

S. (No. 2)

v.

FAO

121st Session

Judgment No. 3595

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. B. S. against the Food and Agriculture Organization of the United Nations (FAO) on 24 June 2013 and corrected on 30 September, the FAO's reply of 13 December 2013, the complainant's rejoinder of 7 April 2014, corrected on 14 April, and the FAO's surrejoinder of 22 July 2014;

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 both the decision to separate him from service with effect from 3 December 2010 and his non-selection for the post of Chief Technical Advisor for project GCP/AFG/058/NOR advertised under vacancy announcement RAP-581-10-PRJ.

Facts relevant to this case can be found in Judgment 3386, delivered on 9 July 2014, concerning the complainant's first complaint. Suffice it to recall that in March 2008 the complainant was appointed under a one-year fixed-term contract at grade P-5 for a project UTF/AFG/049/AFG. On 31 March 2009 his contract was extended for one year. Following a decision to prematurely close the aforementioned project, by a letter of 4 December 2009 he was notified that he would

be transferred to the P-5 position of Chief Technical Advisor/Coordinator for project GCP/AFG/058/NOR with effect from 1 January 2010.

While he was employed as Chief Technical Advisor/Coordinator, the complainant's appointment was extended four times until 30 November 2010. It was then exceptionally extended until 3 December 2010 (at which point he separated from service), in order for him to be able to return to his home station while he was still under contract.

In the meantime, in August 2010 a vacancy announcement for the post of Chief Technical Advisor for project GCP/AFG/058/NOR was issued. The complainant applied and was interviewed for the post. On 7 February 2011 he was informed by the Administration that he had not been selected.

The complainant contacted the Ethics Officer on 24 February 2011 and, following conversations in March and April with the Chief of the Administrative Law Management Branch (CSHL), he wrote to Chief of the CSHL on 2 May regarding any possible justifiable grievance he might have concerning his separation from the FAO. In an e-mail of 31 May the Chief of the CSHL informed him that no issues had been identified that would provide the grounds for a grievance and provided reasons for that conclusion.

On 4 July 2011 the complainant submitted his first complaint to the Tribunal. In Judgment 3386 the Tribunal dismissed that complaint summarily as irreceivable for failure to exhaust the internal means of redress.

On 18 July 2011 the complainant lodged an appeal with the Director-General in which he challenged what he characterised as the change in the nature of his contract and the process related to the competition for the post of Chief Technical Advisor for project GCP/AFG/058/NOR, including his non-selection for that post. He claimed various forms of relief. By a letter of 16 September from an Assistant Director-General the complainant was informed that his appeal was dismissed as time-barred and without merit and his claim for compensation was without foundation.

In a memorandum of appeal dated 18 November 2011 the complainant lodged an appeal with the Appeals Committee in which he challenged the decision of 16 September. In its report of 7 January 2013 the Appeals Committee found the appeal receivable. It recommended, in addition to recommendations of a general scope, that the complainant be compensated for the lack of transparency and poor management that prevailed from the moment he was transferred to project GCP/AFG/058/NOR, and for the fact that his age improperly played a role in his non-selection for the contested post; the Appeals Committee left it to the discretion of the FAO to determine the appropriate amount of that compensation. The Appeals Committee further recommended that his other requests for relief be dismissed.

By a letter of 22 March 2013 the Director-General informed the complainant that he had decided to reject the Appeals Committee's recommendation with respect to the receivability of the appeal, and to also reject its recommendations that he be compensated for lack of transparency and poor management and for his non-selection for the challenged post on the basis of his age. The Director-General accepted the Appeals Committee's recommendation to dismiss the complainant's other requests. That is the impugned decision.

As preliminary matters, the complainant seeks the disclosure of various documents and he requests oral proceedings. He asks the Tribunal to quash the impugned decision and to order the FAO to pay him all salary, benefits and other emoluments, including pension contributions, for the period 4 December 2010 to 8 January 2012 (which he indicates would have been the date of his statutory retirement had he not separated from service). He seeks 250,000 Swiss francs in moral damages and reimbursement of the actual legal fees and costs incurred in bringing his complaint. He further seeks payment of interest on all amounts awarded by the Tribunal at the rate of 8 per cent per annum, from 4 December 2010 through to the date all amounts awarded are paid in full, and any other relief the Tribunal determines to be just, necessary and equitable.

The FAO asks the Tribunal to reject the complaint *in toto*.

CONSIDERATIONS

1. The complainant, a former staff member, worked at the FAO on various contracts at different times from 1995 until the expiration of his last contract on 3 December 2010. At the time of his separation from service, he was the Chief Technical Advisor for project GCP/AFG/058/NOR in Afghanistan. A vacancy for the post which the complainant last occupied was announced in August 2010 (RAP-581-10-PRJ). The complainant applied and was interviewed but was not chosen as the successful candidate and he was informed of this on 7 February 2011.

2. On 24 February 2011 the complainant addressed an e-mail concerning the circumstances of his separation to the Ethics Officer. Following numerous communications with the Ethics Office, on 25 March 2011 he was directed to the Chief of the CSHL. The complainant spoke with the Chief of the CSHL by phone on 30 March 2011 and 18 April 2011 and sent an e-mail to her on 2 May 2011 with the subject line “[complainant’s name] grievances against FAO”. In that e-mail the complainant relevantly referred to two main issues: the change in the nature of his contract in December 2009, and the age discrimination which he believed played a part in the selection process for vacancy RAP-581-10-PRJ. He stated inter alia “[y]our guidance and further explanation would be very much appreciated. I am trying to understand what actually happened and what are my entitlements and rights in this situation. I am sure you appreciate that time is running and that further delay may be to my disadvantage should I seek to use alternative courses of action that could be available for me to pursue.” He followed up with another e-mail two days later, asking for confirmation of receipt of the e-mail of 2 May and he subsequently called the office again on 27 May.

3. The Chief of the CSHL responded to the complainant’s e-mail of 2 May on 31 May 2011, informing him that no issues that would provide grounds for a grievance were identified; the FAO’s Regulations and Rules were followed throughout the selection process;

no irregularities were identified in the selection process; and while his candidacy was duly considered, the selection process resulted in the appointment of another candidate.

4. Not realising that the proper course was to file an internal appeal against the impugned decisions, the complainant submitted a complaint (his first) to the Tribunal on 4 July 2011 which was summarily dismissed (Judgment 3386) as irreceivable for failure to exhaust all internal means of redress. He lodged an appeal with the Director-General on 18 July 2011 challenging the original decisions (the non-renewal of his contract expiring 3 December 2010 and his non-selection for the post announced under vacancy RAP-581-10-PRJ) on the basis of unlawful non-renewal and age discrimination. By a letter dated 16 September 2011 his appeal to the Director-General was dismissed as time-barred and without merit. The complainant filed his internal appeal with the Appeals Committee on 18 November 2011.

5. In its report dated 7 January 2013 the Appeals Committee found that the appeal was receivable for the following reasons. It noted that the complainant was appealing against an accumulation of events, and that he had become aware of the negative implications “of the change of the nature of his contract” only when he had learned of his non-selection for vacancy RAP-581-10-PRJ. Therefore it found that the 90-day time-limit for appealing a decision, provided for under Staff Rule 303.1.311, had started to run on 7 February 2011. The Appeals Committee considered that the complainant had been in contact with the Ethics Officer and the Chief of the CSHL between 7 February and 9 May (the expiration of the 90-day time-limit), including by sending the e-mail of 2 May 2011 essentially challenging the two above mentioned decisions, yet neither the Ethics Officer or the CSHL had informed the complainant at any time in their correspondence that the appropriate procedure for formally challenging those decisions was the appeals procedure. It stated in this regard that “[i]n light of the functions and competencies of the Ethics Office and the Organization’s Administrative Law Management Branch, [...] it should have been evident to those two Offices that the [complainant] was seriously considering challenging

two identified decisions/processes and that he was obviously mistaken about how he should proceed at that stage” and the Appeals Committee noted that the content of the e-mail of 2 May clearly identified the two decisions/processes that the complainant had challenged in his 18 July appeal and that the e-mail of 2 May was within the 9 May deadline. It further considered that the Ethics Officer, by directing the complainant to the Chief of the CSHL, and the Chief of the CSHL, by providing a clarification on the basis for the FAO’s decisions without providing him at an early stage with minimum information regarding the appeals process, “had misguided him, resulting in a considerable loss of time”.

6. With regard to the complainant’s claims relating to the changes made to his contract in December 2009, the transparency of the process, and the final non-renewal of his contract past the expiry date of 3 December 2010, the Appeals Committee considered that the complainant’s situation could have been managed better. More transparency could have been achieved by providing him with clear information regarding his contractual situation when project UTF/AFG/049/AFG closed prematurely. Also, the vacancy announcement could have been advertised from the start or at least earlier than was done as this could perhaps have “avoided the creation of expectations on the part of the [complainant] which he, having been actively involved in the design of the project, including the securing of its funding, and having apparently been led to believe that it was guaranteed that he would continue working on the project until reaching the mandatory retirement age, inevitably developed”. However, the Appeals Committee found no evidence that any rule had been breached in this regard.

7. Concerning the complainant’s claims regarding the vacancy announcement and selection process for vacancy RAP-581-10-PRJ, the Appeals Committee again found that the situation did not seem to have been handled properly. It noted that the complainant was not notified that the post he occupied would be advertised and the actual vacancy announcement was published while the complainant was away on holidays and that, if it was true that had he not been notified by a member of the Administration he might have missed the opportunity

to apply, it was “very regrettable and [was found] to evidence lack of transparency and poor management on the part of the Organization”. However, the Appeals Committee did not find any evidence of bad faith or a violation of the rules or procedures. In reviewing the additional information made available to it for *in camera* examination, the Appeals Committee observed that, as mentioned by the FAO in its submissions, the complainant’s age and the fact that he was close to the mandatory retirement age had been noted in the selection documentation. The fact that other candidates were “young” or “relatively young” had also been noted. The Appeals Committee also noted that the column “availability” had been left blank for the complainant. The Appeals Committee found that while that could not prove that the complainant’s age was the determining factor in his non-selection, it was clear that his age was a consideration in the selection process and, as the post under review was for a 12-month duration, the entire duration of which the complainant would have been able to serve as he was available to begin immediately and he would have been allowed to work until 31 January 2011, his age “should not even have been considered, and that the fact that it was did not respect the priorities set out in Article VIII(3) of the Organization’s Constitution”. Therefore the Appeals Committee recommended that the complainant be compensated, in an amount to be determined by the FAO, for “the lack of transparency and poor management that prevailed from the moment he was transferred to [p]roject GCP/AFG/058/NOR, and for the fact that his age improperly played a role in his non-selection for [the vacancy announced under] RAP-581-10-PRJ”; and that his other requests be dismissed.

8. In his decision dated 22 March 2013, the Director-General rejected the recommendation of the Appeals Committee with respect to the receivability of the appeal and the recommendation for compensation for the lack of transparency and the fact that the complainant’s age was improperly considered in the selection process for vacancy RAP-581-10-PRJ, on the grounds that he did not find those recommendations well founded. He accepted the Appeals Committee’s

recommendation to dismiss the complainant's "other requests". The complainant's appeal was dismissed in its entirety.

9. The complainant impugns the Director-General's decision of 22 March 2013 on several grounds. First, the dismissal of his appeal as time-barred was unlawful because the FAO erred in not calculating the relevant date from which the time limits stemmed as 7 February 2011. Second, the delay in filing his appeal was attributable to the FAO's failure to direct his request to the proper authority and to provide him with the requested information in a timely manner. Third, as he was already separated from the FAO when he was notified of his non-selection, he had no access to the intranet (and hence the Staff Regulations and Staff Rules) and was under the impression that the internal appeals system was not available to him as a former staff member. Fourth, his separation from service with effect from 3 December 2010 was a case of premature termination. Fifth, his non-renewal was not properly motivated and was not in the interest of the FAO. Sixth, he was not given sufficient notice of his non-renewal. Seventh, the FAO breached its duty of care, its duty to inform and its duty to respect his dignity; and the decision confirming his non-selection was in violation of the principle of equal treatment and non-discrimination as his non-selection was based on his age.

10. The Tribunal finds the complaint to be receivable and founded. The e-mail of 2 May 2011 must be considered as the complainant's timely appeal of the decision notified to him on 7 February 2011 (and the previous non-renewal decision which manifested its damage to him only with the 7 February notification of his non-selection). The e-mail of 2 May clearly stated the decisions he was challenging and furthermore requested information on what his rights were in regard to these decisions. The Chief of the CSHL had a duty to inform him of his mistake and to forward his e-mail to the proper body, and her failure to do so cannot support a claim of irreceivability for failure to contest a decision within the proper time limits (see Judgments 3424, under 8(a), and 3425, under 7, and the cases cited therein).

11. The FAO violated its duty of care and showed a lack of transparency and of respect for the complainant's dignity by not properly informing him of his contractual situation when the original project closed prematurely. Much of what transpired stemmed from a lack of transparency in the period when project UTF/AFG/049/AFG was discontinued prior to the completion of his contract. If the FAO had been clear from the moment that the complainant's contract was in jeopardy of not being renewed in the same fashion (i.e. by another one-year fixed-term contract) he could have prepared himself for the eventualities which might arise, for example, by seeking and applying for other contract options with the advantage of being considered as an internal candidate, preparing to separate from service, or negotiating the terms for the new project GCP/AFG/058/NOR where he was placed for the remaining three months of his contract (followed by the five short renewals). He also could have had the time to research his rights and obligations with regard to the internal appeals process while he had full access to the intranet and the support available to staff members. The FAO's failure to act transparently was a violation of its duty of care and duty to respect the complainant's dignity.

12. The complainant claims that the selection process was vitiated by unequal treatment and discrimination. This claim is founded. As noted by the Appeals Committee, the complainant was hypothetically available to work the entire duration of the 12-month post, therefore his age or future retirement date should have had no consideration in the selection process for vacancy RAP-581-10-PRJ. The Director-General specified in his decision of 22 March that "it should be clarified that project GCP/AFG/058/NOR was for a period of three years, expiring in December 2013. Indeed, [vacancy announcement] RAP-581-10-PRJ indicated that the post of [Chief Technical Advisor], project GCP/AFG/058/NOR, was for a period of '12 months (extendable)'. In this respect, the fact that you would not have been available to serve for the duration of project GCP/AFG/058/NOR was a reasonable consideration to take into account in the selection process." This is mistaken. The FAO cannot presume to require a commitment from its staff that it is not willing to match. Although perhaps in an ideal

scenario, the successful candidate would be available and willing to continue on the project for its total duration, the fact of the matter is that the contract as offered was for a duration of 12 months, therefore the FAO could not require a candidate to demonstrate that she or he was available for longer than that duration. Thus, the complainant's nearing date of retirement, which fell beyond the 12-month contract being advertised, should not have been considered, and certainly not to his detriment.

13. The complainant requests oral proceedings and the disclosure of unspecified documents relating to this matter. In view of the abundant and sufficiently clear submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the aspects of the case that are relevant to the outcome of the dispute and does not therefore deem it necessary to grant the request for oral proceedings. The complainant formulated his request for documents as "any and all" documents in relation to some events, without explaining their potential relevance. The case law provides that the Tribunal "will not order the production of documents on the speculative basis that something might be found to further the complainant's case" (see Judgment 2510, under 7), particularly when the request is made "in the most general terms which are tantamount to a fishing expedition" (see Judgment 3499, under 6, and the case law cited therein). For this reason, the Tribunal disallows the request for documents.

14. As the complainant lost a valuable opportunity to be fairly considered for the position, he is entitled to an award of material damages which the Tribunal sets in the amount equivalent to four months' salary plus all benefits, entitlements and emoluments (in line with the amounts of his last four salary payments), without any statutory deductions, plus interest at a rate of 5 per cent per annum from the date of his separation from service until the date of final payment. For the lack of transparency, breach of duty of care and disregard for the complainant's dignity, he is entitled to moral damages which the Tribunal sets at 20,000 Swiss francs. As his complaint succeeds, he is also entitled to costs which the Tribunal sets at 3,000 Swiss francs.

DECISION

For the above reasons,

1. The FAO shall pay the complainant material damages in an amount equivalent to the last four months of his salary plus all benefits, entitlements and emoluments, without any statutory deductions, plus interest at a rate of 5 per cent per annum from the date of his separation from service until the date of final payment.
2. It shall pay him moral damages in the amount of 20,000 Swiss francs.
3. It shall also pay him costs in the amount of 3,000 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 28 October 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ