

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Z.

v.

FAO

127th Session

Judgment No. 4066

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms B. M. Z. against the Food and Agriculture Organization of the United Nations (FAO) on 2 July 2016 and corrected on 3 August, the FAO's reply of 17 November 2016, the complainant's e-mail of 20 March 2017 informing the Registrar of the Tribunal that she did not wish to enter a rejoinder and the FAO's further submissions of 6 July 2018;

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 not to promote her in the 2013 promotion exercise.

The complainant is a staff member of the World Food Programme (WFP), an autonomous joint subsidiary programme of the United Nations and the FAO. Beginning in June 2010, she was assigned to positions at the P-4 level while retaining her P-3 grade.

In the 2013 promotion exercise, the complainant's first-level supervisor recommended that she be promoted from grade P-3 to P-4. After having interviewed the complainant, the Career Discussion Panel (hereinafter the "CDP") did not recommend the complainant for

promotion. The CDP gave her oral feedback in November 2013 and on 10 December she received its written feedback through the Performance and Competency Enhancement (PACE) platform.

On 13 December 2013 the complainant lodged an appeal with the WFP Executive Director requesting that the CDP's recommendations and the decision not to endorse her first-level supervisor's recommendation for promotion be set aside, and that a new decision be taken. She also sought the removal of remarks made by the CDP from her personnel file.

By a letter of 13 March 2014 the WFP Executive Director rejected her appeal on the ground that there was no flaw in the decision not to recommend her for promotion.

The complainant appealed against that decision before the Appeals Committee, asking for a decision to promote her to be taken or, alternatively, that the Executive Director be ordered to fully consider her promotion to the P-4 grade and to provide her with a detailed decision on this. She also claimed damages for unfair and discriminatory treatment in the amount of two years' net base salary, as well as damages equivalent to the difference between the salary she had received and the salary "owed since taking up functions at the higher grade" and the removal of remarks made by the CDP from her personnel file.

In its report of 25 June 2015 the Appeals Committee found that some of the complainant's claims were irreceivable for failure to exhaust internal remedies. It found that the CDP was not properly constituted and that its line of questioning had been inappropriate. It recommended that the CDP's decision not to recommend the complainant for promotion be set aside, that its "conclusions" be removed from her personnel file and that her application for promotion be remitted to the WFP Executive Director for review.

By a decision of 29 March 2016 the FAO Director-General decided to dismiss her appeal as partially irreceivable with respect to the claims she had raised for the first time before the Appeals Committee, and as otherwise unfounded, as the procedure and criteria used during the 2013 promotion exercise had been in accordance with the applicable rules. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order her promotion to grade P-4 with effect from 1 January 2014. Subsidiarily, she asks the Tribunal to remit the case to the WFP Executive Director for a new decision giving proper weight to her long years of service at the P-4 level, or to order reconsideration by the Executive Director for preferential promotion in view of her longstanding performance of functions at a higher level. She seeks retroactive payment of the difference between her salary at grade P-3 and the salary owed to her since taking functions at a higher level in June 2010 and claims moral damages in the amount of two years' net base salary, as well as additional moral damages for the delay in acting on her request to promote her and for the delay in the internal appeal proceedings. Lastly, she asks the Tribunal to order the removal of the CDP's "conclusions" from her personnel file and to award her 5,000 euros in costs.

The FAO submits that the complaint is partially irreceivable for non-exhaustion of internal remedies and otherwise unfounded.

By a letter of 6 July 2018 the FAO filed further submissions informing the Tribunal that it had decided to promote the complainant to grade P-4 with effect from 1 January 2018.

CONSIDERATIONS

1. The complainant impugns the decision which the Director-General issued on 29 March 2016, dismissing her internal appeal, contrary to the recommendations of the Appeals Committee. Her complaint had its genesis in her initial appeal by e-mail to the Executive Director on 13 December 2013 against the decision by the CDP not to recommend her for promotion from grade P-3 to grade P-4 in the second phase of the 2013 promotion exercise notwithstanding her first-level supervisor's recommendation. In that initial appeal, she asked that the CDP's decision be set aside and that a decision be taken to ensure a fair consideration by the Professional Promotion Panel (PPP). She claimed that the CDP was not properly constituted, that its line of questioning was

inappropriate and she also sought the removal of remarks made by the CDP from her personnel file.

In her subsequent appeal, the complainant asked the Appeals Committee to recommend to the Director-General that the Executive Director's decision to reject her claims be set aside; that a decision be taken to promote her to grade P-4, or, alternatively, that the Executive Director be ordered to fully consider her promotion to that grade and to provide her with a detailed decision on this; to remove the CDP's "negative and baseless comments" from her personnel file; to award her damages in the amount of two years' net base salary for unfair and discriminatory treatment; and to pay retroactively the difference between the salary she received and the salary owed to her since taking up functions at a higher grade.

2. The Appeals Committee first found that some claims in the appeal were irreceivable, in the context of Section 331 of the FAO Manual and the Tribunal's case law, as they were not raised in the initial appeal of 13 December 2013. It found, secondly, that the WFP had breached the principle which requires every authority to abide by the rules which it has itself established, as the CDP was not constituted in accordance with the 2013 Promotion Procedures. The Appeals Committee found, thirdly, that when it interviewed the complainant, the CDP asked her an inappropriate question concerning her work-life balance, which is not in the list of criteria for merit-based promotions provided in the 2013 Promotion Procedures. The Appeals Committee therefore recommended that the CDP's decision not to recommend the complainant for promotion be set aside, that its "conclusions" be removed from her personnel file and that the complainant's application for promotion be remitted to the Executive Director for her careful review. In the impugned decision the Director-General rejected these recommendations and maintained the Executive Director's initial decision.

3. The Tribunal's case law does not guarantee to staff members of an international organization an automatic right to promotion (see Judgment 3495, under 11). It is also well established that an organization has a wide discretion in deciding whether to promote a staff member.

For this reason, such decisions are subject to limited review. The Tribunal will only interfere if the decision was taken without authority; if it was based on an error of law or fact, some material fact was overlooked, or a plainly wrong conclusion was drawn from the facts; if it was taken in breach of a rule of form or of procedure; or if there was an abuse of authority (see Judgments 2835, under 5, and 3279, under 11). Additionally, the Tribunal has stated that since the selection of candidates for promotion is necessarily based on merit and requires a high degree of judgement on the part of those involved in the process, a person who challenges it must demonstrate a serious defect in the decision (see Judgment 1827, under 6). The breach of a procedural rule is a flaw on the basis of which a decision not to promote a staff member may be set aside (see Judgment 1109, under 4).

4. The FAO raises receivability as a threshold issue submitting that the complainant did not raise in her internal appeal some of the issues which she raises in her complaint. However, the Tribunal finds that the FAO has not distinguished between new pleas, which the complainant may rely on to support her claims, and new claims, which would be irreceivable as they extend the scope of the claims submitted during the internal appeal process (see Judgment 4009, under 10, and the judgments cited therein).

5. On the merits, and not considering the relief claimed, the following are the receivable grounds on which the impugned decision is challenged:

- (i) contrary to the 2013 Promotion Procedures, the CDP was not properly constituted;
- (ii) the CDP's line of questioning in the oral discussion was inappropriate;
- (iii) there was a breach of procedure in the oral feedback session;
- (iv) the promotion procedure was severely flawed as the CDP's written feedback report does not show that the assessment criteria were applied in the manner required under the 2013 Promotion

Procedures but were applied in a manner that evinced bias, unequal treatment, prejudice and retaliation against the complainant;

- (v) at the time of the 2013 promotion exercise the complainant had been performing higher-level functions for some four years without compensation, which, in addition to her outstanding performance, created a right to promotion and concomitant compensation; and
- (vi) there was excessive delay in the promotion process and in the internal proceedings.

6. The evaluation process prescribed for merit-based promotions from the P-3 to the P-4 grade in the FAO's 2013 Promotion Procedures provided for a three-phased assessment. In the first phase, the staff member was to be assessed by her or his first-level supervisor through the online assessment form, made available through the PACE platform. For staff recommended at the first level, the completed online assessment was to be forwarded to the responsible second-level manager – the Division Director or the Regional Director – in charge of conducting the second level assessment. This second phase was to consist of a career discussion with recommended staff members conducted by the CDP, chaired and convened by the Division Director or the Regional Director in addition to two members they nominated, with an “HR representative” present to facilitate the meeting. The other members of the Panel were not to include the first-level supervisors. They were to be “preferably from a different function within the Bureau or different division at HQ”. Human Resources was to provide a standard set of criteria to facilitate the career discussion session and, based on the outcome of the discussion, second-level managers were to determine whether to endorse the recommendation of the first-level supervisor and would include comments on the online recommendation system. The session was to serve “the dual purpose of enabling the managers at Director level to know their staff” and to give staff “the opportunity to express themselves in order to substantiate the recommendation for promotion”. Where a further recommendation for promotion emerged from this session, the PPP was to convene to make the final assessment (the third phase). Where however, it did not result in further

recommendation, the Division or the Regional Director was required to provide constructive feedback to the staff member, who was also to receive a copy of the form in which she or he could add comments.

7. Whether the CDP was improperly constituted, as the complainant contends in the first ground of the complaint, is a function of interpretation. It is a basic rule of interpretation that words which are clear and unambiguous are to be given their ordinary and natural meaning and that words must be construed objectively in their context and in keeping with their purport and purpose (see, for example, Judgments 4031, under 5, and 3744, under 8). The first ground of the complaint is well founded. In clear and unambiguous words the 2013 Promotion Procedures conferred the critical responsibilities upon the Division or Regional Director to chair the CDP and to “conduct career discussion sessions with the recommended staff members”. The 2013 Promotion Procedures also expressly required either the Division or Regional Director to provide constructive feedback to a candidate who was not recommended by the CDP to go on to the third phase of the promotion process. One of the stated purposes for so constituting the CDP was to enable the managers at Director level to know their staff. Against this background, the Appeals Committee correctly found that the Promotion Procedures were breached when the Director, Office of Gender, was appointed to chair the CDP. The FAO was bound by the rules that it had itself promulgated in the 2013 Promotion Procedures. While the rules are not entirely harmonious, it is clear they create, for obvious reasons, an overarching objective that the chair of the CDP is familiar with the work of the candidate. It was necessary to comply with this provision, even if it gave rise to tension in the application of the rules to the composition of the PPP. It follows that the CDP was improperly constituted for the oral feedback session as well, with the result that the third ground of the complaint is also well founded. It was also improperly constituted for the written feedback report.

8. The Appeals Committee also correctly found that the CDP’s line of questioning in which it asked the complainant questions supposedly concerning her work-life balance was inappropriate. The Tribunal considers that the second ground of the complaint is well founded,

because the subject line of questioning was couched in pejorative terms and did not address the stipulated criteria for merit-based promotions, which criteria were expressly intended to invite the CDP to consider the complainant's history of achievement and her successful performance at the grade which she held at the material time, as well as her potential to perform at the next level.

9. The written feedback report was brief and its analysis could have been more ample. However, its contents were not so inadequate to lead to the conclusion that it was flawed, as the complainant contends in the fourth ground of the complaint. Moreover, the complainant has not proved that the assessment criteria were so applied in it by reason of retaliation, bias or prejudice against her. Neither has she proved that she was subjected to unequal treatment in that she was treated differently from other staff members who were in like situations in the subject promotion procedure (see, for example, Judgment 3868, under 6). Ground four of the complaint is accordingly unfounded.

The fifth ground of the complaint in which the complainant states that at the time of the 2013 promotion exercise she had been performing higher-level functions for some years without compensation, which, in addition to her outstanding performance, created a right to promotion and concomitant compensation is unsustainable. This is because of the Tribunal's case law which states that a staff member of an international organization does not have an automatic right to promotion and that an organization has a wide discretion in deciding whether to promote a staff member.

10. Regarding the sixth ground of the complaint, it is the Tribunal's view that the internal proceedings followed a fairly normal time-frame up to the date on which the Appeals Committee issued its report on 25 June 2015. The fact that the impugned decision was taken some nine months subsequently was an unreasonable delay, which entitles the complainant to compensation for which she will be awarded 2,000 euros.

11. In addition to setting aside the impugned decision because of the breaches found in considerations 7 and 8 of this judgment, the complainant will be awarded moral damages in the total amount of 17,000 euros, inclusive of the 2,000 euros awarded in consideration 10 of this judgment. She will also be awarded 1,000 euros in costs.

It is not within the Tribunal's competence to promote the complainant to the P-4 grade. However, as the impugned decision will be set aside, the matter will be remitted to the FAO for it to reconsider the decision not to promote her to the P-4 grade in 2013.

12. As to the complainant's request that the CDP's written feedback be removed from her personnel file, consistent precedent requires that a staff member should be notified of any document that is placed on her or his file and be given an opportunity to respond to it (see, for example, Judgment 3487, under 9). The written feedback is an integral part of the complainant's personnel file. The record shows that the complainant had an opportunity to respond to the written assessment. Her written response also forms part of her file. No order to remove the written feedback from her personnel file will be made. It is also assumed that the present judgment will be included in her personnel file.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The matter is remitted to the FAO in accordance with consideration 11, above.
3. The FAO shall pay the complainant 17,000 euros in moral damages.
4. The FAO shall pay the complainant 1,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 23 October 2018, 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 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ