

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

J.
v.
FAO

128th Session

Judgment No. 4178

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr K. J. against the Food and Agriculture Organization of the United Nations (FAO) on 6 June 2017 and corrected on 9 June, the FAO's reply of 2 October, the complainant's rejoinder of 29 November 2017 and the FAO's surrejoinder of 20 March 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 grant him a promotion in the 2014 professional promotion exercise.

At the material time the complainant was employed with the World Food Programme (WFP), an autonomous joint subsidiary programme of the United Nations and the FAO, under a fixed-term appointment at grade P-3 in Myanmar. In the context of the WFP's 2014 professional promotion exercise, in September 2014 he was recommended for promotion to grade P-4 by his first-level supervisor; this recommendation was endorsed by the Country Director for Myanmar.

In October 2014 the complainant's candidacy for promotion was considered in a second-level review by a panel convened by the Regional Director of the Bangkok Regional Bureau (RBB). Following this review, the Regional Director included the complainant (as the 12th ranked candidate) in a list of 12 candidates for promotion to be submitted to a Professional Promotion Panel (PPP) for further consideration. On 7 November the complainant was notified by the Administration that the recommendation for his promotion to grade P-4 had been "submitted for final calibration" by the PPP.

By an email of 25 November the Chief of the Individual Performance Strengthening Branch of the WFP Human Resources Division (HRMTS) informed the Regional Director that the proposed list of candidates exceeded the number of slots for promotion allocated to the region (by one candidate) and requested that he correct that issue. The complainant's name was subsequently removed from the RBB's list of candidates for promotion and his promotion file was not presented to the PPP for further consideration.

In early December the Administration issued the list of staff members who had been promoted as a result of the 2014 exercise; the complainant's name was not included. On 9 January 2015 he discussed the matter with the Regional Director. Shortly thereafter he received a copy of his promotion evaluation form which included comments from the Regional Director setting out the reasons for the removal of his name from the list of candidates to be submitted to the PPP.

On 11 February 2015 the complainant submitted an appeal to the Executive Director of the WFP challenging his non-promotion on several grounds. By a letter of 13 April 2015 he was notified that his appeal was rejected.

On 18 May 2015 the complainant lodged an appeal with the FAO Appeals Committee challenging the Executive Director's decision of 13 April. He sought a recommendation that the FAO's Director-General reverse that decision and he claimed reimbursement of his legal fees. In its report of 30 November 2016 the Appeals Committee recommended, among other things, that the appeal be dismissed and that the complainant's claim for reimbursement of legal fees be rejected.

By a letter of 10 March 2017 the FAO's Director-General informed the complainant that he had decided to dismiss the appeal in its entirety. The Director-General concurred with the Appeals Committee's rationale and conclusion that the WFP did not breach its rules on promotion when deciding not to submit the complainant's candidacy to the PPP; the WFP was bound to comply with the mandatory regional quota system. In addition, although the delay by the Administration in notifying the complainant that the PPP would not consider his candidacy might have caused him inconvenience, it did not amount to a denial of justice. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order his promotion to grade P-4 with effect from 1 January 2014, with payment of related salary and allowances. He claims moral damages and he seeks legal fees and other costs in the amount of 5,000 euros for the internal appeal proceedings and the proceedings before the Tribunal.

The FAO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. This complaint arises from the WFP's 2014 professional promotion exercise and the complainant's non-promotion at the conclusion of that exercise. The complainant lodged an internal appeal challenging the WFP's Executive Director's decision not to promote him to the P-4 grade. In the impugned decision of 10 March 2017, the FAO's Director-General endorsed the Appeals Committee's recommendation that he dismiss the appeal.

2. In August 2014, the WFP's Executive Director issued Circular No. OED2014/010 promulgating the "2014 Professional Staff Promotion Exercise (Procedures)" governing the 2014 promotion exercise. The Procedures established a multi-level review process during which eligible staff members would be assessed and ranked in order of priority for promotion during a first and second level review. The candidacy of staff members whose recommendation for promotion was endorsed at the first and second level of review would then be reviewed by the

Professional Promotion Panel (PPP) and the Executive Director would make the final decisions on promotion. The HRMTS served as the PPP's secretariat.

3. As part of the 2014 promotion exercise process, each region had a quota for the number of eligible staff members in the region that could be recommended for promotion. In effect, no more than 25 per cent of the eligible staff members from each region would ultimately be considered by the PPP. As there were 42 staff members including the complainant eligible for promotion in the RBB, the region had a maximum quota of 11 candidates that could be recommended for consideration by the PPP.

4. The central issue in this complaint is whether the application of the allotted quota was mandatory. As the issue arises at the second level review, an overview of the promotion exercise process is useful. The Procedures relevantly provided that the Country Director was "expected to prioritize candidates by endorsing the recommendation of no more than 50% of the eligible candidates" at the first level review. As stated in the Procedures, the second level review was relevantly to be completed by the Regional Director for all candidates under her or his management. The Regional Director conducted a merit-based assessment of each candidate recommended and endorsed at the first level review. Next, the Regional Director convened a panel to conduct a career discussion session with each candidate. After the career discussion session, the Regional Director determined whether to endorse the recommendation for the staff member's promotion. The Procedures relevantly stated that the "[...] Regional Directors are expected to prioritize candidates by endorsing the recommendation of no more than 50% of the staff members who were reviewed at the second level" for consideration by the PPP.

5. In the present case, at the first level review, the Country Director endorsed the recommendation for the complainant's promotion and the complainant's candidacy for promotion was considered at the second level review. On 7 November 2014 the Regional Director

submitted the list of RBB candidates for the PPP's consideration. The complainant was the 12th ranked candidate on the list. On the same day, the complainant was informed on behalf of the Regional Director that his recommendation for promotion to P-4 was "submitted for final calibration by the [PPP]." On 25 November, HRMTS informed the Regional Director that the list of RBB candidates exceeded the region's allotted quota by one candidate and asked him to "review the proposed list and correct this issue". Having not received a response from the Regional Director, on 3 December HRMTS advised the Regional Director that the rules governing the 2014 promotion exercise limited him to advancing a maximum of 11 candidates for review by the PPP.

6. In response, on 4 December the Regional Director put forward two options to remedy the issue. First, he suggested that the complainant's candidacy be "retained by the PPP for the moment and not included in the initial round of processing while an analysis is made by [Human Resources] on whether any other offices [had] rounded down [the results of the calculations of their quotas] so that two '0.5's' could then be allocated to Myanmar". The second option was the removal of the complainant from the RBB's list of candidates based on "a strict application of the quota system". The complainant's name was removed from the RBB list and his file was not submitted to the PPP for consideration. Accordingly, the complainant did not receive a promotion.

7. The complainant contends that the WFP breached the provisions applicable to the promotion exercise, violated the fair process principle, breached its duty of care, and failed to treat him with respect in its handling of his candidacy for promotion. Before turning to the complainant's submissions, two preliminary observations are necessary. First, in several instances in his pleadings, the complainant relies on the provisions in the WFP HR Manual. This reliance is misplaced. Paragraph 6 of the Circular specifically states that the promotion exercise would be governed by the procedures in Annex 1 attached to the Circular "in place of the procedures found in WFP HR Manual Chapter II.6". Second, in his submissions, the complainant takes issue with several of the WFP Executive Director's findings and

observations in her 13 April 2015 decision in response to the complainant's initial challenge to his non-promotion. As the impugned decision in the complaint is that of the FAO's Director-General, the submissions in relation to the 13 April decision will not be considered.

8. First, the complainant submits that according to the statement in the Procedures "[t]he [PPP] will consider the candidacy of the staff members whose recommendation for promotion was endorsed at the first and second level of review". The complainant argues that as his recommendation for promotion was endorsed at both levels of review, the PPP should have considered his case as it did for the other candidates. This submission is unfounded. The provision upon which the complainant relies concerns the next stage of the promotion exercise process and states that the PPP will review the candidates who were successful at the first and second level reviews. As the complainant's candidature for promotion was erroneously endorsed by the Regional Director and later reversed, it cannot be said that his candidature was endorsed at the second level review as contemplated in the provision relied on by the complainant.

9. The complainant's second submission concerns the application of the allotted quota at the second level review. The relevant provision of the Procedures, repeated here for ease of reference, states that the "[...] Regional Directors are expected to prioritize candidates by endorsing the recommendation of no more than 50% of the staff members who were reviewed at the second level". The complainant submits that the language used in relation to the application of the quota, in particular, the words "are expected to" conveys a general expectation that the Regional Directors will apply the quota but does not require a strict adherence to the allotted quota. The complainant's interpretation is flawed as it is based solely on the meaning of the words "are expected to".

10. The principles of statutory interpretation are well settled in the case law. The primary rule is that words are to be given their obvious and ordinary meaning (see, for example, Judgments 3310, consideration 7, and 2276, consideration 4). Additionally, as the Tribunal stated in

Judgment 3734, consideration 4, “[i]t is the obvious and ordinary meaning of the words in the provision that must be discerned and not just a phrase taken in isolation”. The meaning of the phrase “are expected to” read in the context of the complete text of the provision simply conveys to the Regional Directors what they are to do at that point in the process. The provision instructs the Regional Directors to do two things. First, the Regional Directors are to rank the reviewed candidates in order of priority. Second, the Regional Directors are to endorse the recommendation of “no more than” 50% of the candidates reviewed at the second level. The obvious and ordinary meaning of this provision does not allow for any deviation from the specified upper limit of the allotted quota by the Regional Directors. Although the FAO’s submission that the Administration did not breach the applicable provisions in deciding not to submit the complainant’s candidacy to the PPP is correct, it remains that there was a breach of the provision that the recommendations of no more than 50% of the staff members who were reviewed at the second level review would be endorsed.

11. Third, the complainant submits that a decision was taken and he was officially informed by the Regional Director on 7 November 2014 that his candidature had been endorsed by the second level review panel and would be considered by the PPP. He adds that despite this official notification no review of his candidacy for promotion was ever done by the PPP. The complainant takes the position that the notification constitutes a breach of duty of care. Additionally, he submits that the delay in the Administration’s communication that his name had been removed from the RBB list showed a lack of respect and was also a breach of its duty of care. He contends that the WFP should have taken into account the fact that the Regional Director made a mistake and that he should not have to suffer the consequences of that mistake.

12. The FAO acknowledges the Regional Director’s error in submitting the complainant’s candidacy for promotion to the PPP. However, the FAO submits that the WFP did not breach its duty of care or show the complainant a lack of respect. It observes that the 7 November communication accurately reflected the Regional Director’s intention

to advance the complainant's candidacy to the PPP. As well, the Regional Director was required to reverse that action after discovering that he had both exceeded the allocated quota and that no exceptions could be made to the quota limits. The decision to remove the complainant's name from the RBB list for consideration by the PPP was taken on 4 December 2014 and in keeping with the Procedures on 9 January 2015 the Regional Director spoke to the complainant and explained the reason for the removal of his name from the RBB list.

13. On 7 November 2014, although it appears that the Regional Director genuinely supported the complainant's promotion, he knew or ought to have known that the inclusion of the complainant's name in the RBB list did not comply with the instruction in the provision concerning the application of the quota at the second level review and that it may be problematic. The Regional Director's 7 November communication to the complainant was unnecessary and certainly exacerbated the problem he had created. As the Appeals Committee properly observed this type of communication "should be avoided at all costs, especially during an ongoing promotion exercise as [it] could be misleading and wrongly create a sense [of] false hope for those candidates directly involved". Certainly, by 25 November and at the latest 4 December, the Regional Director knew that the complainant's candidacy would not be put forward to the PPP for consideration. At that point, having already informed the complainant that his candidacy was "submitted for final calibration by the [PPP]" as a matter of respect, the complainant should have been promptly informed and given the reason for the removal of his name from the RBB list of candidates put forward for consideration by the PPP.

14. As was stated in Judgment 3353, consideration 26, "[a]n organisation must care for the dignity of its staff members and not cause them unnecessary personal distress and disappointment where this could be avoided". Although the Administration remedied the error itself, as a result of the breach of the provision and the unnecessary communication to the complainant, undoubtedly, the complainant was deeply disappointed by his non-promotion and understandably distressed not knowing for

an inordinate amount of time about what had led to him not being promoted for which the complainant is entitled to an award of moral damages in the amount of 3,000 euros. Given that the complainant was ranked in 12th place and the quota limited the Regional Director's endorsements to 11 candidates, it cannot be said that the complainant suffered any material damage as a result of the breach of the provision.

15. Lastly, the complainant submits that there was inordinate delay in the internal appeals process. He observes that the FAO provided its final submission to the Appeals Committee on 12 August 2015, however, the Committee only issued its report on 30 November 2016 and the Director-General did not issue his decision until 10 March 2017. It is well settled in the case law that internal appeals must be conducted with due diligence and in a manner consistent with the duty of care an international organisation owes to its staff members (see, for example, Judgments 3160, consideration 16, 3582, consideration 3, and 3688, consideration 11). In Judgment 3160, consideration 17, the Tribunal also observed that “[t]he amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations” namely, the length of the delay and the effect of the delay. The complainant submits that he has suffered pain and distress, including as a result of the delay in the internal grievance procedures. It is observed that the FAO did not make a submission in relation to the delay in the appeal process. Accordingly, the complainant is entitled to moral damages in the amount of 1,000 euros. As the complainant succeeds in part, he will be awarded costs in the amount of 500 euros.

DECISION

For the above reasons,

1. The FAO shall pay the complainant moral damages in the sum of 4,000 euros.
2. The FAO shall pay the complainant costs in the amount of 500 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 2019, Mr Giuseppe Barbagallo, 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 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ