Officer in the FAO Regional Office for Europe (REU), at grade D-1, based in Budapest, Hungary. The complainant challenged that decision in his first complaint.

In August 2017, a vacancy announcement was published for the grade D-2 position of Director, TCI. The complainant applied for this position and was shortlisted, but after having been interviewed he was informed on 2 November 2017 that another candidate had been selected. On 24 November 2017, the Director-General announced that he had appointed Mr M. as Director, TCI. The complainant challenged the appointment of Mr M. by submitting a grievance to the Director-General on 22 December 2017. He alleged that the disputed appointment was tainted with bias and discrimination, conflict of interest and breach of the FAO rules governing selection and appointments. His grievance was rejected as being without merit and the complainant then lodged an appeal with the Appeals Committee.

In its report of 12 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. On the merits, the Committee observed that it could not substitute its judgment on the relative merits of candidates in a selection process for that of the Director-General, and it therefore rejected the complainant's arguments aimed at establishing that he was a better candidate for the disputed position. However, regarding the complainant's argument that the involvement of Mr G. (the Deputy Director-General, Operations) in the selection process represented a serious conflict of interest, the Committee found that Mr G.'s presence on the interview panel should have been avoided and that he should have recused himself in view of the fact that he was the subject of a complaint of harassment filed by the complainant. Relying on Judgment 3958, the Committee considered that "it was not for the [complainant] to demonstrate evidence of conflict of interest" and that it was reasonable to presume that Mr G. was fully aware of the harassment complaint filed against him by the complainant, hence it was "reasonable to conclude that there was an appearance of partiality, and therefore a conflict of interest". On this basis, the Committee recommended that the complainant be awarded

compensation for moral damages. As the complainant had retired in December 2018, it considered that his claim to be transferred to the position of Director, TCI, in lieu of Mr M. was moot.

In his final decision of 8 July 2019, the Director-General dismissed the complainant's appeal in its entirety. He considered that the complainant had not provided evidence to support his allegations and that the selection process had been validly undertaken in accordance with the rules governing selection and appointments, and with the basic rules of fair and open competition. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to declare the appointment of Mr M. unlawful. He claims 500,000 euros in moral damages, 200,000 euros in material damages, 300,000 euros in exemplary damages, costs, 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 4 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 fifth, specifically concerns a decision of 24 November 2017 to appoint another staff member, Mr M., to the post of Director, Investment Centre Division (TCI). The impugned decision is that of the Director-General of 8 July 2019 rejecting the complainant's internal appeal against the outcome of an initial appeal challenging the decision of 24 November 2017 appointing Mr M.

4. The defendant organisation does not raise as an issue the receivability of the complaint insofar as it directly challenges the appointment of Mr M.

5. 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 "fatally flawed by [...] bias, personal prejudice and serious conflicts of interest" 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".

6. The subsequent detailed pleas 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 allegations and contentions raised in challenges to other decisions by way of internal appeal were, as the Committee said, "not technically receivable in its review of [the] appeal".

7. The second subheading, “errors of law”, contains six subsidiary arguments. The following is the substance of each of them. The first is that the defendant organisation had arbitrarily and unlawfully “removed” rules on recruitment and interview of senior staff (D-1 and above). The second is that in the impugned decision, the Director-General erroneously rejected the conclusion of the Appeals Committee that the selection process was infected by a conflict of interest. The third, related to the second, was that the selection process was not objective and transparent, which includes an allegation that the entire selection process was intentionally designed to favour selection of the successful candidate including a “rigged” interview panel. The fourth is that the discretionary power invested in the Director-General to appoint and promote must be exercised within the bounds of legality and it was not. The fifth involves an alleged failure of the defendant organisation to submit a Statement to the Appeals Committee within the time specified by the Staff Rules. The sixth concerned the rejection of the arguments of the complainant in the internal appeal seeking to demonstrate his technical superiority over the selected candidate. In his rejoinder, the complainant raises several supplementary or incidental arguments.

8. One plea of the complainant is plainly correct and decisive. It concerns the participation of Mr G. in the interview panel determining the competition to fill the post of Director, TCI, in which the complainant had participated. On 15 May 2017, the complainant submitted a complaint of harassment and abuse of authority to the Office of the Inspector General (OIG). The allegations concerned the conduct of Mr G. (the Deputy Director-General, Operations) and the Director, Office of Support to Decentralised Offices.

9. On 27 August 2017, a vacancy announcement was issued for the position of Director, TCI. On 15 September 2017, the complainant was informed that he had been shortlisted for an interview for the position. That occurred on 20 September 2017 and Mr G. was on the panel conducting the interview and was the chairman. On 22 December 2017, the complainant submitted a letter of grievance to the Director-General impugning the decision to appoint Mr M., announced on

24 November 2017, to the post. One issue raised in the grievance was the participation of Mr G. in the interviewing panel. The grievance was rejected by the Director-General on 20 February 2018. On 23 February 2018, the complainant lodged an internal appeal to the Appeals Committee.

10. In its report of 27 March 2019, the Appeals Committee addressed, amongst other issues, an issue raised by the complainant, namely the participation of Mr G. in the selection process. The Committee first referred to Judgment 3958 of the Tribunal, which, at consideration 11, had said:

“According to the Tribunal’s case law, ‘[i]t is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to his jurisdiction must withdraw in cases in which his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the persons affected by the decision to suspect its author of prejudice. Persons taking part in an advisory capacity in the proceedings of decision-making bodies are equally subject to the above-mentioned rule. It applies also to members of bodies required to make recommendations to decision-making bodies. Although they do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence on the decision to be taken.’ [...] A conflict of interest occurs in situations where a reasonable person would not exclude partiality, that is, a situation that gives rise to an objective partiality. Even the mere appearance of partiality, based on facts or situations, gives rise to a conflict of interest.”

11. The Appeals Committee then observed that, having considered the matter at length, it had reached a unanimous conclusion that the presence of Mr G. on the interview panel should have been avoided in light of the complaint of harassment that the complainant had filed beforehand. It should be recalled that the Committee was composed of five individuals. It said that Mr G. should have recused himself or should have been invited to do so by the OIG, “or other appropriate office”. The Committee then said:

“The fact that [Mr G.] was only one of four panel members and that all applications were reviewed by the Office of Human Resources beforehand are of little relevance in the Committee’s opinion as these facts do not dilute the implications of the mere presence of [Mr G.] on the interview panel. In

light of the reasoning in the above cited Judgment [Judgment 3958], the Committee also considered that it was not for the [complainant] to demonstrate evidence of the conflict of interest, as stated by the Organisation. It is sufficient that a reasonable person would not exclude partiality in the circumstances. In this case, the Committee considered that it was reasonable to presume that [Mr G.] was fully aware of the complaint of harassment that had been filed against him by the [complainant] beforehand and that, as a result, it was reasonable to conclude that there was an appearance of partiality, therefore a conflict of interest.”

12. This reasoning of the Committee should, in the circumstances, be accepted. It recommended that the complainant be awarded moral damages. However, its conclusion on this issue and the recommendation based on it was not accepted by the Director-General who rejected the complainant’s appeal as “without merit”. In relation to Mr G.’s involvement, the Director-General said:

“I note that, notwithstanding the Committee’s conclusion, it observed that you did not raise any objection regarding the composition of the interview panel until you lodged the present appeal against the outcome of the selection process. I wish to recall that the interview panel was composed of four members in total and that the recommendations of the interview panel regarding the interviewed candidates were made as a result of discussions and consultations between all the members of the panel. I reiterate that you have not made any particular allegation to support your claim or to show prejudice, discrimination, lack of integrity or partiality on the part of [Mr G.] in his discharge of his functions in the selection process. I also wish to recall that OIG found no credible case of harassment on the part of either [Mr G.] or [Mr D.]”

There are several manifest errors in this approach. They include that the fact that Mr G. participated with others in the selection process does not excuse his participation if there was a possibility, as plainly there was, particularly given his role as chair of the panel, for him influencing the decision-making of others. Additionally, the Director-General appears to have been suggesting that it was incumbent upon the complainant to “show prejudice, discrimination, lack of integrity or partiality on the part of [Mr G.]”. The conclusion of the Committee was based on the fact, as in the circumstances it could be, that a complaint of harassment against Mr G. had been lodged and was being processed and the FAO does not deny that Mr G. was aware of this. It was wrong of the

Director-General to call in aid the fact that the OIG had subsequently “found no credible case of harassment”. That is so for one and possibly two reasons. The outcome of the OIG’s consideration of the grievance was not known at the time of Mr G.’s participation in the selection process. Thus, the assessment of a “reasonable person” that would not exclude partiality is to be based on known facts at the time, namely the time of the interviews. Moreover, the conclusion of the OIG manifest in a Notice of Closure of 27 October 2017 was reached unlawfully as discussed in Judgment 4691.

One further point can be made. It is true the role of the Appeals Committee is to make recommendations only and the Director-General is entitled to depart from those recommendations and the conclusions on which they are based, though she or he must motivate that departure. However, certainly on a topic such as the present, the fact that five individuals of apparent repute had unanimously formed a view about what a reasonable person would conclude about partiality, must be given considerable weight by the Director-General, particularly in circumstances where no error is pointed to by him in the reasoning of the Committee. It is difficult to avoid the conclusion that it was not given any weight at all.

13. One matter of detail in the defendant organisation’s pleas should be addressed. In its surrejoinder, it points to the fact that the issue of Mr G.’s partiality was not raised by the complainant at the time the selection process was occurring or when the contested appointment was made, but rather was only raised subsequently. In this respect it relies on the fact that the “OIG found no credible evidence of harassment”. However, as just noted above, the conclusion of the OIG manifest in a Notice of Closure of 27 October 2017 was reached unlawfully, as discussed in Judgment 4691. The OIG’s opinion carries no weight at all. The defendant organisation refers to Judgment 2225 which involved, in this respect, broadly analogous facts. In that case the Tribunal said: “[i]n the absence of [a contemporaneous] objection [...], a decision should not be set aside on the ground of conflict of interest except in a case where there are reasonable grounds for concluding that there was an actual conflict of interest, not merely a perceived conflict”. In the

material before the Tribunal there is ample documentary evidence, coupled with the complainant's account of events which has largely been uncontested (though how those events should be characterised is plainly contested), which arguably could justify a conclusion that Mr G. harassed the complainant and engaged in an abuse of authority. Moreover, as earlier noted, the fact that Mr G. was aware of the harassment complaint is not disputed. This, in the circumstances, is sufficient.

14. It is unnecessary to consider the other arguments advanced by the complainant.

15. Typically, the error revealed in the preceding considerations would justify setting aside the appointment of Mr M., subject to shielding him from injury, and justify an order that a new competition be held in which the complainant could compete. However, the complainant left the service of the FAO in December 2018, having reached the mandatory retirement age. In these circumstances no such order should be made.

16. The complainant claims moral damages. The Appeals Committee made a finding that the complainant's claims that the selection process was vitiated by "a serious conflict of interest" and by a "tainted selection interview" were founded. It also concluded that "as a result [the complainant] suffered moral harm". It recommended that the complainant be compensated for moral damages though it left the quantification of those damages to the organisation. The Committee does not detail the nature of that moral harm but its findings in this respect cannot be ignored. In the impugned decision, the Director-General rejected the recommendation that the complainant be compensated but did so because in his (erroneous) view, there was no flaw in the selection process.

17. Mr G. was viewed by the complainant as his nemesis (along with Mr D.) and an inference can readily be drawn that Mr G.'s participation in the selection process caused the complainant considerable distress and anxiety, particularly given that at the time, he had lodged with the OIG a complaint against him. The Tribunal is satisfied the

complainant is entitled to moral damages and they are assessed in the sum of 15,000 euros.

18. The complainant seeks exemplary damages. A claim to similar effect made in other proceedings by the complainant was discussed by the Tribunal in Judgment 4690, consideration 16. The observations of the Tribunal in that matter are apt to apply in these proceedings as well and the claim for exemplary damages should be rejected.

19. The complainant seeks moral damages for the time taken in the internal appeal. The observations of the Tribunal in Judgment 4690, consideration 22, are apt to apply in the present case. This claim is unfounded.

20. The complainant is entitled to costs assessed in the sum of 8,000 euros.

21. He 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.

DECISION

For the above reasons,

1. The FAO shall pay the complainant 15,000 euros moral damages.
2. The FAO shall pay the complainant 8,000 euros costs.
3. All other claims are 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