

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

118th Session

Judgment No. 3350

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. T.-R. against the Intergovernmental Organisation for International Carriage by Rail (OTIF) on 14 February 2012 and corrected on 29 March, OTIF's reply of 13 July, the complainant's rejoinder of 16 August and OTIF's surrejoinder of 5 October 2012;

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 and the pleadings may be summed up as follows:

A. The complainant was appointed as head of the Finance Department with effect from 1 March 2011. Her letter of appointment specified that her annual basic salary would be that of grade 4, step 10. On 9 March 2011 she asked for her post to be reclassified because the salary was too low. The Secretary-General rejected her request but, after a number of discussions with her, on 30 August told her that since she was about to complete her six-month probationary period successfully, she had been granted three extra steps in her grade, and from 1 September would therefore be receiving a salary corresponding to grade 4, step 13.

On 28 September 2011 the complainant wrote to the Secretary-General, averring that her post had been classified at “far too low” a level. She drew a comparison between the salaries of the various departmental heads at OTIF and those of their “collaborators”, and requested an immediate readjustment of her basic salary so that the difference between her salary level and that of the assistant finance officer in her Department would be at least 42,000 Swiss francs a year. On the following day, the Secretary-General replied that her request was tantamount to a request for reclassification of her post to grade 1, step 9. However, according to Article 11, paragraph 2, of the Staff Regulations he could not decide to reclassify a post to that grade without the prior approval of the Administrative Committee. He explained that the Committee’s approval could not be obtained “just yet” because its next session would be taking place on 17 and 18 November 2011, and he refused the complainant’s request.

On 5 October 2011 the complainant requested the Secretary-General to review that decision. On the following day, he replied that the review she had requested had not prompted him to change his position.

At its 116th session of 17 and 18 November 2011, after hearing both parties, the Administrative Committee dismissed the appeal filed with it by the complainant on 13 October 2011, on the basis that the Secretary-General could not decide to reclassify a post without its prior approval. That is the impugned decision. Following the discussion on her appeal, the complainant tendered her resignation, which took effect at the end of February 2012.

B. The complainant seeks to show that she was treated unfairly, because there is a “striking” difference between her annual basic salary and that received by her two predecessors in the post of head of the Finance Department, Mr N. and Mr D., although her responsibilities in the post were similar to theirs. She points out that Mr N.’s post had been classified in grade 1 and Mr D.’s post in grade 2, and alleges that the Secretary-General “downgraded” the level of her post when she applied for it. She argues that, to ensure

respect for the principle of non-discrimination, her post should have been classified at grade 2, step 13, as had been the case with Mr D. She also argues that she suffered discrimination “in terms of salary” by comparison with her “professional colleagues”.

Since according to Article 12, paragraph 2, of the Staff Regulations posts at grades 10 to 3 frequently include routine tasks, the complainant argues that none of these grades could be assigned to her post. She also contends that she possessed the basic skills as regards education, experience and knowledge of OTIF’s working languages, that are required by Article 12, paragraph 3, of the Regulations for the holder of a post at grade 2 or 1, or in the senior grades.

She requests the Tribunal to order OTIF to classify her post at grade 2, step 13, for the entirety of her service, and to pay her the resulting difference in salary, together with interest at 5 per cent per annum from 1 September 2011. She also claims costs.

C. In its reply, OTIF queries the receivability of the complaint since, in its opinion, the complainant’s request of 28 September 2011 was out of time. It adds that the question of the receivability of the complaint can, however, be left open, since the complaint is groundless.

On the merits, OTIF points out that according to the case law, the Tribunal has only a limited power to review the Secretary-General’s appraisal of the skills warranting placement on a particular career path. OTIF denies that the complainant’s post was classified in an arbitrary manner. It explains that the Administrative Committee had approved the classification of the post at grade 4. The complainant formally accepted the grade for her post when she accepted her letter of appointment, and the level of the post was identical to, or higher than, the level of posts held by heads of departments comparable to the Finance Department. OTIF also argues that the complainant has not suffered any unequal treatment, since she was not in the same situation as Mr N. and Mr D. The former, who had initially been appointed at grade 4, reached grade 1 only after a career of over

20 years at OTIF, and the latter's post was classified at grade 2 when he took up employment with OTIF because, unlike the complainant, he met one of the conditions for appointment to a senior grade post or a post at grade 1 or 2.

D. In her rejoinder, the complainant avers that it was only after accepting her letter of appointment that she became aware of the difference between the amount of her annual basic salary and that of her two predecessors. She had challenged the classification of her post in oral exchanges with the Secretary-General, but his responses had been unsatisfactory, and she had therefore written to him on 28 September 2011 to request "an increase" in her salary.

She further contends that her situation was identical to that of Mr N. and Mr D., since all three of them had been incumbents of the same post. Moreover, if her salary was determined according to her sex rather than according to the post she filled, that would violate the "fundamental principle" of equal treatment. Lastly, she argues that the reasons given by OTIF to justify the classification of Mr D.'s post are irrelevant.

E. In its surrejoinder, OTIF denies that the complainant was a victim of gender discrimination, since her post had been classified at grade 4 before it was opened for competitive recruitment. It adds that the complainant's successor was appointed at the same grade as she had been, but at one step lower.

CONSIDERATIONS

1. The complainant took up employment with OTIF on 1 March 2011 as head of the Finance Department, at the level of Administrative Assistant I for a period of three years including a six-month probationary period. Her terms of employment were set out in a letter of appointment dated 27 January 2011, which specified that she would receive an annual basic salary corresponding to step 10 of grade 4. She would receive a salary increment of one step on

1 March 2013 “subject to satisfactory performance of [her] duties”. The complainant accepted her appointment in writing on 5 February 2011, and the contract was subsequently approved by the Administrative Committee.

As early as 9 March 2011, the complainant requested a reclassification of her post, on the basis that her predecessor had received a salary corresponding to grade 2, step 13. Her request was refused, but the Administrative Committee granted her an increment of three steps in her grade, to take effect at the end of the probationary period, which would result in an increase of 7,095 Swiss francs in her annual basic salary. The complainant was informed of this decision on 30 August 2011.

However, on 28 September 2011, when her probationary period had elapsed and her appointment had been confirmed, she requested an immediate readjustment of her annual basic salary. In support of her request, she pointed to information which had come to her attention in the course of her duties, showing that even with the increase in her salary, its amount was considerably less than that received by her predecessors and by those of her colleagues whose basic qualifications were similar to her own. Moreover, her basic salary was only slightly higher than that of her colleague, whose post of Administrative Assistant II was classified at grade 5.

This is the matter in dispute before the Tribunal, the impugned decision being that taken by the Administrative Committee at its 116th session on 17 and 18 November in finally rejecting the request by the complainant which, according to the Secretary-General, would have required her post to be reassessed.

2. Like private law contracts, the conclusion of a contract of employment of a public servant is based inter alia on the free exercise of consent. The overriding principle of good faith and the rule of *pacta sunt servanda* require each of the parties to adhere to the contract, provided it is not undermined by a lack of consent.

In this case the terms of employment, as derived from the vacancy announcement for the post and the letter of appointment,

were clear. The complainant could not therefore be unaware of the classification of the post to which she was being appointed, or of the corresponding basic salary. It was also open to her to inform herself of changes that might have taken place in the classification and the basic salary, and of the relationship between that classification and basic salary and those of staff members with responsibilities comparable to her own, or indeed those of her colleague.

She cannot therefore claim that she was misled or that OTIF was guilty of deceit.

3. Thus, the only question that arises is whether the change in the classification of this post is based on discrimination of any kind or is contrary to the rules of the Organisation. The defendant's written pleadings, and the evidence referred to by the parties, especially the persuasive explanations given by the Secretary-General on 9 February 2011 to a Government representative of a Member State of the Organisation, show that the individual situation of the complainant's two predecessors differed markedly from hers, to the point at which the classification of the post at a higher grade when they were the incumbents was justified.

Certain disparities pointed out by the complainant, including those arising from a comparison between her salary and that of staff members with similar responsibilities, may at first sight appear surprising. However, the incremental steps she was granted at the end of her probationary period mitigated them appropriately, given that a retroactive change of classification could not be envisaged in view of the circumstances, as described above, in which the contract of employment had been concluded.

Finally, it should be noted that in the area of post classification the Tribunal leaves a considerable degree of discretion to organisations. It cannot simply substitute its own assessment for theirs. Decisions taken in this area are subject to only limited review, and can be set aside only if they were taken without authority, show some formal or procedural flaw or a mistake of fact or of law,

overlook some material fact, draw clearly mistaken conclusions from the facts or involve an abuse of authority (see, for example, Judgment 3273, under 6, and Judgment 2581, under 2). The complainant has not produced any evidence that the impugned decision should be set aside on one of these grounds.

The complaint must therefore be dismissed, without there being any need, in view of the evidence on file, to hold the oral proceedings for which the complainant, in the brief accompanying her complaint form, “expressly reserve[s] the right to apply”.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 1 May 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN
DRAŽEN PETROVIĆ