Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

119th Session **Judgment No. 3449**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second and third complaints filed by Mr C. L.-K. against the International Labour Organization (ILO) on 25 February 2011 and corrected on 11 and 5 April 2011 respectively;

Considering the letter of 20 April 2011 in which the complainant requested a stay of proceedings in both cases, the letter of 5 May by which the ILO agreed to this request, the letters of the Registrar of the Tribunal of 11 May 2011 informing the parties that the President of the Tribunal had authorised a stay of proceedings *sine die* and the letter of 22 June 2012 in which the complainant asked for the resumption of proceedings in both cases;

Considering the ILO's replies of 24 September 2012, the complainant's rejoinders of 21 December 2012 and the ILO's surrejoinders of 10 April 2013;

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

A. On 8 January 2010 the ILO published a vacancy notice, dated 6 January, for a grade P.4 post, and on 19 March it published another notice concerning a grade P.3 post. Both posts, which were described as technical cooperation positions, were filled in the course of the

year. Although the complainant, who held grade P.3, did not apply, he filed two grievances in his capacity as Chairperson of the Staff Union Committee of the International Labour Office, the ILO's secretariat, in which he alleged a breach of paragraph 9 of Annex I to the Staff Regulations, which concerns the recruitment procedure, because the Staff Union had not been notified of the proposal to publish the two vacancy notices and in both cases the application deadline had been less than one calendar month. As his grievances were dismissed, on 10 June he referred the matter to the Joint Advisory Appeals Board.

In its reports of 28 September 2010 the Board unanimously recommended that the disputed competitions be cancelled. It held that, even if the grade P.3 post was a technical cooperation position and could therefore be filled by appointment by direct selection by the Director-General under Article 4.2(e) of the Staff Regulations, the recruitment process resembled that of a competition under Annex I to the Staff Regulations to fill a "career post". Since the ILO had thus decided to follow the "normal method" of opening a competition provided for by subparagraph (f) of that article, it should have abided by all the regulations governing competitions. The Board was of the opinion that the grade P.4 post was not a technical cooperation position and that it should therefore have been filled in accordance with the rules established in Annex I.

By a letter of 29 November 2010, which constitutes the decision impugned in both complaints now before the Tribunal, the Director-General informed the complainant that, in his opinion, both grievances were irreceivable since they concerned not appointment decisions but the "contractual policy regarding posts" which are not funded by the regular budget and the Staff Union's role in the filling of these posts. He added that both posts were in fact technical cooperation positions and should therefore be filled by appointment by direct selection; the fact that a call for expression of interest had been issued could not be interpreted as indicating an intention to follow the competition procedure provided for in the above-mentioned Annex I.

B. The complainant considers that the posts referred to in the disputed vacancy notices were wrongly described as technical cooperation positions. He therefore argues that appointment by direct selection under Article 4.2(e) of the Staff Regulations could not be used. In addition, as the Director-General, acting under the second sentence of that subparagraph, decided to make the appointments by competition, all the rules established by Annex I to the Staff Regulations should have been followed.

In each case the complainant requests the setting aside of the impugned decision, the cancellation of the disputed recruitment process, redress for the injury suffered and costs in the amount of 2,000 Swiss francs.

C. In its replies the ILO submits that the complaints are irreceivable. Referring to Judgment 3072, it states that since the complainant has not shown that it was physically impossible for him to submit an application, he has no cause of action in his personal capacity. It is also of the opinion that the complainant has no cause of action in his capacity as Chairperson of the Staff Union Committee. It holds that since these cases concern collective disputes regarding the rules governing recruitment, the procedure set forth in Article 7 of the Recognition and Procedural Agreement of 27 March 2000 between the Office and the Staff Union should have been followed. Thus, as there was a difference of opinion between the Office and the Staff Union as to the interpretation or application of the Collective Agreement on a Procedure for Recruitment and Selection of 6 October 2000 introducing the pertinent recruitment provisions into the Staff Regulations, a review panel should have been set up. This did not occur.

On the merits and subsidiarily, the ILO asserts that the grade P.3 post was a technical cooperation position. The grade P.4 post was entirely funded by Programme Support Income. Posts of this kind are regarded as technical cooperation positions. The ILO infers from this that both posts could be filled by appointment by direct selection by the Director-General in accordance with Article 4.2(e) of the Staff

Regulations and that it was under no obligation to hold a competition. It explains, however, that for a number of years it has often published vacancy notices to advertise posts in technical cooperation programmes, because calls for expression of interest facilitate recruitment. However, these measures cannot be regarded as competitions within the meaning of Article 4.2(f), because only some of the stages listed in Annex I to the Staff Regulations are followed by analogy. Simplification of the stages in the call for expression of interest procedure meets the need for efficiency while respecting the principle of equal treatment.

Lastly, the ILO submits that, since the grade P.3 post was abolished on 30 September 2011, the complainant's claim that the corresponding recruitment process should be cancelled is moot.

When the Registrar forwarded the complaints to the ILO, she asked the latter to give the persons appointed at the end of the disputed recruitment processes the opportunity to express their opinion. The candidate who was appointed to the grade P.4 post submitted his comments on 17 September 2012. The ILO explains that it has been unable to satisfy the Tribunal's request with respect to the grade P.3 post, as it was abolished.

D. In his rejoinders the complainant insists that he does have cause of action both in his personal capacity – since the disputed vacancy notices were published during a slack period when he was on leave, which prevented him from applying – and in his capacity as Chairperson of the Staff Union Committee. He considers that the Review Panel is not an appeal body and would not have been competent in this case. On the merits he enlarges upon his pleas.

E. In its surrejoinders the ILO maintains its position. It states that, since the complainant failed to respond to the invitations which it had addressed to him on several occasions to follow the correct procedure, his complaints are irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal. It adds that the complaints are also premature because they are directed against procedural steps. In addition, it questions the Tribunal's jurisdiction to hear these complaints insofar as

they concern human resources management policy. It asks the Tribunal to join the two complaints.

CONSIDERATIONS

1. These complaints seek the cancellation of separate recruitment processes. However, they are based on the same alleged breach of the rules governing the opening of a competition for two vacant posts and are couched in almost identical language. They will therefore be joined to form the subject of a single judgment.

2. Any employee of an international organisation who is eligible for a post may challenge an appointment to that post, regardless of his or her chances of successful appointment to it (see Judgment 2959, under 3). In order to be entitled to take such action, however, he or she must have applied for the post or, failing that, must have been prevented from doing so through no fault of his or her own.

The complainant says that he learnt of the two disputed vacancy notices by e-mail when they were published. He could have submitted an application within the deadlines set by those notices, i.e. within a fortnight in one case and within 21 days in the other; indeed, he provides no evidence to show that he was prevented from doing so through no fault of his own. As he did not apply, he has no cause of action before the Tribunal to challenge the procedures followed and their outcome, and the two complaints are irreceivable insofar as the complainant is acting as an official of the Organization to defend his personal interests. (See Judgment 3072, under 5.)

3. However, the complainant also acted in his capacity as Chairperson of the Staff Union Committee of the Office. According to the case law, members of a staff committee may bring a complaint to preserve common rights and interests, these being understood to mean enforceable legal rights and interests derived from terms of appointment or under Staff Regulations which have not necessarily been breached in respect of the member of the staff committee who files a complaint with the Tribunal.

In order for a complaint submitted on behalf of a staff committee to be receivable, it must allege a breach of guarantees which an organisation is legally bound to provide to staff who are connected to it by an employment contract or who have the status of officials. This condition is a sine qua non for the Tribunal's jurisdiction (see Judgment 3342, under 10, and the case law cited therein).

4. The ILO submits that the complaints do not fall within the Tribunal's jurisdiction because they call into question its human resources management policy and because a collective bargaining procedure is available to deal with matters of this kind. This argument is unfounded, because the complainant alleges a failure to observe the rules on recruitment and appointment laid down in the Staff Regulations. The argument that the complaints are premature is likewise unfounded, since the complainant acted in accordance with the rules of procedural economy by referring the matter to the internal appeal body as soon as he realised that the competition procedures were flawed for the reasons he explained.

The Tribunal considers that the complainant does have cause for action, since he relies on a breach of the right, recognised in the Staff Regulations, of representatives of the Staff Union to be notified of a proposal to open a competition.

It follows from the foregoing that both complaints are receivable insofar as they have been filed by the complainant in his capacity as Chairperson of the Staff Union Committee of the Office.

Moreover, the Organization is wrong to submit that the complaint concerning the appointment to the grade P.3 post has become moot because that post has been abolished, since the appointment in question produced effects.

5. The recruitment procedure is laid down in Chapter IV of the Staff Regulations. The first sentence of Article 4.2(e) thereof stipulates that the normal methods of filling certain vacancies, including those in technical cooperation projects, are transfer in the same grade, promotion or appointment by direct selection by the Director-General.

The second sentence of that provision authorises the Director-General to depart from that rule, after consulting the Staff Union representatives, and to fill vacancies by one of the other methods mentioned in Article 4.2(f). Under the latter subparagraph, vacancies in grades G.1 to P.5 inclusively shall normally be filled by competition through transfer in the same grade, promotion or appointment. Promotion or appointment without competition may be employed only in a limited number of cases listed therein.

6. The two vacancy notices dated 6 January and 19 March 2010 concerned appointments to grade P.4 and P.3 posts respectively, both of which, according to the ILO, fell into one of the categories listed in the first sentence of Article 4.2(e) of the Staff Regulations.

The ILO submits that in publishing these notices it did not intend to open a competition, as it was authorised to do under the second sentence of Article 4.2(e) of the Staff Regulations, since both posts were to be filled by appointment by direct selection, after the deadlines set in the notices. In order to widen employment possibilities for staff and to offer the managers a broader choice, the Organization decided to publish vacancy notices, in one case because it was a technical cooperation post and in the other because it was a post entirely funded by Programme Support Income. The posts were, however, to be filled by appointment by direct selection, albeit after a call for expression of interest and following certain stages of the ordinary competition process.

7. In publishing the vacancy notices of 6 January and 19 March 2010, the Director-General may have given the staff the impression that he was opening competitions as provided for by the second sentence of Article 4.2(e), even though, in view of the nature of the posts be filled, he could normally have made an appointment by direct selection. He did not, however, follow the rules laid down in the Staff Regulations and Annex I thereto in that, not only did he not consult the representatives of the Staff Union, but he also shortened by at least one third the statutory deadline for submitting applications.

8. The Organization's approach, which it explains by a concern for "transparency", would have been acceptable if the vacancy notices had clearly indicated that the procedure being followed was that of appointment by direct selection, but this was not the case. The 164 and 205 persons who applied for the two posts in question may well have thought that the Director-General had availed himself of the possibility offered by the second sentence of Article 4.2(e) of the Staff Regulations and that an ordinary competition had therefore been opened, as one of the persons appointed in fact writes in his comments of 17 September 2012.

Moreover, the Tribunal notes that the Organization itself acknowledges that the manner in which it proceeded was ambiguous and that it has decided that henceforth, when it advertises posts to be filled by appointment by direct selection, the vacancy notice will make it clear that the procedure involved will not be the normal one of competition and that appointment will be by direct selection in accordance with the first sentence of Article 4.2(e) of the Staff Regulations.

9. By adopting a procedure that could mislead potential applicants as to the nature of recruitment to the posts in question, the ILO rendered these recruitments unlawful.

For this reason, the complaints must be allowed and the impugned decision must be set aside, without there being any need to examine the complainant's other pleas. The two unlawful competitions must be cancelled.

The persons appointed to the posts advertised, who accepted their appointments in good faith, must be shielded from any injury.

10. The complainant seeks redress for the injury he has suffered without, however, explaining the nature of that injury. Since, as stated in consideration 2, above, his personal interests are not at stake in these cases, this claim will be dismissed.

11. In the circumstances of this case, there are no grounds for awarding the complainant costs.

DECISION

For the above reasons,

1. The impugned decision is set aside and the two disputed competitions are cancelled.
2. All other claims are dismissed.
3. The persons appointed to the posts advertised must be shielded from any injury.

In witness of this judgment, adopted on 6 November 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

(Signed)

CLAUDE ROUILLER SEYDOU BA PATRICK FRYDMAN

DRAŽEN PETROVIĆ