

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

112th Session

Judgment No. 3101

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms R. A.B. against the International Labour Organization (ILO) on 17 August 2009, the Organization's reply of 7 January 2010, the complainant's rejoinder of 12 March and the ILO's surrejoinder dated 13 May 2010;

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. The complainant, a Spanish national born in 1965, entered the service of the International Labour Office, the secretariat of the ILO, in January 1997 as a proofreader, at grade P.2, in the Proofreading/Quality Control Unit of the Relations, Meetings and Document Services Department. She was given an appointment without limit of time as of 1 January 2004.

On 5 February 2008 the Office published a vacancy notice for the position of Editor (Document Quality Assurance Officer) at grade P.3 in the Official Documents Branch. The complainant applied on

2 March and was one of the three candidates who were shortlisted. On 14 April she took part in a technical evaluation interview conducted by a four-member selection board which included the responsible chief, in other words the Chief of the Branch. On 7 July 2008 she was informed that she had not been selected for the post in question. On 7 August, at her request, she met with the responsible chief in order to obtain feedback on the technical evaluation. After this interview she asked him to send her a written response. In an e-mail of 20 August he informed her of the weak points in her evaluation. On 19 September 2008 she submitted a grievance to the Joint Advisory Appeals Board in which she sought the cancellation of the competition procedure and ensuing appointment. In its report of 6 March 2009 the Board concluded that the technical evaluation had not been conducted in an “objective, transparent and impartial manner” and that the complainant’s candidature had not been considered “in good faith and in keeping with the basic rules of fair and open competition”. It recommended that the Director-General should cancel the results of the competition and arrange for a new technical evaluation of the candidates. By a letter of 6 May 2009 the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had decided to accept this recommendation. That is the impugned decision.

A new technical evaluation was held on 4 July 2009 and the external candidate who had been selected following the disputed procedure was again successful.

B. The complainant submits that the impugned decision is unlawful in that it did no more than cancel the technical evaluation, whereas the flaws noted by the Board should have led to the cancellation of the whole competition procedure and the referral of the candidatures back to the Human Resources Development Department. This would have made it possible to draw up a new shortlist of candidates meeting the conditions set out in the vacancy notice and to avoid any recurrence of the same irregularities.

She complains that the Chief of the Official Documents Branch was not neutral during the technical evaluation interview on 14 April

2008, where she felt “belittled and humiliated”, because he favoured the successful candidate for personal reasons. In her opinion, irrelevant questions were put to her in the course of this interview in order to influence unduly the selection board.

The complainant adds that holding a competition for the disputed post was merely a trick “to justify employing the successful candidate on the Organization’s regular budget”. She asserts that this post was created as soon as the Chief of the Official Documents Branch took office, that the successful candidate does not have the minimum qualifications required for a grade P.3 editor’s post and that she does not in fact perform the duties of the post, but is entrusted with secretarial tasks by the Chief.

Lastly, the complainant considers that the selection board which conducted the technical evaluation overlooked some essential facts and drew clearly mistaken conclusions from the evidence in considering that she had not demonstrated particular editorial skills.

She asks the Tribunal to cancel the impugned decision as well as the disputed competition and ensuing appointment. She also claims compensation for material and moral injury and costs.

C. In its reply the Organization argues that the complaint is irreceivable because the three pleas entered by the complainant are irreceivable. As far as the first is concerned, since the impugned decision cancelled the technical evaluation interview held on 14 April 2008 the arguments relating to it have now become moot. The second, namely that the successful candidate does not work as an editor, concerns facts subsequent to the impugned decision. As for the third plea, that the successful candidate does not possess the requisite qualifications, this is a new plea which the Joint Advisory Appeals Board has not had an opportunity to examine. In this respect the complainant has not therefore exhausted internal means of redress.

On the merits, the Organization submits that partial cancellation of the competition procedure is consistent with the Tribunal's case law and that the decision to resume the recruitment procedure as from the point at which it became flawed, i.e. as from the technical evaluation in this case, is perfectly lawful. It states that the complainant has not supplied any proof of the successful candidate's alleged lack of qualifications and that the allegations regarding the duties which the latter actually performs are groundless.

D. In her rejoinder the complainant submits that her complaint is receivable, since it seeks the cancellation of the whole competition procedure and not merely the technical evaluation. Relying on the Tribunal's case law, she says that while new claims are certainly irreceivable, new pleas may be entered at any time. In her opinion, the fact that the Joint Advisory Appeals Board found that the successful candidate does not possess the required qualifications for the post makes it all the more necessary to cancel the whole procedure.

On the merits, the complainant submits that, despite the fact that the Board had established that numerous irregularities had been committed "throughout the procedure", because of the clumsy wording of its report, the Director-General merely ordered that a new technical evaluation be conducted, whereas in her opinion he ought to have cancelled the competition. She also contends that the wording of the vacancy notice for the post illustrates the bias shown by the chief responsible, since he added duties which did not match those of an editor in order to give an advantage to the successful candidate. She maintains that, in breach of Annex I to the Staff Regulations, the successful candidate did not undergo the compulsory stage of evaluation by the Assessment Centre before being invited to the technical evaluation interview.

E. In its surrejoinder the Organization maintains its position. It raises a new objection to receivability, arguing that the complainant has not exhausted the internal means of redress with respect to her arguments concerning the alleged misinterpretation of the Joint

Advisory Appeals Board's recommendation and the biased wording of the vacancy notice.

The defendant contends that the successful candidate did possess the required professional qualifications and experience and that the vacancy notice was not biased in any way. In keeping with Annex I to the Staff Regulations, it was drawn up by the chief of the branch concerned and then submitted for an opinion to the Human Resources Development Department and then the Staff Union.

According to the Organization, the fact that the successful candidate underwent the technical evaluation before completing the evaluation by the Assessment Centre had no influence on the fairness of the recruitment process.

Lastly, it produces the comments of the candidate selected at the end of the competition procedure.

CONSIDERATIONS

1. On 2 March 2008 the complainant, who was working as a proofreader at grade P.2, applied for a post of Editor (Document Quality Assurance Officer) at grade P.3, which had been advertised in a vacancy notice inviting applications from internal and external candidates. She was shortlisted and participated in a technical evaluation interview on 14 April.

On 7 July 2008 the Administration informed her that she had been unsuccessful, since the selection board had recommended the appointment of an external candidate.

2. On 28 July the complainant requested an interview with the responsible chief for the job concerned in order to obtain feedback on the technical evaluation, in accordance with paragraph 13 of Annex I to the Staff Regulations. This interview took place on 7 August. Pursuant to paragraph 14 of the same Annex, she then requested a written response from the responsible chief. On the same date, i.e. on 20 August, the latter confirmed in writing the information which he

had given to the complainant regarding the reasons why she had not been selected.

3. On 19 September 2008 the complainant submitted a grievance to the Joint Advisory Appeals Board seeking the cancellation of the competition procedure and ensuing appointment.

4. In its report of 6 March 2009 the Board considered “that the technical assessment [had] not [been] conducted in an objective, transparent and impartial manner and that the complainant’s candidature [had] not [been] considered in good faith and in keeping with the basic rules of fair and open competition”. It therefore recommended that the Director-General should “cancel the result of the competition, while shielding the successful candidate from any injury, and should arrange for a new technical evaluation of the candidates”.

By a letter of 6 May 2009 the complainant was informed that the Director-General accepted this recommendation and that a new technical evaluation would be organised in due course. That is the decision impugned before the Tribunal.

5. The complainant asks the Tribunal to set aside this decision, to cancel the whole competition procedure, to cancel the appointment resulting from this procedure, to award compensation for the moral and material injury which she has suffered and to order the defendant to pay costs.

She submits in substance that the whole procedure should have been cancelled, not just the technical evaluation, that the creation of the post was a sham and that the Director-General “acted unlawfully” by agreeing to follow the Joint Advisory Appeals Board’s recommendation.

6. At the Tribunal’s request, the defendant forwarded the complaint to the candidate who was appointed as a result of the competition in order to obtain her comments. This person stated *inter alia* that she took part in this competition in all honesty, that the selection board chose her as the best qualified candidate for the post

and that her appointment has been “validated” by the Staff Union and the Director-General.

7. The defendant argues that the complaint should be dismissed, firstly because it is irreceivable for failure to exhaust internal means of redress and, secondly, because it is groundless.

8. The Organization states that the complaint rests on three main pleas and it submits that the first, relating to the technical evaluation interview of 14 April 2008, is irreceivable because it has manifestly become moot. Indeed, this interview has been cancelled, as the Director-General arranged for a new technical assessment of the candidates. The complainant therefore no longer has any cause of action in this connection and her claims based on her arguments concerning this interview should therefore be deemed irreceivable.

The defendant holds that the second plea, that the candidate appointed after the second technical evaluation does not perform the duties of an editor, should not be accepted by the Tribunal, as it concerns facts subsequent to the impugned decision.

The Organization also challenges the receivability of the third plea on the grounds that internal means of redress have not been exhausted. In its opinion, the complainant is now basing her complaint on the fact that the successful candidate did not possess the qualifications required in the vacancy notice. This being so, the cause of action on which her complaint is based is different from that underpinning her internal appeal and the Organization has therefore not had an opportunity to address this ground of appeal.

9. The Tribunal considers that the first two objections to receivability put forward by the Organization must be rejected. The complainant’s submissions to which the defendant objects are merely arguments in support of her main claim that the whole competition should be cancelled. If necessary they will be dismissed, if they prove to be related to facts subsequent to the impugned decision.

The objection to receivability based on a failure to exhaust internal means of redress will likewise be rejected because, contrary to the Organization's submissions, the cause of action is no different from that examined during the internal appeal procedure. Indeed, before both the Joint Advisory Appeals Board and the Tribunal, the complainant, challenging the lawfulness of the competition procedure, sought the cancellation of the procedure and of the appointment of the successful candidate and compensation for the injury she has suffered. The cause of action is therefore the same as that underpinning the grievance examined by the Board.

10. According to the Tribunal's case law, persons who apply for a post to be filled by some process of selection are entitled to have their application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that every applicant must enjoy, whatever their hopes of success may be (see, for example, Judgment 3032, under 20 *in fine*).

11. In the instant case the Tribunal notes that in the proceedings before the Joint Advisory Appeals Board the complainant contended that, by inviting the successful candidate to undergo technical evaluation prior to completing the Assessment Centre process, the Office breached paragraph 11 of Annex I to the Staff Regulations, but that the Board, although it pointed out that the evaluation by the Assessment Centre should precede technical evaluation, considered that this flaw had not influenced the outcome of the competition and that it did not justify its cancellation.

In her rejoinder the complainant reiterated the plea that the defendant had not complied with the provisions concerning the compulsory evaluation by the Assessment Centre prior to technical evaluation.

12. Paragraph 11 of Annex I to the Staff Regulations reads:

“The responsible chief will undertake and ensure rigorous technical evaluation of all candidates who have successfully completed the Assessment Centre's process, and will prepare a report.”

In addition, the Collective Agreement on a Procedure for Recruitment and Selection between the International Labour Office and the Staff Union reads in relevant part:

“Article 1

Definitions

[...]

- 1.1 The expression ‘assessment centre’ means an independent body of assessors, reaching decisions by consensus on the competence of individuals to work at particular levels in the Organization.

[...]

- 1.6 The expression ‘technical evaluation’ means an appraisal of technical skills and professional expertise and experience of successfully assessed candidates to a given vacancy.

[...]

Article 4

Competition process

- 4.1 The selection process is composed of two phases, the assessment centre and the technical evaluation.

[...]

- 4.3 External candidates short-listed by the responsible Chief in agreement with [the Human Resources Development Department] will be invited to participate in the Assessment Centre.

Article 5

Technical evaluation

- 5.1 All candidates who have been successfully assessed shall be technically evaluated. It is the responsibility of the Chief to undertake and assure a rigorous technical assessment of candidates according to guidelines that shall be agreed by the Union and the Office. The Parties agree to elaborate these guidelines by 31st December 2000 and, in any case, before this Agreement becomes operational.

[...]”

13. In Judgment 3032, under 20, the Tribunal already found that these provisions read together showed that there is a chronological order in the competition process and that an external candidate must successfully complete the first stage, that is evaluation by the

Assessment Centre, before he or she can participate in the second, namely the technical evaluation.

The defendant submits that the order in which technical evaluation and evaluation by the Assessment Centre occur has no influence on the fairness of the recruitment process and that “in this case, as all the shortlisted candidates had to undergo examination by the Assessment Centre, it was immaterial whether the candidate in question underwent this examination before or after the technical evaluation”.

14. The Tribunal will not accept the defendant’s argument on this point. It considers that all candidates must be treated equally. In particular, the eligibility of external candidates for appointment to a post at a given grade within the Organization must be evaluated by the Assessment Centre before the technical evaluation which is mandatory for all candidates who may be appointed, and that did not occur in this case.

15. The Tribunal recalls that when an international organisation wants to fill a post by competition, it must comply with the material rules and the general precepts of the case law (see, for example, Judgments 2163, under 3, and 3032, under 22).

In this case the defendant, by failing to respect the order established for the competition process, that is the evaluation by the Assessment Centre and then the technical evaluation, breached its own rules governing the conduct of the competition process. Moreover, the possibility that this reversal of the order had an impact on the results of the competition cannot be ruled out.

It follows that the competition process was flawed and must therefore be cancelled, without there being any need to rule on the complainant’s other pleas or to consider the further written submissions presented by the defendant, without the Tribunal’s authorisation, after the written proceedings had been closed.

16. The complainant requests the cancellation of the whole procedure. The Tribunal concludes that the procedure must be resumed as from the stage at which it became flawed, in other words at the stage of evaluation by the Assessment Centre.

17. The complainant requests the cancellation of the appointment resulting from the disputed procedure. The Tribunal considers that this request is well founded, on the understanding that the defendant must shield the successful candidate from any injury that may flow from the cancellation of an appointment which she accepted in good faith (see the above-mentioned Judgment 3032, under 25, and the case law cited therein).

18. She also seeks compensation for the moral and material injury she allegedly suffered. The Tribunal considers that she did not suffer any material injury due to her lack of success in the competition. However, the procedural flaw caused her moral injury that must be redressed by awarding compensation of 3,000 Swiss francs.

19. The complainant is entitled to costs in the amount of 2,000 francs.

DECISION

For the above reasons,

1. The decision of 6 May 2009 is set aside.
2. The competition procedure shall be resumed as indicated under 16, above.
3. The Organization shall pay the complainant 3,000 Swiss francs 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 18 November 2011, 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 February 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet