

M. (No. 12)

v.

FAO

138th Session

Judgment No. 4855

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 3 July 2020 and corrected on 6 August, the FAO's reply of 28 October 2020, the complainant's rejoinder of 2 February 2021 and the FAO's surrejoinder of 6 May 2021;

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 appointment of another official to the position of Deputy Director, Investment Centre Division (ICD), following a competition.

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, TCI. 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 May 2018, the FAO issued a vacancy announcement for the position of Deputy Director, TCI, at grade D-1. The complainant applied for this position, was shortlisted, and was interviewed on 28 August 2018. By an email of 10 December 2018, he was informed that another candidate had been selected for the position.

On 25 December 2018, the complainant lodged an appeal to the Director-General against the Administration's "recent appointment" of another official to the position of Deputy Director, TCI, and also against the rejection of his request for a lateral transfer to that position. He alleged that: (i) the contested decisions were discriminatory and constituted unequal treatment; (ii) the selection process was tainted by a breach of due process and lack of transparency due to the absence of key members from the Interview Panel, which was also a violation of the principle *tu patere legem quam ipse fecisti*; and (iii) the selection process was moreover tainted by the presence on the Interview Panel of Mr M., Director, TCI, whose appointment the complainant had challenged – initially by way of appeal, in December 2017, and then in his fifth complaint to the Tribunal – and who thus had a conflict of interest and should have recused himself. Following the rejection of his appeal to the Director-General on 21 February 2019, the complainant lodged, on 23 March 2019, an appeal to the Appeals Committee maintaining, in the main, the allegations made in his appeal to the Director-General.

The Appeals Committee issued its report on 3 December 2019. On the question of receivability, it considered that the complainant's appeal was not directed against the decision to reject his request for a lateral transfer to the position of Deputy Director, TCI, but, rather, against the decision to appoint another candidate to that position further to a selection process in which he had participated. On the merits, the Committee noted that the Professional Staff Recruitment Guidelines were not applicable, as they only applied to posts from grade P-1 to P-5, and that further to the withdrawal of the Recruitment/Interview Guidelines

for senior level vacancies (D-1 level and above), no procedures had been issued to replace them. Reiterating its findings in the complainant's appeal underlying his eleventh complaint to the Tribunal (against the decision to appoint Ms C. to the position of Director, Office of Strategy, Planning and Resources Management), the Committee concluded that the FAO's failure to replace the withdrawn selection procedures for positions at the D-1 level and above represented a breach of the administrative requirement of transparency and was not in line with the fundamental tenet that laws should be open and clear, general in form, universal in application and "knowable" to all. On the allegation of conflict of interest, the Committee acknowledged that the complainant had lodged an appeal against his non-selection for the position of Director, TCI, prior to his interview for the position of Deputy Director, TCI, on 28 August 2018, but considered that Mr M. would not have known of the complainant's appeal at that time, as appeal proceedings are strictly confidential. The Committee recommended that the FAO award the complainant appropriate moral damages for breach of due process and breach of his right to transparency, inasmuch there were no "knowable" procedures governing the selection process for the position of Director, TCI. In the interest of fairness, transparency, and the rule of law, the Committee also recommended that the FAO formulate and publish appropriate selection and appointment procedures for positions at the D-1 level and above to replace those previously in force. Lastly, noting that the complainant had filed a total of sixteen appeals, the Committee recommended that the FAO consider the option of mediation as an alternative to litigation before the Tribunal.

By a letter of 7 April 2020, the Director-General informed the complainant that he had decided to reject his appeal in its entirety. This is the impugned decision in the present complaint (the complainant's twelfth).

The complainant asks the Tribunal to set aside the impugned decision and to draw all legal consequences therefrom. He claims 300,000 euros in material and moral damages for (i) the FAO's protracted prejudicial conduct which denied him an equal opportunity for lateral transfer to a position commensurate to his earlier position as

Director, Liaison Office for North America; (ii) the fatal flaws in the selection process, including the unlawful composition of the Interview Panel and the conflict of interest; (iii) the breach of the applicable rules on the duty of transparency and fair competition. He claims reimbursement of the legal costs he incurred, as well as interest on all awarded amounts at the rate of 5 per cent per annum from 10 December 2018 through the date all such amounts are paid in full. Lastly, he claims such other relief as the Tribunal deems necessary, just and fair.

The FAO asks the Tribunal to dismiss the complaint, to the extent that it is receivable, as unfounded on the merits.

CONSIDERATIONS

1. The complainant is a former staff member of the FAO. This judgment concerns a complaint filed by him on 3 July 2020, his twelfth 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. In this judgment, some of the reasoning from the judgment on the complainant's eleventh complaint is repeated.

5. The present complaint concerns, specifically, a decision, notified to the complainant by an email of 10 December 2018, to appoint another candidate, Mr P., to the post of Deputy Director, Investment Centre Division (TCI), after a competition in which the complainant participated and was shortlisted. The impugned decision is the Director-General's decision of 7 April 2020, rejecting the complainant's internal appeal against the outcome of an initial appeal challenging the decision to appoint Mr P., notified to the complainant on 10 December 2018. The impugned decision followed a report of the Appeals Committee of 3 December 2019.

6. The arguments raised by the complainant in this complaint have similarities to those raised by him in his eleventh complaint, in which judgment is given at this session. However, no request was made to join the proceedings. Nonetheless, the Tribunal's reasons for dismissing his eleventh complaint should inform a consideration of this judgment.

7. The defendant Organization does not raise as an issue the question of whether the complainant has a cause of action concerning the appointment of Mr P., or otherwise put in issue the receivability of the complaint insofar as it directly challenges that appointment.

8. There was a material difference between the reasoning and conclusions in the impugned decision of the Director-General and the reasoning, conclusions and recommendations of the Appeals Committee in its report. One of the contentions of the complainant in his pleas in these proceedings is that the Director-General did not, in the impugned decision, motivate or adequately motivate his conclusions to the extent they differed from those of the Appeals Committee and which led him to reject its recommendations. It is well established in the Tribunal's case law that the executive head of an international organisation, when taking a decision on an internal appeal that departs from the recommendations made by the appeals body, to the detriment of the employee concerned, must adequately state the reasons for not following those recommendations (see, for example, Judgment 4062, consideration 3, and the case law cited therein).

9. It is convenient to commence by considering this contention. The Director-General rejected the appeal in its entirety. He did so notwithstanding a recommendation by the Appeals Committee that the complainant be awarded an appropriate amount of moral damages to be determined by the Organization. Thus, the rejection of this recommendation was to the complainant's detriment. The recommendation that moral damages be awarded was based on a conclusion of the Appeals Committee that the Organization had "breach[ed] due process" and the complainant's "right to transparency", given "there were no knowable selection procedures governing the selection process in question". Plainly, on this topic, the Appeals Committee drew upon, and did so expressly, the discussion in its report on the complainant's appeal underlying his eleventh complaint (Case No. 809), and which is repeated, in material respects, in the Tribunal's judgment concerning that complaint (Judgment 4854).

10. The analysis of the Appeals Committee leading to its conclusion on this topic in Case No. 809 was as follows. The Committee said, amongst other things:

“27. [T]he selection process in question responded to no known selection procedures and this, in the opinion of the Committee, [...] left a legal vacuum. [...]

28. [T]he Committee did agree with the [complainant’s] claim that there was no semblance of transparency in the selection processes for D1 level and above positions. Without applicable selection procedures to evaluate the facts against, it could not be concluded with certainty that no procedural flaw took place. In conclusion, the Committee found that the lack of selection procedures positions for positions at the D1 level and above represented a breach of the administrative requirement that specific competitive selection procedures for senior level positions exist and that they be knowable to staff at large.”

11. It appears not to be an issue, at least by the time these proceedings were commenced, that there were no specific written procedures expressly governing the appointment by competition to positions at the D-1 level and above.

12. The reasoning of the Director-General in the impugned decision in this matter provides no effective answer to the Appeals Committee’s conclusion (which seems to be correct), originating in Case No. 809, that “the selection process in question responded to no known selection procedures and this, in the opinion of the Committee, [...] left a legal vacuum”. A general reference to normative legal documents of wide application does not answer the conclusion of the Appeals Committee on which its recommendation was based. What the Director-General appears to be relying on is the fact that there were procedures followed in conducting the competition and filling the position. Doubtless, this is correct. But the point being made by the Appeals Committee, which remained unanswered, was the need (as the Appeals Committee viewed it) to have, in advance, procedures in writing on how the competition would be conducted, and a selection ultimately made.

13. Accordingly, and in the result, the Director-General has not sufficiently motivated his decision to reject the conclusion and associated recommendation of the Appeals Committee that the Organization had breached its duty of care towards the complainant and should pay the complainant moral damages. Often, in cases of this type, the matter is remitted to the organisation to enable the executive head to motivate her or his decision. However, in the present case, the complainant has retired from the Organization and no apparent purpose would be served by requiring further reasons. Citing Judgment 4157, consideration 7, the Organization says that no moral damages should be awarded, as there is no evidence of moral injury. However, in this case, the moral injury occasioned by a failure to motivate a decision rejecting a recommendation of an internal appeal body is tolerably clear as is the Organization's breach of its duty, as found by the Appeals Committee. The complainant is entitled to moral damages, which the Tribunal assesses in the sum of 12,000 euros.

14. Insofar as the complainant also alleges a range of deficiencies in the selection process, including the participation of Mr M., the Director, TCI, in the Interview Panel, the rejection of those contentions by the Appeals Committee is persuasive and its reasoning need not be repeated. Insofar as the complainant alleges that his non-selection was motivated by bad faith, prejudice and discrimination, this has not been proven and cannot be presumed (see Judgment 4352, consideration 17, and the case law cited therein). It is to be recalled that the ultimate decision to appoint Mr P. was based on the recommendation of the Interview Panel and it would be necessary for the complainant to have established, in these proceedings, that its consideration and recommendation was infected by bias, prejudice or discrimination of the type alleged against the Organization more generally. There is not a scintilla of evidence that this was so. The fact that Mr M. became aware in January 2020 of a challenge by the complainant to his appointment has no bearing at all on his state of mind, and possible bias against the complainant, when participating in an interview of the complainant for the position in August 2018.

15. Save for the argument that the Director-General failed to motivate his decision, the complainant's contentions are unfounded and should be rejected. The complainant is entitled to costs assessed in the sum of 10,000 euros.

16. 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.

DECISION

For the above reasons,

1. The FAO shall pay the complainant 12,000 euros moral damages.
2. The FAO shall pay the complainant 10,000 euros costs.
3. All other claims are 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