

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

114th Session

Judgment No. 3176

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr D. Z. against the International Labour Organization (ILO) on 20 October 2010 and corrected on 22 November 2010, the ILO's reply of 23 February 2011, the complainant's rejoinder of 30 May and the Organization's surrejoinder dated 29 July 2011;

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. Information regarding the complainant's career at the International Labour Office, the ILO's secretariat, is to be found under A in Judgment 3175, also delivered this day, concerning his first complaint. Suffice it to recall that in September 2006 the complainant was assigned to the Payment Authorisation Section in the Budget and Finance Branch to perform duties at grade P.3 under a fixed-term technical cooperation contract which was extended several times.

On 31 July 2008 the Office published a vacancy notice advertising a grade P.3 post of Finance Officer in the above-mentioned section. The complainant applied, was shortlisted and then took part in a technical evaluation interview. The competition panel recommended that the competition should be declared “unsuccessful” because, in its opinion, none of the candidates possessed the requisite level of technical knowledge. The Staff Union Committee, which had been invited to examine this recommendation, made some comments concerning the technical evaluation of the abilities of one of the candidates. On 4 December 2008 the Director-General approved the panel’s recommendation and the complainant was informed of this on the same date.

On 17 February 2009 the Head of the Budget and Finance Branch, acting in his capacity of responsible chief, proposed that Ms G. – whom he and another panel member had evaluated, although she had not applied – should be appointed to the post of Finance Officer. The Director-General accepted this proposal and appointed her to that post, but at grade P.2, her promotion to grade P.3 being subject to the completion of a period of probation and to a favourable assessment of her work.

On 12 November the complainant filed a grievance with the Human Resources Development Department in order to challenge the appointment of Ms G., of which all the staff had been notified on 1 October. As his grievance was dismissed, the complainant referred the matter to the Joint Advisory Appeals Board on 11 December 2009. In its report of 1 June 2010 the Board considered that the appointment of Ms G. by direct selection, after the competition had been declared “unsuccessful”, was in conformity with Article 4.2(f) of the Staff Regulations and with the Office’s normal practice. It therefore recommended that the Director-General should dismiss the grievance. However, it drew his attention to “the risks stemming from over-frequent use of appointment by direct selection when a competition had been declared unsuccessful”, considering that the “systematic” use of direct selection in such cases was not “in the spirit” of subparagraph (f). The complainant was informed by a letter

of 27 July 2010 that the Director-General had decided to adopt the Board's recommendation and that his grievance was therefore dismissed as unfounded. That is the impugned decision.

B. The complainant submits that, during the internal proceedings, the Organization justified the decision to appoint Ms G. on the basis of Article 4.2(f) of the Staff Regulations, which stipulates that an appointment without competition may be employed where, inter alia, it is impossible to satisfy the provisions of subparagraph (a) of that article by any other method. Subparagraph (a) indicates that the paramount consideration in the filling of any vacancy is the necessity to obtain a staff of the highest standards of competence, efficiency and integrity, although due regard must be had to other criteria such as geographical origin. In his view, given the nature of the post to be filled, it was not impossible to satisfy these provisions. He considers that it was reasonably not impossible to appoint a qualified candidate at the end of the competition procedure and it was "easy" to organise a call for candidatures in order to fill the post in an objective and transparent manner.

The complainant recalls that the Office's practice is to give priority to candidates from under-represented member States where qualifications are equal, and he draws the Tribunal's attention to the fact that, unlike Ms G., he is a national of one of those States. Referring to the fact that Ms G. was recruited from another international organisation and was appointed at a grade lower than that advertised in the vacancy notice, he further contends that she did not possess the minimum qualifications required for the position in question, whereas he had been "working in that position since August 2006".

The complainant also asserts that the Staff Union was not informed of the decision not to reopen the selection and recruitment procedure after the competition had been declared "unsuccessful", in breach of Article 8 of the Collective Agreement on a Procedure for Recruitment and Selection between the International Labour Office and the ILO Staff Union. He adds that under that article the reopening

of the procedure was obligatory. He doubts that the assessors who conducted the Assessment Centre process for Ms G. were selected in accordance with the provisions of Article 10.7(b) of the Staff Regulations, and he therefore asks the Organization to supply the Tribunal with documentation regarding that process.

The complainant asks the Tribunal to set aside the impugned decision, to cancel the appointment of Ms G., to order redress for the injury suffered and to award him costs in the amount of 3,000 Swiss francs.

C. In its reply the Organization states that the appointment of Ms G. by direct selection was justified. In its view, the fact that the competition to fill the post of Finance Officer was declared “unsuccessful” constituted sufficient grounds to presume that it was impossible to recruit a person with the necessary qualifications for the job in question by means of a competition. Furthermore, there was no guarantee that holding a second competition – which would have meant that time was lost and additional expenses incurred – would have resulted in the recruitment of a sufficiently qualified person. The Organization also holds that appointing an official at one grade lower than that advertised in a vacancy notice is in conformity with the Tribunal’s case law and with the Office’s long-standing, consistent practice as codified in Circular No. 334, Series 6, of 20 July 1985, which states that the possibility of making such an appointment must be specified in the notice of vacancy, which it was in this case.

The ILO acknowledges that it did not inform the Staff Union of the measures taken in the wake of the “unsuccessful” competition, but maintains that its duty to inform is not substantive, since “it has no bearing on the situation of the unsuccessful candidates in the competition”. It points out that Ms G. underwent evaluation by the Assessment Centre and technical evaluation, and it infers from this that it did fulfil its obligation to reopen the selection and recruitment process. It takes the view that the Staff Union could have expressed an opinion as to how the procedure might be reopened when it examined the recommendation to declare the competition “unsuccessful”.

The Organization also endeavours to show that the two assessors – whose names it supplies – who conducted the evaluation of Ms G. at the Assessment Centre on 17 March 2009, were selected in accordance with the provisions of Article 10.7(b) of the Staff Regulations. It states that, at the Tribunal’s request, it invited Ms G. to comment on the complaint, but that she has not responded. Lastly, the defendant requests the joinder of the instant complaint with the complainant’s first complaint on the grounds that they both raise largely the same issues of fact and contain at least two identical arguments.

D. In his rejoinder the complainant points out that one of the two assessors was not an official of the International Labour Office and he holds that Article 10.7(b) of the Staff Regulations was therefore breached. He is also opposed to the joinder of his two complaints on the grounds that the claims and pleas set forth in them are different.

E. In its surrejoinder the Organization maintains its position. It adds that because of the difficulty of selecting internal assessors for the evaluation conducted at the Assessment Centre, the Human Resources Development Department did call on “external assessors”, but that the Staff Union had agreed with those arrangements in accordance with paragraph 6 of Annex I to the Staff Regulations.

CONSIDERATIONS

1. The complainant’s career at the International Labour Office is summarised in Judgment 3175, also delivered this day, concerning his first complaint.

2. In his second complaint, filed on 20 October 2010, he impugns the decision of 27 July 2010 by which the Director-General of the Office endorsed the recommendation of the Joint Advisory Appeals Board and dismissed his grievance directed against the appointment of a Finance Officer by direct selection, although a

competition to fill that post, in which he had taken part, had been declared “unsuccessful”.

3. The complainant asks the Tribunal to set aside the impugned decision and to cancel the disputed appointment, to order redress for the injury he allegedly suffered and to order the ILO to pay costs.

4. In support of his complaint, he contends that the appointment, by direct selection, of another person to the post for which he had applied breached Article 4.2(f) of the Staff Regulations and that this person did not possess the minimum qualifications specified in the vacancy notice for the post in question. He adds that the Collective Agreement on a Procedure for Recruitment and Selection between the International Labour Office and the ILO Staff Union of 6 October 2000 was violated and that the procedure for appointing assessors to conduct the Assessment Centre evaluation of Ms G. was not respected.

5. At the Tribunal’s request the complaint was communicated to the person whose appointment is disputed and she has thus been given an opportunity to comment.

6. The ILO requests the joinder of this complaint with the complainant’s first complaint.

For the same reasons as those set forth in Judgment 3175, also delivered this day, the Tribunal considers that there are no grounds for ordering this joinder.

7. The Organization contends that insofar as the complainant challenges the decision of the Director-General to declare that the competition in which he had participated had been “unsuccessful”, the complaint is irreceivable, because internal means of redress have not been exhausted.

The Tribunal finds, however, that the complainant does not formally impugn that decision of the Director-General.

8. In his first plea the complainant taxes the Organization with a breach of Article 4.2(f) of the Staff Regulations. This subparagraph reads in pertinent part:

- “Promotion or appointment without competition may be employed only in:
- filling vacancies requiring specialized qualifications;
- [...]
- filling vacancies in urgency;
 - filling other vacancies where it is impossible to satisfy the provisions of article 4.2(a) above by the employment of any other method.”

He takes the Organization to task for relying on this provision in order to justify its decision to make an appointment by direct selection when, in his view, it did not apply. He argues that, bearing in mind the duties pertaining to the post of Finance Officer, it was not impossible to satisfy the provisions of Article 4.2(a) of the Staff Regulations by the employment of another method. Subparagraph (a), to which subparagraph (f) refers, relevantly provides that “[t]he paramount consideration in the filling of any vacancy shall be the necessity to obtain a staff of the highest standards of competence, efficiency and integrity”. As the post advertised was, in his view, “relatively common in the international civil service, at a relatively low grade (P.3) and non-political”, he considers that “it was reasonably not impossible to find a qualified candidate through a competition”. He adds that, since he was a national of an under-represented State, whereas the appointee was not, the ILO did not follow its practice according to which priority goes to candidates from under-represented member States where qualifications are equal.

9. The Organization replies that, in the instant case, appointment by direct selection was perfectly justified. In its opinion, it is up to the Director-General to ascertain whether it is impossible to recruit a person with the necessary qualifications by competition and, in practice, he considers that an “unsuccessful” competition is normally sufficient reason to presume that this is so. A new competition can be contemplated only when it ultimately proves impossible to find a suitable person. It emphasises that it lies within the Director-General’s discretion to make these choices.

10. It is not disputed that the appointment in question was made by direct selection, on the basis of Article 4.2(f) of the Staff Regulations, after the competition to fill the post of Finance Officer was declared “unsuccessful”.

An examination of this subparagraph shows that an appointment to a vacant post in grades G.1 to P.5 inclusive may be made without a competition only in certain circumstances, for example when it is necessary to fill vacancies requiring specialised qualifications, to fill vacancies as a matter of urgency, or to fill other vacancies where it is “impossible to satisfy the provisions of article 4.2(a) [of the Staff Regulations] by the employment of any other method”.

11. On reading the Organization’s reply, the Tribunal finds that the arguments it puts forward to justify the appointment by direct selection are not convincing. None of the circumstances specified in Article 4.2(f) in which an appointment without competition can be made applied in the instant case. In particular, there was no urgent need to fill the post in question and it did not call for any specialised qualifications. The Organization’s interpretation of the word “impossible” in Article 4.2(f) is misconceived for, if one were to concur here with the ILO, the systematic use of direct selection would become the rule whenever a competition was declared “unsuccessful”, and that, as the Joint Advisory Appeals Board commented, is not “in the spirit” of Article 4.2(f).

12. The Tribunal considers that in this case, especially in light of the fact that the person selected could be appointed only at grade P.2, it was possible to reopen a competitive selection procedure, for example by issuing a call for candidatures which, as the Board stressed, is a quicker, less complicated procedure than a competition, and to inform the Staff Union accordingly, as provided for in the Agreement of 6 October 2000.

13. It may be concluded from the foregoing, without it being necessary to examine the complainant’s other pleas, that the impugned decision must be set aside and that the disputed appointment, which

resulted from a procedure violating the applicable rules, must be cancelled.

14. However, the person who was appointed must be shielded from any injury that might result from the cancellation of that appointment, given that she accepted it in good faith.

15. The complainant has reason to claim damages, which the Tribunal assesses at 3,000 Swiss francs, in respect of the moral injury caused by the violation which is found to have occurred. He is entitled to costs, which the Tribunal sets at 750 francs.

DECISION

For the above reasons,

1. The impugned decision is set aside and the disputed appointment is cancelled.
2. The person who was appointed shall be shielded from any resulting injury.
3. The ILO shall pay the complainant moral damages in the amount of 3,000 Swiss francs.
4. It shall also pay him 750 francs in costs.

In witness of this judgment, adopted on 9 November 2012, Mr Seydou Ba, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Dolores M. Hansen
Patrick Frydman
Catherine Comtet