

116th Session

Judgment No. 3272

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms S. K. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter “the Commission”) on 19 July 2011 and corrected on 18 November 2011, the Commission’s reply of 22 February 2012, the complainant’s rejoinder of 23 May and the Commission’s surrejoinder of 29 August 2012;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgment 3172, delivered on 6 February 2013. Suffice it to recall that the complainant joined the Provisional Technical Secretariat of the Commission in February 2003 as a temporary assistant at grade G-3. In May 2003 she was appointed to a G-4 position under a fixed-term appointment which was extended several times. In November 2009 she was informed that her appointment would not be extended beyond its

expiry date of 4 May 2010. She separated from service on that date. In the meantime, on 18 December 2009 she applied for the G-4 position of secretary in the Finance Services Section. The vacancy announcement stated inter alia that “[k]nowledge of basic accounting concepts and practices [was] desirable”.

Having heard that the position for which she had applied had been filled, the complainant wrote to the Executive Secretary on 15 June 2010 asking him to confirm that she had not been selected and, if so, to review his decision. She also requested that the selection process be started anew, asserting that she had not been given an opportunity to compete for the position, particularly because she had not been called for interview. She alleged lack of good faith on the part of the Commission and procedural irregularities in the selection process. By a letter of 15 July 2010 the Executive Secretary replied that he maintained his decision, as due consideration had been given to her application and the recruitment procedures had been followed.

On 13 August the complainant filed an appeal with the Joint Appeals Panel (JAP) challenging the decision of 15 July. She contended that her application for the position of Secretary had not been given due consideration, and she asked the Panel to obtain the documents concerning the recruitment process. She also submitted that she should have been given priority over other candidates, given that her appointment with the Commission had been terminated. She requested that the appointment decision be set aside and that she either be appointed to the position in question under a three-year contract or that a new selection process be conducted. She also claimed moral damages and costs. On 30 August the Commission objected to the receivability of the appeal, submitting inter alia that the complainant was no longer a staff member; it asked the JAP to rule on that preliminary issue first. The JAP dismissed this objection on 8 October 2010 and decided to consider the merits of the appeal.

In its report of 5 May 2011 the JAP indicated that its Chairperson had consulted the confidential documents relating to the contested selection procedure and that, based on his review, it considered

that the recruitment procedure had been conducted in line with Administrative Directive No. 20 (Rev.2) concerning Recruitment, Appointment, Reappointment and Tenure. The JAP found no evidence of bad faith or retaliation, and it noted that there was no provision in the Staff Rules and Regulations stipulating that a staff member whose post had been abolished should be given priority over other candidates when applying for a vacant position. It therefore recommended dismissing the appeal.

By a letter of 20 May 2011 the Executive Secretary informed the complainant that he had decided to endorse the JAP's recommendation and therefore to dismiss her appeal. That is the impugned decision.

B. The complainant alleges bad faith on the part of the Commission insofar as it abolished her post and did not assist her in finding a position commensurate with her grade, experience and qualifications. She submits that, according to the Tribunal's case law, the Commission had an obligation to explore possible options with her, even though there was no express provision in the Staff Rules and Regulations in that respect. In her view, the Commission had a duty to give priority to her application.

According to the complainant, the Commission acted in breach of paragraphs 1.8 to 1.10 of Administrative Directive No. 20 (Rev.2), because the Personnel Section provided the division director with a list of candidates who appeared to be most qualified vis-à-vis the qualifications listed in the vacancy announcement, instead of simply indicating those who obviously did not meet the requirements set out in the vacancy announcement.

The complainant contends that the evaluation of her candidature was fundamentally flawed, in particular because she was not asked to take a written examination. She argues that the JAP made an error of fact in concluding that, although she possessed the requisite knowledge of basic accounting concepts and practices stipulated in the vacancy announcement, she did not mention this on her Personal History Form and therefore failed to bring it to the attention of the division director.

The complainant further alleges breach of due process in the internal appeal proceedings, on the grounds that the Administration made documents available to the Chairperson of the JAP without allowing the other members of the JAP or herself to consult them. No legitimate reasons for doing so were given, and the JAP's rules of procedure provide that the Panel, and not merely its Chairperson, shall have access to all documents pertinent to the case. She asks the Tribunal to order the Commission to provide her with the documents relating to the contested recruitment process or to ask the Commission to submit them to the Tribunal for *in camera* review. To support her request, she relies on the Tribunal's case law according to which a staff member must, as a general rule, have access to all evidence on which the authority based its decision against him or her.

She asks the Tribunal to set aside the impugned decision, to order the Commission to reinstate her and to pay her all salaries and benefits from the date of separation to the date of reinstatement, together with interest from due dates. She also asks the Tribunal to order the Commission to initiate a new recruitment process for the contested position. Lastly, she claims 10,000 euros in moral damages and costs.

C. In its reply the Commission denies having acted in bad faith or in retaliation, and asserts that the complainant has not proved her allegations. It stresses that the Executive Secretary, in a letter of 14 December 2009, encouraged the complainant to apply for the vacant position, adding that her application would be considered along with other applicants who might apply for the post. In its view, the selection procedure was conducted in accordance with Administrative Directive No. 20 (Rev.2), as noted by the JAP.

Regarding the complainant's allegations of breach of due process, it explains that the Chairperson of the JAP was invited to consult the documents relating to the contested recruitment process with the purpose of "balancing the interests of confidentiality of the recruitment process with the interest of justice for the complainant". It contends that there was no compelling procedural reason for all

three Panel members to review collectively the documents concerned, because the review was a straightforward exercise aimed at establishing whether or not there had been a procedural error in the recruitment process. In any event, the Chairperson was acting on behalf of the JAP with its implicit authorisation. Furthermore, if the JAP had found that some documents ought to have been provided to the complainant, it would have asked the Administration to do so, but it did not.

D. In her rejoinder the complainant maintains that the competition process was unfair, stressing that the Chief of the Personnel Section highlighted the names of the candidates whom she considered to be “suitably qualified” when forwarding the list of candidates to the division director, and that the latter did not prepare an evaluation of all candidates indicating to what extent they met the requirements of the post. In addition, he failed to provide an overall rating of each candidate. She reiterates that her application was not given due consideration.

She adds that the division director reviewed the written tests of candidates prior to establishing the shortlist of applicants for interviews, which according to her could constitute unequal treatment. She also notes that the Chief of the Personnel Section, in a memorandum of 2 February 2010 indicated that in shortlisting candidates the comparison of the candidates’ qualifications and experience must be based on the core requirements of the vacant post and not on secondary considerations. The complainant contends that the qualifications that were listed as desirable, such as knowledge in accounting, were not “core requirements”, and that she should therefore have been shortlisted.

E. In its surrejoinder the Commission maintains its position. It provides a copy of the Personal History Form the complainant had submitted with her application, and points out that there is no indication therein of her knowledge of accounting concepts and practices.

It explains that the complainant received some documents relating to the recruitment process, i.e. those proving that her application was given due consideration, but did not receive the other documents consulted by the Chairperson of the JAP because these documents “did not concern her”. It adds that, according to the Tribunal’s case law, a candidate in a competition is not entitled to consult the records of the recruitment process. In any event, the Chairperson of the JAP reviewed all the relevant documents taking into account the complainant’s allegations. On the basis of his review, the JAP concluded that her allegations were unfounded.

CONSIDERATIONS

1. The complainant joined the Commission in February 2003 as a temporary assistant. In May 2003 she was appointed secretary at grade G-4. Her fixed-term contract was extended several times with her last contract due to expire in May 2010.

2. In November 2009, the complainant learned that her post would be abolished. In early December 2009, the Commission posted a Vacancy Announcement, VA268-47-2009, for a G-4 secretary position in the Finance Services Section. In a written request to the Commission, the complainant asked to be reassigned to this position. The Executive Secretary refused the request but encouraged the complainant to submit her application so that it could be “considered along with the other applicants who might apply for the post”. In mid-December, the complainant submitted her application for the post.

3. Shortly after her separation from service, in June 2010, the complainant learned informally that the position had been filled. On 15 June 2010, the complainant wrote to the Executive Secretary enquiring whether this was in fact true and, if it was, requested that the decision be reviewed and reversed. The Executive Secretary rejected the complainant’s request.

4. In August 2010, the complainant appealed the Executive Secretary's decision to maintain the appointment to the JAP. The JAP considered receivability as a preliminary issue and found that the appeal was receivable. Subsequently, the JAP requested that the Commission provide additional documentation in relation to the recruitment for VA268-47-2009, "including but not limited to the vacancy announcement, the reply sent to the Appellant upon application and the selection by Personnel of candidates forwarded to the Director for evaluation". The Commission provided some of the requested documentation but refused to provide further information on the ground that it would compromise the confidentiality of third-party candidates. Instead, the Commission proposed that it give the documents to the Chairperson of the JAP for review. He could then report to the other members of the Panel. This proposal was accepted and the Chairperson reviewed the documents and reported his findings to the other members.

5. In its report, the JAP recommended the rejection of the appeal. The Executive Secretary accepted the recommendation of the JAP and maintained his decision regarding the appointment to the vacancy and rejected the complainant's requests for moral damages and costs. This is the impugned decision.

6. The first issue is whether the complainant's due process rights were breached during the internal appeal process. There are two aspects to the allegation. The first stems from the fact that the Administration permitted access to certain documents to the Chairperson but not to other members of the JAP.

7. The Commission submits that its invitation to the Chairperson to review the documentation related to the recruitment process was made in good faith with the purpose of balancing the interests of confidentiality with the interests of justice for the complainant. The Commission claims that the fact that the Chairperson accepted the invitation shows that the JAP members were in agreement with the approach.

8. The Commission adds that there was no compelling procedural reason for all three Panel members to collectively review the documents. The review was straightforward and aimed at establishing whether there had been any procedural error in the recruitment process. The Chairperson was undertaking a fact-finding mission on behalf of the Panel with its authorisation, implicit or otherwise. The Commission adds that the JAP rules of procedure do not preclude the Panel from taking this course of action and, in any event, it did not adversely impact the complainant.

9. The Commission notes that the Chairperson's report provided a detailed description of the documentation for the Panel members and that it may be inferred that the JAP took all relevant steps to ascertain whether the competition process was tainted by a procedural flaw or unfair treatment.

10. The Commission's position is fundamentally flawed. Staff Rule 11.1.01(b) provides that the JAP, established pursuant to Staff Regulation 11.1, shall consist of three members: a chairperson designated by the Executive Secretary after consultation with the Staff Council; one member appointed by the Executive Secretary; and one member elected by all staff members. Staff Rule 11.1.01 provides that the JAP shall establish its own rules of procedure.

11. The JAP's rules of procedure are found in Administrative Directive No. 22 (Rev.1). In relation to documents, paragraph 1 of rule III.G states that "[s]ubject to the rules of confidentiality of the Commission, the Panel may require that the Party in possession produce any document". Paragraph 3 of rule III.G reads, in part:

"If a Party or witness declines to produce a document on the grounds of confidentiality, the Panel may request its production for the limited purpose of determining whether its relevance overrides its confidentiality and whether the rules of confidentiality of the Commission permit its further disclosure, without first transmitting a copy to the other Party. Should it be so determined, a copy of such document, or only the relevant parts thereof, may be transmitted to the other Party."

12. Rule IV.E deals with the meetings of the JAP. It states that the Panel may meet either in executive sessions or hold hearings. However, the “entire Panel and the Secretary must be present at all meetings”.

13. As set out above, paragraph 3 of rule III.G sets out a specific procedure for dealing with claims of confidentiality in relation to documents that requires the involvement of the whole Panel. The Panel cannot unilaterally adopt an alternative procedure. There is another reason to reject the approach adopted by the JAP. Fact-finding is an integral component of the internal appeal process that involves the assessment of the evidence in terms of its admissibility, reliability, accuracy, relevance and weight. As it is an appellate body, the members of the Panel each have an individual responsibility to be fully engaged in the fact-finding process. This obligation cannot be delegated to another member of the Panel. Additionally, the procedure adopted also offends the requirement that the entire Panel be present at all meetings.

14. This procedural flaw alone is a sufficient basis on which to set aside the impugned decision. There is an additional procedural error. As the Tribunal stated in Judgment 3264, under 15:

“It is well established in the Tribunal’s case law that a ‘staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him’. Additionally, ‘[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality’ (see Judgment 2700, under 6). It also follows that a decision cannot be based on a material document that has been withheld from the concerned staff member (see for example, Judgment 2899, under 23).”

15. The Tribunal has consistently affirmed the confidentiality of the records of the discussions regarding the merits of the applicants for a post. However, this does not extend to the reports regarding the results of the selection process with appropriate redactions to ensure the confidentiality of third parties. Within these parameters, the

complainant should have been provided with all of the documentation relied on by the JAP and in turn by the Executive Secretary in reaching his decision. The failure to do so constitutes a breach of the complainant's procedural fairness rights and requires that the decision, upon which this documentation was based, be set aside and the matter be remitted to the JAP for reconsideration. In these circumstances a consideration of the complainant's other pleas is unnecessary. The complainant is entitled to moral damages in the amount of 10,000 euros for the flawed internal appeal and costs in the amount of 4,000 euros.

DECISION

For the above reasons,

1. The Executive Secretary's decision of 20 May 2011 is set aside and the matter shall be remitted to the JAP for reconsideration.
2. The Commission shall pay the complainant moral damages in the amount of 10,000 euros.
3. The Commission shall also pay the complainant costs in the amount of 4,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Hugh A. Rawlins
Catherine Comtet

