

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

105th Session

Judgment No. 2755

The Administrative Tribunal,

Considering the complaint filed by Mrs M.- L. V. against the International Labour Organization (ILO) on 29 June 2007, the Organization's reply of 24 August, the complainant's rejoinder received by the Tribunal's Registry on 20 September and the ILO's surrejoinder of 28 November 2007;

Considering Article II, paragraphs 1 and 6, 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. Article 4.2(e) and (f) of the Staff Regulations of the International Labour Office, the ILO's Secretariat, provide as follows:

“(e) Transfer in the same grade, promotion or appointment by direct selection by the Director-General shall be the normal method of filling vacancies:

- of Chiefs of Branch and Directors of offices in the field;
- in technical cooperation projects;
- in the Office of the Director-General;
- of principal secretary to a Deputy Director-General;
- of a purely temporary nature, up to two years, of a specialist nature, not expected to lead to a career in the ILO, any extension beyond two years being subject to article 4.2(f);
- in the National Professional Officers category in external offices;
- in the General Service category in external offices.

The Director-General may in such cases, at his or her discretion and after consulting the Staff Union representatives mentioned in Annex I, decide on the use of one or other of the methods of filling vacancies referred to in article 4.2(f).

(f) In accordance with the provisions of the Collective Agreement on a Procedure for Recruitment and Selection, competition shall be the normal method of filling vacancies between grades G.1 and P.5 inclusive. The methods to be employed shall comprise transfer in the same grade, promotion or appointment, normally by competition. Promotion or appointment without competition may be employed only in:

- filling vacancies requiring specialized qualifications;
- filling vacancies caused by upgrading of a job by one grade or in the case of a job upgraded from the General Service to the National Professional Officers category or to the Professional category or in the case of a job upgraded from the National Professional Officers to the Professional category by one grade or more;
- filling vacancies in urgency;

– filling other vacancies where it is impossible to satisfy the provisions of article 4.2(a) [...] by the employment of any other method.

The Staff Union representatives mentioned in Annex I shall be informed of any promotions or appointments made without competition.”

The officials of the ILO were informed by a circular of 8 December 2005 that Mrs P. had been appointed Deputy Chief of the Internal Administration Bureau (INTER), at grade P.5., with effect from 1 January 2006.

The complainant, a Spanish national born in 1962, is an official of the Office at grade P.5. At the material time, she was also the Chairperson of the Office’s Staff Union Committee. On 26 April 2006, under Article 13.2(1) of the Staff Regulations, she filed a grievance with the Human Resources Development Department, in which she challenged the above-mentioned appointment on the grounds that it had been made without a competition, or even a call for candidatures. The Director of the Department informed the complainant by a minute of 20 June that the Office had rejected her grievance. On 17 July 2006 the complainant therefore filed a grievance with the Joint Advisory Appeals Board under Article 13.3(2) of the Staff Regulations. The Board, in its report of 9 February 2007, recommended the dismissal of the grievance on the grounds that it was “without substance”. By a letter of 3 April 2007, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had dismissed her grievance.

B. The complainant states that she filed her complaint both as an ILO official and in her capacity as Chairperson of the Staff Union Committee.

She emphasises that, in the internal appeal proceedings, the Organization queried the admissibility of her grievance, alleging that she did not possess the requisite qualifications for the post of Deputy Chief of INTER. In her view, candidates’ qualifications must be evaluated in a competition and, since no competition was held prior to the disputed appointment, the fact that she did not possess qualifications which were not stipulated in any vacancy announcement cannot be held against her.

On the merits she considers that the appointment of Mrs P. is illegal because the procedure set out in Chapter IV of the Staff Regulations was not observed. She explains that the Regulations provide for two kinds of recruitment. The first is recruitment (transfer, promotion or appointment) by “direct selection” under Article 4.2(e), which allows the Director-General very wide discretion. It is reserved for political posts or those not expected to lead to a career. The second type of recruitment (transfer, promotion or appointment) is the ordinary procedure laid down in Article 4.2(f) for officials between grades G.1 and P.5. In this case, recruitment is normally by competition. Some appointments and promotions are, however, made without a competition. At all events and in accordance with established practice, the Office always issues a call for candidatures before filling any post.

The complainant draws attention to the fact that in its reply to her grievance the Human Resources Development Department acknowledged that “the appointment of Mrs [P.] was made by direct selection [by the Director-General]”. In her opinion, however, the post concerned does not belong to any of the categories of jobs normally filled by direct selection by the Director-General.

She explains that Article 4.2(f) makes it plain that a competition is the rule, the absence of competition being the exception, and that justification has to be provided for every exception. Yet there is no justification for the exception made in the case of the appointment of Mrs P. In the complainant’s view, the Staff Regulations are unclear, in that they do not mention the case of an in-grade transfer such as Mrs P. was given. She contends that a restrictive interpretation would require that a competition be held for this kind of transfer and that no exception to this rule should be allowed. A broad interpretation would lead to the view that an in-grade transfer should normally involve a competition, but that exceptions are possible. The Joint Advisory Appeals Board and the Director-General opted for the latter interpretation. However, in the complainant’s opinion, the Director-General acted illegally by not justifying the exception to the “rule”, by not making the appointment in a transparent and objective manner, by not stating the reasons for his decision to make an appointment without a competition before announcing the appointment and by informing Staff Union representatives only through a circular addressed to the whole of the staff.

The complainant asks the Tribunal to set aside the impugned decision and to award her compensation for the injury she has suffered, as well as costs in the amount of 2,000 Swiss francs.

C. In its reply the ILO notes that another complaint concerning the same facts has been filed with the Tribunal and submits that it would be advisable to join the two complaints.

It considers that by mentioning her capacity as Chairperson of the Staff Union Committee, the complainant apparently wishes to make the Staff Union a party to this case, which is inadmissible under the current version of the Statute of the Tribunal. The possibility of granting *locus standi* to staff unions and associations of organisations which have recognised the Tribunal's jurisdiction is being discussed, but the discussion has not yet produced any tangible results. The ILO claims that insofar as the complaint was filed on behalf of the Staff Union, it is irreceivable and it requests the Tribunal to rule accordingly.

On the merits the Organization explains that the new post of Deputy Chief of INTER, to which Mrs P. was appointed and to which her previous functions of Chief of Protocol were added, was created as part of the process of reorganising the Office, which began in 2004. For most of that period a Senior Building Maintenance Officer had been absent (on sick leave, followed by retirement). That absence had made it all the more urgent for the Organization to ensure adequate services in that area. Mrs P. was therefore appointed by means of an in-grade transfer.

Relying in particular on Judgment 535, it emphasises that an international organisation enjoys wide discretion when effecting such a transfer instead of holding a competition. It also considers that the choice of a Chief of Protocol necessarily lies within the discretion of the Director-General.

As for the legality of the disputed decision, the Organization points out that the Joint Advisory Appeals Board commented that Article 4.2(f) of the Staff Regulations, which specifies that vacancies between grades G.1 and P.5 must normally be filled by a competition, does not explicitly refer to in-grade transfers without a competition. In particular, the Board noted that the promotion and appointment without competition could be resorted to only in certain specific circumstances. In the present case there was an in-grade transfer, an instance where the Director-General's margin of discretion is not confined to a list of particular examples. The Board likewise drew attention to the fact that under paragraph (f) the Staff Union must be informed of any promotions or appointments made without a competition, but not of transfers in the same grade. The reason for the difference in treatment is plain: the rules could certainly not permit an official to benefit from promotion outside the cases listed exhaustively in paragraph (f); nevertheless depending on the circumstances, the interests of the service and, in particular, the need for swift action might warrant an in-grade transfer without having to refer to one of the circumstances mentioned in that provision.

The Organization explains that once it had been decided to restructure INTER, the Administration had taken the view that waiting until a competition had been held would not be in the Office's interests. It emphasises the wide discretion enjoyed by international organisations in matters of restructuring.

At the Tribunal's request, the Organization forwarded a copy of the complaint to Mrs P. and invited her to submit her comments. In the comments she submitted on 14 August 2007, which the Organization produces as an annex to its reply, Mrs P. states that she accepted her appointment in good faith.

D. In her rejoinder the complainant submits that her capacity as Chairperson of the Staff Union Committee is entirely relevant since the decision causing injury concerns a process in which the Staff Union plays a central part. Its role in recruitment and selection is enshrined in the Staff Regulations. It is the only body able to denounce breaches of the Staff Regulations by the Administration. Since much of the process is confidential and officials have no access to the content of the selection files and panels' findings, it is the Staff Union Committee which can examine them and denounce any defects. As the Committee does not have a legal personality distinct from that of the Office and does not have *locus standi* as an entity, she was obliged to file her complaint with the Tribunal also in her capacity as Chairperson of the Committee. She adds that in Judgment 2562 the Tribunal recognised that individual members of the Staff Committee of the organisation in question had the power to file suit as representatives of that body.

The complainant notes that the impugned decision states that the Director-General "will take the appropriate steps to ensure that joint discussions are held in order to clarify the procedures laid down in Article 4.2 of the Staff Regulations for the benefit of all concerned", but points out that these discussions have not taken place.

She comments that the reasons put forward by the Organization in its reply to justify its decision were never

conveyed to the Staff Union before the publication of the circular of 8 December 2005, so that the whole of the staff and the Staff Union were presented with a *fait accompli*.

She submits that the case law on which the ILO relies is valid only with respect to the Staff Regulations of the organisation concerned by the ruling in question. The Office's Staff Regulations and constant practice indicate that a competition is the normal method of recruiting officials between the grades of G.1 and P.5. In her opinion, there was no justification for following an exceptional procedure in the present case, and the Organization does not remedy that flaw by giving reasons extraneous to the exceptions allowed by the Staff Regulations.

She considers that the arguments concerning restructuring and urgency, which were put forward to justify the Office's failure to comply with the provisions of the Staff Regulations, are inappropriate.

E. The Organization maintains its position in its surrejoinder.

CONSIDERATIONS

1. The complainant joined the Office on 6 June 1989. At the material time she held a grade P.5 post and was also the Chairperson of the Organization's Staff Union Committee.

She learnt from a circular of 8 December 2005 that the Director-General had appointed Mrs P., an official of the Office, Deputy Chief of INTER, a new post created as part of the Office's reorganisation. In order to challenge the legality of this appointment she filed a grievance, which was rejected by the Administration on the grounds that "Article 4.2(f) of the Staff Regulations provides for the possibility of filling a vacancy by transfer in the same grade" without a competition.

The Joint Advisory Appeals Board, to which the matter was referred, concluded in its report of 9 February 2007 that the in-grade transfer which had occurred did not constitute an illegal decision and it recommended that the Director-General dismiss the grievance as being without substance. It did, however, recommend that "in the interests of transparent procedures and, in particular, with a view to clarifying the terms of Article 4.2 of the Staff Regulations [...]", he should "invite the Administration and the Staff Union jointly to clarify the procedure applicable to transfers in the same grade with and without a competition in the context of that Article".

The complainant was informed by a letter of 3 April 2007 that, in accordance with the Board's recommendation, the Director-General had dismissed her grievance on the grounds that it was without substance. That is the decision impugned before the Tribunal.

2. The complainant, who states that she is also appealing "in [her] capacity as [...] Chairperson of the Staff Union Committee", requests the setting aside of the impugned decision, an award of compensation for the injury suffered and 2,000 Swiss francs in costs.

She submits that the appointment of Mrs P. is illegal in that the procedure laid down in Chapter IV of the Staff Regulations – entitled "Recruitment and appointment" – has been disregarded. She states that at all events and in accordance with established practice the Office always issues a call for candidatures before filling any post.

She observes that in the present case the vacancy did not meet the criteria which might warrant the procedure of direct selection by the Director-General, for which provision is made in Article 4.2(e) of the Staff Regulations, but that since the post is funded from the regular budget and is not a Chief of Branch post, it should have been filled in accordance with the procedure laid down in Article 4.2(f), which provides that competition shall be the normal method of filling vacancies between grades G.1 and P.5, except for certain appointments and promotions. She considers that transfer in the same grade, which is mentioned in paragraph (f), could not occur without a competition.

3. The Organization contends that the complaint is irreceivable insofar as it has been filed on behalf of the Staff Union Committee.

On the merits it submits that the Director-General's decision was a lawful, discretionary decision involving no error of law or of fact.

Moreover, it draws the Tribunal's attention to the advisability of issuing a single judgment on both this case and that which is the subject of a complaint filed by another official "concerning the same facts and containing the same line of argument".

4. Mrs P., to whom the complaint was forwarded, has intimated, in substance, that she accepted the offer of appointment in good faith, since the vacancy comprised duties matching her qualifications and abilities.

The request for joinder

5. For the reasons set forth in Judgment 2754, also delivered this day, the Tribunal considers that this case and that mentioned by the Organization should not be joined.

Receivability

6. In reply to the Organization, the complainant comments that her capacity as Chairperson of the Staff Union Committee is entirely relevant because the decision causing injury concerns a process in which the Staff Union plays a central part.

She refers to Judgment 2562 in which the Tribunal recognised that individual members of the Staff Committee of the organisation in question had the power to file suit as representatives of that body.

The Tribunal considers that the debate concerning the receivability of the complaint, insofar as it was filed by the complainant in her capacity as Chairperson of the Office's Staff Union Committee, has no bearing on the outcome of proceedings, since the complaint is receivable having been filed by an official with *locus standi*.

The merits

7. The Tribunal notes, as did the Joint Advisory Appeals Board, that the appointment of Mrs P. was made by an in-grade transfer under Article 4.2(f) of the Staff Regulations. This is a discretionary decision which can be set aside by the Tribunal only if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the facts (see Judgment 535, under 3). The point at issue is therefore whether, in the present case, the applicable provisions permitted the appointment of Mrs P. by an in-grade transfer without a competition.

8. The provisions of Article 4.2(f) of the Staff Regulations specify that competition shall be the normal method of filling vacancies between grades G.1 and P.5, and that the Director-General may, in certain specific cases which are exhaustively listed, fill such vacancies without holding a competition by appointment or by promotion, but not by transfer in the same grade. This interpretation is borne out by the fact that the paragraph in question makes no mention of transfer in the same grade where it offers the possibility of filling vacancies between grades G.1 and P.5 inclusively without a competition, since this possibility is provided for only in the event of a promotion or appointment. Moreover, that same paragraph stipulates that the Staff Union representatives must be informed only of promotions and appointments made without a competition, but not of transfers in the same grade, which must therefore be preceded by a competition of which the staff members have been informed.

9. In view of the current wording of Article 4.2(f) of the Staff Regulations, which cannot be interpreted in a manner that is contrary to its letter, the Tribunal can only conclude from the foregoing that the Director-General breached this provision by transferring Mrs P. in the same grade, by direct selection, without a competition.

The impugned decision must therefore be set aside, as must the disputed appointment. The Organization must, however, ensure that Mrs P. is shielded from any injury which might result from the cancellation of her appointment, which she accepted in good faith.

10. The complainant is entitled to seek compensation for the moral injury she has suffered on account of the unlawful nature of the decisions set aside by this judgment. To this end she should be awarded token damages of one Swiss franc.

11. She is entitled to costs in the sum of 2,000 francs.

DECISION

For the above reasons,

1. The impugned decision and the decision appointing Mrs P. are set aside.
2. The ILO shall shield Mrs P. from any injury which might result from the cancellation of her appointment.
3. It shall pay the complainant token damages of one Swiss franc in compensation for the moral injury suffered.
4. It shall also pay her costs in the amount of 2,000 francs.

In witness of this judgment, adopted on 2 May 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet