

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

V.
v.
ITU

128th Session

Judgment No. 4154

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. M. V. against the International Telecommunication Union (ITU) on 9 January 2018 and corrected on 2 March, the ITU's reply of 4 June, corrected on 8 June, the complainant's rejoinder of 13 July and the ITU's surrejoinder of 24 October 2018;

Considering Articles II, paragraph 5, and VII 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 may be summed up as follows:

The complainant challenges the validity of a selection process in which he participated and the lawfulness of the ensuing appointment.

In November 2016 the complainant applied for the post of Workplace Safety and Training Officer (WSTO). He was preselected, and then shortlisted by the Appointment and Promotion Board. On 7 December 2016 he took part in a written test. He was invited to an evaluation interview on 11 January 2017, together with another candidate. On 24 January the complainant was informed that his application had been turned down.

On 9 March 2017 the complainant submitted a request for review of the decision not to select him and asked that a new selection process be initiated and that he be reimbursed costs in the amount of 5,000 Swiss francs. On 24 April his request was dismissed. He lodged an appeal with the Appeal Board on 23 June reiterating the requests he had made on 9 March, while increasing the amount of costs, and asking the Board to compensate him for the moral injury supposedly suffered.

In its report of 2 October the Appeal Board concluded that the complainant's qualifications and experience had been properly considered and that no evidence of any flaw, nor evidence of prejudice, bias or conflict of interest, was found in the selection process. It recommended *inter alia* that the Secretary-General reject the appeal. By a letter of 12 October 2017, which constitutes the impugned decision, the complainant was informed that the Secretary-General had decided to follow this recommendation.

On 9 January 2018 the complainant filed a complaint with the Tribunal, asking it to quash the impugned decision, to review the decision not to select him for the contested post, to compensate him for the moral injury he considers he has suffered, and, lastly, to award him costs.

The ITU asks the Tribunal to dismiss the complaint as entirely unfounded. At the Tribunal's request, it forwarded a copy of the complaint to the candidate appointed as a result of the disputed selection process and invited him to submit his written comments, which he did on 10 April 2018.

CONSIDERATIONS

1. The complainant commenced employment with the ITU in 2005 as a security officer at grade G.3. In early October 2016 a post was created in the Division in which the complainant worked. A vacancy notice for the position, WSTO, was published and, on 9 November 2016, the complainant applied for the position. He was unsuccessful and another serving member of staff was appointed. He was informed of the decision of the Secretary-General not to appoint him on

24 January 2017. The complainant unsuccessfully sought a review of this decision. Thereafter he lodged an appeal with the Appeal Board. The Appeal Board reported to the Secretary-General on 2 October 2017 recommending the Secretary-General to maintain his decision of 24 January 2017, which he did by a decision dated 12 October 2017. This is the decision impugned in these proceedings.

2. The complainant's brief is divided into four sections. Broadly described, the first three are the factual and related background. The fourth section is entitled "LEGAL ANALYSIS" which, in substance, contains four arguments seeking to establish that the selection process was legally flawed with the result that the decision not to appoint the complainant should be quashed and ancillary or related relief should be granted. The first argument is that material facts were omitted from the consideration of his candidature and incorrect conclusions were drawn from the evidence. The second argument is that the complainant was subjected to unequal treatment. The third argument is that the selection process was infected by bias. The fourth and related argument is that one of the individuals on the selection panel had a conflict of interest.

3. In order to identify the legal context in which these arguments must be assessed, it is convenient to quote from Judgment 3669, consideration 4, which repeats well-established principles of the Tribunal:

"Firstly and fundamentally, the Tribunal accepts that the appointment by an international organisation of a candidate to a position is a decision that lies within the discretion of its executive head. It is subject only to limited review and may be set aside only if it was taken without authority or in breach of rule of form or procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence. This formulation is found in many judgments of the Tribunal including, for example, Judgment 3209, consideration 11, and is intended to highlight the need for a complainant to establish some fundamental defect in the selection process. Those defects can include the appointment of a candidate who did not meet one of the conditions stipulated in the vacancy announcement (see, for example, Judgment 2712, consideration 8). However, as the Tribunal observed in Judgment 1827, consideration 6: 'The selection of candidates for promotion is necessarily based on merit and requires a high degree of judgment on the part of those involved in the selection process. Those who would have the

Tribunal interfere must demonstrate a serious defect in it; it is not enough simply to assert that one is better qualified than the selected candidate.”

4. As noted earlier, the complainant’s first argument is that material facts were omitted from the consideration of his candidature and incorrect conclusions were drawn from the evidence. This argument contains four elements. The first is that a recommendation table used in the selection process was deficient either because it misstated or neglected to mention attributes or experience of the complainant or because it misstated attributes or experience of the other shortlisted candidate. However the ITU contends, correctly, that the content of the table has to be viewed in the context of the purpose it served, namely as a summary document, and of other material available in the selection process which included other documents detailing attributes or experience. Each of the matters identified as deficiencies concerned matters of detail, none of which was, in the table, egregiously wrong. Certainly none can be said to manifest a “fundamental defect” (to use the language of Judgment 3669) either individually or collectively. The second element concerns a written test undertaken by the complainant and the other shortlisted candidate. The complainant focuses, in particular, on the answer he and the other candidate gave to the last question, question 21. That question required the candidate to draft a mock incident report based on a short scenario in which a gas stove emitted visible flames and smoke triggering an alarm. The complainant contends that the answer given by the other candidate was riddled with mistakes “apparent to any person having some cursory knowledge of safety and security”. He contrasts this with his answer that he characterises as “short, to the point, and [an] appropriate response to the incident”. He points to the fact that the other candidate got full marks and his mark fell well short of full marks. But this analysis is necessarily subjective and certainly does not manifest an error that engages the Tribunal’s power to intervene.

5. The third element concerns the interview but the substance of the complainant’s criticisms is of the same general character as those he makes of the written test. He criticises matters of detail that mostly involve the way the interview was conducted and answers were

assessed but none of which individually or collectively point to a “fundamental defect” in the process. The Tribunal later discusses the interview in the context of a claim of bias. The fourth element concerns the written recommendation of the Appointment and Promotion Board and, in particular, its express conclusion, in relation to the other candidate who was appointed, that “his overall result demonstrated that he is the only qualified candidate for the post”. This conclusion is contested by the complainant who says he was “fully qualified”. However this evaluation is quintessentially a matter involving a value judgement and assessment which this Tribunal will not itself engage in as discussed earlier in the quoted passage from Judgment 3669.

6. The second of the complainant’s arguments is that he was subjected to unequal treatment. However this argument really reflects the complainant’s subjective assessment about how he was treated in relation to his written test and the interview compared to how the other candidate was treated. His assessment, even if accepted, does not point to any fundamental flaw in the selection process.

7. The third argument of the complainant is that the selection process was infected by bias and that can be considered with the fourth and related argument, namely that one of the individuals on the selection panel had a conflict of interest. Both arguments concern Mr D., the complainant’s former second-level supervisor. In July 2014, another member of staff of ITU filed a harassment complaint against the complainant alleging that the complainant had made verbal value judgements about him and had expressed doubts about his professional capabilities. The matter was resolved by mediation in December 2015 and the complaint was withdrawn.

8. In these proceedings, the complainant identifies three instances of events manifesting Mr D.’s bias against him. The first is that Mr D. used the investigation into the harassment allegation against the complainant to disparage the complainant. The second is a particular event in which Mr D. manifested aggressive behaviour towards the complainant and did so more generally. The third is the failure of the

complainant to secure one of the seven G.3 security officer posts which had been created following a restructuring of the Security Department. The complainant also contends that the successful candidate for the WSTO position was a friend of Mr D.

9. The third matter, the failure of the complainant to secure a G.3 security officer post, fundamentally depends on the complainant's assessment that he should have been appointed having regard to his qualifications and others should not have been. This provides no legitimate foundation for an allegation of bias. In relation to the evidence given by Mr D. to the Commission of Inquiry in February 2015 concerning the complaint of harassment, it is true that Mr D. does, on occasions, speak critically of the complainant's attitude and behaviour when answering questions put to him. However the context is important. Mr D. had to answer the questions truthfully. He was told this when commencing to give his testimony. None of his comments critical of the complainant are demonstrably completely non-responsive to the questions he was asked. The fact that his view of the complainant was not an entirely positive one does not found a claim of bias. The mere fact that one individual has expressed a partly negative view of another in the context of an investigation of harassment does not establish that in another context (for example an application for a position or promotion) the first mentioned individual will not approach the assessment of the second individual fairly and in a balanced way. It is to be recalled that in cases where bias is alleged, the burden of proving bias falls on the person making the allegation (see, for example, Judgment 2472, consideration 9).

10. The second instance concerns the alleged physically aggressive behaviour of Mr D. towards the complainant and, in particular, an incident in December 2015. The complainant contends that Mr D. approached him when he was with another security officer asking (with his face close to that of the complainant), in an aggressive and intimidating way, the complainant why he was there and indicating he should work elsewhere. The complainant points to the fact that he did not behave in the same way towards the other security officer. In an

affidavit sworn by Mr D. for the purposes of the review of the complainant's non-appointment to the WSTO position, he did not dispute that he approached the complainant and spoke to him and did so at close quarters. His explanation was that he needed to speak to the complainant discreetly as the other security officer was at his actual post whereas the complainant was not and should not have been there. In what is described by the complainant in his rejoinder as an incident report, the other security officer said that Mr D. approached the complainant and spoke in an aggressive manner and manifested a menacing attitude. This document was dated 2 March 2018, over two years after the event. In its surrejoinder, the ITU advances several reasons why limited or no weight should be given to the 2 March 2018 document. One which is of some significance is that the other security officer gave a precise date as to when this incident occurred, namely on 14 December 2015. However from internal ITU travel documents furnished in the surrejoinder it appears more probable than not that the other security officer was in Egypt on that day. Another point made by the ITU is that the quoted statement, in French, made by Mr D. as set out in the 2 March 2018 document (dated the same day as the complainant's brief), is almost word for word the quoted account, in English, in the complainant's brief, of what Mr D. said. It is difficult to accept that over two years after the event, the other security officer had any clear recollection of what was said in a language (English) which was not his spoken language (French) and this raises a real suspicion that his account is not an independent one. These matters certainly point to the conclusion that this is not weighty evidence sufficient to reject the sworn account of Mr D. In the result, the Tribunal is not prepared, on the material before it, to conclude that it is probable Mr D. was biased against the complainant so as to distort and subvert the selection process for the WSTO position.

11. One final submission of the complainant should be addressed. The complainant contends that the successful candidate for the WSTO position was a friend of Mr D. This is partly based on the general contention in the brief that "it was a know[n] fact within ITU that Mr [D.] enjoys a close relationship with the selected candidate for the

WSTO post”. The only particulars of this relationship are that the two could regularly be found in Mr D.’s office “having lengthy discussions on personal matters” and that the successful candidate was given preferential treatment in relation to the financing of a training course in Lausanne. The latter matter is of no real weight given that there is no evidence about the involvement, if any, of Mr D. in relation to the financing of the attendance of the successful candidate at the training course. The other matter, the office discussions, falls well short of establishing a friendship that may have led Mr D. to favour the successful candidate.

12. The complainant has not established any legal error of the type comprehended by the Tribunal’s principles set out earlier in the passage from Judgment 3669. Accordingly the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ