

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

115th Session

Judgment No. 3209

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. T. against the International Telecommunication Union (ITU) on 10 February 2011 and corrected on 21 March, the ITU's reply of 24 June, the complainant's rejoinder of 29 September 2011 and the ITU's surrejoinder of 10 January 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 11 of its Rules;

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, a French national born in 1966, entered the service of the ITU in 1985 and obtained a continuing appointment in 1992. At the material time she held a grade G.5 post of Secretary in the Mail Section of the Buildings and Logistics Service within the Administration and Finance Department.

On 30 October 2009 the ITU published a vacancy notice concerning the grade G.6 post of Chief of the Mail Section. The

complainant applied for the post on 10 November 2009, and on 20 April 2010 she asked the Chief of the Administration and Finance Department whether she had been shortlisted. She was informed in an e-mail of 30 April that she was not on the shortlist, which contained the names of the candidates considered by the Appointment and Promotion Board to be the best qualified. That same day she expressed her puzzlement, but it was explained to her, in an e-mail of 4 May, that she had not been shortlisted because she did not possess one of the “qualifications [...] specified in the Vacancy Notice”, namely, “a baccalaureate diploma or equivalent technical or commercial studies”. In a memorandum dated 20 May 2010 addressed to the Secretary-General, the complainant pointed out that there was no mention in the vacancy notice, among the required qualifications, of any diploma, only of “[c]ompleted secondary education”. She stated that, since she had obtained a “certificate of completed secondary education” in 1985, in her view she possessed all the required qualifications, unlike the candidate who had been appointed. She therefore requested that the decision to reject her candidature be reconsidered and, in particular, that the competitive appointment procedure be cancelled. On 9 August, having received no reply, she lodged an appeal with the Appeal Board.

On 20 September the Board delivered its report, in which it accepted that the wording of the e-mail of 4 May 2010 suggested that the Administration had set a “new requirement”. Nevertheless, it concluded that the Appointment and Promotion Board, when drawing up the shortlist, had considered all the preselected candidates, including the complainant, and that “other things being equal, those with the best references” had been placed on the shortlist. Consequently, the Appeal Board “dismissed the appeal under both principal and subsidiary heads”. It also made a number of recommendations relating inter alia to the wording of vacancy notices.

By a memorandum of 16 November 2010, which is the impugned decision, the complainant was informed that the Secretary-General endorsed the conclusion of the Appeal Board and that, consequently, the decision of 30 April 2010 was maintained. It was also made clear

that the Secretary-General had noted the general recommendations made by the Board.

B. The complainant argues that the ITU “changed its reasons” during the appeal procedure. Although she had been told, in the e-mail of 4 May 2010, that her candidature had been rejected because she did not have a baccalaureate diploma, in its reply before the Appeal Board the Union had stated that the reason for that decision was that other candidates were better qualified than she was. She complains that, although she requested on 2 September 2010 to be allowed to submit a rejoinder, the chairman of the Appeal Board never replied to her request and, as a result, she was denied the opportunity to comment on this new reason, which was a violation of her right to a hearing.

She accuses the ITU of having failed in its duty to ensure transparency in the selection process, particularly because she was not made aware of the composition of the Appointment and Promotion Board or how it had reached its decisions. In her view, these matters ought to have been set down in a record of the proceedings. In this connection, she challenges the lawfulness of paragraph 21 of the Board’s Rules of Procedure insofar as it calls for a “recommendation” by supervisors during the selection process, which in her view undermines the Board’s freedom of action. She concludes from this that the decisions taken at the end of the selection process were unlawful.

The complainant also argues that there was a factual error in the decision to reject her candidature, because it was not compared with the others. If that had been done, she would “very probably” have been included on the shortlist, notwithstanding the fact that she does not have a baccalaureate. Moreover, if the possession of a baccalaureate had been a formal requirement, this would have been stated in the vacancy notice. She claims that her candidature was not actually considered at all, and that she did not compete on an equal footing with the other candidates.

Subsidiarily, the complainant contends that, even if her candidature had been compared with the others, the selection process

would still have been tainted with an error of law because, during the process, the possession of a baccalaureate became a decisive and sufficient criterion for rejecting her candidature. As a result, other essential factors, such as her professional experience and the standard of her work, were ignored. On a “very subsidiary” basis, the complainant argues that since these factors were ignored given the “disproportionate” significance attached to the possession of a baccalaureate, the impugned decision is based on a plainly mistaken assessment. In that respect, she adds that it was “unreasonable” to appoint a candidate who, in her opinion, lacked the necessary experience. Lastly, she contends that in any event the evidence she has submitted is sufficient for the Tribunal to require production of the file of the selection process.

The complainant asks the Tribunal to set aside the impugned decision and the entire selection procedure and subsequent appointment, and to require the ITU to repeat the procedure from the stage at which it became flawed. She claims compensation equivalent to eight months’ salary for material and moral injury, and the sum of 6,000 euros for costs. Lastly, she asks the Tribunal to find that, if these sums were to be subject to national taxation, she would be entitled to claim a refund of the tax paid from the ITU.

C. In its reply the Union denies that it changed its reasons during the internal appeal procedure. Even if the reasons given in the e-mails of 30 April and 4 May 2010 could be regarded as insufficiently clear, in its reply to the Appeal Board it had clarified and supplemented them, thereby confirming that the complainant was not included on the shortlist because she was not among the most qualified candidates. It also submits that Chapter XI of the Staff Regulations, which governs appeals, does not provide that the staff member concerned must be given an opportunity to submit a rejoinder to the ITU’s reply to the Board; that if the Board considers that it cannot deal appropriately with the appeal on the basis of the written submissions, it may decide to hold oral proceedings, which was not done in this instance; and that in any case the complainant was able to respond, in her complaint to the Tribunal, to the arguments raised in the said reply. The defendant

concludes that the complainant's right to be heard was respected. It also points out that, contrary to the complainant's statement that her request of 2 September 2010 went unanswered, the chairman of the Appeal Board met with the complainant and explained the internal appeal procedure to her "at length".

The ITU argues that the composition of the Appointment and Promotion Board is published on its Intranet site, and that it was under no duty to produce a written record of the selection process. It submits that it is both lawful and "wholly justified" to have a supervisor make a recommendation as part of the process, particularly because this may prove helpful to the Board.

The defendant explains that in this case all the preselected candidates, including the complainant, were considered to have the "basic qualification", in that they had completed secondary education or equivalent technical or commercial studies. Having made a comparative study of the candidatures, taking into account the candidates' initial training, their professional experience and their language skills, the Appointment and Promotion Board had decided that the possession of "certain diplomas" was one of the additional objective factors which could be used to distinguish among them. In the exercise of its discretion, the Board then found that the complainant, who according to the ITU competed on an equal footing with all the other candidates, was not among the most highly qualified. Indeed, the shortlist included only candidates holding higher-level diplomas than hers. The ITU also states that the application from the person appointed, who had all the required qualifications, was judged to be the best.

The defendant asserts that the request for production of the file of the selection process is a new claim made for the first time in the complaint, and that, as such, it is irreceivable. It adds that, in its view, the complainant has not succeeded in showing that the selection made at the end of the process was tainted by any flaw such as to justify production of the file. It points out that, if the Tribunal were to find that the information supplied in support of its arguments was insufficient, it would provide the file exclusively for the Tribunal's

attention, given that it contains confidential information about persons other than the complainant.

The defendant states that, at the Tribunal's request, it invited comments from the candidate appointed at the outcome of the selection, who replied that she had no comment to make.

D. In her rejoinder the complainant, relying on information provided by the ITU in its reply, asserts that, contrary to paragraph 5 of the Rules of Procedure of the Appointment and Promotion Board, it was not the Chief of the Administration and Finance Department who took part in the preselection panel, but the Head of the Buildings and Logistics Service.

According to the complainant, the time limit of three weeks stated in the vacancy notice for submitting applications was insufficient. In the light of the rules and practice followed by other international organisations, it should not have been less than one month. She argues that her request for disclosure of the file of the selection process is not a claim, but a request for a measure of investigation based on Article 11 of the Rules of the Tribunal.

The complainant maintains all her claims, but seeks an increased award of costs, in the amount of 9,000 euros.

E. In its surrejoinder the ITU explains that it did not specify in its reply that the Head of the Buildings and Logistics Service had been appointed to take part in the preselection panel as the representative of the Chief of the Administration and Finance Department, because that seemed to it to be obvious. When a competitive selection is to take place, a chief of department appoints his representative informally, and it does not consider this to be contrary to the Staff Regulations and Staff Rules.

According to the Union, there is no fixed time limit in the Staff Regulations and Staff Rules for applications for posts in the General Service category. The three-week time limit set in this case was a reasonable period to enable interested persons to submit their applications.

CONSIDERATIONS

1. The complainant, who at the material time held a grade G.5 post of Secretary in the Mail Section, applied on 10 November 2009 for the grade G.6 post of Chief of that section. The vacancy notice, published on 30 October 2009, specified inter alia that candidates must have “completed secondary education” or “equivalent technical or commercial studies”.

2. On 20 April 2010 the complainant asked the Chief of the Administration and Finance Department to tell her whether her name was on the shortlist drawn up by the Appointment and Promotion Board. On 30 April she was told that it was not. Having asked for an explanation, she was informed by e-mail on 4 May that the Board “[had] not include[d] [her] on the shortlist because [she] [had] not obtained a baccalaureate diploma or the equivalent in technical or commercial studies [whereas] that qualification [was] specified in the vacancy notice [...] and [had to] be satisfied”. In the meantime, the complainant had had a meeting with the Secretary-General and, according to the ITU, he had told her that it was “not surprising” that the Board, in order to distinguish among the preselected candidates, had based its selection on the possession of a diploma of completed secondary education, or equivalent technical or commercial studies, “because the baccalaureate diploma, among other things, was a significant factor which carried added value by comparison with the basic qualifications called for in the vacancy notice”.

3. By a memorandum of 20 May 2010 the complainant requested a review of the decision to reject her candidature for the post of Chief of the Mail Section. She asked the Secretary-General to cancel the competition and order a fresh selection procedure, so that “all the rules relevant to drawing up the shortlist are respected”.

4. As she received no reply within the time limit stipulated in the applicable rules, she took the view that her request had implicitly been rejected, and on 9 August she lodged an appeal with the Appeal

Board, reiterating her claims and also seeking compensation for the “serious” harm she claimed to have suffered “having regard to [her] genuine prospects of success in the disputed selection procedure”.

5. The Appeal Board “dismissed” the appeal, having concluded that the Appointment and Promotion Board, in drawing up the shortlist, had considered all the preselected candidatures, including that of the complainant, and that “other things being equal, those with the best references” had been shortlisted. However, it took care to recommend, *inter alia*, that when drawing up vacancy notices special attention should be paid to the wording, and that copies of the requisite diplomas should be included in the file of every applicant, so that in the event of a dispute it would be able to reach an informed decision without having to request additional information.

6. By a memorandum of 16 November 2010, which constitutes the impugned decision, the complainant was informed that the Secretary-General was in full agreement with the conclusion of the Appeal Board and that, consequently, the decision of 30 April 2010 was maintained.

7. The complainant contends that the selection process is vitiated through a violation of her right to be heard, a lack of transparency and infringements of the freedom of action of the Appointment and Promotion Board.

She also contends that an error of fact was committed because, contrary to the assertion of the defendant, no comparative examination was made of her candidature, and that the principle of equal treatment was breached.

Subsidiarily, she asserts that there has been an error of law in that the Appointment and Promotion Board took the view that, in order to be shortlisted, the candidates had to hold a baccalaureate diploma, although the vacancy notice did not mention any such requirement. She alleges that in taking that view, the Board overlooked essential

facts. On a “very subsidiary” basis, she submits that the decision to reject her candidature is tainted by an obvious error of assessment.

Lastly, she contends that the evidence she has submitted should lead the Tribunal to require the disclosure of the file of the selection process, with a view to ascertaining how the candidates’ respective merits were compared.

8. The complainant’s claims are set out under B, above.

9. The defendant argues that the complaint should be dismissed as unfounded. It states that the selection process was conducted lawfully, in both form and substance, and that the person appointed at the outcome of the process had all the qualifications required in the vacancy notice and was rightly considered to be the best candidate.

10. This person was invited to comment on the complaint, but said that since it did not concern her directly she did not wish to comment.

11. According to the Tribunal’s case law, an appointment by an international organisation is a decision that lies within the discretion of its executive head. 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. 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, *inter alia*, Judgment 2163, under 1, and the case law cited therein).

12. On studying the file, the Tribunal finds that there are several points on which the parties do not agree, particularly whether the possession of a baccalaureate diploma was a decisive factor in

choosing candidates for the shortlist, and whether there was in fact any comparative assessment of the candidatures. Since these points cannot be resolved on the basis of the documents produced by the parties, the file of the selection process must be communicated to the Tribunal.

13. In its reply the Union argues that the complainant's request for the communication of the file is a claim made for the first time in her complaint and must therefore be dismissed as irreceivable.

However, as the complainant rightly observes, this is not a new claim which would be subject to the rule on the exhaustion of internal remedies. In this instance, it is merely a request made on the basis of Article 11 of the Rules of the Tribunal, for the Tribunal to use its powers of investigation, which it can in fact do on its own motion.

14. The defendant also stated that if the Tribunal considered that the information supplied in support of its arguments was insufficient, it would transmit the file of the selection process for the exclusive attention of the Tribunal. What it objects to is the transmission of the file to the complainant, because it contains confidential information about other individuals.

The Tribunal recalls that, according to the adversarial principle, all documents submitted to it by a party to the proceedings must be communicated to the other party. It will be for the organisation itself, if it considers this necessary in order to protect the interests of third parties, to conceal identities to the required extent in the documents produced.

DECISION

For the above reasons,

1. The ITU shall produce the file of the selection process in accordance with consideration 14, above, within fifteen days of the delivery of this judgment.
2. The complainant shall make her observations, if any, within thirty days of receiving the documents produced.
3. The defendant shall be given thirty days to make final comments, if it so wishes.
4. All the rights and pleas of the parties not expressly ruled upon in this judgment are reserved pending the Tribunal's final ruling on the case.

In witness of this judgment, adopted on 2 May 2013, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet