

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K.
v.
FAO

132nd Session

Judgment No. 4412

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. K. against the Food and Agriculture Organization of the United Nations (FAO) on 14 December 2018 and corrected on 13 February 2019, the FAO's reply of 10 May, the complainant's rejoinder of 27 June, the FAO's surrejoinder of 5 September 2019, the complainant's additional submissions of 28 May 2020 and the FAO's comments thereon of 15 July 2020;

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 decisions not to renew her short-term appointment beyond 31 March 2016 and not to select her for the G-3 position of Office Assistant, Plant Production and Protection Division (AGP), advertised through vacancy announcement IRC 2744 (vacancy IRC 2744).

The complainant joined the FAO in June 2010 on a short-term appointment through the Temporary Assistance Pool. Her appointment was thereafter regularly renewed with the mandatory breaks in service being observed. In February 2011 she was assigned to AGP.

On 6 March 2015 the Administration promulgated Administrative Circular No. 2015/07 (AC 2015/07) introducing with immediate effect an overall limit to the maximum length of employment for holders of short-term appointments. Pursuant to AC 2015/07, holders of short-term appointments in the General Service and Professional categories could not be re-employed by the FAO under that type of appointment once they reached a total, aggregate period of 55 months of service. In May 2015 the complainant was granted another short-term appointment which was thereafter renewed a number of times. On 10 March 2016, at a meeting with the Staff Relations Officer, she was informed that her short-term appointment would not be renewed beyond 31 March 2016 due to the 55-month limit introduced by AC 2015/07. From 1 April until 22 July 2016 the complainant worked under a non-staff consultancy contract, following which she separated from the FAO.

Prior to that, on 21 January 2015, the Administration issued vacancy IRC 2744 for the position of Office Assistant, AGP, at grade G-3. The complainant applied for it and was interviewed on 28 July 2015. Notwithstanding that interviews were being conducted, vacancy IRC 2744 was cancelled. It was reissued soon after and the complainant was again interviewed on 27 November 2015. On 27 January 2016 she was informed that she had not been selected for further consideration. On 21 March 2016 she wrote to the Director, Office of Human Resources (OHR), to request a redacted copy of the selection report drawn up by the General Service Selection Committee (GSSC) for vacancy IRC 2744. The Director, OHR, responded on 27 April 2016, rejecting the request on the ground that confidential selection reports were not disclosed to candidates whose applications had been unsuccessful. The Director, OHR, added that there were no grounds to believe that the decision to appoint another candidate to the position of Office Assistant, AGP, was unsound in any way.

Meanwhile, the complainant had also applied to the Global Calls for Expression of Interest for General Service positions (Global rosters), issued in January 2016 through vacancy announcements IRC 3112 and IRC 3113, but on 6 May 2016 she was informed that she would not be included in the Global rosters of qualified candidates. The stated reason was that her qualifications and experience did not sufficiently match the profile sought for these positions. On 6 June 2016 the complainant requested a review of the decision to exclude her from the Global rosters.

On 20 April 2016 the complainant lodged an appeal with the Director-General contesting the decision not to further renew her short-term appointment due to the implementation of AC 2015/07 (communicated by the Staff Relations Officer on 10 March 2016) and the decision not to further consider her for the position of Office Assistant, AGP (dated 27 January 2016). In her appeal the complainant requested a redacted copy of the selection reports drawn up for both the first (cancelled) and second selection processes for the post of Office Assistant, AGP. This appeal was rejected on 6 June 2016 and on 5 July 2016 the complainant lodged an appeal with the Appeals Committee. In its report of 21 March 2018, the Appeals Committee recommended that a redacted copy of the selection report drawn up by the GSSC be made available to the complainant immediately and that she be awarded moral damages for a breach of procedural fairness. As to the complainant's other claims, the Appeals Committee recommended that they be dismissed.

By a letter of 21 September 2018, the Director-General notified the complainant of his decision to reject her appeal in its entirety. That is the impugned decision.

The complainant asks the Tribunal to order the cancellation of the selection process for the position of Office Assistant, AGP, advertised through vacancy IRC 2744 or, alternatively, to award her one year's salary with retroactive payment of all benefits, entitlements, step adjustments, pension contributions, and all other emoluments she would have received had her appointment not been terminated. She claims moral damages for the FAO's disregard for and breach of its own Staff Regulations, Staff Rules and procedures, as well as for its continued refusal to disclose key documents of the selection process for the position of Office Assistant, AGP. She also claims payment of all legal fees incurred by her in bringing this complaint and any other relief the Tribunal deems fair and equitable.

The FAO asks the Tribunal to dismiss the complaint as irreceivable in part and unfounded in the remainder.

CONSIDERATIONS

1. In its report of 21 March 2018, the Appeals Committee considered and made recommendations to the Director-General on the five decisions which, in its view, the complainant contested in her

internal appeal lodged on 5 July 2016. First, the Committee found that the complainant's appeal against the decision to cancel vacancy IRC 2744 for the post of Office Assistant, AGP, at grade G-3, was time-barred, because the complainant did not despatch a letter of appeal to the Director-General contesting it within 90 days from the date of receipt of the contested decision, as Staff Rule 303.1.31 required. The complainant, however, notes that she had clearly stated in her submissions to the Appeals Committee that she queried the cancellation of vacancy IRC 2744, in effect as a plea, to establish a pattern of bias and prejudice by the Administration towards her which tainted other decisions she contested. The complainant relies on the Tribunal's statement in Judgment 3380, consideration 8, that events or conduct that cannot be impugned may nonetheless be relevant in assessing whether another event or other conduct was motivated by bias. Prior biased conduct can be used to support an inference that the impugned conduct was also motivated by bias. Insofar as the complainant does not put forward in her complaint a substantive claim arising from the decision to cancel vacancy IRC 2744, the Tribunal will consider this matter as a plea in support of the complainant's claims concerning her non-selection for the post advertised through vacancy IRC 2744.

2. In the second place, the Appeals Committee considered the FAO's decision to exclude the complainant from its Global rosters of qualified candidates, from which persons were selected for future General Service positions. The Committee recommended to the Director-General that the complainant's challenge to that decision be dismissed as irreceivable for failure to exhaust the internal means of redress that were available to her in relation to that matter. This was because she had not despatched an appeal against that decision to the Director-General, pursuant to Staff Rule 303.1.311, before she filed an appeal in which she raised it with the Appeals Committee. In the present proceeding, however, the complainant states that she listed that decision as part of the chronology in her appeal before the Appeals Committee, in effect as a plea, to support her claim that other decisions which she contested had been motivated by personal prejudice and bias. The Tribunal will consider it as such.

3. In the third place, in considering the decision not to renew the complainant's short-term appointment upon its expiry on 31 March 2016 and to replace it with a non-staff appointment as a consultant, the Appeals Committee noted that Staff Rule 316.2.62 stated that short-term appointments expire on the date specified in the terms of appointment and that no notice need to be given by either party. It also noted that Staff Rule 303.4.103 stated that short-term appointments shall be for a period of less than one year, ending on the date specified in the letter of appointment. The Committee found that none of the complainant's short-term appointments gave rise to any expectation of, or right to, renewal and, accordingly, the complainant "had [...] no right that her extension would be granted or denied based on a specific justification". The Committee concluded that it was "therefore irrelevant for the present case whether or not AC 2015/07 of 6 March 2015 was lawful [...] that, in any case, AC 2015/07 did not vitiate any rights or obligations [the complainant] had under her short-term contract in force when AC 2015/07 was published with immediate effect [and which] therefore did not have retroactive effect in the sense that it would have retroactively affected any of [her] rights granted [...] under a contract concluded before 6 March 2015". This conclusion meant, in effect, that the lawfulness of AC 2015/07 was an irrelevant consideration as far as the non-renewal of the complainant's short-term appointment was concerned. The Committee therefore recommended that the complainant's internal appeal against the decision not to renew her short-term appointment upon its expiry on 31 March 2016 be dismissed. The impugned decision accepted this recommendation.

4. The Appeals Committee's conclusion to the effect that AC 2015/07 was an irrelevant consideration with respect to the decision not to renew the complainant's short-term appointment upon its expiry was inaccurate. In the letter of 6 June 2016, which dismissed the complainant's appeal to the Director-General, the Assistant Director-General, Corporate Services Department, relevantly stated as follows:

"I recall that the Organization's decision not to renew [your] short-term appointment beyond its expiry date was made in accordance with AC 2015/07, which introduced an overall limit of 55 months to the maximum length of employment possible under short-term appointments governed by Manual Section [...] 316. As explained to staff [...] prior [to] the issuance of AC 2015/07, 'short-term [...] could actually go on for as long as ten years' as there [were] no limits in the rules, only mandatory breaks. [...]"

When AC 2015/07 was issued [...] you were already on your 55th month of service under short-term appointments. While AC 2015/07 was announced to enter into force with immediate effect, the Organization respected the terms of your short-term contract, which, accordingly, continued until its expiration date [...] Furthermore, after the expiration of your short-term appointment, you were offered a three-month consultancy contract.”

5. These statements confirm that the complainant was not offered any further short-term appointments with the FAO, even after the consultancy contract ended, expressly because of AC 2015/07. It is, however, recalled that in Judgment 4230, delivered in public on 10 February 2020, the Tribunal set aside AC 2015/07 on the ground that the FAO had failed to carry out a proper consultation with the staff representatives prior to its introduction. Inasmuch as the decision not to renew the complainant’s short-term appointment, when it expired on 31 March 2016, was based on an unlawful Administrative Circular, that unlawfulness infected the non-renewal decision subsequently resulting in the complainant’s separation from the Organization, upon the conclusion of her consultancy contract. This caused the complainant to lose an opportunity to have her short-term appointment renewed, entitling her to material damages. The impugned decision will be set aside to the extent that it accepted the Appeals Committee’s recommendation to dismiss the complainant’s internal appeal against the decision not to renew her short-term appointment when it expired on 31 March 2016.

6. In the fourth place, the Appeals Committee recommended the dismissal of the complainant’s appeal against the decision not to select her for the fixed-term position of Office Assistant, AGP, at grade G-3, for which she was interviewed on 28 July and 27 November 2015. This recommendation was accepted in the impugned decision.

7. The Tribunal has consistently held that the appointment by an international organisation of a candidate to a position is a decision that lies within the discretion of its executive head. It is subject only to limited review and may be set aside only if it was taken without authority, or in breach of a rule of form or 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. This formulation is intended to highlight the need for a

complainant to demonstrate that there was a serious defect in the selection process which impacted on the consideration and assessment of her or his candidature (see, for example, Judgment 4023, consideration 2).

8. On 27 January 2016, the GSSC Secretariat informed the complainant that it had not selected her for further consideration, pointing out that there was always strong competition for jobs at the FAO and that it often had to make difficult choices between many high-calibre candidates. It also informed her that her application would be maintained in the roster and she might be called for interviews where her skills and experience matched the job description. Subsequently, on 27 April 2016, the Director, OHR, in replying to the complainant's 21 March 2016 email seeking, among other things, more information as to the reason for her non-selection for the subject position, confirmed that the GSSC had considered that the qualifications and experience of a number of other candidates better matched the profile of the subject position than the complainant's.

9. The Appeals Committee noted that in challenging the appointment of another candidate, who was selected to fill the subject position, the complainant stated that had a proper selection procedure been carried out, it would probably have been unnecessary for her to bring the internal appeal, but that she "c[ould] only guess that the real and underlying reason for being treated in this manner by the [FAO] was extraneous to her alleged lack of skills, experience, qualification but was a retaliatory response to her active and highly vocal and visible participation in the work stoppage that took place following the issuance of AC 2015/07 and was motivated by personal prejudice and bias". She also asserted that, given her comments during that work stoppage and on the Intranet, which were picked up by a magazine, "it [was] then more than probable that the hierarchy in the [FAO] was none too pleased with the magazine's characterization of [the Assistant Director-General, ad interim, Corporate Services Department], his interview, or decisions that [he] had recently [...] taken" or to find her comments reproduced therein.

The Tribunal finds that the Appeals Committee correctly concluded that the possible reasons which the complainant advanced for her non-selection for the subject post were speculative and that she had failed to provide supporting evidence. The complainant's repetition of those

allegations in these proceedings, even taking into consideration her allegations concerning the circumstances surrounding the cancellation of the selection process for vacancy IRC 2744 and her exclusion from the Global rosters, do not advance from the realm of speculation her claim that her non-selection for the subject post and exclusion from the Global rosters were retaliatory responses for her activities and because of a pattern of prejudice and bias against her. In short, the complainant provides no evidence to support her allegations of retaliation, personal prejudice, or bias, in the terms stated, for example, in Judgments 3748, consideration 6, or 3912, consideration 13.

10. In the fifth place, the Appeals Committee further concluded that, having reviewed a redacted copy of the GSSC selection report, it saw nothing that supported the complainant's assumption that her candidacy was not considered in good faith or that the selection process was not conducted in accordance with the basic rules of open competition. The Tribunal has consistently stated, for example in Judgment 3652, consideration 7, that anyone who applies for a post to be filled by some process of selection is entitled to have her or his application considered in good faith and in keeping with the basic rules of fair and open competition.

11. The complainant advanced various unmeritorious arguments to support her contention that the selection process for the position of Office Assistant, AGP, was flawed. These include her assertions that although she had carried out the duties of the post for five years with consistent "very good" performance appraisals, she was not even placed on the recommended list of appointable candidates given to the Director-General; that no explanation was offered for not placing her on the recommended list apart from the statement that other candidates were a better match for the profile of the subject position; and that there was no reason for the cancellation of the selection process, and the prospective introduction of new procedures was not a valid reason for the cancellation. The complainant also raised the issue of the FAO's failure to disclose to her the selection report drawn up by the GSSC (which the FAO disclosed to the Appeals Committee) which led to the decision not to select her for the subject position.

12. In considering the issue of non-disclosure, the Appeals Committee correctly concluded that the failure by the FAO to disclose a redacted copy of the document to the complainant breached procedural

fairness. The Committee recommended to the Director-General that a redacted copy of the report be immediately disclosed to the complainant and that she be paid adequate moral damages for the breach of procedural fairness. This recommendation was rejected in the impugned decision.

13. In her email dated 21 March 2016 to the Director, OHR, referred to above in consideration 8, the complainant requested a redacted copy of the selection report because, in her view, the reason which the GSSC gave for her non-inclusion in its list of candidates from whom the final selection was to be made did not provide sufficient information why her name was not included therein. She noted that paragraph 18 of the Guidelines for the Selection of General Service Staff (the Guidelines), then in force, required the GSSC to provide a selection report and to justify its selection. Relying on the principles stated in Judgment 3586, consideration 16, the complainant requested a “redacted GSSC [s]election [r]eport with information about [her] candidacy, in keeping with recent [...] Judgments [of the Tribunal] on the right of staff to review documentation which forms the basis of the decision affecting their employment”.

14. The Tribunal relevantly restated in Judgment 3586, consideration 16, that a staff member must, as a general rule, have access to all evidence on which an authority bases or intends to base its decision against her or him, and that, under normal circumstances, such evidence cannot be withheld on grounds of confidentiality, unless there is some special case in which a higher interest stands in the way of the disclosure of certain documents. Such disclosure may not be refused merely in order to strengthen the position of the Administration or one of its officers. Additionally, the Tribunal reiterated, in consideration 17 of that judgment, its consistent case law that the principle of equality of arms must be observed by ensuring that all parties in a case are provided with all the materials an adjudicating body uses in an internal appeal and that the failure to do so constitutes a breach of due process.

15. In response to the complainant’s request for the disclosure of a redacted copy of the subject report, the Director, OHR, noted, among other things, the Tribunal’s statement that a document cannot, under normal circumstances, be withheld on grounds of confidentiality, unless there is some special case in which a higher interest stands in the way

of the disclosure. Thereupon, she advised the complainant, without citing any authority, that “confidential selection reports are a special case and they are not disclosed to candidates whose applications have been unsuccessful”. The parties maintained these arguments in the internal appeal procedure and in the present proceedings.

16. In considering the complainant’s challenge against the decision to withhold from her a redacted copy of the GSSC selection report, the Appeals Committee correctly concluded, on the basis of the principle stated in consideration 16 of Judgment 3586, that the FAO should have disclosed a copy of the redacted report to the complainant. The Committee stated that, although under paragraph 3 of Appendix B to Manual Section 305 “[r]ecommendations submitted by the GSSC, discussions in the GSSC, and their minutes are strictly confidential”, this did not shield the report from disclosure to the complainant. This latter statement accords with the Tribunal’s case law in Judgment 3272, consideration 15, for example, which affirmed the confidentiality of the records of the discussions regarding the merits of the applicants for a post but stated that this does not extend to the reports regarding the results of the selection process with appropriate redactions to ensure the confidentiality of third parties. The impugned decision erred in rejecting the Appeals Committee’s recommendation to immediately disclose a copy of the redacted selection report to the complainant and to award her adequate moral damages for the breach of procedural fairness (due process). The complainant will be awarded 20,000 euros in moral damages for this breach. It is noteworthy that in the present case, contrary to the case law in Judgment 1372, consideration 11, a copy of the redacted report which was disclosed to the Appeals Committee has not been disclosed to the Tribunal.

17. In her submissions to the Tribunal, the complainant links her request for a copy of the selection report to her right to have access to information providing evidence that the selected candidate was more suitable than her to fill the subject post. She adds that “disclosure of the reports and a proper review by the Appeals Committee would have dispelled any suspicion the complainant might have as to whether her exclusion from the list of recommended candidates was tainted by bias and personal prejudice”. The FAO’s failure to provide the complainant with a copy of the selection report, which it disclosed to the Appeals

Committee, violated the adversarial principle and the principle of equality of arms, impeded her right of appeal and inhibited her ability to fully argue her case before the Appeals Committee in full knowledge of all facts of the case. It thereby tainted the internal appeal procedure, rather than the selection process as the complainant seems to suggest. This procedural irregularity is therefore not a basis for cancelling the selection process as the complainant requests. However, the impugned decision will be set aside to the extent that it rejected the Appeals Committee's recommendation to immediately disclose a redacted copy of the selection report to the complainant and to award her adequate moral damages for the breach of procedural fairness (due process).

18. In summary, the impugned decision will be set aside to the extent stated in considerations 5 and 17 of this judgment. The complainant will be awarded material damages in the amount of 20,000 euros, to which she is entitled based on the finding in consideration 5 of the judgment, and moral damages in the amount of 20,000 euros, in accordance with consideration 16 of the judgment. She will also be awarded 3,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision, dated 21 September 2018, is set aside to the extent stated in considerations 5 and 17 of this judgment.
2. The FAO shall pay the complainant 20,000 euros in material damages.
3. The FAO shall pay the complainant 20,000 euros in moral damages.
4. The FAO shall also pay the complainant costs in the amount of 3,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 7 June 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ