

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session

Judgment No. 3118

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. D. against the International Labour Organization (ILO) on 15 June 2010 and corrected on 5 July, the Organization's reply of 12 October, the complainant's rejoinder of 12 November 2010 and the ILO's surrejoinder of 14 February 2011;

Considering Article II, paragraph 1, 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 French national born in 1963, joined the International Labour Office, the ILO's Secretariat, in 1985 at grade G.1. He holds an appointment without limit of time, which he obtained on 1 April 1999. He had held a series of clerkship posts, successively at grades G.3, G.5 and G.6, when he was appointed, on 1 March 2001, to the G.7 post of Head of the Distribution Unit in the Document and Publications Production, Printing and Distribution Branch. On 2 August 2007 he applied for a post at grade P.3 in the same branch, but his application was unsuccessful. He took steps to challenge the

appointment made to that post, and eventually filed his first complaint with the Tribunal. The proceedings on that complaint were stayed *sine die*, at the complainant's request, under Article 10, paragraph 3, of the Rules of the Tribunal.

In 2008 the G.6 post of Clerical Assistant (Senior Clerk) in the Distribution Unit fell vacant owing to the retirement of its incumbent. To fill the post, the Director-General appointed Mr N. by transfer in the same grade, without a competition, with effect from 1 July. The grievance lodged by the complainant on 12 December 2008 with the Human Resources Development Department against this appointment having been dismissed, on 5 May 2009 he submitted a grievance to the Joint Advisory Appeals Board. In its report of 5 February 2010 the Board recommended that the grievance should be rejected as unfounded. By a letter of 16 March 2010, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had decided to endorse that recommendation.

B. The complainant contends that the post to which Mr N. was transferred does not belong to any of the categories of vacancies which can be filled by the Director-General by direct selection under Article 4.2(e) of the Staff Regulations, and that according to Article 4.2(f) "competition shall be the normal method" of filling vacancies between grades G.1 and P.5. He contends that although, according to the latter provision, promotions and appointments can take place without a competition, in the case of a transfer there is no exception to the requirement to hold a competition. He points out in this connection that in Judgment 2755 the Tribunal held that the Director-General of the ILO had breached the provisions of Article 4.2(f) by making a transfer in the same grade by direct selection. He also complains that although, according to Article 4.2(a), the paramount criterion in the filling of a vacancy is competence, no vacancy notice had been issued. The Organization therefore failed to comply with the provisions of Article 4.2(g), which requires prior account to be taken of certain applications or claims.

The complainant asks the Tribunal to set aside the impugned decision and the appointment of Mr N., to compensate him for the injury he claims to have suffered and to award him costs in the amount of 2,000 Swiss francs.

C. In its reply the ILO contends that the complaint is irreceivable because the complainant has no cause of action. Referring to the Tribunal's case law, it argues that the complainant was ineligible for the post of Clerical Assistant (Senior Clerk) in his unit, a post junior to the one he holds, and that he has not been injured in any way by the decision to appoint Mr N. to the post. It emphasises that he did not show any interest in the post before 12 December 2008 and that, if he had wanted to be transferred to it in order to shed some of his responsibilities, he would have made that clear, for example by submitting a request for downgrading. Yet he has always sought to advance in his career, and this is evident from the fact that in his first complaint he challenges the decision not to appoint him to a P.3 post.

On the merits, the defendant states that the decision to transfer Mr N. in the same grade was taken quite lawfully and that, because of the discretionary nature of the decision, the Tribunal has only limited power to review it. As no reliance was placed on Article 4.2(e) when Mr N. was appointed, the complainant's argument on that score is irrelevant. Moreover, it is clear from Article 4.2(f) that vacancies in grades G.1 to P.5 may also be filled without a competition. In this regard the ILO explains that the appointment of Mr N. was warranted by the needs of the service and was made in accordance with Article 4.2(f), which permits appointment without competition when "filling vacancies requiring specialized qualifications" and "filling vacancies in urgency". Lastly, while Article 4.2(g) does not require either a competition or the issuance of a vacancy notice, it does provide that in filling any vacancy, account shall first be taken of applications from former officials whose appointments have been terminated because of a reduction of staff, and thereafter of applications for transfer. Given that Mr N. submitted such an application, the complainant has not shown that the provision in question was breached.

At the Tribunal's request, the ILO transmitted a copy of the complaint to Mr N. to enable him to comment, but he has chosen not to do so.

D. In his rejoinder the complainant argues that, since no vacancy notice was issued, he cannot be accused of failing to show interest in the post of Clerical Assistant (Senior Clerk) in the Distribution Unit. As he was not fully satisfied with the post he holds, and has not succeeded in gaining promotion, he was willing to take on fewer responsibilities and to be appointed to the above-mentioned post. He adds that as a Union Steward of the ILO Staff Union, he wishes to "condemn the arbitrary practices for which the Organization is famous".

E. In its surrejoinder the Organization maintains its position in full. In its view, being a Union Steward in the Staff Union is not sufficient to give the complainant a cause of action before the Tribunal.

CONSIDERATIONS

1. The complainant joined the ILO in 1985 at grade G.1. He has since progressed steadily in his career in the Organization. Since 2001 he has held the post of Head of the Distribution Unit, grade G.7, in the Document and Publications Production, Printing and Distribution Branch.

In 2007 the complainant applied without success for a P.3 post in that branch. The decision not to select him for the said post is the subject of his first complaint to the Tribunal. At his request, and with the consent of the defendant, on 12 July 2010 the proceedings were stayed *sine die*, in accordance with Article 10, paragraph 3, of the Rules of the Tribunal. Accordingly, that case is still pending.

2. On 12 December 2008 the complainant filed a grievance challenging the decision of the Director-General to make an appointment by means of a transfer in the same grade to the post of

Clerical Assistant (Senior Clerk) in the unit for which he is responsible, the vacancy having arisen because of the retirement of its incumbent. As the grievance was not upheld, he appealed to the Joint Advisory Appeals Board. By decision of 16 March 2010 the Director-General, following the Board's recommendation, dismissed the grievance. That is the decision referred to the Tribunal.

3. The complainant contends that, since the post in question falls within a category of vacancies which, pursuant to Article 4.2(f) of the Staff Regulations, have to be filled by competition, in accordance with the requirements and purposes of paragraphs (a) and (g) of that Article, the Director-General could not make a direct selection for the post by way of a transfer under paragraph (e).

In the defendant's opinion, the complaint is not receivable. It argues that the complainant has no cause of action, since the contested appointment has not harmed him in any way. Therefore, the primary issue for the Tribunal to resolve is whether the complainant has any interest in having the decision set aside that must be protected.

4. According to the Tribunal's case law, the receivability of a complaint does not depend on proving certain injury. It is sufficient that the impugned decision should be liable to violate the rights or safeguards that international civil servants enjoy under the rules and regulations applicable to them or the terms of their employment contract.

It must first be made clear that all staff members are entitled to compete in accordance with the conditions laid down in the applicable provisions, and that a staff member is free to choose whether or not to apply for a competition. A staff member's interest in challenging the appointment of another staff member to a given post does not depend on whether he or she had a relatively good chance of being appointed to the post in question. But it does require that he or she would be eligible for the post, otherwise the contested appointment could not be deemed to have injured or legally affected him or her. The right to challenge an appointment on the basis that it has been made by direct

selection and not through a competition is limited by the prohibition against abuse of the right of appeal. (See inter alia Judgments 1223 and 1272, under 12.)

5. In the light of this case law, the Tribunal has for example ruled that a former staff member had no right to challenge an appointment to a post which he could not occupy because he had retired (see Judgment 2832, under 7 and 8). It did however find that a staff member challenging the appointment of a third party to a post at the same grade as his own had such a right, because both persons concerned were following similar careers and were entitled to expect that promotions would be made fairly and objectively, based on merit and in accordance with the law (see Judgment 1968, under 6). Similarly, it has found receivable a complaint by a staff member who, having challenged through an internal procedure the decision not to appoint her to the post to which she aspired, had not applied for a similar post, and who was moreover already in a post corresponding to her wishes (see Judgment 2210, under 4 (c) and (d)).

6. In the present case, appointing the complainant to the post in question would have been the equivalent of downgrading. He does not claim that he showed interest when the post fell vacant, a fact of which he cannot have been unaware since the Organization had initially found itself obliged to retain the incumbent in the post. His wish to take the post in question is more than unusual; it is incomprehensible from the viewpoint of his career, since his determination to progress in that career had prompted him to apply for a post at a higher grade than he was in and, as explained above, to challenge the decision to turn down his application by way of a complaint to the Tribunal which is still pending. In these circumstances, and in the absence of any relevant motive, his desire to shed some of his responsibilities is scarcely credible. For the Tribunal, it is therefore unclear what interest the complainant would have had in taking part in a competition from which he would have gained no advantage if he had succeeded.

It must therefore be concluded that the complainant has no personal interest in challenging the procedure followed to fill the post of Clerical Assistant (Senior Clerk) in the Distribution Unit. Even if he claims to be doing so in his capacity as a Union Steward for the Staff Union, he has not shown that the Union mandated him to challenge the procedure. The defendant's objection that the complaint is irreceivable is therefore well founded.

7. It follows from the foregoing that the complaint must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2012, 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 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet