

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D. (No. 3)

v.

ITU

126th Session

Judgment No. 4027

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr H.-L. D. against the International Telecommunication Union (ITU) on 2 May 2015 and corrected on 19 June, the ITU's reply of 8 October, corrected on 14 October 2015, the complainant's rejoinder of 13 February 2016 and the ITU's surrejoinder of 3 June 2016;

Considering Articles II, paragraph 5, 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 case may be summed up as follows:

The complainant challenges the lawfulness and outcome of several competitions in which he participated.

Having applied unsuccessfully for a number of posts (R23/P2/543, ST04/P4/323, R22/P4/449 and R23/P4/799 and 474) which were advertised between November 2013 and February 2014, in each case the complainant submitted a request for review of the decision to reject his application and asked to be informed of the reasons for the decision. He also asked for precise information concerning the procedure followed in the various competitions. All his requests were rejected.

On 29 July 2014 the complainant lodged an appeal with the Appeal Board in which he asked it to recommend to the Secretary-General that he revoke the disputed decisions, cancel the appointments to the disputed posts, redress the injury which he considered he had suffered and pay him fair costs. In its report of 15 December 2014 the Appeal Board recommended that, in the absence of elements justifying the revocation of the contested decisions, the appeal should be dismissed. By a memorandum of 3 February 2015, which constitutes the impugned decision, the complainant was informed that the Secretary-General had decided to follow that recommendation.

On 2 May 2015 the complainant filed a complaint with the Tribunal, asking it to set aside the impugned decision, the decisions rejecting his applications and the disputed appointments, to order the ITU to rerun the disputed competitions, to redress the injury he considers he has suffered by awarding him at least 15,000 euros and, lastly, to award him 8,000 euros in costs for the proceedings before the Appeal Board and before the Tribunal.

The ITU asks the Tribunal to dismiss the complaint as completely groundless. It submits that it is under no obligation to reimburse the costs incurred by a staff member during an internal appeal. At the Tribunal's request, the ITU forwarded a copy of the complaint to the candidates appointed at the end of the disputed competitions in order that they might comment thereupon. Only one of them wished to do so and stated that the complainant's contentions were "general and imprecise in every respect" and that he knew perfectly well that the chosen candidate had been found to be more knowledgeable.

CONSIDERATIONS

1. The complainant has filed a complaint with the Tribunal in which he asks it to set aside the impugned decision, the decisions rejecting his applications and the appointments to the posts listed above in the summary of the facts, to order the ITU to rerun the disputed competitions, to award him damages to redress the injury which he considers he has suffered and which he evaluates at 15,000 euros at least

and, lastly, to award him 8,000 euros in costs for the proceedings before the Appeal Board and before the Tribunal.

2. The complainant advances five pleas in support of his claims: a procedural flaw arising from a breach of ITU Staff Regulation 4.9, a breach of paragraph 12 of the Rules of Procedure of the Appointment and Promotion Board, a lack of transparency and a breach of the right of appeal, a breach of the right to an effective internal appeal, and a breach of the adversarial principle.

3. The complainant considers that his right to an effective internal appeal was violated in that the Appeal Board did not fully review the competition procedures and failed to provide sufficient reasons for its opinion. In the ITU's view, the Appeal Board conducted a full and thorough review of the case and, in any event, it is legitimate for the Board to assess and delineate the scope of its review.

4. The Tribunal recalls that the internal appeal body's consideration of the appeal is vitally important and, in particular, enables the official to decide whether or not to bring further proceedings, notable before the Tribunal. Thus, the Tribunal found in Judgment 3424, under 11, that, "apart from the fact that the review of a disputed decision in an internal appeal procedure may well suffice to resolve a dispute, one of the main justifications for the mandatory nature of such a procedure is to enable the Tribunal, in the event that a complaint is ultimately lodged, to have before it the findings of fact, items of information or assessment resulting from the deliberations of appeal bodies, especially those whose membership includes representatives of both staff and management, as is often the case (see, for example, Judgments 1141, under 17, or 2811, under 11). [...] [T]he [a]ppeal body plays a fundamental role in the resolution of disputes, owing to the guarantees of objectivity derived from its composition, its extensive knowledge of the functioning of the organisation and the broad investigative powers granted to it. By conducting hearings and investigative measures, it gathers the evidence and testimonies that are

necessary to establish the facts, as well as the data needed for an informed assessment thereof.”

5. In this case, the Appeal Board’s report, consisting of five essential points, does not provide full details of the disputed competition procedures, since the Board merely presents its findings without listing the complainant’s arguments or providing a preliminary discussion allowing its position to be understood. This very succinct report does not enable the Tribunal to ascertain whether the Board considered the disputed competition procedures in sufficient depth. Since the plea of a breach of the right to an effective internal appeal is well founded, the impugned decision must be set aside for that reason, without there being any need to rule on the complainant’s other pleas concerning the lawfulness of the internal appeal proceedings.

At this stage of the proceedings, the Tribunal would ordinarily remit the case to the organisation for the Appeal Board to re-examine the complainant’s appeal. However, having regard in particular to the time that has elapsed since the events and to the importance of a final determination as to the lawfulness of the disputed competitions, the Tribunal will not do so in this case but will itself examine the complainant’s pleas in respect of the contested decisions concerning these competitions.

6. In the complainant’s view, the Appointment and Promotion Board misconstrued its advisory function by simply drawing up a “raw” list of candidates without identifying which it regarded as the most suitable for the posts to be filled.

7. The ITU considers that the Appointment and Promotion Board fulfilled its function correctly and in compliance with the provisions in force.

8. The Tribunal notes that the procedure for selecting candidates for an advertised post in accordance with, in particular, Staff Regulation 4.8 d), is governed by Staff Regulation 4.9. This provision reads in relevant part:

“a) The Secretary-General shall establish an Appointment and Promotion Board to advise him (and, if appropriate, the Director of the Bureau concerned) in all cases where a vacancy is advertised.

[...]

f) The Secretary-General shall report to the next regular session of the Council [of the ITU] whenever he proposes to take an appointment or promotion decision which is contrary to **the advice** of the Appointment and Promotion Board. [...].” (Emphasis added.)

The ITU submits that by only drawing up a list of candidates whom it considered to be the best qualified for the advertised posts, the Appointment and Promotion Board simply complied with paragraph 16 of its Rules of Procedure, which states: “[t]he Board shall establish the list of candidates which it considers to be the best qualified for the post advertised, accompanied, if appropriate, by special conditions concerning the listed candidates. This list (short list) shall contain not more than five names, unless the Board decides otherwise.”

The complainant argues in his rejoinder that these Rules are unlawful inasmuch as they restrict the scope of Staff Regulation 4.9, but the Tribunal considers that it is legitimate for the Rules to stipulate that the advice provided for in Staff Regulation 4.9 should take the form of a list of staff members considered the best qualified for each advertised post. The complainant’s challenge to the lawfulness of these Rules must therefore be dismissed and, accordingly, the plea of a breach of Staff Regulation 4.9 must also fail.

9. The complainant submits that the procedure followed did not comply with paragraph 12 of the Rules of Procedure of the Appointment and Promotion Board, which states: “the immediate supervisor(s) of the post considered shall submit an opinion on the candidates in writing (evaluation of the preselected candidates)”. He points out that the documents containing the opinions of the supervisors of the posts considered were signed by the directors of the Bureaux concerned and not by the supervisors themselves. However, it is clear from the evidence that these opinions came from the supervisors in question, and the plea of a breach of paragraph 12 of the Rules of Procedure of the Appointment and Promotion Board must therefore be dismissed.

10. In his rejoinder, the complainant alleges a breach of the principle of equality between the candidates whose names appeared on the short list in that only the curriculum vitae of the candidate recommended by the supervisors for each of the advertised posts was submitted to the Secretary-General.

11. The ITU takes the view that the recommended candidate is not in the same situation as the other short-listed candidates.

12. The Tribunal recalls its case law according to which, “the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity” (see, for example, Judgment 3900, under 12). In light of this case law, the recommended candidate, who has already been preselected by the supervisors in accordance with paragraph 21 of the Rules of Procedure of the Appointment and Promotion Board, is not in the same situation as the other short-listed candidates. It is natural that this candidate’s curriculum vitae should be submitted to the appointing authority to elucidate the proposal made in her or his regard. The plea of a breach of the principle of equal treatment is therefore unfounded.

13. It follows from the foregoing that the complainant’s claims against the decisions concerning the disputed competitions must be dismissed.

14. However, the unlawfulness of the impugned decision arising from the flaw identified in consideration 5, above, that tainted the examination of complainant’s internal appeal, has caused him moral injury which may be fairly redressed by awarding him compensation in the amount of 5,000 euros.

15. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The decision of the Secretary-General of 3 February 2015 is set aside.
2. The ITU shall pay the complainant moral damages in the amount of 5,000 euros.
3. It shall also pay him 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ