116th Session **Judgment No. 3251**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs L. N. against the International Labour Organization (ILO) on 20 September 2011, the ILO's reply of 21 December 2011, the complainant's rejoinder of 1 March 2012 and the ILO's surrejoinder of 31 May 2012;

Considering Article II, paragraph 1, 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 and the pleadings may be summed up as follows:

A. Facts relevant to this case can be found in Judgment 3250, also delivered this day. Suffice it to recall that the complainant joined the ILO in August 1990 and worked under a series of contracts of varying lengths, in particular special short-term and short-term contracts, until May 1995. Following a break in service, as from June 1996 she has been continually employed at grade P.4. In March 2004 she was given a contract without limit of time with effect from 1 January 2003.

On 22 October 2009 the ILO published Office Procedure No. 125 (Version 1) regarding personal promotions; it took effect that same day. Paragraph 1 of the Procedure stipulates that it supersedes both

Circular No. 334, Series 6, of 20 July 1985, which had governed the personal promotion system, and Circular No. 334 (Add. 1) of 10 December 1989. Paragraph 9 of the Office Procedure relevantly provides that all contracts established under the Staff Regulations or the Rules Governing Conditions of Service of Short-Term Officials count for the purpose of calculating the required length of service, i.e. 13 years of service in the same grade at the ILO, which is one of the criteria for determining eligibility for personal promotion. Under paragraph 14 of the Office Procedure, each year the Human Resources Development Department (HRD) is required to draw up a list of officials who meet the contractual and seniority requirements for consideration for personal promotion as at 31 December of the previous year on the basis of the available data in the Organization's information system. Furthermore, pursuant to paragraph 15 of the Office Procedure, all officials who consider that they meet the eligibility requirements must check within the given deadline that they appear on the list drawn up by HRD.

The complainant went on annual leave from 9 to 26 October 2009 inclusive. Meanwhile, HRD notified officials of the 2008 personal promotion exercise by way of an e-mail dated 23 October 2009. This e-mail explained that the list of officials who met the requirements for personal promotion as at 31 December 2008 had been prepared and that, if an official meeting the criteria wished to verify that her or his name appeared on the list, she or he should send an e-mail to HRD no later than 7 November 2009, and that each request would receive a response.

In the autumn of 2010 officials who had been considered in the 2008 personal promotion exercise were informed of the outcome of that procedure. On 15 October 2010 the complainant filed a grievance with HRD pursuant to Article 13.2 of the Staff Regulations, alleging that she had not been informed as to whether she was eligible for the 2008 promotion exercise nor had she been informed if she had been considered. By a letter of 21 December 2010 the complainant was notified that HRD considered that her grievance was devoid of merit and that there was no reason for the ILO to take any further action. It

was stated, however, that the complainant's name had already been included in the list of officials eligible for consideration for a personal promotion in the 2009 exercise. In the event that the complainant was awarded a promotion as a result of the 2009 exercise, her promotion would be granted with retroactive effect to the date upon which she became eligible taking into account all of her prior service.

On 21 January 2011 the complainant filed a grievance with the Joint Advisory Appeals Board (JAAB) in which she reiterated and added to the arguments she had raised in her grievance of 15 October 2010. In its report of 30 May 2011 the JAAB recommended that her grievance be dismissed as entirely groundless and devoid of merit. By a letter of 29 June 2011 from the Officer-in-Charge of the Management and Administration Sector (ED/MAS), the complainant was informed that the Director-General accepted the Board's recommendation and he therefore rejected her grievance. That is the impugned decision.

B. The complainant submits that it is clear from her personal file and the provisions of Circular No. 334 that were in force at the material time that she was eligible for consideration under the 2008 personal promotion exercise based on the length of her service, which included the various short-term contracts she held between 1990 and 1996. As HRD had a full record of her employment history it should have included her on the list of candidates for the 2008 exercise. She asserts that Office Procedure No. 125, which came into force after she became eligible for personal promotion, effectively shifts the burden from HRD to the candidate concerned to ensure that he or she is included on the list. It is therefore less favourable to officials than Circular No. 334 and should not have been applied to her retroactively. Furthermore, she argues that the reasoning put forward by HRD that the Integrated Resource Information System (IRIS) could not take into account ILO service prior to 2000 does not justify shifting the responsibility for verifying candidature to the official concerned.

She states that she was on annual leave on the date HRD sent the e-mail of 23 October 2009. In addition, she had no reason to believe, based on the language in that e-mail, that changes had been made to the personal promotion exercise that would require action on her part. She points out that HRD stated that if an official "wish[ed]" to verify that his or her name was on the list, they were to contact HRD by e-mail. In her view, this clearly meant that it was not compulsory to do so.

Lastly, the complainant asserts that a personal promotion was granted to an official who did not satisfy the requirement of having been posted outside of Geneva, in violation of Articles 6.8.2(1) and 6.8.2(4) of the Staff Regulations. She contends that the Joint Negotiating Committee was not consulted on any possible exception to the relevant provisions and thus, the decision to promote that official was tainted by mistake of law.

She asks the Tribunal to set aside the impugned decision and to order the ILO to set aside the 2008 personal promotion exercise. She seeks 5,000 Swiss francs in moral and material damages, and 2,000 francs in costs.

C. In its reply the ILO asserts that, according to the Tribunal's case law, the decision to promote lies at the discretion of the Director-General and is subject to only limited review.

The ILO submits that the 2008 personal promotion exercise was conducted in accordance with the relevant statutory provisions and procedures. Contrary to the complainant's assertions, the rules applicable to the 2008 promotion exercise were those contained in Office Procedure No. 125 and Article 6.8.2 of the Staff Regulations. Paragraph 15 of the Office Procedure was not applied to the complainant retroactively. It points out that the responsibilities and procedural steps set out in the Office Procedure were specifically agreed upon with the Staff Union Committee. The ILO denies that provisions of the Office Procedure are less favourable than those of Circular No. 334.

With respect to the e-mail from HRD of 23 October 2009 the ILO asserts that the language of the e-mail in no way substitutes or derogates from paragraph 15 of Office Procedure No. 125 which requires officials who consider that they meet the eligibility requirements for personal promotion to check the list drawn up by HRD. Furthermore, paragraph 15 of the Office Procedure is consistent with Office Directive No. 1 (Version 1) of 7 January 2008 regarding the Internal Governance Documents System. Paragraph 12 of that Directive relevantly provides that "Office procedures set out the administrative steps that *must* be followed. Failure to comply with them may expose the Office and the official to legal or financial risks".

The ILO states that the complainant was not considered for the 2008 personal promotion exercise because she failed to notify HRD that she met the eligibility criteria. She has not adduced evidence that she was not informed of the launch of the 2008 exercise or Office Procedure No. 125. The Administration's records do not indicate that she was absent on annual or medical leave or on mission for the period between 27 October and 7 November 2009.

It contends that her allegation regarding the unlawful personal promotion of another official is unfounded. The decision was taken in accordance with Article 6.8.2(4) of the Staff Regulations – which, contrary to the complainant's assertions, does not require an official to have undertaken a field posting in order to qualify for a personal promotion – and Office Procedure No. 125. Also, the personal promotion exercise is carried out by a three-member panel appointed by the Joint Negotiating Committee and the contested promotion was unanimously endorsed by that panel.

D. In her rejoinder the complainant presses her pleas. She contends that, in violation of the principle of transparency, the ILO has never published a list of the officials who received a personal promotion as a result of the 2008 exercise. She asks the ILO to confirm that all officials eligible for personal promotion under the aforementioned exercise did, in fact, contact HRD.

E. In its surrejoinder the ILO maintains its position in full. It confirms that it did not unilaterally check personal files in order to draw up the list of candidates for personal promotion. The service records of any officials who did make themselves known to HRD in accordance with paragraph 15 of the Office Procedure were reviewed to verify their eligibility.

CONSIDERATIONS

1. On 15 October 2010, in accordance with Article 13.2 of the Staff Regulations, the complainant submitted a grievance to HRD regarding her eligibility for the 2008 personal promotion exercise. By a letter dated 21 December 2010, HRD rejected her grievance. The Director explained that she had failed to follow Office Procedure No. 125 (Version 1) in that she had not informed HRD of prior service which would have enabled her to meet the eligibility requirements for personal promotion. HRD further considered that "[i]n order for [the complainant's] prior service to be considered in this calculation, it was necessary for [her] to make this known in accordance with paragraphs 14 and 15 of Office Procedure Number 125, which [she] failed to do either within the time limit or at anytime thereafter". By the same letter, HRD informed her that her name had already been included in the list of officials eligible for consideration for a personal promotion under Article 6.8.2(2) of the Staff Regulations in the 2009 exercise and that if she was awarded a promotion as a result of that exercise, it would have retroactive effect.

2. On 21 January 2011, the complainant filed a grievance with the JAAB requesting it to recommend that the Director-General review her grievance, to note the fact that she was not considered eligible for the 2008 exercise, to set aside the result of the impugned exercise, and to set aside the decision not to consider her specifically for the same exercise. In its report dated 30 May 2011, the JAAB unanimously recommended that the Director-General dismiss the grievance as "entirely groundless and devoid of merit". It considered

that according to the case law of the Tribunal, "staff members have a right to be kept informed of any action that may affect their rights or legitimate interests", but it noted that the complainant had been duly informed of "1) the issuance of the Office Procedure pertaining to personal promotions, 2) the launch of the 2008 personal promotion exercise and 3) the need for staff members who believed they met the eligibility criteria to verify whether their names appeared in the list of identified officials no later than 7 November 2009". The JAAB concluded that the complainant had suffered no loss as her name had already been included in the list of officials considered for the 2009 promotion exercise and that in the event she was awarded a personal promotion in the 2009 exercise, it would be made retroactive to the date upon which she became eligible, taking into account all her prior service. Thus, the JAAB could find no grounds whatsoever for her grievance.

3. By letter of 29 June 2011, the complainant was informed of the Director-General's decision to accept the unanimous recommendation of the JAAB and consequently, to reject her grievance as "entirely groundless and devoid of merit". That is the impugned decision.

4. The Tribunal is requested to set aside the impugned decision; to set aside the 2008 personal promotion exercise; to order the Organization to pay 5,000 Swiss francs for the moral and material damages suffered; and to award 2,000 Swiss francs in related costs. The grounds for complaint are presented in Section B above.

5. As the Tribunal finds the complaint to be unfounded on the merits, it is unnecessary to rule on the question of whether or not the complainant had a cause of action, i.e. whether or not the complainant suffered any direct moral or material loss. The Tribunal is of the opinion that the ILO conducted the 2008 personal promotion exercise in accordance with the applicable rules and procedures. The ILO properly applied the new Office Procedure (No. 125, which took effect from 22 October 2009) to the 2008 personal promotion

exercise. The 2008 promotion exercise was announced on 23 October 2009 to the staff by an e-mail informing all officials that the exercise would be carried out in accordance with Office Procedure No. 125 then in force. That Office Procedure clarified its paragraph 9, that "all contracts established under the Staff Regulations or the Rules Governing Conditions of Service of Short-term Officials count for the purpose of calculating the required length of service". Paragraph 15, under the heading "Responsibilities", provides that "All officials who consider that they meet the eligibility requirements must check within the given deadline that they appear on the list drawn up by HRD". Considering that the 2008 promotion exercise was launched after Office Procedure No. 125 took effect, the ILO was correct to follow its provisions for the promotion exercise, and not those of Circular No. 334, Series 6, as the complainant suggests. The complainant did not have any acquired right to the 2008 promotion exercise, promotions being considered "an optional and exceptional discretionary measure which is subject to only limited review by the Tribunal" (see Judgments 2668, under 11, 1500, under 4, 1109, under 4, and 1973, under 5). Considering the above, the Tribunal disagrees with the complainant's assertion that Office Procedure No. 125 was applied retroactively and the implementation of the procedure did not affect any acquired right.

6. The Tribunal agrees with the JAAB's conclusion that the complainant was properly informed regarding the 2008 promotion exercise as she had access to her office e-mail during and after her absence on annual leave and she could have read the e-mail sent to all staff explaining the procedure for the 2008 promotion exercise. She returned to work on 27 October 2009, within the 7 November 2009 deadline for verifying the list of officials considered for promotion. The Tribunal also agrees with the finding of the JAAB, that "checking one's eligibility for a personal promotion, which is not an automatic entitlement, is certainly not an undue burden for staff members". It is uncontested that the complainant was eligible for the 2008 promotion

exercise but as she failed to fulfil the requirements of paragraph 15 of Office Procedure No. 125, she was not considered for the exercise. However, the Tribunal notes that the complainant was included on the list for the 2009 promotion exercise.

7. The claim that the ILO did not publish the list of officials who were promoted as a result of the 2008 promotion exercise, is unfounded. In accordance with paragraph 30 of Office Procedure No. 125 which provides that "[p]ersonal promotions will be published as such in the regular staff movements list", the list was made available on the HRD web page of the intranet. Regardless, the Tribunal is of the opinion that the publication of the list (which in this case was properly done) is irrelevant to the lawfulness of the impugned decision as it occurred after the decision was taken, and it merely affects the efficacy of the decision and the time limits for contesting the decision.

8. The complainant raises the issue of the promotion of another official who had never served in the field, in violation of paragraph 4 of Article 6.8.2 of the Staff Regulations. The ILO points out that the promotion was lawful as the criterion of mobility invoked by the complainant was suspended in 2002 by Circular No. 625, Series 6, of 21 January 2002. The Tribunal notes that that promotion, whether lawful or not, has no effect on the complainant's situation, nor on the complainant's non-inclusion in the list of candidates eligible for the 2008 promotion exercise. As such, the complainant's arguments in this respect will not be considered by the Tribunal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet