UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1217

Ajay Sud

(Appellant)

v.

President
of the International Fund for Agricultural Development

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Counsel for Appellant: Jordan Howells

Counsel for Respondent: Bernard Eelco Szabó

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work with very little assistance from his supervisor. He is accurate and detail-oriented and he can be counted on to complete assignments thoroughly. Ajay was quick to build a good relationship across departments. He is thoughtful and courteous towards others."

21. Although, the supervisor did include areas of growth in her review (strategic thinking and organizational development, and managing time, resources and information), they were general in nature and did not specify that two International Swaps and Derivatives Association (ISDA) agreements needed to be executed during the probationary period. Mr. Sud argues the JAB erred in considering that these two agreements needed to be signed during his probation when in fact there is no such mention in neither his performance plan nor in the PES assessment of January 2019. As such, the JAB relied entirely on the affidavits presented by the Administration and did not consider the absence of such requirement in the PES report or in the performance plan.

22. For the signing of two ISDA agreements to become a condition of employment and yet never makes its way in the actual performance plan or in the PES assessment is patently unfair, submits the staff member. He notes if IFAD had wished to use this specific measure of performance to determine his probation, then the Fund should have said so explicitly in the PES assessment.

23. Mr. Sud also argues that he received conflicting information from the General Counsel about what needed to be prioritized in his unit. He notes on 25 September 2018, the General Counsel sent an e-mail stating the following: "Given the tight schedule and importance of the matter, I ask each of you to put other matters aside and make [the proposed amendments to the Agreement Establishing IFAD] your top priority so that LEG can deliver our work on time. Thank you all for your crucial contributions in getting this important initiative forward."

24. Additionally, Mr. Sud also posits had IFAD not prematurely terminated his appointment, eight weeks before the end of his probation, he would have actually been able to get two ISDA agreements signed. This makes the decision of the Administration even more perverse, he argues.

25. Regarding the mid-point review, which is the first formal feedback under the HRIP, sw-2.9 (v)u(rgu)0.6

The Respondent's Answer

31. As a preliminary matter, the Respondent notes that Mr. Sud seeks to introduce new evidence, which was not part of the record reviewed by the JAB. This evidence, which has been included under Annex 13 to the Appeal Brief, consists of an Additional Statement that Mr. Sud sought to submit to the JAB belatedly on 30 November 2020. The l42.6 wa 3(sts o (ncl)1.2 d)5.1 (sdB)-3.4 iosdu c

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46. Article 2(10) of the Statute states that a "special agreement may only be concluded if the agency, organization or entity *utilizes a neutral first instance process that includes a*

(iii) The JAB decision will be considered as constituting a record of the proceedings in the Appeal. The decision shall be drafted in English by the Chairperson of the JAB and shall include a summary of the facts and matter, analysis of the Appeal, the applicable legal and procedural determinations and the reasoning behind the JAB's decision.

(iv) The JAB shall make efforts to reach the decision in a unanimous manner. If consensus cannot be reached, the Chairperson shall make the decision on behalf of the JAB and include the dissenting views in the Report.

(v) The Secretary of the JAB will notify the parties of the decision.

9.17. UNITED NATIONS APPEALS TRIBUNAL (UNAT)

(i) Both parties have the right to appeal to the UNAT, under the procedures prescribed in its Statute and Rules, against the decision taken by the JAB.

(ii) In addition, in matters related to the UNJSPF, Appeals before the UNAT shall be processed under the procedures prescribed in the Administrative Rules of the UNJSPF.

50. The Fund implemented changes in Sections 9.8.1 and 9.16 of the HRIP in the July 2020 version and substituted the term "re 

61. Section 2.20.1 of the HRIP, on the other hand, establishes the procedure for assessing satisfactory perttrT

to mention the fact that he also took some sick leave during that time. The effective remaining time was too little for the Respondent to comply with his duties to give Mr. Sud "the chance to meet the level of performance required", as stipulated under Staff Rule 2.5 (e). At the same time, this reduced timeframe surely had a negative impact Mr. Sud's ability to meet the level of performance required.

66. Of further relevance is that, even though the Respondent claims to have informed Mr. Sud about the competencies and performance level required separately in the Job Profile, these were not stipulated in the Performance Plan, as is formally required. By the same token, the Respondent contends that the e-mails to Mr. Sud (transcribed in his submissions above in this Judgment) informed him of his performance plan and the objectives of his post. However, the e-mails, apart from being on some occasions sent to all staff members and thus not relating to Mr. Sud's particular situation, only prove that certain individual tg (a)1.sk (a)-3.5 m3d3a.6 (6 (e)-4.Tj-0.c -0

negotiating; (ix) Building relationships and partnerships, and (x) Managing performance and developing staff.

71. The decision to terminate Mr. Sud's appointment was transmitted by letter dated 26 June 2019, whereby the Director, HRD, officially communicated to the staff member that, effective from 28 August 2019, his appointment would be terminated due to unsatisfactory performance during the probationary period. The letter is quite detailed and stated, *inter alia*:

> [D]uring the initial meeting held in January, two behavioural competencies requiring improvement were identified and discussed at length: strategic thinking and organizational development; and managing time, resources and information. You were provided with information as to why these competencies required improvement, highlighting the need to be proactive in moving forward with urgent work matters, to demonstrate teamwork and to keep your supervisor properly briefed on crucial and time-sensitive work matters. Furthermore, during the meeting, you were also informed

> recorded ln the Probationary Form and the recommendation made at the end of your probationary period has been to terminate your appointment.

72. The Appeals Tribunal has long held that the duty to justify a decision is essential for the tribunals to exercise their judicial review of administrative decisions, assessing whether they are arbitrary, capricious, or unlawful.[13] Although this obligation might not stem from any Staff Regulation or Rule, it derives from the public law principle which confers upon the tribunals the inherent power to review the validity of such administrative decisions, the functioning of the system of administration of justice and the principle of accountability of managers.[14]

73. It is therefore good practice for the Organization as a whole to provide general guidance for its managers that a well-e4tBDCj550.1d.3 (tt2 1.397an-i 397T4r)-03(.j2.6 3s45(i)1y.8 (a)-9B.j2.6 3s45.7 .6 3s45

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Ajay was reminded that in the January 2019 meeting that there were two specific competencies that we identified as requiring improvement: strategic thinking and organizational development; and managing time, resources and information. *Ajay was told that at the [mid-*

agreement needed to be signed was at the mid-point review (communicated in writing on 17 May 2019), and Mr. Sud's appointment was terminated on 26 June 2019.

84. The Respondent therefore did not notify Mr. Sud of his shortcomings in sufficient time or of the consequences of failing to remedy them. Also, IFAD did not establish explicit measures to enable Mr. Sud to understand and satisfy the Fund's requirements nor did it provide evidence that it gave him sufficient time, opportunity and support to meet the requirements of the post, as prescribed by Staff Rule 2.5 (e). Finally, contrary to its claim, t

however, not sufficiently similar to the present case. In *Sarwar,* the staff member was granted an additional eight months after his probation to improve his performance, whereas in this case, Mr. Sud's appointment was not extended and was in fact reduced by two months before the end of his probation period.

87. Having found that the decision to terminate Mr. Sud's appointment is unlawful and that the JAB erred in fact in its approach to the case, the Appeals Tribunal reverses the JAB Decision and rescinds the contested IFAD decision. In compliance with Article 9(1)(a) of its Statute, the Appeals Tribunal sets the compensation *in lieu* to an amount equivalent to two years' net base salary, plus interest until payment. This amount takes into consideration the three-year FTA, which was unlawfully terminated as well as the circumstances of the case.

88. Mr. Sud's claim for compensation for moral harm in relation to breach of contract, reputational damage and delays suffered during the process is rejected. The Appeals Tribunal jurisprudence requires evidence of the harm,[20] which was not provided by Mr. Sud.

89. Lastly, Mr. Sud requests that the Appeals Tribunal make an award in legal costs to the amount of GBP 7,500 arguing that unlike United Nations staff, IFAD does not subscribe to, and its staff members have no recourse to, OSLA. According to Article 9(2) of the Statute: "Where the Appeals Tribunal determines that a party has manifestly abused the appeals process, it may award costs against that party." Although this Judgment has acknowledged that the decision to terminate Mr. Sud's appointment was unlawful, there is no evidence of abuse of the appeals process, and for this reason, this claim must be dismissed.

[20] *Harris v. Secretary-General of the United Nations,* Judgment No. 2019-UNAT-896, para. 61.

Judgment

90. Mr. Sud's appeal is granted, and the JAB Decision is reversed. The decision to terminate Mr. Sud's appointment with IFAD is rescinded. As an alternative to rescission, the Fund may elect to pay compensation *in lieu* to an amount equivalent to two years' net base salary. Interest will accrue on the total sum from the date of this Judgment at the current US Prime rate until payment. If the total sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

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