

C.
v.
WTO

130th Session

Judgment No. 4290

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs L. I. C. against the World Trade Organization (WTO) on 27 July 2019 and corrected on 5 August, the WTO's reply of 14 October, the complainant's rejoinder of 12 November and the WTO's surrejoinder of 19 December 2019;

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 decision of the Director-General not to promote her in the 2018 performance-based promotion exercise.

The complainant, who joined the WTO in 1999, was at the material time the incumbent of the position of Conference Technology Specialist at grade 5.

On 30 July 2018 the list of staff members who had been promoted following the 2018 performance-based promotion exercise was published. On 12 September 2018 the complainant, whose name was not on the list, asked the Director-General to provide her with a statement of the reasons why she had not been promoted. On the following day, the Director of the Human Resources Division (HRD) replied to the complainant indicating that only three slots were available for promotion to grade 6S and that the three candidates who

were granted promotion stood above all others based on the criteria set out in the promotion policy, the information contained in the promotion dossier and their individual performances.

On 21 September 2018 the complainant filed a request for review challenging the outcome of the 2018 performance-based promotion exercise. In addition to asking to be promoted, she requested, *inter alia*, the conduct of a general classification of post exercise and that her post be reclassified or that she be granted a special post allowance.

By a memorandum of 19 October 2018, the complainant was informed that the Director-General had rejected her claims. On 16 November 2018 she lodged an internal appeal with the Joint Appeals Board (JAB). In its report of 29 March 2019, the JAB found that the complainant had not identified any legal grounds upon which the 2018 promotion exercise could be re-opened, but it considered that the Administration had failed to provide the facts and legal reasoning underpinning the decision at issue. With regard to the alleged effect of the absence of post classification on the challenged promotion exercise, the JAB found that the allegations were baseless, but it recommended that the Administration carry out the post classification exercise as this had been recommended following an external audit conducted in 2013.

By a memorandum of 30 April 2019, the complainant was informed that the Director-General had decided to maintain his decision not to promote her as part of the 2018 performance-based promotion exercise. He added that, in future, HRD would be requested to provide more detailed statements of reasons. He further stated that the Administration was currently considering how to proceed on the issue of updating post classification standards. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision of 30 April 2019 and to find that the promotion exercise was not conducted in accordance with the applicable rules. She requests the Tribunal to either order WTO to re-open the 2018 promotion exercise in order that her file may be analysed according to the appropriate benchmark, or to take other administrative action, such as reclassification, to remedy the injury. She further asks the Tribunal to find that the Director-General did not properly motivate his decision with respect to the JAB's recommendation to conduct a classification exercise and to remit the case to the JAB with regard to her claims

related to her contention that the lack of classification of her post is inconsistent with the Staff Regulations and Rules. She seeks moral damages of 6,000 Swiss francs and such other relief as the Tribunal deems necessary.

WTO asks the Tribunal to reject all the claims as unfounded. WTO also asks the Tribunal to limit its review of this case to the decision of non-promotion as it considers the matter of classification of posts as a separate issue from that arising from the impugned decision.

CONSIDERATIONS

1. This case is essentially concerned with the complainant's challenge to WTO's 2018 performance-based promotion exercise. The process is governed by Administrative Memorandum No. 975 on Performance-Based Promotions (AM No. 975). The complainant, who at the time held a grade 5 level post, submitted her dossier for consideration for promotion to grade 6S in that exercise. As she was not among the three persons who were promoted in that exercise her name was not listed in the announcement made on 30 July 2018. Pursuant to Staff Rule 114.1bis, the complainant requested a statement of the reasons why she was not promoted. The Director of HRD informed her in reply, on 13 September 2018, that only three slots were available for promotion to grade 6S and that the Promotion Board considered that three other candidates stood above all others based on the criteria set out in the promotion policy, the information based on the promotion dossier and their individual performances. The Director also stated that as only three slots were available, several high performing and valued staff members were not promoted during the 2018 promotion exercise. The Director also assured the complainant that the Promotion Board had carefully studied her promotion dossier, and he encouraged her to participate in the 2019 promotion exercise.

2. On 21 September 2018 the complainant requested the review of the "final administrative decision" not to include her in the list of persons who were promoted in the 2018 promotion exercise. In the same document, she made certain related requests, including re-opening that exercise, which will be detailed later. She also made claims for the classification of her post and a general reclassification of posts or to be paid a special post allowance. The Director-General rejected

all requests and essentially confirmed that rejection, on the JAB's recommendation, in the impugned decision. In the present complaint, the complainant repeats her challenge to the non-promotion decision, as well as her request for post classification. Inasmuch as the WTO raises irreceivability as a threshold objection to the last-mentioned claim, the Tribunal finds it convenient to consider it at this juncture.

3. In her request for review, in addition to challenging her non-promotion in the 2018 promotion exercise, the complainant asked the Director-General to conduct a general classification of posts and of her post in particular, and either promote her immediately on that basis or grant her a special post allowance pursuant to Staff Rule 106.5, if he felt that the promotion exercise could not be re-opened. She stated, among other things, that Staff Regulation 6.1 requires that the WTO's compensation policy adhere to the principle of equal pay for equal work. The complainant repeated the request for classification in her internal appeal of 16 November 2018. The JAB noted that the appeal did not concern a decision not to classify or re-classify the complainant's post. It additionally noted that AM No. 975 states explicitly in paragraph 7 that "[a] performance-based promotion is not dependent upon the classification of the post occupied by the staff member, does not necessitate a prior post reclassification, and does not lead to a subsequent post reclassification". The JAB concluded that the alleged absence of post classification provided no ground to challenge the 2018 promotion exercise, but nevertheless recommended that the Administration follow the audit recommendations and carry out a post classification exercise in due course. In the impugned decision, the Director-General noted the Board's recommendation that the Administration continue its process of updating post classification standards and confirmed that it was considering how to proceed.

4. Regarding her claim for post classification, the complainant contends that the Director-General did not accept or reject the JAB's recommendation to follow the audit suggestions to carry out a post classification exercise in due course and did not properly motivate his decision not to follow that recommendation. On that basis, citing Judgment 4167, under 4 and 5, she asks the Tribunal to set aside the impugned decision. The complainant further contends that the JAB misunderstood her separate claim concerning her request for

classification. The gravamen of this challenge to the JAB's recommendation (and by extension to the impugned decision) may, in summary, be appreciated from her following submissions:

“31. [...]. The [c]omplainant was precisely asking the JAB to find that the Staff Regulations and Rules mandate the WTO Director-General to classify her post (and everyone else's), not to object to any current classification which did not exist.

32. The JAB also ignored the [c]omplainant's arguments with respect to the effect of improper classification on the obligation to provide equal pay for equal work in Staff Regulation 6.1.

33. Therefore, the [c]omplainant would ask the Tribunal to remand this element of her appeal back to the JAB to properly treat her claims with respect to Staff Regulations 6.1 and 7.2 and Staff Rule 107.3.”

5. Staff Rule 114.3(a) relevantly states that “[a] staff member intending to appeal against an administrative decision [...] shall first request the Director-General, in writing, to review the decision”. This provision presupposes that an administrative decision on an initial request has already been taken before that decision is contested by way of a request for review. By seeking the classification of posts for the first time in her request for review, the complainant wrongly sought to use that request procedure as a conduit for making the request for classification on which there was no prior administrative decision. Further, as the JAB correctly concluded on the basis of paragraph 7 of AM No. 975, there is no relationship between the decision not to promote the complainant and the classification of posts. Additionally, as the WTO submits, the decision not to promote the complainant in the 2018 promotion exercise was exclusively based on a comparison between candidates. Requesting the classification of posts in the request for review was therefore an impermissible expansion of her case therein and it was open to the Director-General to deal with the complainant's requests concerning posts classification in the way in which he did in the impugned decision. Accordingly, her claim for posts classification is irreceivable in these proceedings for failure to exhaust internal remedies.

6. The complainant asks the Tribunal to set aside the impugned decision regarding the non-promotion decision on the ground that the Director-General erred by not determining that the 2018 promotion exercise was flawed. She additionally asks the Tribunal to require the

Director-General to take corrective measures either by re-opening the promotion exercise to analyse her dossier according to the appropriate benchmark or by taking other administrative action to remedy the injury to her. She also seeks moral damages.

7. In her rejoinder, the complainant notes that the WTO introduced new assertions with respect to the factual situation of the 2018 promotion exercise. She asks the Tribunal to look specifically at those assertions and to either ask the WTO for documentary proof that is contemporaneous to the promotion exercise or disregard them. As it is unnecessary to consider those assertions, the Tribunal has disregarded them.

8. The Tribunal recalled, in Judgment 4066, consideration 3, that its case law does not guarantee to staff members of an international organization an automatic right to promotion (see Judgment 3495, under 11). It is also well established that an organization has a wide discretion in deciding whether to promote a staff member. For this reason, such decisions are subject to limited review. The Tribunal will only interfere if the decision was taken without authority; if it was based on an error of law or fact, some material fact was overlooked, or a plainly wrong conclusion was drawn from the facts; if it was taken in breach of a rule of form or of procedure; or if there was an abuse of authority (see also Judgment 2835, under 5). Additionally, the Tribunal has stated that since the selection of candidates for promotion is necessarily based on merit and requires a high degree of judgement on the part of those involved in the process, a person who challenges it must demonstrate a serious defect in the decision (see Judgment 1827, under 6). The breach of a procedural rule is a flaw on the basis of which a decision not to promote a staff member may be set aside (see Judgment 1109, under 4).

9. Having noted the foregoing general principles, the complainant submits that there was a serious defect in the 2018 promotion exercise which the JAB and the Director-General ignored. This, she states, was the lack of a single benchmark against which to evaluate her performance. She insists that the promotion exercise was flawed because the Promotion Board did not follow the procedure established in AM No. 975. She refers, in particular, to the statements in

paragraph 6 of that Memorandum and footnote 2, respectively, that a performance-based promotion may be awarded where a staff member with a sustained record of outstanding performance has “consistently demonstrated the capacity to perform functions and responsibilities that are necessary to the efficient operation of the Organization at a level that exceeds his/her current grade” and that “[t]he assessment whether the functions to be performed are at a level exceeding the staff member’s present grade will be performed on the basis of the Secretariat’s Benchmark Standards”.

10. The complainant also recalls that, in her request for review, she had specifically asked for an explanation of which benchmark required by paragraph 21(d) of AM No. 975 was included in her dossier and how the Promotion Board assessed her performance on the basis of the Secretariat’s Benchmark Standards. She states that her dossier, which the WTO provided as the one presented by HRD to the Promotion Board in the JAB’s proceedings, referred to two benchmarks: “General Support Position/Computer Support Position”. The complainant submits that reliance on two benchmark standards that differ in important and relevant ways is a serious defect in the process. She relies on the Tribunal’s statement in Judgment 4144, consideration 10, that the WTO “should have a specific job description for each post and that the performance should be evaluated on the basis of the duties and responsibilities as set forth in the job description, but [the Tribunal] also notes that a general job classification standard, approved by the Director-General, exists”. She notes that in that case the Tribunal held that Staff Rule 107.3 requiring posts to be evaluated on the basis of job classification standards had not been violated because the complainant was evaluated against the general job classification standard. She states that in her case, however, the WTO “still cannot assign [her] post to *one* benchmark standard, but instead identified *two*” (original emphasis).

11. The foregoing submissions however provide no basis for finding that the promotion process was defective, as the complainant submits. Staff Rule 107.3 concerns evaluation of posts for the purpose of job classification, and paragraph 7 of AM No. 975 draws a clear distinction between performance-based promotion and the classification of posts, as does Judgment 1207, under 9. Moreover, the statement in

Judgment 4144, on which the complainant relies, was made in the context of a challenge to a decision not to revise a “partly satisfactory” overall rating in a performance evaluation report. It has no bearing on a Promotion Board’s assessment for the purpose of a performance-based promotion pursuant to paragraph 6 of AM No. 975 and footnote 2.

12. The complainant further submits that the WTO still cannot show how the Promotion Board determined which aspect of her job corresponds with each of the two benchmark standards or how it applied them to her or anyone else’s dossier. She argues that the WTO’s statement in its reply that when staff members are subject to two benchmark standards “their individual dossiers will be evaluated against both benchmark standards and each will have equal weight” has no support in AM No. 975 or in any other information available to WTO staff members concerning how the promotion process works.

13. The complainant has not established that the criteria for the award of the performance-based promotion in paragraph 6 of AM No. 975 and footnote 2 were not followed in the 2018 promotion exercise in relation to her. The Tribunal observes, as did the JAB, that pursuant to paragraph 21 of AM No. 975, her dossier which contained her self-assessment; her Director’s assessment and recommendation; her three most recent PERs and the two benchmark standards for her post were provided to the Promotion Board for the 2018 promotion exercise. The Promotion Board’s report, dated 23 July 2018, states that the Board met and deliberated extensively the merits of the 58 candidates who were nominated by their respective Directors for promotion to grades 6, 7 and 8. It also states that in order to do so in a fair, transparent and meritorious manner, the Board’s members were given the necessary time to study the promotion dossier of each candidate. After deliberating, the Board submitted its nominations to the Director-General. It is apparent that the Board carried out its mandate pursuant to paragraph 6 of AM No. 975 and that the complainant’s challenge to the lawfulness of the promotion exercise is unfounded.

14. In the foregoing premises, the complaint is unfounded and will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 6 July 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ