

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M.
v.
FAO

121st Session

Judgment No. 3594

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms I. M. against the Food and Agriculture Organization of the United Nations (FAO) on 16 September 2013, the FAO's reply of 4 March 2014, the complainant's rejoinder of 17 April and the FAO's surrejoinder of 1 August 2014;

Considering Article II, paragraph 5, 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 contests the decision to abolish her post and not to renew her fixed-term appointment.

The complainant joined the FAO in July 2002 and until June 2007 she worked for the Organization under various types of temporary appointments. In July 2007 she was granted an 11-month short-term appointment as an Emergency Operations Officer, at grade P-2, in the Emergency Operations Service for Asia, Near East and Europe (TCES) of the Emergency Operations and Rehabilitation Division (TCE). This appointment was subsequently extended to 28 February 2009. On 1 March 2009 it was converted to a fixed-term appointment running until 28 February 2010. In March 2010 it was extended until 28 February 2011. With effect from 1 August 2010, the complainant was transferred

together with her post from the FAO's headquarters in Rome to Jerusalem; she was assigned to the West Bank and Gaza Strip (WBGs) programme and her appointment was extended until 31 July 2011.

At a meeting held on 7 June 2011, the Chief of TCES told the complainant that, as a result of the WBGs programme prospects and the TCE Human Resources plan for 2012, her post would be abolished on 31 December 2011 and she would only be offered an extension until then. This was confirmed in writing on 9 June 2011.

By an e-mail of 17 June 2011, staff members of TCES were informed that several headquarters posts would have to be transferred to the field, due to adjustments in the staffing structure of TCE at headquarters. The e-mail listed a number of P-3 and P-4 posts in various duty stations which would become available in the coming months, including a P-3 post of Emergency Programme Officer in Jerusalem, West Bank and Gaza Strip. It invited concerned staff members to express their interest in a transfer to any of the field posts listed therein and it stated that successful candidates would be selected by the TCE Senior Management based on the post requirements, their knowledge and experience. Individual e-mails were subsequently sent to staff members in TCE re-inviting them to express their interest or confirming their preferences.

In the meantime, on 29 June 2011, the complainant wrote to the Chief of TCES seeking confirmation of what had been communicated to her at the 7 June meeting, namely that her post would be abolished on 31 December 2011 and that a P-3 post of Emergency Programme Officer in Jerusalem, West Bank and Gaza Strip, would be advertised and possibly filled by 31 December 2011. The Chief of TCES replied on 2 August 2011; he confirmed that the complainant's post would be abolished but he added that the P-3 post of Operations Officer at headquarters would be transferred to the field in Jerusalem.

On 25 October 2011 the complainant lodged an appeal with the Director-General against the decision of 2 August 2011 to abolish her post and to terminate her employment with the FAO on 31 December 2011. Following the rejection of her appeal by the Assistant Director-General on 27 December 2011, she filed an appeal with the Appeals

Committee on 13 February 2012. The Appeals Committee submitted its report on 11 March 2013. It concluded that, while the FAO had complied with its legal framework and with the case law with regard to the non-renewal of the complainant's appointment, its lack of engagement in trying to explore alternative options for reassignment or redeployment fell short of what could have been "morally expected" under the circumstances. The Appeals Committee nevertheless found no evidence to support the complainant's claims, in particular the claim that she had been singled out in a discriminatory manner, since at least 44 of her colleagues had found themselves in the same situation. It thus recommended that the appeal be dismissed. By a letter of 17 June 2013 the Director-General notified the complainant of his decision to dismiss her appeal. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order her reinstatement effective 1 January 2012. She claims material damages for the loss of salary and allowances from 1 January 2012 and moral damages for unequal treatment. She also claims costs for the internal appeal proceedings as well as the proceedings before the Tribunal.

The FAO submits that the non-renewal of the complainant's appointment was lawful and that she has therefore not suffered any damage as a result of an illegal or improper act by the FAO. It requests the Tribunal to reject the complaint and the complainant's claims in their entirety.

CONSIDERATIONS

1. The complainant was employed by the FAO on a fixed-term contract on a project post as an Emergency Operations Officer at grade P-2 in the Emergency Operations Service for Asia, Near East and Europe (TCES) of the Emergency Operations and Rehabilitation Division (TCE). With effect from 1 August 2010, the complainant and her post were transferred from headquarters in Rome to Jerusalem and she was assigned to the West Bank and Gaza Strip (WBG) programme.

2. On 7 June 2011 the Chief of TCES informed the complainant orally that due to an anticipated shortfall in funding and the consequent need to restructure TCE, her contract would be extended for a final period from 1 August to 31 December 2011, at which point her post would be abolished. The Chief of TCES confirmed the abolition of her post with effect from 31 December 2011 in an e-mail dated 2 August 2011. He also mentioned that the P-3 Operations Officer position at headquarters would be transferred to the field level in Jerusalem.

3. On 25 October 2011 the complainant appealed to the Director-General the decision to abolish her post and not to renew her contract beyond 31 December 2011. On 27 December 2011, on behalf of the Director-General, the Assistant Director-General rejected her appeal, recalling the reasons for the abolition of her post and the non-renewal of her contract which had been provided to her by the Chief of TCES in the meeting and follow-up e-mail mentioned above. The complainant filed an appeal before the Appeals Committee on 13 February 2012. In its report dated 11 March 2013 the Committee recommended that the Director-General reject her appeal. In a letter dated 17 June 2013, the Director-General endorsed the Committee's recommendation and dismissed the complainant's appeal. That is the impugned decision.

4. The complainant bases her complaint on the following grounds:

- (a) she was denied an equal opportunity to apply for an alternative assignment, as she was the only Emergency Operations Officer with a contract expiring in 2011 who was not invited to apply for a transfer; unlike the Emergency Operations Officers in Rome and Jamaica, whose contracts were identical in nature to hers, she was not invited to express her interest in any of the available field posts;
- (b) none of the other 27 international field staff members, who were separated from service in 2011, was an Emergency

Operations Officer assigned to a post that managed groups of projects;

- (c) her transfer from Rome to Jerusalem in 2010 did not justify a loss of the opportunity to compete for reassignment in the same way as her colleagues who had remained in Rome;
- (d) the abolition of her post and its replacement with a P-3 post was arbitrary. The FAO's alleged need to streamline operations in the WBSG programme was illusory, having regard to the fact that the first and second individuals who were considered for the P-3 post in Jerusalem turned it down, and the third individual, who was ultimately selected for the post, did not meet the minimum selection criteria, given that he had previously never been involved in the Middle East desk and he had no knowledge of the WBSG portfolio or of the Arabic language; and
- (e) the FAO has not properly justified its decision to abolish her post and to deny her the opportunity of reassignment.

5. The FAO submits that the complainant's P-2 post was abolished and the P-3 Operations Officer post at headquarters was transferred to the field in Jerusalem in the context of a restructuring of the TCE, which was due to the need to strengthen the field offices and to face the expected shortfall in the TCE's funding for 2012. It points out that decisions on how to restructure are within its discretion and that the Tribunal's power of review in this respect is limited. It asserts that there was no discrimination against the complainant as all field-based staff on project posts were treated equally. It also asserts that none of the field-based Operations Officers was invited to express interest in reassignment or to apply for transfer, except for the unique case of the Emergency Operations Officer in Jamaica who was invited in error. The FAO considers that the reassignment exercise was validly limited to headquarters-based staff.

6. The Tribunal accepts that the abolition of the complainant's post was decided by the FAO in the exercise of its discretionary power to restructure due to the need to strengthen the field offices and to cope with the difficulties stemming from the anticipated shortfall in funding for 2012. The FAO clarified its plan to restructure, inter alia, TCE in its memorandum of 1 July 2011, noting that the TCE changes would include "transfer to the field of P positions with change of Terms of Reference (11)" and "abolition of encumbered P positions (5)". As mentioned above, the complainant was first notified of the abolition of her post in the meeting of 7 June 2011, and it was confirmed in writing on 9 June 2011. Therefore, the Tribunal finds that the complainant was informed in a timely manner that, as a result of the restructuring, her post would be abolished on 31 December 2011 and, in light of the above, it can be concluded that the FAO provided valid reasons for the abolition of her post.

7. The complainant's claim that the P-3 Operations Officer, who was selected for the WBGGS post, was randomly chosen and did not have the competence required is irrelevant as the complainant could not expect to be upgraded to a P-3 post and therefore she has no interest in the results of that reassignment. In any case, her allegations in this respect have not been proven.

8. The Tribunal, nevertheless, finds that to the extent that the complainant alleges an inequality of treatment in the reassignment exercise and a consequent unlawfulness of the decision not to renew her contract, the complaint is well-founded. The Tribunal considers that the fact that the complainant's colleagues working at headquarters in Rome and holding project posts under contracts with essentially the same terms of reference as hers were invited and considered for a transfer to the field while she was not, demonstrates a lack of transparency and does not appear justified or logical. The FAO points out that the complainant's position was different from that of headquarters-based staff members because their posts were to be transferred to the field or abolished and it asserts that that difference required different treatment. This argument, which appears to be the only reason provided to justify

the refusal to invite the complainant to apply for a transfer, is not convincing. The different position described above does not imply a relevant difference warranting the contested different treatment (see Judgment 2313, under 5).

9. The Tribunal notes that the complainant and her post were transferred from Rome to Jerusalem with effect from 1 August 2010 when the process of restructuring had already begun (as shown in a memorandum of 1 July 2011, appended by the FAO to its reply, according to which “[i]n line with the Organization’s reform process, [Technical Cooperation] has undergone a developmental renewal and restructuring process that was implemented as of 2010”). It can be inferred that the complainant’s transfer to Jerusalem already constituted an act of the decentralisation policy implementing the restructuring process.

10. The Tribunal observes that by an e-mail of 17 June 2011 the Rome-based Emergency Operations Officers were given a list of available P-3 and P-4 field posts for which they could apply. This list was amended in the subsequent e-mails sent individually to staff members to also include four P-2 posts. The invitation to apply for a transfer was only extended to the Rome-based staff (and later, also to one P-2 Jamaica-based Emergency Operations Officer). Regarding this argument raised by the complainant, the Appeals Committee considered that the e-mail sent to this P-2 Officer working in Jamaica “clearly made reference to the staff member’s current field duty station” and “the invitation of this field-based P2 Operations Officer had clearly not been an oversight”. It can be added that this invitation to apply for a transfer was sent by an e-mail dated 31 October 2011, i.e. more than four months after the general invitation was sent to the Rome-based Officers. This occurrence confirms that the FAO expressly and intentionally decided to extend the invitation to the Jamaica-based Operations Officer and this cannot be considered as having been done in error. The Tribunal concludes that the fact that the complainant was working in the field did not put her in a relevantly different situation from the Rome-based Emergency Operations Officers, which would

have justified the different treatment and thus the FAO violated the principle of equal treatment by not inviting her to apply for a transfer.

11. It follows that the FAO could not decide that the complainant's contract would not be renewed without having given her the same opportunity that was offered to the Rome and Jamaica-based Officers, i.e. to apply internally for a transfer to another field post of the same grade. Accordingly, the decision not to renew her contract was taken in violation of the principle of equality.

12. The complainant is not entitled to reinstatement or material damages on the basis that her contract should have been renewed, as a fixed-term contract carries no right to renewal. It should be noted that there is no guarantee, even if the complainant had been allowed to apply for a transfer, that she would have been successful and that her contract would have been renewed, but the Tribunal recognises that she lost a valuable opportunity to have the question of her contract renewal properly considered on the basis of a decision on her application for a P-2 field post. Accordingly, the complainant is entitled to material damages for the loss of opportunity to be considered for a contract renewal (see Judgments 2678, under 16 and 17, and 2873, under 10). Taking into account that the complainant has been working at the FAO headquarters in Rome as a consultant since March 2012, the Tribunal sets the amount of material damages at 10,000 euros. Additionally, the FAO shall pay the complainant moral damages for subjecting her to unequal treatment, thereby causing injury to her dignity and reputation; the Tribunal sets the amount of moral damages at 12,000 euros. As the complainant succeeds in part, she is entitled to costs which the Tribunal sets at 800 euros.

DECISION

For the above reasons,

1. The FAO shall pay the complainant material damages in the amount of 10,000 euros.

2. It shall pay her moral damages in the amount of 12,000 euros.
3. It shall also pay her costs in the amount of 800 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 20 October 2015, Mr Giuseppe Barbagallo, Vice-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 3 February 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ