

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

V.
v.
FAO

125th Session

Judgment No. 3933

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr K. V. against the Food and Agriculture Organization of the United Nations (FAO) on 5 August 2016 and corrected on 19 September, the FAO's reply of 15 December 2016 and the complainant's email of 31 January 2017 informing the Registrar of the Tribunal that he did not wish to submit a rejoinder;

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 to terminate his appointment.

The complainant, who had held a continuing appointment since 1997, was informed on 3 September 2013 that his P-5 post in the Information Technology Division (CIO) would be abolished as of 31 December 2013 due to budgetary constraints. He could either separate on 31 December 2013 with a termination indemnity or be placed on special leave with pay for one year and separate on 31 December 2014, namely one year before his mandatory retirement date. The complainant replied that he preferred redeployment, even at

P-4 level, and the Administration confirmed that redeployment was another option available to him.

The complainant was informed on 18 November 2013 that the Task Force on Redeployment for Professional Staff (hereinafter “the Redeployment Task Force”) had recommended reassigning him to the newly created P-5 post of Chief, Global Operations Branch, CIO. The complainant replied that he accepted the recommended reassignment. By a memorandum of 21 November 2013 the Director, CIO, informed the Director of the Office of Human Resources (OHR) that he had decided to reject the recommendation on the ground that the complainant did not meet critical requirements of the post.

By a letter of 30 December 2013 the complainant was notified that, as the Redeployment Task Force’s efforts had not been successful, his appointment would be terminated effective 31 March 2014, but that serious efforts would be made to find redeployment opportunities until that date. A subsequent attempt to reassign the complainant in the field proved unsuccessful.

On 3 March 2014 the complainant lodged an appeal against the decision of 30 December 2013. In his appeal, he also challenged the abolition of his post. His appeal was rejected on 22 April 2014 as time-barred with respect to the decision to abolish his post and as unfounded with respect to the decision to terminate his appointment.

The complainant appealed before the FAO’s Appeals Committee on 23 June 2014, asking for reinstatement and compensation. In its report, the Appeals Committee found that the complainant’s claims with respect to the decision to abolish his post and the decision not to terminate his service on agreed terms were irreceivable. It considered that the termination of his appointment at the end of the three-month redeployment period was in line with the applicable provisions, and it recommended that the appeal be dismissed in its entirety. On 9 May 2016 the Director-General decided to follow the Appeals Committee’s recommendation. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order the payment of his full salary and allowances from 1 April 2014 to 31 December 2015, plus interest. He claims 50,000 euros in moral damages for actions taken with respect to the abolition of his post and the failure to reassign him, as well as 20,000 euros for the excessive delay in the internal appeal proceedings. He seeks 5,000 euros in costs for the internal appeal proceedings and the proceedings before the Tribunal.

The FAO requests the Tribunal to dismiss the complaint as partly irreceivable, as some of the complainant's claims are time-barred, and as entirely unfounded.

CONSIDERATIONS

1. The complainant commenced employment with the FAO in 1990. In September 2013 the complainant was informed that the post he then held was to be abolished. The position was Senior Officer, IT Governance, at the P-5 level in the Information Technology Division (CIO). The abolition of the position occurred at a time when the Division was being restructured as a cost-saving measure.

2. On 30 December 2013 the complainant received a notice of termination of his contract effective 31 March 2014. The complainant appealed to the Director-General against this decision but the appeal was rejected on 22 April 2014. The complainant lodged an internal appeal to the FAO Appeals Committee in June 2014 and in a report dated 19 February 2016 the Committee recommended that the appeal be dismissed. The Director-General accepted this recommendation and by letter dated 9 May 2016 informed the complainant of his decision. This is the impugned decision in these proceedings.

3. In his brief (no rejoinder was filed), the complainant advances his pleas under five headings. The first addresses the abolition of his post. The second concerns the FAO's failure to reassign him which addresses, specifically, the failure to reassign him to the position of

Chief, Global Operations and, more generally, an alleged failure to consider him for alternative assignments. The third heading raises an issue about whether there had been a breach of FAO's duty of care to the complainant focusing on the abolition of his post and, specifically, unequal treatment among P-5 officers, a failure to offer agreed termination and a manipulation of a post description. The fourth heading concerns an alleged failure to provide the complainant with a document relied on by the Organization in the internal appeal. The fifth and last heading concerns the delay in the internal appeal.

4. A material element in a significant part of the complainant's pleas is a challenge to the decision to abolish his post communicated to him in September 2013. That decision was an administrative decision amenable to administrative challenge at the time. Indeed the Appeals Committee concluded that the complainant's challenge in the internal appeal to the abolition of his post was time-barred, a conclusion consistent with the Tribunal's case law (see, for example, Judgments 3755, consideration 3, 3754, consideration 8, and 3439, consideration 4). This is recognised by the complainant in his brief, in which he notes that the appeal against the abolition of his post was, as the Appeals Committee concluded, time-barred and states that he "does not impugn these findings". Nonetheless, he "requests the Tribunal to examine the circumstances surrounding the abolition of his post [...] in order to determine whether the decision to terminate his contract was tainted with abuse of authority". A similar concession is made by the complainant about irreceivability in relation to the "refusal of agreed termination". The Appeals Committee concluded the "refusal of agreed termination" was irreceivable, because it had not been raised in the initial appeal to the Director-General. That is to say, the complainant does not challenge the failure to provide for agreed termination and accepts that that issue was and remains irreceivable, but nonetheless argues that this failure is relevant to whether the termination of his contract was tainted with abuse of authority.

5. There is some support in the Tribunal's case law for the proposition that it is open to the Tribunal to examine the circumstances surrounding the abolition of a post in a challenge to the subsequent termination of a staff member's employment, even if no legal challenge was made, within time or at all, to the abolition of the post itself (see Judgment 3172, consideration 16). However even if, in the face of more recent case law referred to in the preceding consideration, it is open to the Tribunal to do so, it is for the limited purpose of, for example, ascertaining whether there has been an abuse of authority which entails consideration of whether the decision was taken for an improper purpose. The case law certainly does not provide a licence to examine all or any other aspects of the decision to abolish the post in the context of dealing with a challenge to the subsequent termination of employment.

6. In the complainant's pleas under the first heading concerning the abolition of his post, it is not established that the abolition of the post was for an improper purpose. That is to say, it is not established that the abolition of the post was for a purpose other than the stated purpose, namely a reorganisation of the Division with the reduction of posts in order to effect cost savings within the Organization. The gist of the complainant's argument is that the restructuring could have been done differently and perhaps should have been done differently with the result that his position would not have been abolished. But that is well short of demonstrating improper purpose. A specific criticism concerning the lack of communication about reasons, even if justified, does not sustain an inference in all circumstances that the abolition of the post involved an abuse of authority. There is no support for the complainant's concluding argument that the "unnecessary abolishment of the post was merely a first step in a series of progressive steps to prematurely end the complainant's contract".

7. Under the third heading, duty of care, the complainant maintains further pleas about the abolition of his post. None are expressly directed to an abuse of authority. Nor, in substance, are they directed to that issue. Rather they are specific arguments concerning the way his post was abolished (which demeaned him), that he had

allegedly been the subject of unequal treatment compared to others at the P-5 level, that he was misled about what might happen if he refused an agreed termination and that a post description of a position for which he was recommended by the Redeployment Task Force (but the transfer was rejected by the Director of OHR at the behest of the Director CIO) had been manipulated. These matters do not address the question of whether his post was abolished for a reason other than the stated reason. The pleas are, in relation to the abolition of his post, unfounded.

8. However it is open to the complainant to impugn the redeployment process, as he does in his pleas under his second heading, if a failure to redeploy him has led to the termination of his employment (see, for example, Judgment 3727). The first specific topic the complainant addresses under his second heading, concerns the failure to appoint him, as part of the redeployment process, to the position of Chief, Global Operations Branch, CIO. As discussed in the preceding consideration, his appointment to this position was proposed by the Redeployment Task Force. The draft job description for this position required ten years of relevant management experience “out of which the last three to be in managing infrastructure and operations including user support for a large user base, data centre and global networks”. The basic point made by the Director CIO, in a letter dated 21 November 2013 to the Director OHR opposing the complainant’s transfer to this position (a proposition accepted by the Director OHR), was that the complainant did not have relevant recent experience. In his pleas the complainant seeks to demonstrate that either these requirements involving recent experience were unnecessary or, in relation to other positions with similar requirements, those requirements were ignored. He also argues, as noted earlier, that the job description was “manipulated”. However, the Tribunal is not satisfied that the decision not to approve the recommendation to transfer the complainant to the position of Chief, Global Operations Branch was not a bona fide assessment by the Director CIO and the Director OHR about the FAO’s future needs in this regard, the qualifications required of the individual leading this area, and that the complainant did not possess those qualifications.

9. A specific criticism is made by the complainant that if, as was the case with him, the Director OHR did not approve the recommendation of the Redeployment Task Force, then paragraph (e)(ii) of the Redeployment Guidelines required the case to be resubmitted to the Redeployment Task Force, and this did not occur. The FAO answers this argument in its reply by saying that the Director OHR, after she had communicated her rejection of its recommendation, had constant oral and written exchanges with members of the Redeployment Task Force who continued thereafter to look for a suitable post to which the complainant could be redeployed. There is no rejoinder challenging these facts and the Tribunal accepts them. Accordingly paragraph (e)(ii) was, in substance, satisfied.

10. Further criticism is made by the complainant about the failure to consider him for alternative assignments and reference is made to several positions he says he could have been redeployed to. However, his pleas on this topic are at a highly generalised level and do not provide a foundation for a conclusion that the redeployment process was legally flawed.

11. The issues raised by the complainant under the fourth and fifth headings, withholding evidence and delay respectively, are of substance. The first topic concerns the provision to the Appeals Committee of a memorandum setting out the reasons of the Director, CIO for not accepting the complainant's reassignment to the position of Chief, Global Operations Branch, CIO. The FAO does not contest that the document was provided to the Committee but not the complainant but notes, as the Appeals Committee did in its report, that the document was marked "strictly confidential". However this does not provide a basis for exceptionally not providing the complainant with a copy of a document, and potentially an important document, in adversarial proceedings such as the internal appeal where the document is relied on by the Organization (see, for example, Judgments 3688, consideration 29, 3586, consideration 16, and 3862, consideration 11). The complainant was entitled to see the evidence advanced by the FAO in the internal appeal in order to equip him to provide rebutting evidence or to otherwise

question the evidence or comment on it. The complainant was denied this opportunity. He is entitled to moral damages.

12. As to delay in the internal appeals process, the Tribunal notes that the internal appeal to the Appeals Committee was lodged on 23 June 2014. The Committee, it appears, did not meet to consider the case until 14 October 2015 and reported on 19 February 2016 resulting in a decision of the Director-General on 9 May 2016. This delay is excessive (though the time taken for the initial appeal to the Director-General is not) and no explanation or answer is provided by the FAO in its reply. Indeed it makes no submissions on this question at all. The complainant is entitled to moral damages for this delay.

13. The Tribunal assesses the moral damages for the matters referred to in the preceding two considerations at 16,000 euros.

14. The complainant has been successful, in part, in these proceedings and is entitled to an order for costs, which the Tribunal assesses in the sum of 1,000 euros. All other claims should be dismissed.

DECISION

For the above reasons,

1. The FAO shall pay the complainant 16,000 euros in moral damages.
2. The FAO shall pay the complainant 1,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ