

114th Session

Judgment No. 3182

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. H. against the International Labour Organization (ILO) on 25 October 2010 and corrected on 14 January 2011, the Organization's reply of 27 April, the complainant's rejoinder dated 1 August and the ILO's surrejoinder dated 28 October 2011;

Considering Article II, paragraph 1, 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, a Belgian national born in 1969, joined the International Labour Office, the ILO's secretariat, in 1996. Since 2001 she has worked as Legal Officer at grade P.3 in the International Labour Standards Department (NORMES). She has also served as General Secretary of the Staff Union Committee since December 2008.

In August 2009 a vacancy announcement was published for the grade P.4 position of "Legal specialist on working conditions" in the Conditions of Work and Employment Programme (TRAVAIL). The

complainant applied for this vacancy and was shortlisted together with three other candidates. She successfully passed the written and oral examinations in October 2009. The technical panel chaired by the responsible chief, who was the Chief of the Programme, concluded that three candidates, including the complainant, were suitable for appointment to the post. On the basis of the results of the technical evaluation it decided to rank the complainant first and unanimously recommended in its report to the Director-General that she be appointed to the position. In November 2009 the Director-General decided to appoint Mr O. instead, an internal candidate who had been ranked third by the panel and who already held grade P.4. He was therefore transferred to the post at the same grade. On 30 November the complainant was informed that she had not been selected.

On 1 December 2009 the complainant sent an e-mail to the responsible chief requesting an interview in order to obtain feedback on the technical evaluation, as provided for under paragraph 13 of Annex I to the Staff Regulations of the International Labour Office. The interview took place on 4 December. On 15 December the complainant sent another e-mail to the responsible chief, thanking her for the interview and asking her to confirm in writing the feedback she had provided on her technical evaluation, pursuant to paragraph 14 of Annex I to the Staff Regulations. The responsible chief replied on 15 January 2010, emphasising the discretionary power of the Director-General in making appointments. She indicated that the complainant did appear “as the candidate who had best prepared for the interview” and that her major strengths included her strong technical knowledge of the area of responsibility and her commitment and motivation for the job, whereas areas for improvement and development included her limited experience in the provision of quality policy advice and of working in a multidisciplinary context. The responsible chief also indicated that she had been consulted by the Human Resources Development Department (HRD) about her views on the learning curve of the other internal candidate and that she had responded that he had broader experience than the complainant in the provision of policy advice to constituents and that he was suitable for appointment.

On 12 February 2010 the complainant submitted a grievance to the Joint Advisory Appeals Board alleging that the Director-General's decision to appoint Mr O. was tainted, inter alia, with errors of fact and law as well as misuse of authority. She submitted in particular that, during the interview on 4 December, the responsible chief had explained that she had been instructed by HRD that where several internal candidates were considered "apt for the job", the Office's policy was to give priority to those whose appointment would not involve a promotion. She also submitted that the decision not to select her appeared to be a measure of retaliation directed against her on account of her prominent role in Union activities.

In its report dated 10 May 2010 the Joint Advisory Appeals Board recognised that the technical panel had considered the complainant as the most qualified candidate for the position. However, it dismissed the complainant's argument that the Director-General had committed an error of law by choosing to appoint another candidate. It found that the Director-General had complied with the requirements of the Staff Regulations. The Board held that the Director-General had exercised his discretionary power on an objective basis. It also dismissed as unsubstantiated the complainant's allegations that the decision had been taken in retaliation for her role in Staff Union activities.

By a letter dated 12 July 2010 the complainant was informed of the Director-General's decision to dismiss her grievance as unfounded, in accordance with the recommendation of the Joint Advisory Appeals Board. That is the impugned decision.

B. The complainant contends that in deciding to appoint Mr O. to the disputed post the Director-General made an error of law and drew clearly mistaken conclusions from the facts, as she was ranked as the best qualified candidate and should therefore have been appointed in accordance with Article 4.2(a)(i) of the Staff Regulations. The technical panel unanimously decided to recommend her as the best qualified candidate for the position under competition, a ranking which was confirmed by the Joint Advisory Appeals Board. Therefore, the Director-General breached the applicable rules by subsequently

deciding to change the relative weight attributed to the various elements used in the evaluation made by the technical panel. In her view, it is not the role of the Director-General to redo the assessment made by the technical panel, nor to determine *ex post facto* what the needs of the recruiting department were. She adds that a fair and transparent competition procedure requires that clear, relevant and objective criteria be used for the evaluation of candidates and that they be determined prior to the evaluation process.

Moreover, the complainant argues that the decision is based on an erroneous application of Article 4.2(g) of the Staff Regulations. She submits that the priority established by that article applies only if the internal candidate seeking a transfer at the same grade possesses qualifications that are at least equal to those of the internal candidate seeking a promotion. This, she says, is made clear in the Tribunal's case law concerning the application of Article 4.2(g) and it was also the Office's constant practice until the disputed competition.

Lastly, the complainant alleges that the Director-General discriminated against her because of her prominent role in recent disputes between the Administration and the Staff Union. Therefore, she submits that the impugned decision is tainted with misuse of authority.

She asks the Tribunal to set aside the impugned decision, cancel the appointment of Mr O. and order the ILO to appoint her to the post instead. She claims damages in the amount of 30,000 euros and costs in the amount of 2,000 euros.

C. In its reply the ILO submits that the complaint is entirely unfounded. It objects to the complainant's argument that the Director-General had an obligation to appoint her because she was ranked first by the technical panel, and points out that the Director-General's discretionary authority in appointment-related decisions is a well-established principle of international civil service law. Contrary to the complainant's assumption, the technical panel is not the decision-making body in appointment matters. Therefore, whatever the ranking of candidates recommended by the technical panel, it is for the

Director-General to decide which candidate meets the highest standard of competence, efficiency and integrity, pursuant to Article 4.2(a)(i) of the Staff Regulations. Consequently, in its view, the Director-General does have the discretion not to appoint the technical panel's first ranked candidate.

The Organization explains that the Director-General decided, in the exercise of his discretionary authority and on the basis of objective criteria corresponding to the requirements of the vacancy announcement, to depart from the recommendation of the technical panel and to appoint another of the three candidates whom the panel deemed suitable. In particular, the Director-General noted that the comments made on Mr O.'s written examination were more positive than those concerning the complainant; that his learning curve was significantly better than the complainant's; that Mr O. had successfully carried out work and missions which demonstrated his skills in communication, client service and collaboration; and lastly, that he had been working at grade P.4 for almost two years to the satisfaction of his supervisors. Consequently, the Director-General found that Mr O. was the best qualified candidate in the sense of Article 4.2(a)(i).

Moreover, the ILO submits that the appointment of Mr O. was also lawful on the basis of Article 4.2(g) of the Staff Regulations, which requires the Office to give priority to applications for transfer over claims to promotion, where candidates have equivalent skills and profiles. It denies that there was a change in the justification used for the decision to appoint Mr O., as the responsible chief indicated both orally and in writing that she had been asked by HRD to provide further details about the qualifications and competences of the other internal candidate. In the defendant's view, Article 4.2(a)(i) and Article 4.2(g) are not to be applied independently of each other, and, where several candidates are recommended for a position and one of them holds the grade of the post to be filled, it is the duty of the Director-General to determine whether that candidate should be given priority within the framework of Article 4.2(a)(i).

Lastly, the ILO rejects the allegation of anti-union discrimination as being totally unsubstantiated, and points out that two other members of the Staff Union Committee applied successfully for other vacancies during the same period.

D. In her rejoinder the complainant presses her pleas. She contends that the arguments used by the Organization in fact run counter to the rules governing the division of responsibilities between, on the one hand, the responsible chief and the technical panel, whose task is to evaluate the technical skills of each candidate and, on the other, the Director-General, who may take into account other broader considerations referred to under Article 4.2(a)(i), such as gender, age or geographical origin. She points out that, in this case, the technical panel chaired by the responsible chief carried out a rigorous technical evaluation of the candidates and unanimously concluded that, taken together, her technical skills, professional expertise and experience were superior to those of the other candidates, including Mr O.

In the complainant's view, the discretionary authority of the Director-General in appointment-related matters is not absolute and has to be exercised within the limits set by the Staff Regulations and general principles of law. When the competition process includes both written and oral examinations by an independent body such as the technical panel, that discretionary power is necessarily narrower than in cases where there is no such competition procedure. By deciding to modify unilaterally the result of the technical evaluation the Director-General breached the Staff Regulations by substituting his own technical evaluation for that of the panel. Lastly, she argues that, as there is a *prima facie* case of anti-union discrimination, the onus of proving the existence of objective and legitimate reasons justifying the Director-General's decision should be shifted to the Organization.

E. In its surrejoinder the ILO maintains its position in full. It denies that the Director-General dismissed the evaluation made by the technical panel, and points out that he simply drew different conclusions from the panel's evaluations of Mr O. and the complainant. It notes that the complainant has not provided any

additional elements to support her allegation of discrimination and denies that it bears the burden of proof. Referring to the Tribunal's case law, it recalls that the burden of proof lies on the party making the allegation.

CONSIDERATIONS

1. The complainant impugns the Director-General's decision – communicated to her by a letter dated 12 July 2010 – to follow the Joint Advisory Appeals Board's recommendation, and to dismiss as unfounded her appeal against the Director-General's prior decision of 30 November 2009 not to appoint her to the position of "Legal specialist on working conditions", at grade P.4, in the Conditions of Work and Employment Programme (TRAVAIL). Following its technical evaluation of the written and oral examinations, which were conducted as part of the selection process for the vacancy, the technical panel ranked the complainant, an internal candidate, as first; the second place ranking was assigned to an external candidate; and Mr O., an internal candidate, already at grade P.4, was ranked third. The ranking reflected the order in which the technical panel recommended the candidates, with the candidate in the first ranking being considered the most qualified for the position. However, the Director-General decided to appoint the candidate ranked third.

2. The complainant asks the Tribunal to set aside the impugned decision, cancel the appointment of Mr O. to the position, order the Organization to appoint her instead and award her 30,000 euros in damages and 2,000 euros in costs.

3. She puts forward the following arguments: (a) she was the best qualified candidate for the position under Article 4.2(a)(i) of the Staff Regulations, which in her view has primacy over Article 4.2(g); (b) she was a victim of anti-union discrimination; and (c) the Director-General used his authority to make appointments for purposes other than those for which this authority has been conferred on him, and his doing so constitutes a misuse of authority.

4. Article 4.2 of the Staff Regulations is entitled “Filling of vacancies”. Under (a)(i) it provides, in relevant part, that: “[t]he paramount consideration in the filling of any vacancy shall be the necessity to obtain a staff of the highest standards of competence, efficiency and integrity”. Under (g) it relevantly provides: “[i]n filling any vacancy account shall be taken, in the following order of – [...] (2) applications for transfer; (3) claims to promotion”.

5. The Organization submits that the Director-General is not bound by the technical panel’s opinion and its ranking of eligible candidates and that the Director-General has the authority and the duty to select and appoint the candidate which he considers to meet the “highest standards of competence, efficiency and integrity”, as provided by Article 4.2(a)(i) quoted above. It should be pointed out that the Director-General’s power to appoint the officials of the ILO has to be exercised in accordance with the general principles of law and also, as stipulated by Article 4.1 of the Staff Regulations, in accordance with the ILO Constitution and Staff Regulations. In the present case, the most important criterion is that candidates have the essential qualifications listed in the vacancy notice. The appointment by competition assessed by the technical panel is the appropriate means of establishing how the criterion is satisfied. Therefore, it was not consistent with the proper procedure for the filling of vacancies for the Director-General to have reassessed the candidates and changed the conclusion reached by the technical panel, by giving more weight to certain criteria than the panel did and by referring to his knowledge of the candidate he decided to appoint.

6. This conclusion is reflected in the scheme consistent with the principles of equality, impartiality and transparency, established by the Staff Regulations applicable at the time. Those Regulations are declared under Article 0.1 to regulate the conditions of employment and set forth the duties and rights of ILO officials. While under Article 4.1 mentioned above the Regulations also declare that the officials are to be selected and appointed by the Director-General, that is subject to an important qualification. The qualification is that this

has to happen “in accordance with the provisions of [...] these Regulations, including those provisions giving effect to collective agreements”. Article 4.2(f) of the Staff Regulations provides in turn that competition is to be the normal method of filling vacancies between grades G.1 and P.5 inclusive, giving effect to the provisions of the Collective Agreement on a Procedure for Recruitment and Selection. The detailed competition procedure is found in Annex I. What the Regulations establish is a mechanism whereby the assessment of candidates can be done in a structured and independent way with technical rigour and expertise. Importantly, technical panels provide the safeguards of complete transparency and impartiality and provide the foundation for objective assessment (Judgment 2083, under 9 and 10). An implicit requirement is that the assessment involves a ranking of the candidates. What this scheme does not contemplate is some further technical evaluation and ranking by the Director-General. Indeed, such further technical evaluation and ranking by the Director-General is contrary to the scheme and would seriously erode the safeguards of complete transparency and impartiality. This conclusion, contrary to what the Organization asserts, is consistent with Article 12 of Annex I of the Staff Regulations on “Recruitment procedure”, and specifically “Competition procedure”, which provides:

“The technical evaluation report will be made available for consultation to the Staff Union representatives, who will have ten working days from the notification of the technical evaluation report in which to make comments. Any comments made will be the subject of discussion between the responsible chief, the Human Resources Development Department and the Staff Union representatives. The Director-General will then take a decision on the candidate to be appointed.”

7. It would be inconsistent with the principles of equality and transparency for the Organization to have a technical panel, responsible for the technical evaluation of candidates, whose report would then be susceptible to reversal or modification on the merits by the comments of the Staff Union representatives. The comments allowed under Article 12 of Annex I can refer to the form or procedure or to a manifest error of the technical panel, but cannot serve to undermine or contradict the merits of the technical evaluation,

as the technical panel is the administrative body with the express authority to assess the technical qualifications of the candidates. As a consequence, this restriction also applies to the Director-General's involvement in the proceedings. Consequently, the Director-General's reviewing of the assessment criteria, prioritising instead the results of the written examinations and the learning curve, was outside his competence. As the Tribunal has often held, "[w]hen an organisation chooses to hold a competition it must abide by its written rules and by the general principles set forth in the case law, particularly insofar as they govern the formal side of the process" (see Judgments 1646, under 6, and 2584, under 21).

8. According to the principles of equality and transparency and to the rule that in a competitive appointment process the essential qualifications are the priority, all exceptions to that rule must be clearly expressed. It is well settled that candidates are entitled to equal treatment in a competition for an advertised post (see Judgment 1990, under 7). In the light of this, the generic provisions of priority given to applications for transfer over claims to promotion apply only where qualifications are equal (see Judgments 1871, under 10, 2833, under 6, and 3032, under 14). In the present case, as the complainant was ranked first, based on the results of the technical evaluation made by the technical panel, the priority envisaged in Article 4.2(g) for candidates seeking a within-grade transfer was not applicable. Therefore, considering the lack of evidence of a flawed evaluation procedure, or a manifest error of the technical panel, there was no basis to appoint the candidate who was ranked third instead of the complainant.

9. The complainant alleges that she was discriminated against on the basis of her involvement in the Staff Union Committee because of disputes between the Administration and the Staff Union. This allegation is unfounded. The complainant has produced no persuasive evidence to show that the Organization's error in not appointing her was due to discrimination.

10. In light of the above considerations, the impugned decision must be set aside, as must the previous decision of 30 November 2009. As such the Tribunal will award moral damages in the amount of 5,000 euros and costs in the amount of 700 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside and the disputed appointment is cancelled.
2. The ILO shall shield Mr O. from any injury which may result from the cancellation of his appointment, which he has accepted in good faith.
3. The case is remitted to the Director-General for a new decision in accordance with the considerations above.
4. The Organization shall pay the complainant moral damages in the amount of 5,000 euros.
5. It shall also pay her costs in the amount of 700 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2012, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet