

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
WTO

124th Session

Judgment No. 3868

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. S. against the World Trade Organization (WTO) on 26 February 2015 and corrected on 26 March, the WTO's reply of 1 July and the complainant's e-mail of 25 July 2015 informing the Registrar of the Tribunal that he did not wish to file a rejoinder;

Considering the additional documents produced by the parties at the Tribunal's request;

Considering Article II, paragraph 5, 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 decision not to shortlist him for a position for which he had applied.

The complainant – a Mauritian national – joined the WTO in January 2013 as a Dispute Settlement Lawyer at grade 7 in the Rules Division under a project-based contract ending on 31 December 2014. The contract stated that it was subject to the terms and conditions described in the WTO Short-Term Staff Rules.

In March 2013 the WTO issued a vacancy notice to fill four regular-budget positions of Dispute Settlement Lawyer at grade 7 in the Appellate Body Secretariat, Legal Affairs Division and Rules Division. The complainant applied. He was shortlisted and interviewed, but it was ultimately decided to cancel the selection process with respect to the vacant position in the Rules Division.

In November 2013 WTO issued another vacancy notice for a Dispute Settlement Lawyer at grade 7 in the Rules Division, for which the complainant also applied. During a meeting with the Division Director the complainant was informed that he had not been shortlisted for this position. The Director explained that an “exceptional pool of talented individuals” had applied. He also expressed reservations about the complainant’s drafting skills. The complainant was formally notified of the decision not to retain his candidature on 7 March 2014.

On 31 March the complainant requested the Director-General to review that decision. He contested the reasons given for the decision, stated that his contract could “only be subject” to the WTO Staff Regulations and Rules, since the Short-Term Staff Rules govern contracts of less than 12 months only, and asked the Director-General to instruct the Director of the Human Resources Division to issue an addendum to his contract to “clarify and reiterate that it [wa]s and ha[d] always been subject to [the WTO Staff Regulations and Rules]”. He also pointed to the fact that he had not yet received his performance evaluation report (PER), alleged discrimination and bias against Sub-Saharan Africans and stressed that the WTO was responsible for providing working conditions free from harassment or abuse. His request was rejected on 1 May 2014.

The complainant appealed the decision to reject his request for review on 4 June 2014, claiming damages. In its report of 17 November 2014 the Joint Appeals Board (JAB) found that the legality of the complainant’s project-based contract did not form part of the administrative decision under review and that he had suffered no disadvantage at the time of his candidature by holding such a contract since he was considered as an internal candidate. It also found that the failure to provide him with a PER in time (he received it in May 2014)

had had no impact on the decision not to include him on the shortlist. It found no evidence that he had been victim of bias or discrimination. The JAB commented that the language used by the complainant in his submissions had been unnecessarily aggressive, containing unsubstantiated allegations against colleagues that bordered on personal attacks, and that such language was unbecoming of an international civil servant. It recommended maintaining the decision of 1 May 2014, which the Director-General did by a decision of 14 December 2014. That is the impugned decision.

The complainant asks the Tribunal to award him material and moral damages in the amount of 300,000 Swiss francs. He claims costs in the amount of 15,000 francs.

The WTO asks the Tribunal to reject all the complainant's claims.

CONSIDERATIONS

1. The central question is whether the decision not to shortlist the complainant for a post which was advertised in vacancy notice VN Ext/F/13-32 was unlawful and should be set aside.

2. The complainant states that about six months prior to issuing that vacancy notice, he had been shortlisted for a similar vacancy in the WTO's Rules Division under vacancy notice VN Ext/F/13-2, "but that was before the Rules Division Director decided to cancel the position after the fact, presumably because the shortlisting exercise had not produced the desired results". He adds that "[b]y the time the position was re-advertised under the guise of VN Ext/F/13-32, the job description had been significantly modified to include not just a requirement for 'trade remedies experience' but also a reference to 'knowledge of national practice in the area of trade remedies' [...] putting Sub-Saharan African candidates [like him] at a disadvantage". According to him, "[t]wo of the three members of the shortlisting panel expressed reservations about the wisdom of the added requirements".

The complainant claims that the shortlisting process was tainted *ab initio*, and conducted under a cloud of suspicion which did not afford him a fair opportunity to compete. He admits that he has no direct

evidence but depends on “circumstantial evidence in the form of bias and discrimination, both general and specific [...]”. He also states that while he does not claim any absolute right to be shortlisted for a post, the management does not “have a license to manipulate the process at will until the desired result is obtained”.

3. It is against this background that the complainant challenges the impugned decision, dated 14 December 2014, in which the Director-General accepted the recommendations of the JAB and dismissed his internal appeal against the decision not to shortlist him in respect of VN Ext/F/13-32, which he had applied for as an internal WTO candidate. He had been notified of this decision on 7 March 2014. In challenging the impugned decision, the complainant contends that it involved errors of law and fact in that it did not recognize that the decision not to shortlist him was made as a result of bias and discrimination and was based on procedural and substantive impropriety. He seeks material and moral damages and costs.

4. The Tribunal considers it convenient to outline the relevant applicable legal framework at this juncture. The basic principle is that a decision concerning the selection of a successful applicant in a competition is a discretionary one and is 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 a selection process must have her or his application considered in good faith and in keeping with the basic rules of fair and open competition. An organisation must abide by its own rules on selection and, when the process proves to be flawed, the Tribunal can quash any resulting appointment, albeit on the understanding that the organisation must ensure that the successful candidate is shielded from any injury which may result from the cancellation of an appointment accepted in good faith (see Judgment 3652, under 7).

5. The applicable internal regulatory provisions are contained, particularly, in WTO Staff Regulations 3.1 to 3.5; 4.1 to 4.3; 5.1 to 5.3, as well as in paragraphs 70 to 79 of Administrative Memorandum No. 934. The latter provides for Personnel Management and Career Development Policies in the WTO Secretariat. These provisions stress that WTO's recruitment policy shall focus on attracting staff of the highest competence, efficiency and integrity.

6. The complainant contends that the JAB erred when it concluded, against the weight of the evidence, that he had failed to discharge the burden of proving that he was the victim of bias and discrimination, or, in other words, unequal treatment. The Tribunal stated as follows concerning proof of bias in Judgment 3380, consideration 9:

“It is well settled that the complainant bears the burden of proving allegations of bias. Moreover, the evidence adduced to prove the allegations must be of sufficient quality and weight to persuade the Tribunal (see Judgment 2472, under 9). It is also recognized that bias is often concealed and that direct evidence to support the allegation may not be available. In these cases, proof may rest on inferences drawn from the circumstances. However, reasonable inferences can only be drawn from known facts and cannot be based on suspicion or unsupported allegations.”

The following statement in Judgment 2313, under 5, provides context for discrimination or unequal treatment:

“**The principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently.** In most cases involving allegations of unequal treatment, the critical question is whether there is a relevant difference warranting the different treatment involved. Even where there is a relevant difference, different treatment may breach the principle of equality if the different treatment is not appropriate and adapted to that difference.” (Emphasis added.)

7. The complainant submits that the shortlisting process was tainted from the outset, because it was conducted under a cloud of suspicion with the result that he was never afforded an equal opportunity to compete for the vacancy on a level playing field. He states that because of “the cloak of secrecy which shrouds such administrative actions, he does not have any [direct] evidence of malfeasance to adduce other

than circumstantial evidence in the form of indicators of bias and discrimination, both general and specific [...]"

8. The general indicators to which the complainant refers raise institutional bias and discrimination which he alleges are inherent to the Rules Division in which he worked. His case may be summarized as follows: the Rules Division has a long history of mismanagement and lack of leadership where managers "vie with one another to instil a climate of fear and intimidation, and push their respective agendas". One result of this is that professional staff who do not follow the dictates of their superiors have been "eased out of the Division" and "shortlists are not acted upon unless they conform to the expected outcome". Another result is that PERs are completed months behind due dates because the two supervisors who should complete them are not on speaking terms and the Director is unable to intervene. In short, procedures are not followed.

9. The Tribunal finds that neither these statements nor the complainant's second "general indicator", namely that his two-year contract was subject to the Short-Term Staff Rules rather than to the WTO Staff Regulations, substantiate his allegation that the decision not to shortlist him was tainted by bias or discriminatory or unequal treatment. Moreover, the Tribunal accepts the WTO's explanation that the complainant was offered a two-year contract which was subject to the Short-Term Staff Rules when it introduced a number of these new project-based contracts in 2012 to cope with a shortage of experienced lawyers due to a temporary surge in cases. Other persons were employed under this type of contract as well.

10. The Tribunal considers that the question whether the complainant's contract was illegal is only at issue in these proceedings if the fact that its subjection to the Short-Term Staff Rules is found to have militated against his shortlisting. The evidence shows that the complainant was considered in the shortlisting exercise as all other WTO internal staff members, including those who were on fixed-term contracts which were subject to the WTO Staff Regulations. It is

noteworthy that the complainant was shortlisted on the same basis for VN Ext/F/13-2. There is no evidence to substantiate his plea that his contractual status compromised his chances of being shortlisted. Accordingly, that plea is unfounded, as is, by extension, his plea of substantive impropriety, that “[t]he JAB was wrong in law and on the facts, [...] when it concluded that the fact that [his] contract was erroneously characterized as subject to [the Short-Term Staff Rules] had no bearing on the subject matter of his complaint”.

11. The complainant alleges that a third “general indicator” of bias and discriminatory or unequal treatment is that job descriptions in vacancy notices are usually manipulated by adding requirements “the effect of which is to deliberately exclude all nationals of Sub-Saharan Africa other than South Africa” so that there is an absence of nationals of Sub-Saharan Africa in the Rules Division. While this highly speculative assertion does not amount to proof of bias or discriminatory and unequal treatment, the complainant centrally claims that he was shortlisted for VN Ext/F/13-2 but not for VN Ext/F/13-32, because the WTO manipulated and changed the job description for the latter vacancy as it had not achieved its desired result in the shortlisting for VN Ext/F/13-2. The complainant does not substantiate this assertion with evidence from which bias and discriminatory treatment may be deduced.

Moreover, the Tribunal notes that two of the three WTO divisions concerned (the Appellate Body Secretariat and the Legal Affairs Division) recruited staff members under VN Ext/F/13-2. However, the Rules Division decided not to fill its vacant position with any candidate from that competition. According to the WTO, this was because no satisfactory candidate was identified for a post in the Rules Division, for which the complainant had applied. It was in those circumstances that VN Ext/F/13-32 was issued. There is no evidence from which the Tribunal may deduce that “the Rules Division Director decided to cancel the vacancy after the fact, presumably because the shortlisting exercise had not produced the desired results”, as the complainant alleges. Neither, as he further alleges, is there evidence from which to deduce that “[b]y the time the position was re-advertised under the guise of VN Ext/F/13-32, the job description had been modified to include not

just a requirement for ‘trade remedies experience’ [...], but also a reference to ‘knowledge of national practice in the area of trade remedies’” and that these added requirements “were clearly calculated to put Sub-Saharan African candidates at a disadvantage”.

12. The complainant alleges that a “specific indicator” that provides proof of bias and discrimination or unequal treatment, specifically to him, arises because he was “banish[ed] to an isolated office on the 4th floor attic from the day of his entry of duty” and that this “was as good a first signal as any that he was meant just as a decoy – not to be an integrated team member”. The complainant further alleges that for the first seventeen months of his two-year contract he was left in that office to operate alone with, little or no interaction with the rest of the Division, and that that only changed after his repeated protests to his supervisor and to the Director, by which time “it had become clear that his role had never been intended to be more than temporary or marginal”. These are unsubstantiated allegations. Moreover, the complainant has not controverted the WTO’s statement that, when he joined the Organization, he was given a choice whether to share an office on the second floor or to have his own office on the fourth floor and he chose the latter.

13. In his second “specific indicator” of bias and discrimination or unequal treatment, the complainant refers to what he states is Ms A.-G.’s “version of his performance feedback”. This reference is to the reply of 1 May 2014 to the complainant’s request to review the original decision not to shortlist him, which was signed by Ms A.-G., acting by delegation of authority from the Director-General. The complainant notes that in her reply, she made disparaging comments about his performance and that “her version of the performance feedback was not just at odds with the feedback provided by [his] supervisor but [was] also in stark contrast with [his] PER released shortly thereafter”. According to the complainant, the “incendiary tone” and “inflammatory contents” of Ms A.-G.’s response “would suggest that it was motivated more by personal animosity than by the strict needs of a review request”. He insists that “the response would appear to have been part of a hoax perpetrated by person(s) unknown, using a ghost version of [his] PER

[...] to inform [Ms A.-G.'s] performance feedback". The view of the Tribunal is that there are aspects of Ms A.-G.'s memorandum which were unnecessarily acerbic and do not accord with the standards of propriety for communication in an international civil service. However, the response merely rejected the complainant's request for review of the decision not to shortlist him and does not amount to bias and discrimination that led to that decision.

14. As to the complainant's third "specific indicator" of bias and discrimination or unequal treatment, he raises the issue of his 2013 PER which was not completed when the shortlisting was conducted. There is, however, no evidence to support the allegation that the failure to complete that PER within the stipulated time is evidence of bias and discrimination that led to the decision not to shortlist the complainant, which is the subject of the present complaint. In particular, there is no evidence that the PERs of the internal candidates were taken into consideration for the shortlisting exercise. Consequently, all arguments concerning the PER are irrelevant.

15. The evidence which the complainant provides to support his claim of bias and discrimination in the present complaint mirrors the evidence which he provided to the JAB. The Tribunal finds that, whether taken individually or compendiously, that evidence does not amount to proof of bias and discrimination within the principles reproduced in consideration 4, above. Accordingly, the complainant's claim that the JAB erred when it concluded, against the weight of the evidence, that he had failed to discharge the burden of proving that he was the victim of bias and discrimination, is unfounded.

16. The complainant also claims that "[t]he JAB erred in its appreciation and understanding of the evidence to the extent that it found that there was no contradiction between one panel member's collective statement of support for the impugned [...] decision and her earlier private email to [him] expressing support for [his] claim, and disgust for both the management response and the presumed author of the response". This plea arises out of the JAB's attempt to definitively

determine whether the members of the shortlisting panel had agreed not to include the complainant on the shortlist. In response to the complainant's assertion made in his internal appeal that there were disagreements among the shortlisting panel members, the JAB had sent specific questions related to the decision not to shortlist the complainant. The three members of the panel responded by confirming that they had agreed that the complainant should not be shortlisted for the position. The complainant challenged the credibility of one panel member, Ms H., by producing a private e-mail from her, dated 6 May 2014, which allegedly contradicted her response to the JAB's enquiry.

17. The Tribunal observes, as the JAB did, that in the e-mail which the complainant produced, the panel member expresses empathy with the complainant. This followed his receipt of Ms A.-G.'s response on behalf of the Director-General, dated 1 May 2014, rejecting his request for review. The complainant had sent the response to her. Her e-mail reply of 6 May 2014, while empathetic, makes no statement expressly or from which it may be deduced that she disagreed with the decision of the panel not to shortlist him. Neither does the Tribunal accept the complainant's contention that that e-mail response raises issues of conflict of interest in relation to Ms H. which requires the decision not to shortlist him to be set aside. In the foregoing premises, the complainant's plea in this regard is unfounded.

18. The complainant's plea of procedural impropriety is directed against the JAB's process. He contends that the JAB is neither independent nor impartial, both in terms of its composition (presumed bias) and in terms of its actual findings (actual bias) and that "on grounds of its credibility gap alone, its findings are devoid of both authority and believability". He further submits that presumed bias is inherent in the JAB's composition and structure as its members are in a position of subservience to the WTO and are not "imbued with the sense of independence and impartiality needed to take on [the WTO]" out of concern for the security of their employment. The Tribunal dismisses these submissions as speculative conjecture and unsubstantiated conclusions.

The plea is unfounded as the Tribunal is satisfied that the JAB was generally constituted in accordance with WTO rules.

19. The Tribunal finds no merit in the complainant's further submission that the JAB's lack of impartiality and independence was manifested as actual bias. He refers to what he describes as the JAB's dismissive treatment of his submissions and provides four examples. However, his examples refer to his PER and to the message of Ms H. The Tribunal has already found that the arguments regarding the PER are irrelevant, and those regarding Ms H.'s e-mail unfounded.

20. The complainant submits, as another plea of procedural impropriety, that the JAB's lack of independence and impartiality is evidenced in its failure to rule in a timely manner on his motions to expunge evidence or to exclude statements. He refers to an occasion on which he tried to move the JAB to seek responses from the WTO on his list of questions and requests for documents. This is elucidated in his e-mail to the JAB's Secretary, dated 9 September 2014, in which the complainant acknowledged receipt of the WTO's written reply to his appeal. The complainant drew the Secretary's attention to some 30 questions and 25 requests for documents attached to his appeal. He noted the WTO's submission that these were irrelevant to the matter and that the application was a fishing expedition. He stated that "albeit unwittingly", the WTO had in its reply responded to eight of his questions, but that two of the documents which it provided were too heavily redacted to be of any probative value. He stated that there were some 22 questions and 25 requests for documents which still remained outstanding and highlighted three sets of questions and requests to which he required responses. First, he referred to his request for information concerning Sub-Saharan African representation in the Rules Division and stated that it was hard to understand why the WTO had provided information concerning the number of such staff members throughout the Secretariat rather than to provide information of such persons in the Rules Division.

The Tribunal notes that the WTO had indicated that the Director of the Division was African, but that the complainant's response was that he was South African. The WTO's reply shows that the Director was the only Sub-Saharan African in the Division, and, moreover, the WTO explained the reason for this. Nothing would have been served by the JAB ordering any further response to that question. Neither does the Tribunal consider that there was a need for further explanation concerning the delay in the completion of the complainant's PER, which he raised as the second set of outstanding requests before the JAB, as that issue had no bearing on the decision not to shortlist the complainant.

In the third place, the complainant refers to a series of questions and requests which he had made pertaining to the legal authority for "the so-called project-based contracts" which, he stated, "lies at the root of the complaint". The Tribunal has determined that that matter is not at the root of the challenge to the decision not to shortlist the complainant. Accordingly, the Tribunal will dismiss the application for the production of the documents which are irrelevant. The application is a mere fishing exercise given the wide terms in which it is framed.

21. The complainant asserts that the JAB's lack of independence and impartiality is further evidenced in its failure to expunge the Rules Division Director's equivalent of an *amicus* statement from the record and in its refusal to afford him the opportunity to respond by calling witnesses. This is a reference to the statement which the Director provided when the JAB posed questions to the parties on 6 October 2014. The WTO's response included the additional comments which the Director submitted. The WTO states that, as it was a written first-hand account to assist in the drafting of its replies to the JAB's questions, it saw fit to attach it to its replies. It insists, however, that it made no attempt to re-argue the case, and indicates that, as the JAB found in its report, "in past appeals both parties to an appeal have provided statements from staff members to support positions or statements advanced" and "where these statements were provided as part of a submission, the [JAB] has never refused to accept them on to the record".

The Tribunal finds that the complainant was not put at a disadvantage and that the JAB acted within the bounds of impartiality and independence inasmuch as it permitted him to respond to the Director's statement, which he did. By extension, the Tribunal also rejects the complainant's assertion that the JAB erred in law and was "seemingly oblivious to [the] principles of due process, to the extent that it failed to either repudiate the Rules Director's unsolicited *amicus* brief or [to] grant [his] motion to be allowed to 'respond in kind'" and denied him the opportunity to respond by calling witnesses. The JAB noted that, while the complainant requested that the brief be struck from the record, he had asked, alternatively, that he be permitted to "respond in kind" to the brief if the JAB admitted it.

The Tribunal further finds that the JAB did not breach due process as it permitted the complainant to respond to the Director's statement, which he did. Further, the Tribunal rejects as scandalous the complainant's submission that "[t]he JAB was inept and/or incompetent in its management of the proceedings, and seemingly unable and/or unwilling to assert its quasi-judicial authority, refusing to rein in [the WTO's] counsel's antics, and allowing him to throw his weight around, dictate proceedings and turn the adjudication process into a circus".

22. The Tribunal also rejects the complainant's assertion that the JAB's lack of independence and impartiality is evidenced in its failure to address grey areas which were relevant to his appeal. The areas to which the complainant refers, namely his request for statistical evidence of the Sub-Saharan African staff in the Rules Division, the "state of unruliness [prevailing] in the Rules Division" and the elucidation of the "ghost" version of his PER, had no bearing on the decision not to shortlist him, which is the subject of the present complaint. In all of the foregoing premises, the complainant's plea of procedural impropriety is unfounded.

23. In the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ