

R. (No. 8)

v.

IAEA

133rd Session

Judgment No. 4467

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr R. R. against the International Atomic Energy Agency (IAEA) on 18 September 2018 and corrected on 16 November 2018, the IAEA's reply of 27 February 2019, the complainant's rejoinder of 13 July and the IAEA's surrejoinder of 28 October 2019;

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 of the recruitment process and the resulting appointment for the post of Client Relationship Manager, for which he had applied.

On 6 January 2017 the IAEA published vacancy notice 2017/0051 for the P-4 level post of Client Relationship Manager in the Division of Information Technology within the Department of Management, with a closing date of 6 March 2017. This was a three-year fixed-term appointment. On the same day, vacancy notice 2017/0054 (014382) was issued internally for a six-month development reassignment to that same post as part of the Organization's mobility policy for staff. The complainant applied for both vacancies on 13 January and Ms V.M. applied on 8 February 2017. Ms V.M. was selected for the development reassignment. She began her assignment on 1 May 2017.

On 28 May 2018 Ms V.M. was informed that she had been selected for appointment to the Client Relationship Manager post advertised in vacancy notice 2017/0051, with effect from 1 June 2018. On 31 May 2018, which was the last day of his fixed-term appointment, the complainant wrote to the Director General to request that the appointment of Ms V.M. be set aside. He further requested to be appointed to the post in question or, in the alternative, to be granted two years of salary for the lost opportunity, as well as 50,000 euros in moral damages for the alleged injury to his dignity.

On 7 June 2018 the complainant was notified that his application for the Client Relationship Manager post had been unsuccessful.

On 20 June 2018 the Director General rejected the complainant's request for review as unfounded and informed him that, as a former staff member, he was entitled to appeal this decision directly to the Tribunal. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision to appoint Ms V.M. to the post and to order that the recruitment process be carried out anew. He claims material damages in an amount equal to the additional salary he would have earned had he been appointed to the P-4 post until reaching the maximum tour of service of seven years in the Professional category. He also claims 50,000 euros in moral damages, 30,000 euros in consequential damages for the loss of enhanced earning capacity and diminished job prospects and 20,000 euros in exemplary damages. He seeks 2,000 euros in costs, with interest on all sums awarded.

The IAEA asks the Tribunal to dismiss the complaint in its entirety.

Further to the Tribunal's request, the successful candidate was invited to express her views on the present complaint, which she did on 11 January 2019.

CONSIDERATIONS

1. The complainant, who at the material time held a P-3 post, was an unsuccessful internal applicant for the P-4 post of Client Relationship Manager, which was advertised under vacancy notice 2017/0051 in the Division of Information Technology in the Department of Management (the contested post). On 31 May 2018, the day on which he separated from the IAEA, he requested the Director General to set aside the appointment of the successful candidate and to appoint him to the

contested post. Alternatively, he requested that he be granted “equitable material damages” amounting to two years’ salary, allowances and other entitlements at grade P-4 in compensation “for the ensuing loss of opportunity”. He also requested moral damages for injury to his dignity as a staff member, allegedly sustained for unequal treatment he received in the course of the recruitment for the contested post. He further alleged that the successful candidate had been unlawfully appointed *ad interim* to the development reassignment position which was advertised under vacancy notice 2017/0054. Eventually, in the decision dated 20 June 2018, which the complainant impugns, the Director General dismissed his request for review and granted his request to appeal directly to the Tribunal, pursuant to Staff Rule 12.02.1(B).

2. The Tribunal’s case law has it that a staff appointment by an international organisation is a decision that lies within the discretion of its executive head and is subject to only limited review. Such a decision may be set aside only if it was taken without authority or in breach of a rule of form or of 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. Nevertheless, anyone who applies for a post to be filled by some process of selection is entitled to have her or his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right which every applicant must enjoy, whatever her or his hope of success may be. An organisation must abide by the rules and the general precepts of law on selection, and, when the process proves to be flawed, the Tribunal can quash any resulting appointment, albeit on the understanding that the organisation must ensure that the successful candidate is shielded from any injury which may result from the cancellation of her or his appointment, which she or he accepted in good faith. However, as the selection of candidates is necessarily based on merit and requires a high degree of judgement on the part of those involved in the selection process, a complainant must demonstrate that there was a serious defect in the selection process which impacted on the consideration and assessment of her or his candidature. It is not enough simply to assert that one is better qualified than the selected candidate (see, for example, Judgments 4023, consideration 2, and 4001, consideration 4).

3. The IAEA raises receivability as a threshold issue, noting that the complainant alleges institutional harassment on the part of the IAEA for the first time in the complaint. The IAEA submits that the allegation is a new claim which was not raised in the request for review and should therefore be rejected.

4. In his complaint brief, the complainant challenges the impugned decision on the following grounds:

- A. Abuse of authority: *ultra vires* appointment, vis-à-vis violation of the statutory requirements set forth in paragraph (D) of the Agency's Statute, with concomittant violation of the provisions established in Administrative Manual Part II, Section 1, and under Staff Regulation 3.01.
- B. Abuse of authority: the impugned decision is vitiated by institutional harassment, for unequal treatment, breach of mutual trust and fairness, breach of due process, breach of the principle of good faith, breach of the concomittant duty of care and breach of the duty to inform and substantiate a decision.

5. Having proffered submissions to support his contention that the impugned decision should be set aside for alleged breaches amounting to abuse of authority, the complainant concludes that the successful candidate was "evidently advantaged in her pursuit of the vacant position [...] by way of [his] unlawful exclusion [...] by way of institutional harassment, whereas every evaluation is naturally conditioned by the quantity and quality of candidates to be evaluated". He repeats this in his rejoinder stating, in effect, that the violations which he alleges caused him to suffer impairment of his dignity and career can more aptly be described through the Tribunal's definition of institutional harassment. He states that his allegation of institutional harassment is a new plea, which he is entitled to put forward as it does not extend the scope of the claims made in his initial request for review. However, this is not a new plea. This is obviously a new claim that should have been raised internally. As it was not, it is irreceivable before the Tribunal. Furthermore, the Tribunal rejected a complaint of harassment in Judgment 4345, consideration 8.

6. The complainant raises issues regarding the decision to appoint the selected candidate on a development reassignment to fill the Client Relationship Manager post *ad interim*. The Tribunal considers those issues to be outside the scope of the present complaint and shall focus only on the issues that are centrally related to the impugned decision of 20 June 2018 and the relevant facts and procedure leading to that decision.

7. The complainant alleges that he was not informed of the outcome of his application for the position. The record however shows that he was so informed by e-mail of 7 June 2017. The complainant submits that the impugned decision suffers from insufficient reasoning, which amounts to a breach of the IAEA's duty of care to substantiate its decision, as well as exposing him to unequal treatment and discrimination in the recruitment procedure as there is nothing in the impugned decision showing that each of his pleas was duly examined. The case law states, in consideration 5 of Judgment 4081, for example, that the reasons for a decision must be sufficiently explicit to enable the person concerned to take an informed decision accordingly; they must also enable the competent review bodies to determine whether the decision is lawful and, in particular, the Tribunal to exercise its power of review. However, the Tribunal has also stated, in consideration 4 of Judgment 2978, that when the result of a competition is announced and, more broadly when the Administration chooses between candidates, the duty to state the reasons for the choice does not mean that they must be notified at the same time as the decision. These reasons may be disclosed at a later date, for example in the context of a procedure arising from a challenge to the selection process, which has been done in the present case. The claim is therefore unfounded.

8. The complainant alleges that his right to a fair internal appeal procedure was violated as the IAEA did not provide him with proof of the successful candidate's qualifications. He argues that, contrary to the Tribunal's case law that such information cannot be withheld on grounds of confidentiality, he did not have all of the evidence on which the contested decision was based. He submits that in the absence of the disclosure there is no evidence that when the successful candidate submitted her application she possessed the required qualifications to fill the contested post. The allegation is unfounded. In the first place,

the case law states that a staff member must, as a general rule, have access to all evidence on which the authority bases or intends to base its decision against him, and, under normal circumstances, such evidence cannot be withheld on grounds of confidentiality. The decision to appoint the successful candidate, which the complainant centrally contests, was not a decision which was made against the complainant. Moreover, perhaps as the case was sent directly to the Tribunal, the complainant only requested the disclosure of documents during the course of these proceedings with no evidence that the decision which he contests was based on some of the requested documents. In the Tribunal's view, the documents which the IAEA disclosed during these proceedings satisfied its duty of disclosure under the case law.

9. The complainant centrally contends that the selected candidate lacked the required qualifications and experience to fill the contested post. According to the case law, an international organisation which decides to hold a competition in order to fill a post cannot select a candidate who does not satisfy one of the required qualifications specified in the vacancy notice. Such conduct, which is tantamount to modifying the criteria for appointment to the post during the selection process, incurs the Tribunal's censure on two counts. Firstly, it violates the principle of *patere legem quam ipse fecisti*, which forbids the Administration to ignore the rules it has itself defined. In this respect, a modification of the applicable criteria during the selection procedure more generally undermines the requirements of mutual trust and fairness which international organisations have a duty to observe in their relations with their staff. Secondly, the appointment body's alteration, after the procedure has begun, of the qualifications initially required in order to obtain the post, introduces a serious flaw into the selection process with respect to the principle of equal opportunity among candidates. Irrespective of the reasons for such action, it inevitably erodes the safeguards of objectivity and transparency which must be provided in order to comply with this essential principle, breach of which vitiates any appointment based on a competition (see Judgment 3073, consideration 4).

Moreover, Article VII.D of the Statute of the IAEA mandates the Director General to secure employees of the highest standards of efficiency, technical competence and integrity. This fundamental requirement is mirrored in paragraphs 60, 66, 78 and 83 of Administrative Manual

Part II, Section 3, as well as in Staff Regulation 3.01 which states as follows:

“The Director General [...] shall be responsible for the appointment of the staff. The paramount consideration in the recruitment, employment and promotion of such staff shall be to secure employees of the highest standards of efficiency, technical competence and integrity. Subject to this consideration, due regard shall be paid to the contributions of Member States and to the importance of recruiting the staff on as wide a geographical basis as possible. Staff members shall be selected without distinction as to race, sex or religion.”

10. The qualifications, experience and language skills for the contested post were set out in vacancy notice 2017/0051 (014382) as follows:

- Advanced university degree in Computer Science, Information Technology, Management, or related field.
- International recognized Certification in Project Management such as PMP or PRINCE2 Practitioner is desirable.
- International recognized Certification in Service Management such as ITIL Practitioner is desirable.
- Minimum of seven years of working experience as a client relationship manager, business analyst or project manager, in an information systems context.
- Minimum of five years of experience in IT service management and service delivery, supporting innovation and managing change.
- Experience in business process reengineering: Identifying opportunities for improvements, proposing new processes, and getting buy-in from stakeholders to implement;
- Excellent command of spoken and written English with special emphasis on drafting skills. Knowledge of another official IAEA language (i.e. Arabic, Chinese, French, Russian or Spanish) an asset.

11. The complainant submits that the selected candidate lacked the academic qualifications required by the vacancy notice and that the recruitment panel misrepresented her diploma from an unrecognized institution as a Bachelor’s degree from a recognized institution, which is proof of favouritism. The submission is unfounded. The record shows that the subject Diploma was from a recognized institution. Critically,

however, at the material time, the selected candidate held the required advanced degree, to wit, a Master's degree in Business Administration from the Open University Business School (UK), which is a recognized and accredited university. The IAEA acknowledges that the evaluation narrative in the Appointment Proposal Overview incorrectly refers to the selected candidate as holding a Bachelor's degree instead of a Professional Diploma in Management. A Bachelor's degree was not, however, listed in the vacancy notice as a requirement. As the candidate had the required advanced university degree, the Panel's error referring to a Bachelor's degree was insignificant and there is no evidence from which to conclude that the error was proof of favouritism or other vitiating ground amounting to a serious defect that requires setting aside the selection process or the impugned decision, which confirmed the appointment of the selected candidate.

12. The complainant submits that there was a “[s]erious violation of the requirements of openness and objectivity of the competition established by the Tribunal in Judgment 1595, under 10, for false representation of credentials, reckless misrepresentation of facts and mistaken conclusions drawn from the evidence”. He submits that the selected candidate falsely represented her credentials by deliberately omitting to state that her certification as a PRINCE2 Registered Practitioner had expired since 2015, while his certification was still valid until November 2018. He argues that the selected candidate's certification, like his, would have been valid for five years from 2009 when it was issued, but that she falsely represented her true credentials when she claimed in her application and in her comments on the present complaint that her certificate was still valid with the clear improper motive of fraudulently improving the appearance of her qualifications and to retain her appointment. He alleges that “these were acts of malice, which fatally vitiate [her] appointment [...] with bad faith and abuse of authority, inasmuch as neither the best interest of the Organisation, nor the requirements of Article VII.D of the Agency's Statute, can be satisfied in a false representation of credentials”. He accordingly submits that the appointment of the selected candidate was *ultra vires* and must be quashed as the Tribunal's case law only shields from cancellation an appointment which a successful candidate accepted in good faith. These submissions are unmeritorious.

13. The successful candidate answered the question “Do you have an internationally recognized certification in Service Management such as ITIL Practitioner” in the negative. She answered the question “Do you have an internationally recognized certification in Project Management such as PMP or PRINCE2 Practitioner” in the affirmative. At the material time the latter certification which was issued to her in 2009 was no longer current as such certification is issued subject to renewal after five years. However, in the Tribunal’s view, it is unreasonable to conclude that by omitting to state that the certification had not been renewed, the selected candidate falsely represented her credentials with the improper motive of fraudulently improving the appearance of her qualifications and to retain her appointment. In her comments on the complaint, the successful candidate factually and accurately stated that she held a “PRINCE2 Registered Practitioner” issued in 2009 and also an ITIL Foundation Certificate in IT Service management issued in 2017. The IAEA produced the complainant’s certificates (both current and expired) with its surrejoinder. In any case, this was a desirable and not a required qualification.

14. The complainant alleges that the selected candidate lacked the required experience for the contested post. The vacancy notice relevantly required a minimum of seven years of working experience as a client relationship manager, business analyst or project manager, in an information systems context; a minimum of five years of experience in IT service management and service delivery, supporting innovation and managing change; and experience in business process reengineering: identifying opportunities for improvements, proposing new processes, and getting buy-in from stakeholders to implement.

15. The complainant submits that the selection process is vitiated by serious violations of law and abuse of authority, with the competition turning out to be a mere sham. He further submits that there is nothing in the file that shows that the successful candidate possessed either the seven years of working experience in an information systems context or the minimum required five years of experience in IT service management and service delivery at the time she applied for the contested post. He insists that these and other shortcomings regarding the proof that the successful candidate had the required experience show that the decision to appoint her to the contested post was based on mistaken conclusions drawn from the evidence and abuse of authority.

16. The complainant's allegation that the selected candidate lacked the required experience for the contested post is unfounded. The IAEA notes that, in her comments on the complaint, the successful candidate stated that she has fifteen years of working experience (eight more than the seven years required) in client relationship management, business analysis and project management in the context of information systems and fifteen years of working experience (ten more than the five years required) in service delivery, supporting new and innovative technologies and managing change. The IAEA also notes her statement that she has "extensive experience and verifiable contributions to business process reengineering". The IAEA then refers to the selected candidate's obviously very strong performance during the interview as detailed by the Panel in the Appointment Proposal Overview from the selection process. The IAEA also states that after careful consideration of the selected candidate's combination of competencies, qualifications and experience the recruitment Panel concluded that she was "Well Qualified" to fill the contested post and that the Panel extensively documented her experience, as well as the experience of the other candidates giving the same level of attention. The Panel made a detailed evaluation of the selected candidate's experience in the Appointment Proposal Review and concluded that she met the requirements set out in the vacancy notice. The Tribunal does not discern a flagrant error in that assessment. Moreover, the complainant, who bears the burden of proof, provides no evidence to prove his allegation that the selected candidate did not possess the required experience. In any event, it is not for the Tribunal to reweigh all the elements and call into question the recruitment Panel's evaluation of candidates.

17. The claim of abuse of authority is unsubstantiated as the complainant provides no evidence to prove that the decision to appoint the successful candidate was taken in bad faith or for an improper purpose (see, for example, Judgments 4261, consideration 10, and 4345, consideration 6). Neither has he provided evidence of sufficient quality and weight to prove that the decision was based on unequal treatment, bias or favouritism (see, for example, Judgments 3380, consideration 9, and 4408, considerations 21 and 22, and the judgments cited therein) as he contends.

In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 25 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ