

NINETY-THIRD SESSION

Judgment No. 2163

The Administrative Tribunal,

Considering the complaint filed by Mrs M. D. S. against the Food and Agriculture Organization of the United Nations (FAO) on 6 February 2001 and corrected on 18 May, the FAO's reply of 16 August, corrected on 13 September and accompanied by the comments provided by Mrs G. at the Tribunal's request, the complainant's rejoinder of 22 October and the Organization's surrejoinder of 21 December 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1961, entered the service of the FAO in 1981. At the material time, she worked in the Food and Nutrition Division as a clerk-typist at grade G.4.

On 30 September 1998 the Organization published a vacancy announcement for a post of secretary at grade G.5 in the National Agricultural Research Systems Secretariat (NARS) of the Research, Extension and Training Division (SDR) in the Sustainable Development Department. The complainant applied for the post on 2 October. On 10 December the SDR Division submitted to the General Service Staff Selection Committee a short list of four on which the complainant's name was in fourth place. In its recommendation of 16 December 1998, the Committee indicated that "as all the short-listed candidates were equally well qualified, the order of the third and fourth short-listed candidates should be reversed as the fourth short-listed candidate had far more seniority". The list thus modified was submitted to the Deputy Director-General, who, on 5 January 1999, selected the first name on the list. However, in the meantime, the person concerned had accepted a post in another unit in the Organization. The same occurred in the case of the candidate placed second. The list was therefore once again submitted to the Deputy Director-General. At the latter's request, in an e-mail message of 4 March the Director of the Personnel Division reviewed the qualifications of each candidate and what the consequences would be of appointing them. On a printed copy of the message, the Deputy Director-General wrote a note to file on 15 March indicating that he had selected Mrs G. for three reasons: (1) much better academic preparation; (2) the very strong preference of the Department; and (3) the fact that she now had a continuing appointment.

On 5 May the complainant lodged an appeal with the Director-General against this decision. By a letter of 17 June, the Assistant Director-General in charge of the Administration and Finance Department dismissed that appeal. On 15 July 1999, the complainant filed an appeal with the Appeals Committee against this decision. In its report dated 29 August 2000, the Committee recommended rejecting the appeal. It also recommended that the Organization should make every effort to provide the complainant with an assignment commensurate with her qualifications and, to the extent possible, at the level she had postulated. In a letter of 10 November 2000, which is the impugned decision, the Director-General rejected the complainant's appeal, but endorsed the recommendation to appoint her to another post, on the understanding that the selection procedures would be observed.

B. The complainant contends that, if the Director-General does not follow the recommendations of the Selection Committee, he must give the reasons for his decision. She asserts that her application was not examined in good faith and in accordance with the fundamental rules ensuring fair competition between candidates. She adds that the impugned decision was taken following an e-mail message from the Director of Personnel, subsequent to the

Selection Committee's recommendation, indicating the Department's preference for Mrs G. That, she says, constitutes unlawful external interference in the decision-making process. She also considers that where qualifications are equal, as the Selection Committee indicated they were in this case, preference must be given to the candidate with the most seniority.

Furthermore, the three reasons given by the Deputy Director-General to justify the choice of the selected candidate are unfounded. In the first place, although the latter had a higher diploma (a masters degree in Chinese) than the complainant (a high school diploma and certificate in secretarial studies), the complainant had a much better knowledge of foreign languages, including the three languages mentioned in the vacancy announcement. Moreover, as knowledge of Chinese was not a requirement in the announcement, it could not be considered an advantage. Secondly, the preference of the Assistant Director-General in charge of the Sustainable Development Department should not have been taken into account since the rules provide that consultation shall take place in the relevant Division, and not the Department. The Director of SDR appeared satisfied with the Selection Committee's recommendation. The complainant adds that the Executive Secretary of the NARS Secretariat had indicated that the immediate availability of the candidates was a very important factor. However, Mrs G. was on the point of taking maternity leave, which she did in April 1999. In the complainant's view, the appointment of Mrs G. "was intended more to please an Assistant Director-General who wished to reward one of his protégés, than to select a qualified and immediately available candidate in the interests of the Organization". The decision is therefore tainted by misuse of authority and bias. Thirdly, having a continuing appointment was not one of the criteria mentioned in the vacancy announcement. Even so, the complainant specifies that she has had such an appointment since 1991, while Mrs G. had obtained it only in the two weeks prior to the decision to select her for the post. She concludes that she was not competing on equal terms with the selected candidate.

The complainant asks for the impugned decision to be set aside, the case to be sent back to the Organization so that it can grant her promotion to grade G.5 with retroactive effect from March 1999 and an award of moral damages. She claims costs.

C. In its reply, the FAO submits that if the appointing authority was bound to appoint or promote candidates that the Selection Committee had placed first, this would mean that the Committee exercised the real decision-making power, which would be incompatible with the discretion conferred upon the Director-General by the rules. In selecting Mrs G., the latter based his decision on a paramount consideration in appointment, namely the need to secure for the Organization the services of staff with the highest standards of efficiency and competence. The Director-General acted within the limits of his discretion and in accordance with the Tribunal's case law in considering that the higher academic qualifications of the selected candidate justified her appointment. The FAO criticises the complainant for attaching fundamental importance to seniority, a subsidiary criterion.

The FAO asserts that it is quite usual for the Deputy Director-General, when called upon to make a choice on behalf of the Director-General, to seek the opinion of the Director of Personnel. In the FAO's view, the fact that the selected candidate holds a university degree obtained after four years of study gives her an undeniable advantage. It denies that the complainant's language skills are better than those of Mrs G., and indeed considers them comparable. It categorically rebuts as excessive the complainant's allegations concerning the reasons for the choice of the selected candidate, observing that such grave accusations must be supported by evidence. It also expresses surprise at the arguments relating to the fact that the selected candidate was pregnant and asserts that a candidate cannot be denied a promotion on the sole ground that she has to take maternity leave. Lastly, the fact that Mrs G. recently obtained a continuing appointment shows the high quality of her services over the preceding six years.

In a letter of 12 September 2001 attached to the reply, the selected candidate indicates that she fully endorses the opinions set out therein and has nothing to add.

D. In her rejoinder the complainant denies ever asserting that the Selection Committee exercised decision-making power and accuses the FAO of placing a "misleading" construction on her pleas, particularly in relation to the criterion of seniority.

With regard to academic qualifications, the complainant says that the FAO has confined itself to an abstract assessment and overlooked the specific requirements of the post. On the subject of language skills, she accuses the FAO of a "blatant" untruth, as Mrs G. has level C (the highest level in the scale used by FAO) in two of the Organization's official languages, namely English and French, while the complainant has attained this level not only in four of the official languages (Arabic, English, French and Spanish) but also in German, and is of Italian

mother tongue. This therefore amounts to an error of fact. She adds that an Assistant Director-General cannot interfere in the selection process, whether directly or through the Director of Personnel. She says that the FAO has demonstrated bad faith by distorting her statements, as there was no question of her challenging the right to maternity leave. Lastly, she refers to the Director-General's letter dated 10 November 2000 in which he agreed to make every effort to provide her with an assignment commensurate with her qualifications, and she complains that the FAO has done absolutely nothing since then in this respect.

E. In its surrejoinder the FAO regrets the "extreme language" used in the rejoinder.

On the merits, it presses its pleas and asserts that the selection process was in keeping with the rules. It adds, with regard to the respective qualifications of the candidates, that it is a matter of common sense that a person with a university degree has better academic preparation and overall possesses better qualifications than someone with a lower level diploma. Moreover, the selected candidate has given entire satisfaction in the post to which she has been appointed. On the subject of language skills, the FAO submits that the complainant is basing her arguments on incomplete information with regard to Mrs G., who has "knowledge of Chinese, English, French and Spanish". Lastly, it confirms the indication in the impugned decision that an effort would be made to find the complainant an assignment commensurate with her qualifications and within the context of the applicable procedures. However, it expresses surprise that although many posts have become available the complainant has applied for only one.

CONSIDERATIONS

1. This dispute turns on the lawfulness of an appointment to an advertised post and of the process of selection.

What power of review does the Tribunal have in such matters?

As it has often held, an appointment by an international organisation is a discretionary decision. Being subject to only limited review, it may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence. The Tribunal will, in cases like the present, exercise its power of review with special caution, its function being not to judge the candidates on merit but to allow the organisation full responsibility for its choice.

Nevertheless, anyone who applies for a post to be filled by some process of selection is entitled to have his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that every applicant must enjoy, whatever his hopes of success may be (see Judgments 1077, under 4, 1497, under 5(b), and 1549, under 9).

2. The complainant's ground for challenging the lawfulness of Mrs G.'s appointment is breach of her right to have her application considered in good faith and in keeping with the basic rules of fair and open competition.

3. When an international organisation wants to fill a post by competition it must comply with the material rules and the general precepts of the case law (see Judgment 1549, under 11).

4. The complainant sees bad faith in the Administration's interpretation of her arguments on seniority. Since she and Mrs G. were equally qualified, being the more senior she should have been selected for the post, not Mrs G. Citing Judgment 1871 she submits that the criteria set for promotion comprise two levels: a main criterion (qualification and experience which most closely meet the requirements shown on the post description) and subsidiary criteria (including length of service). In her view the Deputy Director-General did not deny that both candidates were qualified to do the job, but gave precedence to Mrs G.'s paper qualifications over the complainant's seniority and better language skills. Citing the Interim Terms of Reference and Procedure for General Service Staff Selection Committee, which are set in Annex B to Section 305 of the FAO Manual, she points out that the FAO never argued that Mrs G. fulfilled the requirement in 3(b)(i) of that Annex that, if candidates are equally well qualified, preference must be given first to "a staff member with a permanent appointment who is without, or shortly to be without an assignment". Consequently, she says, the Deputy Director-General was bound to give the complainant preference because of her seniority, according to the rule *patere legem quam ipse fecisti*.

5. Article VIII of the FAO Constitution states in paragraph 1:

"The staff of the Organization shall be appointed by the Director-General in accordance with such procedure as may be determined by rules by the Conference."

and paragraph 3 says:

"In appointing the staff, the Director-General shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of selecting personnel recruited on as wide a geographical basis as possible."

Rule XXIX, paragraph 4, of the General Rules states in part that:

"the Director-General shall act in his unfettered judgment in appointing, assigning and promoting staff personnel, and shall not be bound to accept advice or request from any other source."

On appointments and promotions of one year or more, the above-mentioned Annex B says:

"3. ...

(a) the Committee will recommend selection from the suitable candidates the one whose qualifications and experience most closely meets the requirements shown on the post description.

(b) if the most suitable candidates are equally well qualified, preference for selection should be given in the following order:

(i) the need to place a staff member with a permanent appointment who is without, or shortly to be without an assignment ...;

(ii) length of service within the Organization;

..."

6. The above provisions and consistent precedent show that the Director-General has discretion with regard to the appointment of staff members, which can be subject only to a limited power of review, for example as to whether he exercised his power in accordance with the basic texts of the Organization and the general principles of international civil service law.

7. The Tribunal observes that the reasons for the Director-General's choice of Mrs G. were better academic preparation, the very strong preference of the department and the fact that she held a continuing appointment.

8. Examination of the above provisions and the facts shows that the Director-General did not misapply the provisions.

The FAO Constitution states clearly that "the highest standards of efficiency and of technical competence" are of paramount importance in making appointments.

Consequently, the essential requirements are what count most, and recourse to other criteria such as seniority which are subsidiary in comparison, may be envisaged only where candidates show equal merit.

9. The Selection Committee found the complainant and Mrs G. to be equally well qualified for the post, but had put the complainant above the successful candidate on the short list because she had served the Organization longer.

It is true that the rules require the Selection Committee to recommend selection of the person whose qualifications most closely match the requirements of the post.

However, the Selection Committee's mandate being confined to advising the Director-General, the latter is not bound by its order of preference. Consequently, in choosing one rather than another of the candidates proposed by the Committee, the Deputy Director-General, acting on the Director-General's behalf, acted within the bounds of his discretion.

Furthermore, length of service is not always a decisive criterion (see Judgment 564, under 8). True to say, the complainant had served the FAO longer than Mrs G. But the Organization need select the most senior candidate pursuant to the subsidiary criteria set in Annex B to Section 305 of the Manual only where applicants are equally well qualified for the post.

It follows that, in turning down the complainant in favour of Mrs G. on the grounds that the latter's efficiency and competence were higher, the Director-General acted within his discretion and broke none of the material rules.

10. The complainant asserts that since none of the reasons cited in support of it are valid, the decision to appoint Mrs G. is unlawful.

She denies that Mrs G. was better qualified than she to do the job. In her view, knowledge of a third language as required by the vacancy announcement, should have prevailed over Mrs G.'s university degree, which was of little use given the duties to be performed.

As said in 1 above, it is not for the Tribunal to express an opinion on the two candidates' merits. In particular, it will not compare their language skills. If it passed comment on such matters it would be substituting its own opinion for that of the Organization's competent body and would be exceeding its judicial function (see Judgment 564, under 9).

11. Citing the relevant Department's very strong preference for Mrs G., which, she asserts, is evidenced by the Director of Personnel's e-mail message, the complainant submits that the wishes of the Assistant Director-General ought not to have been taken into account.

She cites a memorandum in which the Executive Secretary of the NARS Secretariat had stressed the importance of early availability for duty in the event of selection. Pointing out that when she got the appointment Mrs G. was about to take maternity leave, and did so from April to October 1999, the complainant observes that Mrs G. was not available to report for duty at once.

In the complainant's submission it is plain on the evidence that Mrs G.'s appointment was intended more to please an Assistant Director-General, who wished to reward a protégé, than to select in the interests of the Organization a qualified and immediately available candidate to fill the vacant post. Consequently, she says, the decision appointing the successful candidate was taken for reasons other than the interest of the Organization and is therefore tainted with misuse of authority and bias.

Precedent says that there will be abuse of authority where the Administration, though not overstepping its authority, uses it for some purpose other than those prescribed by law or, to put it more broadly, those that the general interest requires. A staff member who pleads misuse of authority and the tribunal that allows the plea, must be able to identify the improper purposes for which the authority has been exercised (see Judgment 2104, under 8).

Since it is the Director-General's duty to safeguard the FAO's interests at all times, the Tribunal must ascertain whether the impugned decision was taken in accordance with those interests.

The FAO concedes that the Department may have had a preference for one of the two candidates in view of their qualifications. But it categorically denies that Mrs G. was chosen for the reasons asserted by the complainant.

The Tribunal observes that the complainant has failed to prove those assertions. In fact, by appointing to a vacant post a staff member it deemed particularly well-suited, the Organization's intention was to serve its own best interests. The conclusion is that in the absence of any other evidence to support it, the plea of abuse of authority fails.

12. Lastly, the complainant submits that a continuing appointment was not one of the conditions set in the vacancy announcement. But she points out that when the Selection Committee considered the applications, she held such an appointment whereas Mrs G. was on a fixed-term one. And that was still the case on 4 March 1999 according to the e-mail message from the Director of Personnel. She concludes that, since Mrs G.'s continuing appointment was one of the reasons given on 15 March 1999 in favour of her appointment, it was awarded to her between 4 and 15 March 1999. Therefore, in the complainant's view, she was not competing on equal terms with the successful candidate in that, in breach of the rules, it was the Department that succeeded in imposing its protégé. While it may

have been nothing but coincidence, she nonetheless considers, as the Tribunal did in Judgment 1549, under 15, that "[t]he whole business [gives] the unsuccessful applicants the impression of a bending of the rules".

But as she herself says, a continuing appointment with the FAO was not one of the requirements set in the vacancy announcement. Furthermore, according to Annex B to Section 305 of the Manual, a permanent appointment is a subsidiary criterion to be applied only where candidates are equally well qualified for a vacant post. Furthermore, even without such an appointment, the successful candidate would have met the requirements and the FAO would not have broken the rules in appointing her. The Tribunal is of the view that there is nothing in this case to give the complainant the impression of any bending of the rules on selection procedure.

13. The firm case law has it that the Tribunal will not interfere with the comparison of entrants in a competition. Only when it appears that the choice of candidate may rest on some mistake of fact or law or there may have been misuse of authority will the Tribunal order the production of evidence so that it may review such comparison and will the complainant be entitled to see such evidence (see Judgment 1564, under 8).

In this case, examination of the competition procedure has revealed no breach of the material rules nor any mistake of fact or of law, nor any abuse of authority.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet