Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

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

**B. B.**

***v.***

**IOC**

**131st Session** **Judgment No. 4368**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. B. d. S. R. B. E. d. l. M. against the International Olive Council (IOC) on 2 July 2018 and corrected on 9 August 2018, the IOC's reply of 7 February 2019, corrected on 14 February, the complainant's rejoinder of 25 May and the IOC's surrejoinder of 9 August 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the cancellation of a competition procedure in which she participated.

The IOC's internal regulations depend, to a large extent, on the various international agreements on olive oil and table olives that have been adopted by its decision-making bodies and ratified by its Member States since 1955. The entry into force of a new agreement entails the amendment of all the rules governing the IOC. New organisation charts and job descriptions are then approved by the Council of Members so as to adapt them to the objectives of the agreement in question.

In 2005, the IOC began a restructuring process that led it to reduce its organisational structure and the number of staff members in 2010. The 2012 organisation chart provided for the post of "Head of the Technical Unit" but, in view of a number of contradictions between the 2012 organisation chart and the IOC Rules of Procedure applicable at

that time, this post was assigned *ad interim* pending the approval, on 16 March 2017, of a new organisation chart and new job descriptions.

Despite these contradictions, on 8 November 2016, the Executive Director advertised the post in question in accordance with the 2012 organisation chart and article 9 of the Staff Regulations, which gave priority to internal candidates for vacant posts. On 21 November the complainant – who had worked for the IOC since 2002 and, at the material time, was assigned to the Technical Unit – pointed out a contradiction between the bases of the call to participate in the internal competition and the job description for the advertised post and in terms of the requirements stated. On 23 November she applied for the post and requested that the anomalies that she had identified be duly justified. On 1 December she was informed that the recruitment procedure complied with the applicable rules and procedures. On 16 December 2016 she reiterated her reservations and at the same time asserted her right of internal appeal. She requested to be informed of the outcome of the competition procedure, which had reached its end date.

The new International Agreement on Olive Oil and Table Olives of 20 October 2015 entered into force on a provisional basis on 1 January 2017. Under article 31, its entry into force could not be definitive unless at least five of the Contracting Parties had ratified, accepted or approved it or acceded to it. The Staff Regulations were amended and the rule granting priority to internal applications in recruitment competitions was abolished.

On 16 January 2017 the Administrative Unit informed the complainant that a letter had been received from the Portuguese Ambassador to Spain concerning her application for the post of Head of the Technical Unit, which attested to her high level of qualification and skill.

On 1 March 2017 the complainant wrote to the Executive Director that, according to the minutes of the meeting of the College of Senior Officials, the competition in question had been cancelled by decision of 20 February 2017. She remarked that this decision had still not been notified to her officially, and requested that she be sent a copy of her application and informed of the reasons for the closure of the competition. On 6 March she lodged an appeal with the Joint Committee against the decision of 20 February. She requested to be appointed to the contested post, informed of the reasons for the cancellation of the competition, awarded compensation for the injuries she considered she had suffered

and reimbursed for her costs. She also sought the disqualification of some Committee members. On 20 April she was informed of the new organisation structure which was to be gradually put into operation until its full implementation in 2020 and of her job description in the transitional organisation chart.

On 5 June 2017 a new vacancy notice for the post of "Head of the Olive Growing, Olive Oil Technology and the Environment Unit", formerly the Technical Unit, was published. The complainant, who had applied for this post, was not selected. She subsequently applied for the post of "Head of the Administrative Management and Human Resources Management Unit", advertised on 17 November 2017, but another applicant was appointed.

On 3 April 2018 the Joint Committee delivered its reasoned report in which a majority of its members considered that the Staff Selection Committee had not followed the applicable procedure scrupulously or acted with sufficient speed in view of the short time-frame available, that the selection procedure was unclear and vague, and that the facts of the case could have caused injury to the complainant even though the Executive Director was entitled to cancel a competition. One member of the Joint Committee issued a dissenting opinion. By a letter of 3 May 2018, which constitutes the impugned decision, the complainant was informed that her appeal had been dismissed.

The complainant requests the Tribunal to set aside the impugned decision, appoint her to the contested post, award her compensation for the material and moral injuries she considers she has suffered and award her costs for the internal appeal proceedings and the proceedings before the Tribunal. In her rejoinder, she asks the Tribunal to rule that the justifications provided by the IOC in the reply have no force or effect and she seeks the payment of additional financial compensation, which she assesses at 45,000 euros at least. In addition, she calculates her costs to be 8,000 euros. Finally, in both briefs, she asks the IOC to produce various documents relating, in particular, to the various competition procedures in which she participated.

The IOC asks the Tribunal to dismiss the complaint. It reserves the right to take any legal action to defend its honour, reputation and good name, which it considers to have been damaged by statements contained in the rejoinder, and it rejects the new claims as irreceivable.

## CONSIDERATIONS

1. The complainant impugns the decision of 3 May 2018 by which the Executive Director of the IOC dismissed her appeal against the cancellation of the competition opened on 8 November 2016 with a view to filling the post of Head of the Technical Unit, which appeared on the IOC organisation chart in force at that time.

The complainant submits that the cancellation of that competition, announced by the Executive Director on 20 February 2017, unlawfully deprived her of a valuable opportunity to be appointed to the post in question.

2. The complainant has requested that oral proceedings be held, including, in particular, the hearing of a witness. However, in view of the abundance and high degree of clarity of the submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the case and does not therefore deem it necessary to grant this request.

The complainant has also asked that the IOC be ordered to produce various documents. However, the IOC has submitted, as annexes to the reply, the various documents of which disclosure was requested in the complaint. While the complainant has requested, in her rejoinder, the production of several additional documents, the Tribunal considers that the disclosure of these documents – whose very existence is highly doubtful – is not actually necessary to resolve the dispute. It will not therefore order further disclosure.

3. The Tribunal notes that, as the IOC correctly states, several of the arguments put forward by the complainant in her submissions are irreceivable in these proceedings since they do not relate to the challenge to the impugned decision itself. This applies in particular to her allegations of injury resulting from a general delay to her career and a smear campaign by several colleagues. These considerations do not have a direct bearing on the lawfulness of the cancellation of the contested competition.

Moreover, it should be borne in mind that, as the Tribunal has consistently held, a complainant may not, in her or his rejoinder, enter new claims not contained in her or his complaint (see, for example, Judgments 960, consideration 8, 1768, consideration 5, or 2996,

consideration 6). In the present case, the complainant has, in her rejoinder, presented a claim for compensation for "financial loss", which did not appear in the same form in her complaint. While the IOC misunderstands the implications of this rule, laid down in case law, when it argues in its surrejoinder that the irreceivability in question extends to any submission or allegation made for the first time in the rejoinder, this new claim will be dismissed at the outset for this reason.

4. According to the Tribunal's settled case law, the executive head of an international organisation may cancel a competition in the interests of the service with a view, in particular, to holding a new competition on different terms if need be (see, for example, Judgments 791, consideration 4, 1223, consideration 31, 1771, consideration 4(e), 1982, consideration 5(a), 2075, consideration 3, 3647, consideration 9, 3920, consideration 18, 4216, consideration 3, or 4283, consideration 2).

However, such a decision can never be arbitrary. The Tribunal must therefore ascertain whether the condition relating to the interests of the organisation required under the case law in question is actually met and whether the cancellation of the initial process is based on a legitimate reason (see, in particular, Judgments 3647, consideration 9, and 3920, consideration 18, cited above).

5. In this case, the decision of 20 February 2017 announcing that the aforementioned competition had been cancelled, which was taken, as required by Annex III to the Rules of Procedure of the IOC, after consultation with the College of Senior Officials, is set out in the minutes of the meeting of that body at which it was discussed.

An analysis of an internal note prepared for this meeting, which sets out the reasons why the Executive Director wished to cancel the competition in question, shows that these reasons were threefold.

First, it transpired that the competition could not have been completed, as initially planned, before the new International Agreement on Olive Oil and Table Olives of 20 October 2015 entered into force on a provisional basis on 1 January 2017. This raised various difficulties relating to the general context, itself complex, in which the IOC was operating at that time.

Second, in view of the objections raised in this regard by one of the candidates (namely the complainant), it appeared that the qualification requirements specified in the competition notice were insufficiently clear.

Third, the conduct of the first stage of the competition seemed to have been tainted by several irregularities, which were pointed out by the Staff Selection Committee in its report.

6. The written evidence suggests that the first and third reasons are not without substance and an assessment thereof would raise numerous questions. However, there will be no need for the Tribunal to undertake such an assessment here since the second reason, the lack of clarity of the qualification requirements specified in the competition notice, is indisputably sufficient on its own to warrant the cancellation of the competition.

7. The submissions show that the job description for the post of Head of the Technical Unit, approved by the Council of Members, which was in force at the material time, to which the competition notice of 8 November 2016 expressly referred and which was appended to that notice, provided that the post had to be filled by an official with "[u]niversity qualifications (five-year Master or equivalent) in the agronomic field or similar". Provisions of this nature in a job description are prescriptive. Unless they are amended beforehand, they therefore bind the organisation in the implementation of any decision-making process aimed at filling the post in question.

However, the competition notice stated, in its section on requirements for candidates, that the condition in this respect was the possession of a "[u]niversity degree (doctorate, master's in engineering, master's or degree)", bearing in mind that the term "degree" in this list (which is the literal translation of "grado", the term used in Spain, the IOC's host State) refers to an undergraduate degree awarded after four years – or in some cases only three years – of higher education.

The requirements laid down in the competition notice hence failed to comply with the job description in two respects. First, they accepted the possession of a lower-level degree than a master's or equivalent qualification attesting to five years of higher education as sufficient. Second, they did not provide that the degree was to have been awarded specifically in agronomy or a similar area, which hence did not rule out

the possibility that university qualifications in other disciplines would be taken into account.

8. In an opinion dated 26 June 2017, which the Joint Committee had requested in connection with its examination of the complainant's appeal, from the head of the IOC's Legal Department stated that the organisation now interpreted the provision of article 19 of the Rules of Procedure, which provides that the Council of Members has to approve job descriptions, as not requiring such approval for the qualification requirements for the posts in question. She inferred from this that the Executive Director had the authority to amend the qualification requirements stated in a given job description if necessary, after consulting the College of Senior Officials.

The Tribunal might have accepted that legal analysis, but it observes that the Executive Director had not, in this case, amended the job description before the competition was opened and that it is not even possible to find that he implicitly intended to make such an amendment by stating different qualification requirements in the competition notice. In fact, in a memorandum dated 1 December 2016, sent to the complainant in response to her objections in this regard, the Executive Director stated, on the contrary, that "the job description approved by the Council of Members and appended to the competition notice remain[ed] the same, which, in practice, implie[d] that the degree of *grado* [would] be accepted as years of higher education taken into account, without the higher educational qualifications set out in the job description ceasing to be required".

9. As the content of this last sentence shows, there was indeed a contradiction between the educational requirements specified in the job description in question, which remained in force, and those stated in the competition notice, which were substantially less demanding.

That was, moreover, the argument put by the complainant, in essence, when the competition was opened, in a memorandum dated 21 November 2016 then in subsequent correspondence dated 23 November and 16 December 2016, as the complainant noted in her appeal to the Joint Committee and then her submissions to the Tribunal.

In eventually deciding to cancel the competition on this ground among others and in expressly referring in that connection, as stated above, to the complainant's objections on this subject, the Executive Director thus merely endorsed that same argument.

10. The Tribunal underlines in this regard that the situation described above, resulting from the fact that different qualification requirements were specified in the provisions applicable to the competition, was not only liable to introduce a regrettable ambiguity into the determination of selection procedures for candidates – as the IOC appeared to consider – but was quite simply unlawful. Indeed, the Executive Director could not lawfully decide, while allowing the qualification requirements in the job description to remain in force, to specify different requirements in the competition notice, since the statement in the memorandum of 1 December 2016 to the effect that the provisions set out in that notice would not be applied insofar as they were contrary to those specified in the job description was not capable of remedying their unlawfulness.

11. Since the contested competition had been opened unlawfully, the requirement that administrative decisions be taken lawfully dictated that it be cancelled, as it would otherwise have led to an appointment to the post in question which would itself inevitably have been unlawful.

This implies not only that the decision of 20 February 2017 was taken in the interest of the service and hence based on a legitimate reason, so that, pursuant to the case law referred to in consideration 4 above, the Executive Director was entitled to adopt it, but also that, in this case, he was in fact bound to do so.

12. Inasmuch as the Executive Director thus had no option but to cancel the competition, the complainant's submissions directed against the aforementioned decision of 20 February 2017 taken in that regard must be dismissed as irrelevant.

Moreover, since this decision is thus, by definition, considered lawful, the complainant's claims for compensation based on its alleged unlawfulness must also be dismissed. The Tribunal observes, moreover, that the injuries complained of in support of those claims in fact arose from the unlawfulness of the decision to open the competition – against which the complainant did not formally lodge an appeal – and not the cancellation of that competition as such.

13. For the same reasons, the validity of the impugned decision of 3 May 2018, in which the Executive Director dismissed the complainant's appeal against the decision of 20 February 2017, cannot properly be criticised.

14. On the other hand, the Tribunal considers, in light of the evidence, that the complainant has good grounds to contend that this final decision breached the safeguards inherent to the right of appeal of every international civil servant.

15. In this respect, the complainant submits, in particular, that she was not informed in a timely manner of the reasons for the Executive Director's decision to cancel the competition and that she was thus deprived of essential information that would have enabled her to assert her rights effectively.

The organisation responds by emphasising, first, that the complainant was sent personally, by the Deputy Director to whom she reported, a copy of the minutes of the meeting of the College of Senior Officials which set out the decision of 20 February 2017 and, second, that this decision was properly substantiated since the reasons for it had been explained in the note – referred to above – prepared for that meeting.

These statements are, in themselves, correct. However, the Tribunal is bound to observe that the reference to the decision of 20 February 2017 in the minutes of the aforementioned meeting did not include a statement of the reasons for that decision and that the complainant did not have access to the internal note to which the organisation refers, so that she in fact remained unaware of these reasons at the material time. The main purpose of the statement of reasons for an administrative decision is precisely to enable the staff member concerned to know the reasons for that decision so that she or he can decide whether to exercise her or his right of appeal (see, for example, Judgments 1817, consideration 6, 3117, consideration 9, 3617, consideration 5, or 3914, consideration 15). Thus, while it is true that the Tribunal's case law accepts that the reasons for a decision need not necessarily appear in the decision itself and can be contained in other documents, this is plainly on the condition that those documents are also communicated to the official concerned (see, for example, Judgments 2112, consideration 5, 2927, consideration 7, or 4081, consideration 5).

Since the IOC did not comply with this requirement, the complainant's right of appeal was breached, and the fact that the complainant was provided with the aforementioned note in these proceedings could not, in the Tribunal's view, suffice to rectify the effects of that breach in this case.

16. Moreover, the complainant also rightly contends that her appeal to the Joint Committee was not considered, at least in appearance, in compliance with the essential requirements as to impartiality.

First, the written evidence shows that a member of that Committee – who, according to the complainant's undisputed assertion, was the spouse of the only other candidate participating in the contested competition, and whose disqualification the complainant had requested for that very reason – took part in hearing the case in question. The Tribunal considers that this member faced, in the circumstances of the case, a conflict of interest that required him to withdraw. The practical difficulties put forward by the organisation to justify the fact that he did not do so cannot be accepted, particularly as the member in question had an alternate.

Second, the Joint Committee had, as already stated, asked the head of the Legal Department to provide it with an opinion in connection with its examination of the complainant's appeal. However, as a member of the Committee pointed out in a dissenting opinion, that request breached the principle of impartiality since, in particular, that official was herself involved in managing competitions and, above all, she had at the same time been appointed to represent the Executive Director before the Joint Committee in that case.

17. Since, as stated above, the Executive Director was in any event required to cancel the contested competition and the complainant's internal appeal was therefore bound to be dismissed, the Tribunal will not, in the particular circumstances of the case, set aside the impugned decision of 3 May 2018. The reconsideration of that appeal to which the setting aside of that decision would lead would serve no real purpose here.

However, the Tribunal considers that the moral injury suffered by the complainant as a result of the breaches, identified above, of her right of appeal will be redressed by awarding her compensation of 4,000 euros under that head.

18. Since the complainant succeeds in part, she is entitled to costs in respect of the proceedings before the Tribunal, the amount of which will be fixed at 1,000 euros.

However, there are no grounds for awarding her costs for the internal appeal proceedings. Under the Tribunal's case law, costs of this kind may be awarded only in exceptional circumstances (see, in particular, Judgments 4156, consideration 9, or 4217, consideration 12). Such circumstances are not evident in this case.

DECISION

For the above reasons,

1. The IOC shall pay the complainant compensation for moral injury in the amount of 4,000 euros.
2. It shall also pay her costs in the amount of 1,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 15 January 2021, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 18 February 2021 by video recording posted on the Tribunal's Internet page.

*(Signed)*

PATRICK FRYDMAN DOLORES M. HANSEN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ