

G.
v.
UNIDO

122nd Session

Judgment No. 3669

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. G. against the United Nations Industrial Development Organization (UNIDO) on 8 July 2013 and corrected on 31 July, UNIDO's reply of 12 November 2013, the complainant's rejoinder of 19 February 2014 and UNIDO's surrejoinder of 29 May 2014;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant challenges the decision not to select him for the post of Director, Programme Support and General Management Division, Operational Support Services Branch (PSM/OSS).

The complainant joined UNIDO in 1997 at the P-4 level and was assigned to the Buildings Management Service (BMS). In July 2003 he was promoted to the P-5 level as Chief, BMS, General Services (GES). Following several restructuring exercises, the complainant was reassigned to the position of Unit Chief, General Support Services (PSM/OSS/GES) at the same P-5 level with effect from 10 January 2011.

In August 2011 the complainant applied for the D-1 level post of Director, PSM/OSS. He was among the three eligible candidates who were invited for a personal assessment by the Selection Panel. On 19 October he was informed that another candidate had been selected to fill the post.

On 19 November 2011 the complainant requested a review of the decision not to appoint him to the post, alleging that he was the only one of the three interviewed candidates who satisfied all the requirements listed in the vacancy announcement. On 10 January 2012 the Director-General rejected his request on the ground that the selected candidate, Mr A., was considered by the Selection Panel, the Appointment and Promotion Board and himself to be the most qualified candidate for the post.

The complainant filed an appeal with the Joint Appeals Board (JAB) on 9 March 2012 against the decision not to select him. In its report of 14 March 2013 the JAB concluded that the complainant had failed to provide evidence to support his allegations and recommended dismissing the appeal in its entirety. On 2 April 2013 the Director-General decided to endorse the JAB's recommendation. That is the impugned decision.

At the Tribunal's request, UNIDO wrote to the successful candidate, Mr A., informing him of the complaint challenging his appointment and inviting him to state his views. Mr A. provided his comments by a letter of 22 September 2013.

The complainant asks the Tribunal to quash Mr A.'s appointment and to order that a new vacancy announcement be issued and that a new selection process be held for the post. He also requests an investigation into the circumstances under which Mr A. was appointed. He claims material damages, moral damages in the amount of at least 200,000 Swiss francs, as well as costs, with interest at the rate of 8 per cent per annum on all sums awarded. In his rejoinder the complainant additionally requests that the Tribunal quash the subsequent appointment of Mr B. to the post of Director of PSM/OSS upon Mr A.'s retirement and to appoint him as the only qualified candidate. In addition, he requests that the Tribunal order UNIDO to produce additional documentation.

UNIDO requests the Tribunal to dismiss the complainant's claims as partly irreceivable for failure to exhaust internal remedies and entirely unfounded.

CONSIDERATIONS

1. The complainant commenced employment with UNIDO in 1997. In July 2011 a vacancy announcement was published for the position of Director, PSM/OSS. The complainant applied for this position. He was unsuccessful. Mr A. was appointed to the position. The complainant's internal appeal against the decision not to appoint him was dismissed by the Director-General on 2 April 2013. This decision, in terms, involved the endorsement of the recommendation of the JAB to dismiss the appeal. The Director-General's decision of 2 April 2013 is the impugned decision.

2. In his pleas, the complainant seeks compensation for violation of his dignity and, in so doing, appears to impugn other decisions made by UNIDO affecting his career, including his reassignment from the BMS to the GES effective 10 January 2011. UNIDO argues, correctly, that this claim, to the extent that it travels beyond claimed compensation or damages arising from the failure to appoint him Director, PSM/OSS is irreceivable. The only decision impugned in the internal appeal was that appointment, namely the appointment of Mr A. to the position of Director, PSM/OSS. Thus the complainant's complaint to this Tribunal concerns that decision. That is not to say evidence of events in his career cannot, in an evidentiary sense, be relied on in support of allegations of bias or prejudice in relation to the consideration of his candidacy for the position of Director, PSM/OSS. If the evidence is of substance, it can be relied upon.

3. The complainant's challenge to the decision to appoint Mr A. has four main elements. The first is that Mr A. was not qualified to be appointed having regard to the main functions of the position, required competencies and minimum requirements identified in the vacancy notice. The second is that the complainant was entirely suitable for appointment and substantially better qualified than Mr A. The third is

that the selection of Mr A. and the rejection of the complainant's candidacy was tainted by bias and ill will towards him, particularly on the part of the members of the Selection Panel. The fourth is that the decision to appoint Mr A. was improperly motivated by favouritism in violation of the principle of equality.

4. It is convenient, at the outset, to describe the general legal framework in which the complaint is to be considered. Firstly and fundamentally, the Tribunal accepts that the appointment by an international organisation of a candidate to a position is a decision that lies within the discretion of its executive head. It is subject only to limited review and may be set aside only if it was taken without authority or in breach of rule of form or procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence. This formulation is found in many judgments of the Tribunal including, for example, Judgment 3209, consideration 11, and is intended to highlight the need for a complainant to establish some fundamental defect in the selection process. Those defects can include the appointment of a candidate who did not meet one of the conditions stipulated in the vacancy announcement (see, for example, Judgment 2712, consideration 8). However, as the Tribunal observed in Judgment 1827, consideration 6: "The selection of candidates for promotion is necessarily based on merit and requires a high degree of judgment on the part of those involved in the selection process. Those who would have the Tribunal interfere must demonstrate a serious defect in it; it is not enough simply to assert that one is better qualified than the selected candidate."

5. In his brief the complainant argues that Mr A. failed to meet the minimum requirements identified in the vacancy announcement. UNIDO answers this contention in its reply with a detailed analysis of the process of evaluation undertaken and the records generated during the process. One particular feature of the evaluation pointed to by UNIDO is that in the complainant's assessment report he achieved an overall rating of 2.8 out of a maximum overall rating of 5. In order to be recommended for appointment, the candidate should have received

an overall rating of at least 3. Ultimately, the Selection Panel concluded that only one candidate, Mr A., was suitable for appointment.

6. The complainant's answer in his rejoinder is to assert that the assessment was the result of "a clear manipulation o[f] both weights on each element of the assessment as well as rates given to [him]". The complainant then refers to assessments made during his career at UNIDO and contrasts that with an assessment made in a "one hour interview" notwithstanding that interviews of this duration are a common feature in the selection process for international civil servants.

There is nothing unusual or untoward about an assessment being made as a result of such an interview, irrespective of what other assessments might have been made of a candidate by other processes and for other purposes. It is ultimately argued by the complainant that the low rating he received was to ensure he remained below the threshold for shortlisting and that this occurred "out of the fear that once shortlisted, he could not be easily dismissed". Unless the complainant can establish affirmatively, as he is obliged to do, that there was bias against him or favouring Mr A. or both or, as he puts it, that there were "unlawful external interventions", then UNIDO's analysis of the selection process demonstrates that the preference for Mr A. was the product of a rational and reasoned evaluation. That is so irrespective of the complainant's views, apparently strongly held, about the comparative worth of his candidacy compared to that of Mr A. It is certainly not for this Tribunal to engage in its own assessment (see Judgment 3372, consideration 12), which, in substance, is what many of the submissions of the complainant are directed towards.

7. Central to the complainant's argument about bias was the participation in the selection of the chair of the Selection Panel, Mr L., and a member of the Panel, the Director of the Human Resource Management Branch (HRM), both of whom the complainant contends were not impartial. A significant aspect of the argument concerning Mr L. was the minutes of a meeting of 29 January 2008. The Tribunal can put to one side an unsubstantiated contention colouring the submissions of the complainant that the minutes were "fraudulent" or "falsified". The meeting involved, amongst others, Mr L. and officials of the United

Nations Office at Vienna (UNOV). The meeting, so the minutes record, canvassed UNOV's view that UNIDO's BMS (then headed by the complainant) was obstructing project work being undertaken for UNOV. UNOV was, in substance, complaining about the role of BMS. Mr L. is recorded as thanking UNOV for bringing the matter to his attention and saying that "complaints about management style of [the complainant] would receive immediate and high-level attention by UNIDO management and that appropriate measures would be considered". In its reply, UNIDO characterises this as an appropriately measured response which could not be construed as evidence of bias or prejudice on the part of Mr L. The complainant's response in his rejoinder does not really address this submission. Similarly, other complaints about Mr L. do not demonstrate by persuasive probative evidence that he would not have been able to assess impartially the candidature of the complainant.

8. The allegation about the Director of HRM was that she had demonstrated her bias against the complainant through the previous several years and had been actively involved in decisions to demote the complainant by "illogical restructurings, removing [his] responsibilities and authority and in several actions, statements and manipulations trying to discredit [him] with the upper management". However, again the complainant has not been able to demonstrate that these allegations are of substance by persuasive probative evidence. In fact, the specific allegation that a process of restructuring commencing in 2006 in which the Director of HRM was involved constituted a broader pattern of harassment against him has not been substantiated. These changes are adequately explained by UNIDO in its pleas and the Tribunal rejects the contention that the complainant was subject to such harassment and also the specific allegation that the Director of HRM was biased because of her involvement in them. Also rejected is the contention that the personal connections between the Director of HRM and Mr A., the successful candidate, were of a character that resulted in her preferring Mr A.'s candidature as an act of favouritism. The contention is unsubstantiated by persuasive probative evidence.

9. Likewise, the complainant's contention that the decision-making leading to the selection and appointment of Mr A. was a product of "undue and illegal external intervention and pressure" is unsubstantiated by persuasive probative evidence.

10. In the result, the complainant has not demonstrated that the appointment of Mr A. and the failure of his candidacy were flawed. His complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 17 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

ANDREW BUTLER