

M. (No. 6)

v.

FAO

138th Session

Judgment No. 4852

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 28 November 2019 and corrected on 10 December 2019, the FAO's reply of 28 February 2020, the complainant's rejoinder of 4 June 2020 and the FAO's surrejoinder of 7 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 appointment, by lateral transfer, of another official to the position of Director, FAO Liaison Office in Geneva (LOG).

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 Director,

LOG, at grade D-1. 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.

On 22 August 2017, the Director-General announced his decision to appoint Ms R.B. to the position of Director, LOG, with immediate effect. Ms R.B.'s appointment took the form of a lateral transfer, that is to say, she was transferred from the position she previously held within the FAO to the position of Director, LOG, with no change in grade. On 20 October 2017, the complainant appealed to the Director-General the decision to appoint Ms R.B. as Director, LOG, and asked the Director-General to set it aside, to arrange for his immediate transfer to said position, and to award him material damages, moral damages, and costs. Following the rejection of his appeal to the Director-General on 19 December 2017, the complainant lodged an appeal to the Appeals Committee on 4 January 2018, maintaining the requests put forward in his appeal to the Director-General.

In its report of 13 May 2019, the Appeals Committee recalled that appointment decisions were discretionary and that it had limited authority to enter into the merits of such decisions and to substitute its judgement for that of the Organization. It considered the fact that the complainant himself had made several requests for a lateral transfer to other positions, without the need for a competitive selection procedure, as an acknowledgment on his part of the legality of lateral transfers as per the discretionary authority of the Director-General. The Committee added that, in any event, as the complainant had separated from service due to retirement on 31 December 2018, his request to be transferred to the position of Director, LOG, was moot. It found the appeal unfounded on the merits and recommended that it be rejected.

By a letter of 31 October 2019, the Director-General informed the complainant that he concurred with the Appeals Committee's reasoning and recommendation and had, therefore, decided to reject his appeal. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as the earlier decision to appoint Ms R.B. to the position of Director, LOG, and to draw all legal consequences therefrom. He claims 200,000 euros in material damages for unjustly demoting him to a lower grade post, leaving him without any work for over two years, banning him from promotions and compromising his professional reputation and future employment. He also claims 200,000 euros in moral damages for the FAO's prejudicial conduct, including the excessive delay in the internal appeal process, and 300,000 euros in exemplary damages for the FAO's bias and prejudice and breach of its duty of care towards him. He seeks reimbursement of legal costs in an amount not less than 15,000 euros. He also seeks interest at the rate of 5 per cent per annum from 20 May 2019 through the date all amounts ordered by the Tribunal have been paid in full. Lastly, he seeks such other relief as the Tribunal deems necessary, just and fair.

The FAO asks the Tribunal to dismiss the complainant's claims as partly irreceivable and unfounded in their entirety.

CONSIDERATIONS

1. The complainant is a former staff member of the FAO. This judgment concerns a complaint filed by him on 28 November 2019, his sixth 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 other related judgments is repeated.

5. The present complaint concerns, specifically, the Director-General's decision of 22 August 2017 to transfer by way of lateral transfer, another staff member, Ms R.B. to the post of Director, FAO Liaison Office in Geneva (LOG). The impugned decision is the Director-General's decision of 31 October 2019, rejecting the complainant's internal appeal against the outcome of an initial appeal challenging the decision of 22 August 2017 to appoint Ms R.B. The impugned decision was based on a report of the Appeals Committee of 13 May 2019, recommending the rejection of the internal appeal.

6. The defendant Organization does not raise as an issue the question of whether the complainant has a cause of action concerning the appointment of Ms R.B., or otherwise put in issue the receivability of the complaint insofar as it directly challenges that appointment. However, it cannot be assumed that one member of staff has an unfettered right to challenge the transfer of another member of staff (see Judgment 2670, consideration 5).

7. The detailed pleas in the brief 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. Many of these arguments do not warrant detailed consideration or reply by the Tribunal. They are, on their face, entirely unmeritorious.

8. The argument of mistakes of fact broadly concerns three matters. The first is an alleged error about the period the position of Director, LOG, had been vacant before the appointment of Ms R.B. This fact is irrelevant. The second is the failure of the Appeals Committee to investigate the circumstances of Ms R.B.'s initial appointment by the Organization in September 2015 and her first promotion in April 2017, coupled with the failure to provide the complainant with documents he sought relating to that appointment and promotion. Ms R.B.'s initial appointment and first promotion are irrelevant. The third is the approach of the Appeals Committee, endorsed by the Director-General, that objective circumstances (concerning his treatment in 2016 and 2017) surrounding the impugned decision were, as the Committee said, "not technically receivable" in its review of the appeal. This will be discussed shortly.

9. The second subheading, "errors of law", contains arguments mainly directed towards impeaching the reasons of the Appeals Committee rather than directly addressing the legality of Ms R.B.'s appointment of 22 August 2017. The Tribunal notes, at this point, no relief is sought seeking the remittal of the matter to a newly constituted

Appeals Committee to consider the internal appeal afresh, a course which can be adopted in the event there was material failure in the consideration of the internal appeal. The first error concerns an alleged breach of the rules concerning the submission by the Organization of its brief (allegedly one day late) to the Appeals Committee. Even if true, it is an immaterial breach. The second error concerns the failure to provide reasons motivating the “rejection” of the complainant’s transfer to the position of Director, LOG. It is true that the complainant sought transfer to the position of Director, LOG, on 2 May 2016 but this request did not find favour, and this became apparent shortly thereafter. Indeed, he was told at the time that, for him, the Geneva position was not a likely option and the Director-General had several people in mind as possible candidates, and would prefer an external person. At the time, the complainant took no subsequent steps to challenge any decision, whether express (though it must be accepted that nothing in the material before the Tribunal suggests that any express decision was made) or implied, not to transfer him to this post. There are multiple examples in the Tribunal’s case law involving a challenge to the rejection of a request for transfer (see, for example, Judgments 4266, 3614 and 3484). This failure to transfer the complainant is not in issue in these proceedings (other than as part of the complainant’s allegation of bias, prejudice and discrimination) and any lack of motivation in this regard, even if true, is irrelevant.

10. The third alleged error of law concerns Ms R.B.’s initial appointment by the Organization in September 2015 and her first promotion in April 2017. These events are irrelevant. The fourth alleged error of law concerns the appointment of Ms H.A. to the position of Director, LOG in November 2016. Again, this is irrelevant. The fifth alleged error of law is that the appointment of Ms R.B. was a manifest abuse by the Director-General of his discretionary power to appoint and was an arbitrary decision. The sixth alleged error of law concerns an alleged failure to consult the complainant before the appointment of Ms R.B. No legal or factual foundation for this contention is established in the material before the Tribunal.

11. It is desirable to say something about the complainant's contention that in dealing with him (and in appointing Ms R.B.) the Organization was actuated by bias, prejudice and discrimination. In this context, the defendant Organization raises in its defence the scope of the inquiry permitted by the complainant's challenge to the impugned decision. It rejects the suggestion that the complainant is entitled to canvas the history of his employment in order to demonstrate that the appointment of Ms R.B. on 22 August 2017 was the manifestation of, amongst other things, bias, prejudice and discrimination against him revealed by a myriad of events preceding that appointment. The complainant challenges this contention. It is true that the Tribunal said in Judgment 3669, consideration 2:

"The only decision impugned in the internal appeal was that appointment [...] Thus the complainant's complaint to this Tribunal concerns that decision. That is not to say evidence of events in his career cannot, in an evidentiary sense, be relied on in support of allegations of bias or prejudice in relation to the consideration of his candidacy for the position [...] If the evidence is of substance, it can be relied upon."

12. What the complainant is arguing is, in substance, that in appointing Ms R.B. the Director-General was making a choice between her and the complainant (and perhaps others), and the failure to choose him was infected by, amongst other things, bias and prejudice towards him. The difficulty with this argument is that there is no direct evidence that such a choice was being made nor can an inference reasonably be drawn that it was. It is true, as just noted, that the complainant unsuccessfully sought transfer to the position of Director, LOG, on 2 May 2016. But that was almost a year and a quarter before the appointment of Ms R.B. in August 2017.

13. In some of the judgments arising from the complainant's earlier complaints, referred to in considerations 2 and 3 above, it is revealed that, on 27 February 2017, the complainant was transferred to the position of Senior Policy Officer, REU, in Budapest. He travelled to Budapest on 11 March 2017. On 26 May 2017, the complainant sent an email to the Assistant Director-General, REU, detailing work he might do, particularly in view of the fact that he had not then received

the terms of reference for the position he then occupied. These matters are adverted to in Judgment 4693 (and touched upon in Judgment 4690). It is not possible to infer the complainant would have been seen by the Director-General as a potential transferee to the position of Director, LOG, at the time of making the decision of 22 August 2017. It is true that the complainant lodged an appeal with the Director-General on 10 May 2017 against his transfer to the position of Senior Policy Officer, REU, in Budapest. But that appeal was rejected by the Assistant Director-General on 12 July 2017. Thus, at that time and until 22 August 2017, it is probable that the Director-General was aware that the complainant occupied a post which he was likely to remain in until his retirement the following year. It is true that on 7 September 2017 the complainant lodged an internal appeal to the Appeals Committee concerning his Budapest appointment, but that was after the decision to appoint Ms R.B.

14. As the Tribunal observed in Judgment 4690, consideration 13, when addressing the statement made by the Tribunal in Judgment 3669, consideration 12, and similar cases regarding the reliance on earlier evidence of bias and prejudice to prove the true character of alleged bias and prejudice in later conduct:

“There is probably no overarching principle which will determine the admissibility of evidence concerning earlier events in every case. At least in a case such as the present, the question of admissibility should be determined by reference to the specific facts of the case.”

15. In this case, the evidence of the complainant and the arguments based on it about prior bias and prejudice is not, in the circumstances, relevant to the legality of the decision to transfer Ms R.B. There was no choice being made of the type on which the complainant’s arguments rely. Accordingly, much of the argument of the complainant is not founded and lacks any admissible evidentiary underpinning.

16. Insofar as, additionally, the complainant alleges non-compliance with rules concerning the selection of staff, either, as the FAO correctly argues, relevant provisions were complied with, or they were not in force at the applicable time. In any event, his broadly framed arguments concerning non-compliance do not appear to be directed towards the conclusion that there should have been a competition. Rather, he persists, in this context, with the argument that Ms R.B.'s appointment was unlawful because of bias and prejudice against him.

17. The complainant seeks moral damages for the delay in the determination of his internal appeal on the footing that the delay was inordinate. It is true that the appeal took a long period to resolve, nineteen months or thereabouts, and the impugned decision was taken five and a half months later. However no moral injury was identified, let alone proved as it must be (see Judgment 4595, consideration 11). Accordingly, moral damages in this respect will not be awarded.

18. All the arguments of the complainant are unfounded and the complaint will be dismissed. 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,
The complaint is 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