

The Administrative Tribunal,

Considering the third complaint filed by Ms I. A. A.-B. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 10 April 2006, the Organization's reply of 26 July, the complainant's rejoinder of 19 September and UNESCO's surrejoinder of 7 November 2006;

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

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 is a national of Saudi Arabia born in 1946. Facts relevant to this case are to be found under A in Judgments 2428, delivered on 6 July 2005, and 2577, delivered on 7 February 2007, concerning the complainant's first and second complaints respectively. Further to the complainant's application of 30 September 2003 for the grade D-1 post of Director of the Division of Basic Education (post ED-568), the complainant was notified by a memorandum of 14 June 2004 from the Bureau of Human Resources Management that the Director-General had decided to appoint another candidate to the said post. She protested against that decision in a memorandum addressed to the Director-General on 1 July 2004. Following the rejection of her protest on 17 August, she lodged an appeal with the Appeals Board on 15 September 2004. In its opinion of 13 December 2005 the Board held that the recruitment procedure for post ED-568 was not flawed and recommended that the complainant's claim to be appointed to the post be rejected. Nevertheless, referring in particular to the fact that her job description and performance report had not been finalised despite a series of reminders, it also recommended that she be awarded 2,000 United States dollars for "moral damage caused in relation to her professional situation". By a letter of 6 February 2006, which constitutes the impugned decision, the Director-General informed the complainant that, in accordance with the Appeals Board's recommendation, he had decided to reject her claim to be appointed to post ED-568. He pointed out that the recommendation that she be awarded moral damages "for facts not relating to the impugned decision" was not well founded, but nevertheless agreed to grant her the sum of 2,000 dollars "so that the litigation c[ould] be brought to an end". The complainant did not accept that offer.

B. The complainant contends that the Director-General's decision not to appoint her to post ED-568 is unlawful. She submits that the selection procedure for the said post was flawed because it was not conducted in accordance with the Staff Regulations and Staff Rules or the principles of the law of the international civil service laid down by the Tribunal. She alleges that her application was not considered in good faith and according to the rules of fair and open competition. In her view, the fact that she was not invited to an interview, even though her qualifications exceeded the requirements for the advertised post, amounts to a violation of Staff Regulation 4.2, which requires the Director-General to "use a competitive process in order to secure the highest standards of efficiency, competence and integrity". She argues that, in breach of Regulation 4.4 and Administrative Circular No. 2191 of 29 September 2003, the Administration failed to give priority of consideration to the applications of equally qualified internal candidates like herself over those of external candidates.

The complainant also asserts that UNESCO failed to honour its promise to the Minister of Education of the Kingdom of Saudi Arabia that her application "w[ould] be given every consideration in the evaluation process", and contends that its conduct towards her, in particular her transfer to a post without any meaningful job description and definition of duties, constituted a breach of good faith.

Lastly, she submits that, subsequently to her filing a complaint with the Tribunal against her transfer to a "lower, inappropriate grade post", she has been subjected to "incessant harassment". In this regard, she points to the Administration's undue delay in providing her with a periodic performance report and its failure to assign her any meaningful work.

The complainant asks the Tribunal to quash the decision of the Director-General not to appoint her to post ED-568

or alternatively to order the Organization to promote her to a D-1 post with retroactive effect from the date of nomination of the current incumbent of post ED-568. She also claims 20,000 dollars in compensation for moral prejudice and 4,000 dollars for legal costs.

C. In its reply the Organization objects to the receivability of the complainant's claims for promotion and for monetary compensation on the grounds that they do not fall within the competence of the Tribunal because they are irrelevant to the subject matter of the present complaint, namely the Administration's decision not to appoint her to post ED-568. Moreover, it emphasises that the complainant has not exhausted internal remedies in respect of her grievances concerning her professional situation – in particular her performance report and her job description – and observes that she attempts to link her claim for promotion to grade D-1 to her earlier case before the Tribunal concerning the downgrading of her post, without having requested that the cases be joined.

On the merits UNESCO asserts that any decision concerning an appointment to a post lies within the discretionary power of the Director-General and hence is subject only to limited review. It recalls that, having examined the evidence, the Appeals Board concluded that the determination by the pre-selection panel that the complainant's qualifications were not equal to those of the 25 pre-selected candidates would be "hard to dispute". It dismisses the complainant's plea that as an internal candidate she should have been given priority of consideration, arguing that Staff Regulation 4.4 is applicable "only when qualifications appear to be equal".

The Organization also rejects the argument concerning the alleged breach of promise. It explains that UNESCO's undertaking to give the complainant's application "every consideration" is not to be interpreted as a promise that she would get preferential treatment.

Lastly, UNESCO dismisses the complainant's allegations of breach of good faith and harassment as being unsubstantiated and irrelevant to the nub of the case, namely the legality of the selection process for post ED-568. In this context, it recalls the decision made by the Director-General to offer her compensation for the delay in establishing her post description and her performance report.

At the Tribunal's request the Organization invited the selected candidate to comment on the complaint. In a statement appended to the Organization's reply, she expresses her full agreement with the position of the Appeals Board and the Organization's response to the complaint.

D. In her rejoinder the complainant presses her pleas. She questions the Organization's firm reliance on the findings of the Appeals Board, underlining the fact that the latter's role is merely advisory and that its recommendations are subject to judicial review. She considers that her professional experience, linguistic skills, academic titles and seniority were not given due consideration during the selection process, as shown in the pre-selection sheet evaluating the candidates' qualifications. In addition, she argues that the qualifications and experience of the person selected for the post do not appear to meet the vacancy notice requirements.

E. In its surrejoinder the Organization contends that the complainant has not provided any evidence that either the Appeals Board or the Director-General acted in bad faith when reviewing her appeal. It notes that the vacancy notice requirements were applied by both the pre-selection panel and the evaluation panel and maintains that all information provided by the complainant in relation to her qualifications was duly taken into account. It submits that the selection to post ED-568 was made on the basis of an objective assessment not only of academic qualifications and language skills but also of competence and experience specific to the said post.

## CONSIDERATIONS

1. The complainant challenges the decision of the Director-General dated 6 February 2006 – based on the Appeals Board's recommendation – by which her claim to be appointed to post ED-568 was rejected.

Although the Director-General found the reasoning of the Appeals Board to award the complainant moral damages not well founded, he decided to grant her 2,000 United States dollars in moral damages "so that the litigation c[ould] be brought to an end". The complainant did not accept that offer. The Organization thereafter informed her that the Director-General's decision was final and that the payment of the 2,000 dollars remained at her disposal, without prejudice to her right to pursue her appeal against that decision before the Administrative Tribunal under Staff Rule 111.2. The Tribunal finds that, contrary to what the complainant alleges, this is hardly proof of bad

faith, harassment, bias or ill will on the part of the Organization, but rather evidence of the existence of a consistent intent to pursue a harmonious working relationship with the complainant.

2. In its opinion dated 13 December 2005 the Appeals Board considered it important to point out that “a pre-selection panel affords the staff members a basic safeguard of open and objective decision-making” and that there was no proof that that was not so in the present case. Accordingly, notwithstanding the complainant’s objections, it observed that “the determination by the pre-selection panel that the qualifications of the [complainant] were not equal to the 25 pre-selected candidates would be hard to dispute”. It concluded that the recruitment procedure was not flawed.

3. The Appeals Board’s observations are supported by the evidence on file. On her application form, under the heading “Covering Letter”, the complainant merely stated: “I am a UNESCO staff member. I am sure I am qualified to fill this post ([r]efer to my CV on file).” She left the rest of the page blank. This led the pre-selection panel to note on the complainant’s “Candidate Pre Selection Sheet” that “her motivation [was] not very clear in her application form”. Clearly, such comment was not guided by bias, harassment or bad faith. On the contrary, the panel objectively stated a fact that the Tribunal finds to be supported by the evidence.

The panel had to evaluate the candidate regarding “Education”, “Professional Experience”, “Skills” and “Languages” in relation to the post requirements. In the “Languages” section of the pre-selection sheet, the complainant received the rating “Excellent” only with respect to her knowledge of English – a qualification which, as noted on the pre-selection sheet, was one of the requirements for the post – and of Arabic; her knowledge of French was rated “Good”. However, the “Languages” section was the only section where the complainant’s qualifications were ranked rather positively. The other ratings, for which reasonable explanations were given, were “Good” for “Education”, “Fair” for “Professional Experience” and “Fair” for “Skills”. None of these ratings was “Excellent”.

These comments were sound and reasonable. In light of the fact that the advertised post was Director of the Division of Basic Education, the panel’s conclusion that the complainant’s “professional experience [was] not directly relevant to the requirements of the post” because her diploma related to Higher Education rather than Basic Education was reasonable. So too was the comment that “her motivation [was] not very clear in her application form”. None of the matters advanced by the complainant supports her contention that the selected candidate lacked the necessary qualifications for the post.

4. The Tribunal noted in Judgment 2293 that “[w]hile there is no doubt whatsoever that the Organisation owes a duty of good faith to its staff [...] bad faith must be proved and is never presumed”. In that case it found that there was “a complete absence of evidence either subjective or objective of bad faith” and that “[w]hile clearly and admittedly mistakes were made, there [was] no indication that the decision makers made them otherwise than honestly and in the genuine belief that they were acting in the best interests of the Organisation”. It was also said in that case that “[b]ad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose”. (See Judgment 2293, under 11 and 12.)

The Tribunal finds those arguments and considerations entirely applicable to the instant case.

5. In Judgment 2521 the Tribunal recalled that it has frequently pointed out that “it is for the person alleging harassment to prove specific facts supporting that allegation” and that “the question is whether the actions and decisions in question were taken for a legitimate purpose, albeit one that might have been achieved by other and better means, or whether they resulted from some purpose or attitude, such as hostility, which would justify their characterisation as harassment”. Concerning the facts relied on to establish harassment “it is for the person making the allegation to establish that the acts or decisions in question were accompanied by some purpose or attitude which allows them to be so characterised”.

It is also useful to recall Judgment 2100 where the Tribunal found that “an allegation of harassment must be borne out by specific facts, the burden of proof being on the person who pleads it, and that an accumulation of events over time may be cited to support an allegation of harassment”.

The chain of events, which may in some cases be used to prove harassment, as explained in Judgment 2067, may also be used to negate it. In the instant case there is abundant evidence that the Organization conducted a fair and impartial evaluation of candidates, without prejudice, bias or bad faith. As in her previous case decided by the

Tribunal in Judgment 2577, the complainant has failed to prove her allegations.

6. The Tribunal has established in several judgments that the organisation has a considerable level of discretion when selecting a candidate for a post. It has consistently held that a decision to appoint a candidate to a given post may be quashed only if it was taken without authority or due process of law, in breach of a rule of form or procedure, if it rested on an error of fact or law, if some essential fact was overlooked, if there was misuse of authority or if clearly mistaken conclusions were drawn from the evidence. (See for example Judgments 1017, 1223, 1497, 1549, 2040, 2074, 2163 and 2325.)

In the present case, the complainant has not proved any of the above-mentioned flaws that would affect the validity of the selection process. Likewise, her application was considered but no selection panel ever suggested that she should be appointed to the post in question.

7. The complainant also contends that, contrary to the Staff Regulations, the applications of candidates already in the Organization's service were not given priority of consideration over those of external candidates. It is convenient to recall that the Tribunal held in Judgment 107, under 1, that:

“although the Organization is bound to have full regard to the qualifications and experience of persons already in its service, this does not mean that it must necessarily always appoint them in preference to outside applicants. If this privilege were automatically to be granted to the serving staff, the Organization might be led to take decisions contrary to its own interests, a situation which was certainly not intended by those who drafted the Staff Regulations. The position is that persons already in the service of the Organization have priority only if their qualifications appear to be at least equal to those of other candidates.”

Those principles were duly taken into account in the selection process, which was carefully and correctly conducted by the Organization, and while the qualifications and experience of the complainant are to be noted, they do not automatically give her a right of precedence over other candidates for the advertised post.

8. Regarding the letter sent by the Director-General on 7 December 2001 to the Minister of Education of the Kingdom of Saudi Arabia, the Tribunal has already stated in Judgment 2577 that it did not constitute a promise either to promote or transfer the complainant. It said the following:

“It appears that the letter to the Minister of Education falls short of a promise either to promote or transfer the complainant. It simply undertakes to give consideration to any transfer for which she might apply.”

The Tribunal will therefore not again entertain those claims, which the complainant wishes to reinstate.

9. As the complainant has failed to demonstrate any flaw in the selection process or any violation of the relevant provisions of the Staff Regulations and Staff Rules, or any wrongdoing on the part of the Organization, all her claims must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2007, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Seydou Ba

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2007.