

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

107th Session

Judgment No. 2837

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms R. M. against the International Labour Organization (ILO) on 22 April 2008, the Organization's reply of 15 July, the complainant's rejoinder of 10 September and the ILO's surrejoinder of 14 November 2008;

Considering Articles II, paragraph 1, and VII 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. Circular No. 334, series 6, of 20 July 1985 governs the personal promotion system of the International Labour Office, the ILO's secretariat. It was amended on 10 February 1989. The objective of the system is to offer the possibility of promotion to long-serving officials whose contribution to the Organization goes beyond that normally associated with the level of the position they occupy, as evidenced by their performance over the years, but who have not been able to achieve career advancement through other procedures, i.e. reclassification of post or competition. The circular states, however,

that the number of personal promotions should be restricted wherever possible to “either 5 per cent of the positions at a given grade level or to the percentage of the average vacancy rate at that grade level, whichever was less”. The decision to grant such a promotion is taken by the Director-General on the basis of recommendations made by a selection board. The board bases its recommendations, inter alia, on an assessment of merit provided by the official’s responsible chief and a standard form in which the official states his experience, qualifications and other relevant information. According to paragraph 9 of the circular, a positive recommendation requires a clear demonstration that “the official has regularly performed at a level above the normal requirements of the job” and three criteria are taken into account to this end: quality of work, quantity of work and personal attributes applied to the job. Paragraph 13 states that personal promotions “will be published in the Staff Movements list [...] and will be denoted as personal promotion”. In the event of a negative decision by the Director-General, the above-mentioned board must furnish a brief statement of the reasons and the official may, pursuant to paragraph 15, ask the Director-General to review his decision on the ground that the statement of reasons contains an important factual error.

The complainant, a German national born in 1949, joined the Office in 1987 as a translator at grade P.3. By a letter of 2 May 2006 the Chief of the Human Resources Operations and Development Branch informed her that she was eligible for a personal promotion in the context of the 2004-2005 consolidated exercise, but he pointed out that in accordance with Circular No. 334, series 6, the number of personal promotions granted would be restricted. On 29 September he wrote to the complainant to inform her that the Director-General, acting on a Personal Promotions Committee recommendation, had decided not to award her the promotion in question.

By a letter of 19 October 2006 the complainant asked to be provided with the reasons for this decision. On 31 October 2006 she repeated her request and also asked for a copy of the assessment made by her supervisor, the head of the German Section. These requests

were forwarded to the Committee. On 9 March 2007 the Chairperson of the Committee informed her that the personal promotion exercise was a comparative process and that other candidates had been considered more suitable, but that her case would be reconsidered “in the 2006 exercise”. She added that, pursuant to paragraph 11 of Circular No. 334, series 6, the document requested by the complainant could not be provided because it was confidential.

In the meantime the complainant, relying on Chapter XIII of the ILO Staff Regulations, had filed a grievance on 16 February 2007 which the Human Resources Development Department had rejected. On 19 July she referred the matter to the Joint Advisory Appeals Board. In its report of 30 November 2007 the Board recommended that her grievance be dismissed. By a letter of 30 January 2008, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector notified the complainant that her grievance had been dismissed as devoid of merit.

B. The complainant considers that she has been treated unfairly and in a manner incompatible with her terms and conditions of employment. She points out that, despite her excellent performance record, she has not been promoted since joining the Organization more than 20 years ago. In her view this situation is probably due to her supervisor’s personal prejudice against her. She also submits that the personal promotion procedure is flawed by a lack of transparency. In this connection she finds it regrettable that she has not been allowed to see her supervisor’s assessment, for she is unable to ascertain whether this document is inconsistent with her previous performance appraisal reports. She adds that the German Section is the only one that has no grade P.4 translator/reviser post, since these duties are, she claims, unlawfully assigned to external collaborators, as a result of which she is denied any possibility of “regularly perform[ing] at a level above the normal requirements of the job”.

Moreover, the complainant maintains that the Personal Promotions Committee did not take account of certain essential facts, such as the salary increments for meritorious service which she received in 1991

and 2001 and the mobbing to which she has been subjected in her section for years.

Lastly, she takes the Office to task for breaching paragraph 13 of Circular No. 334, series 6, by failing to publish the list of officials to whom a personal promotion was granted.

The complainant requests the setting aside of the impugned decision, compensation for the moral and material injury suffered and the publication of the list of officials who were granted a personal promotion. She also claims costs in the amount of 5,000 Swiss francs.

C. In its reply the ILO contends that the complainant's allegations regarding the assessment of her merit are irreceivable because paragraph 15 of Circular No. 334, series 6, specifies that the provisions of Chapter XIII of the Staff Regulations may be invoked only with respect to questions which do not relate to the assessment of the official's merit for a personal promotion. It also considers that the allegations of mobbing and the claim for compensation for the injury suffered are irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal. The Organization infers from this that the complaint is irreceivable in its entirety.

On the merits the Organization points out that, in accordance with the case law, decisions on personal promotion are taken at the Director-General's discretion and may be set aside by the Tribunal only on certain conditions which are not satisfied in this case. Furthermore, the Tribunal cannot substitute its own assessment of the facts for that of the Director-General.

According to the ILO, the above-mentioned circular makes it plain that the granting of a personal promotion is not a right, but merely a possibility, and that the complainant had been informed that officials were selected for promotion on the basis of a comparison between the different candidatures. She has not substantiated her allegations or shown that she suffered any injury. The Organization emphasises that the Joint Advisory Appeals Board itself checked that the assessment made by the complainant's supervisor was not inconsistent with her previous performance appraisal reports. In the

instant case it seems that the complainant did not satisfy the three cumulative criteria mentioned in paragraph 9 of the circular. Her candidature was reconsidered in the context of the 2006 personal promotion exercise, but the Personal Promotions Committee was unable to recommend her promotion. Her case should be reconsidered on an exceptional basis during the next exercise.

The Organization acknowledges that the list of officials who have been granted a personal promotion has not been published for several years, but it holds that this omission could not have caused injury to the complainant and that it in no way influenced the decision not to grant her such promotion. It states, however, that it recently decided to recommence publication of the list.

D. In her rejoinder the complainant reiterates her arguments. She further submits, relying on Judgment 2558, that since the Executive Director of the Management and Administration Sector furnished no proof of a delegation of authority by the Director-General, the impugned decision was not taken by the competent authority and must therefore be set aside. In her opinion it was “the Director-General and his Office” who should have taken this decision because the Executive Director was “already involved in various ways in the internal procedure”. She infers from this that the spirit of the Collective Agreement on Conflict Prevention and Resolution, concluded between the International Labour Office and the Staff Union on 24 February 2004, has been disregarded.

E. In its surrejoinder the Organization maintains its position. It contends that the new plea concerning formal requirements is not only irreceivable, since it was not raised in the complaint, but also devoid of merit. It is clear from the wording of the impugned decision that it was indeed taken by the Director-General, who authorised the Executive Director to inform the complainant thereof. This practice has been followed consistently since the entry into force of the Collective Agreement of 24 February 2004. The reference to Judgment 2558 is therefore not pertinent.

CONSIDERATIONS

1. The complainant challenges before the Tribunal the decision of 30 January 2008 whereby the Executive Director of the Management and Administration Sector notified her of the Director-General's decision to dismiss her grievance concerning the refusal to grant her a personal promotion in the context of the 2004-2005 consolidated exercise.

2. She asks the Tribunal to set aside the impugned decision, to award her compensation for the moral and material injury she claims to have suffered, to order the publication of the list of officials to whom a personal promotion was granted and to award her costs.

3. The Organization raises an objection to the receivability of the complaint.

Firstly, it submits that, pursuant to the provisions of the Staff Regulations and Circular No. 334, series 6, grievances related to the refusal to grant a personal promotion are "subject to compliance with specific rules", and that "allegations regarding the assessment of merit are not admissible in the context of a grievance founded on Chapter [XIII] of the Staff Regulations", which deals with conflict resolution. It points out that the issues raised in this case do, in fact, relate primarily to the assessment of the complainant's merits.

The Tribunal must dismiss this objection, because the right of international civil servants to appeal to the Tribunal cannot be restricted by a circular and because, in any case, the provisions of Article 13.3 of the Staff Regulations on which the Organization relies refer only to internal grievances before the Joint Advisory Appeals Board and not to complaints before the Tribunal.

Secondly, the Organization contends that "new allegations or claims" which did not form part of an internal grievance are also irreceivable. In this connection it should be recalled that, according to the case law, arguments raised before internal appeals bodies can be developed in a complaint before the Tribunal, but the complaint cannot

include new claims (see, in particular, Judgments 429, under 1, 452, under 1, and 1380, under 12). It follows that the objection to receivability must be dismissed with respect to the allegations of mobbing, since they form part of the complainant's arguments in support of a claim. On the other hand, the claim for compensation for moral and material injury, which has been submitted for the first time before the Tribunal, must be declared irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal because the internal means of redress have not been exhausted.

4. Before ruling on the merits, the Tribunal must first address the complainant's plea concerning the lack of authority of the person who signed the impugned decision. Citing the case law, the complainant argues that the decision in question was not taken by the competent authority, since the Executive Director furnished no proof of a delegation of authority by the Director-General, and that it should therefore be set aside.

With regard to this plea, the Tribunal finds that the case law cited is not pertinent because it is clear from the submissions, especially from the complainant's own initial submissions, that the impugned decision was in fact taken by the Director-General and that the Executive Director merely communicated it to the complainant. As the Executive Director does not require a specific delegation of authority to communicate a decision of the Director-General, the plea has no factual basis.

5. The complainant raises several other pleas: she contends, in particular, that the personal promotion procedure is not transparent, that she was treated in a manner that was incompatible with her terms and conditions of employment in view of her performance appraisal reports and the fact that she had not once been promoted during her 20-year career, that the Organization failed to comply with the provisions of Circular No. 334, series 6, concerning the publication of personal promotions in the staff movements list, that the Personal Promotions Committee disregarded certain essential facts and that her supervisor harboured personal prejudice against her.

6. It should first be noted that, by its very nature, the decision whether or not to grant a personal promotion is one which is taken at the discretion of the Director-General. As such, it is subject to only limited review by the Tribunal (see, in particular, Judgments 1500, under 5, 1815, under 3, and 2668, under 11). According to the above-mentioned case law, the Tribunal will set such a decision aside only if it shows some fatal flaw, such as a formal or procedural flaw, or a mistake of fact or of law, or if some essential fact was overlooked, if it was *ultra vires*, if there was misuse of authority, or if an obviously wrong conclusion was drawn from the evidence.

7. In the instant case the Tribunal will consider the plea relating to the breach of Circular No. 334, series 6, paragraph 13 of which reads as follows:

“Personal promotion shall be announced to the official in writing as soon as the Director-General’s decision is communicated to the Personnel Department. It will be published in the Staff Movements list once it becomes effective and will be denoted as personal promotion.”

It follows that, in accordance with the terms of that paragraph, the Organization must publish the list of officials who have been granted a personal promotion.

Contrary to the Organization, which maintains that its failure to publish the list could not have caused any injury to the complainant and in no way influenced the decision to refuse her such a promotion, the Tribunal considers that non-publication of the list in question deprived the complainant of information that she might have found useful in filing a request for review within the meaning of paragraph 15 of the above-mentioned circular.

8. The impugned decision must therefore be set aside, without there being any need to rule on the complainant’s other pleas, and the case must be referred back to the Organization so that it may publish the list of officials who were granted a personal promotion in the context of the 2004-2005 consolidated exercise. The complainant may, if she so wishes, file a request for review within a fixed period from the date of publication of the list in question.

If the said list has already been published, the prescribed period shall run from the date of notification of this judgment.

9. The complainant is entitled to costs, which shall be set at 1,500 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is referred back to the ILO so that it may proceed as indicated under consideration 8, above.
3. The Organization shall pay the complainant costs in the amount of 1,500 Swiss francs.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 30 April 2009, 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 8 July 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet