

M.
v.
UNIDO

130th Session

Judgment No. 4293

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. M. against the United Nations Industrial Development Organization (UNIDO) on 31 July 2018, UNIDO's reply of 12 November 2018, the complainant's rejoinder of 21 January 2019 and UNIDO's surrejoinder of 2 May 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 not to select him for the post of Associate Finance Officer.

The complainant joined the Organization in 1989. At the material time he was Finance Assistant in the Accounts and Payment Unit (APT) of the Finance Department at grade G-6, step 11. On 22 August 2014 a vacancy announcement for the recruitment of an Associate Finance Officer within the APT at grade P-2 was issued. The complainant applied for the vacancy. He was shortlisted for an interview, which took place in November 2014. The interview panel which assessed all the candidates for the post subsequently submitted a recommendation to a professional selection panel called the Appointment and Promotion Board. The interview panel's recommendation to the Appointment

and Promotion Board was that two external candidates were most qualified and suitable for the post based on the results of their assessment, with a significant advantage scored by the first candidate, who was ultimately selected.

On 30 November 2016 the complainant was informed that he had not been selected for the post. On 9 December 2016 he filed a complaint of wrongdoing with the Office of Internal Oversight and Ethics (IOE) alleging that the selected candidate's expertise and experience did not meet the requirements of the vacancy. In January 2017 he also sought a review of the decision not to select him for the post. IOE conducted a preliminary investigation and concluded that the selected candidate met the requirements of the post and that there was no evidence of wrongdoing or favouritism in the recruitment process.

By a memorandum of 23 February 2017 the complainant was informed of the IOE's findings and that his request for review had been rejected. On 21 March 2017 he appealed against that decision, claiming retroactive promotion to a suitable P-2 post as well as costs. In its report of 27 April 2018 the Joint Appeals Board (JAB) found that the recruitment process was not flawed. However, it recommended awarding the complainant moral damages, because of "the absence of meritorious recognition by the Organization".

By a memorandum of 22 May 2018 the Director General informed the complainant that he had decided to dismiss his internal appeal. In his view, the JAB's recommendation went beyond the scope of the appeal, which only concerned the recruitment procedure for the advertised post. Moreover, there was no guarantee that all highly performing staff members would be included in the merit award or merit promotion exercises, or that they would receive the award or promotion. That is the impugned decision.

The complainant asks the Tribunal to order UNIDO to produce all the relevant reports regarding the selection process. As his original claim to be appointed to a suitable P-2 post cannot be maintained due to his retirement in April 2019, he claims compensation equal to the amount of salary lost as from February 2015 until his retirement, which he estimates at 25,552 euros, and the loss in terms of pension benefits for the estimated 20 years following his retirement, amounting to 96,600 euros. He claims 10,000 euros in moral damages, as well as 7,000 euros in costs.

UNIDO submits that the complainant's claims for the production of documents and for material and moral damages are irreceivable for failure to exhaust internal remedies. It also submits that his claims based on the decision to advertise the vacancy both internally and externally constitute a separate and distinct issue that should have been appealed when the vacancy was announced and are therefore time-barred. It considers his claim for costs excessive.

UNIDO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. UNIDO raises receivability as a threshold issue. It states that the following "claims" are not receivable: the claim for the production of documents relating to the recruitment decision; the claims for material and moral damages; and the claims of unequal treatment and abuse of power in connection with the decision to circulate the vacancy announcement not only internally but externally as well.

2. On 13 June 2018, after the impugned decision was issued, the complainant requested a copy of all documents reviewed by the JAB, including the appointment selection documents, the interview rating sheets, and the list of recommended candidates for the appointment. A reply on behalf of the JAB advised him that those documents were not in its possession. The Administration informed him that the documents were confidential and could not be shared with him. Before the Tribunal, the complainant repeats his request for the production of documents.

3. UNIDO submits that the "claim" for the production of documents relating to the recruitment decision is irreceivable, pursuant to Article VII, paragraph 1, of the Tribunal's Statute, for failure to exhaust the internal means of redress, because the complainant did not request the documents in the course of his internal appeal. UNIDO states that, moreover, he had not sought review of the administrative decision which rejected his request. UNIDO observes that under Staff Rule 112.02(a) a serving or former staff member who wishes to appeal an administrative decision shall request a review of the decision within 60 days from the date on which the staff member received notification of the decision in writing.

4. However, a request for the production of documents is not a claim. It is concerned with access to evidence. Receivability is therefore not at issue. Moreover, the Tribunal has stated the basic applicable principles concerning access to documents in consideration 5 of Judgment 4023, as follows:

“According to the case law, 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, and, under normal circumstances, such evidence cannot be withheld on grounds of confidentiality. It follows that a decision cannot be based on a material document that has been withheld from the concerned staff member. 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 (see Judgment 3272, considerations 14 and 15, and the case law cited therein, as well as Judgment 3077, consideration 4).”

5. UNIDO produces the complainant’s assessment report, as well as the IOE report, which also provides anonymised information on the ranking of the other short-listed candidates in the selection process. UNIDO also produces, with its reply, reports regarding the results of the selection process with appropriate redactions to ensure the confidentiality of third parties. The Tribunal therefore considers that the complainant’s request for documents has been satisfied, as the complainant seemingly accepts in his rejoinder.

6. UNIDO also raises receivability as a threshold issue in relation to the complainant’s requests for material and moral damages. For reasons that will become clear later, it is unnecessary to consider at this juncture whether these requests are irreceivable.

7. The complainant alleges that there was unequal treatment and abuse of power with respect to the decision to advertise the vacancy both internally and externally instead of advertising it only internally. The complainant first raised this issue in the internal appeal proceedings where he essentially contended that he was subjected to unequal treatment because the contested P-2 post was advertised both internally and externally when a P-5 post which was advertised at the same time was only advertised internally. He submitted that it was unnecessary to advertise the contested post externally and that, if this was not done, he would have had the opportunity to advance

automatically to the contested post. He also argued that by advertising the contested post externally the Director General abused the power conferred on him under the applicable rules. He essentially repeats these submissions in his complaint.

8. UNIDO submits that the complainant's challenge to the decision to advertise the P-2 post externally is irreceivable. It argues that that decision was a separate and distinct decision which the complainant should have appealed at the time that the vacancy was announced. This argument is unsustainable. The Tribunal stated, in consideration 17 of Judgment 4008, that, ordinarily, a vacancy announcement is neither a final administrative decision nor a decision which adversely affects an individual staff member. The complainant therefore properly contested the vacancy announcement at the time that he did.

9. Regarding the merits, consistent principle stated in Judgment 4001, consideration 4, for example, has it that a person who challenges the selection of a candidate for a post must demonstrate that there was a serious defect in the selection process. 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 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. However, when an organization conducts a competition to fill a post the process must comply with the relevant rules and the case law, as the purpose of competition is to let everyone who wants a post compete for it equally. Precedent therefore demands scrupulous compliance with the rules announced beforehand: *tu patere legem quam ipse fecisti*.

10. The complainant challenges the impugned decision on the following grounds:

- (1) The decision to advertise externally the P-2 Associate Finance Officer position was in breach of applicable rules, including the Human Resource Management Framework UNIDO/AI/2010/01 of 25 May 2010 ("the HRM Framework");
- (2) His qualifications, his performance and the job description made him a match for the post;

- (3) The selected candidate did not meet the minimum experience requirements advertised in the vacancy announcement;
- (4) Equitable geographical representation was not taken into consideration or reviewed in context to justify the recruitment of a national from an over-represented country;
- (5) The interview panel's decision was biased and not capable of being independently made;
- (6) UNIDO breached its rules of confidentiality by copying the appeal and replies to various persons whose relevance to the case is not established; and
- (7) There was excessive delay in the way the matter was dealt with.

11. Ground 5 is unfounded as it is based on speculative, unsubstantiated and scandalous allegations. Moreover, the complainant's submission that the failure to explain why the interview panel shortlisted less than three candidates, as envisaged by paragraph 31(c) of the HRM Framework, also shows that the procedure was not respected for an ulterior motive is unsustainable as he provides no evidence of ulterior motive.

12. Ground 6 is also unfounded. The Tribunal observes that the persons to whom the subject documents were copied were officials of the Human Resources Management Branch (HRM) and a person who is a member of the panel of Chairpersons of the JAB and, at the relevant time, presiding officer of the JAB. UNIDO correctly explains, with reference to the Director General's Bulletin on UNIDO Secretariat Structure 2016 UNIDO/DGB/2016/01/Amend. 1, as well as to Information Circular on UNIDO Joint Appeals Board (JAB) IC/2016/05, that the persons to whom the subject documents were copied were officials who were responsible for internal appeals. There was therefore no breach of confidentiality.

13. Ground 7, in which the complainant contends that UNIDO caused him harm by repeated and disproportionate delay in its responses and in the internal appeal proceedings, is also unfounded. The complainant states that he waited two years to be informed of the outcome of the interview and then more than a year for the JAB to issue its report. According to him, UNIDO purposefully delayed its

response to his rejoinder and took a disproportionate amount of time in responding to correspondences. His reference is to two different processes: the selection and internal appeal processes. Regarding the selection process, the evidence shows that the vacancy announcement for the contested post was issued on 22 August 2014. The complainant was interviewed and assessed on 18 and 19 November 2014. On 20 and 28 April 2015 he enquired about the results. He received an apology for the delayed response and was informed that HRM had not informed any of the internal candidates for the positions which were advertised externally. It was unfortunate that HRM had not done so. The complainant was also informed that pending the 2016/2017 budget approval all external recruitment was suspended and that, accordingly, no decision had been taken to fill the contested post. The complainant enquired again in August 2015 and was informed that hiring decisions in UNIDO had been put on hold as UNIDO was facing severe budgetary constraints. He was finally informed on 30 November 2016 that he had not been selected to fill the post. Under the circumstances, the Tribunal accepts UNIDO's explanation that the length of the selection procedure was justified. The complainant's internal appeal proceedings commenced with his request for the review of the selection process on 16 January 2017. It ended when the impugned decision was issued on 22 May 2018. This period in the appeal process was not unreasonable and will therefore not attract an award of compensation.

14. Regarding ground 1, the complainant contends that the decision to advertise the contested post externally breached the applicable rules, including the HRM Framework, which provides that, where possible, UNIDO should identify posts that might be suitable for the advancement of General Service (GS) staff to the Professional (P) category. He insists that UNIDO failed to follow specified procedure by not conducting a review to identify the possibility of a GS to P advancement in the Finance Department in accordance with the HRM Framework. He further argues that there was no justification for advertising the post externally during a hiring freeze, but provides no evidence to show that there was a hiring freeze at the time when the vacancy was announced. UNIDO states that there was no hiring freeze on external recruitment at the material time, and that, additionally, the post was advertised on the basis of a recruitment plan which was

conducted in accordance with the provisions for recruitment and placement under the HRM Framework.

15. Paragraphs 12 to 18 of the HRM Framework provide the process by which HRM in consultation with Managing Directors are to list vacancies that are expected to occur during a planning cycle; draw up the job profiles; prepare a list of posts to be filled through placement, including posts identified for advancement of GS staff to the P category, as well as prepare a compendium of posts that are to be filled through recruitment. HRM is then required to submit these compendia to the Director General for approval. According to paragraph 28 of the HRM Framework, posts included in the recruitment compendium approved by the Director General are to be advertised internally and externally. The Director General approved the recruitment compendium which included the contested post. The complainant does not contest UNIDO's assertion that this process was followed in the subject recruitment process and provides no evidence that challenges the process by which the decision to advertise the post externally was made. His consistent insistence that he merited automatic advancement to the post without its external advertisement is therefore unsustainable and unfounded. Moreover, the complainant provides no evidence to support his allegations that advertising the post was arbitrary, contrary to the principle of equal treatment, or amounted to an abuse of power.

16. Regarding ground 2, the complainant's contention that his qualifications, job description and performance made him a match for the contested post is a statement of personal belief. It has no relevance to the recruitment process. It also mirrors his mistaken insistence that he should have advanced to the contested post automatically. It is settled principle, stated, for example, in Judgment 4100, consideration 5, that a staff member of an international organization has no entitlement or right to be selected for a contested post. However, the complainant refers to paragraphs 67 and 68 of the HRM Framework, which, according to him, set out UNIDO's policy and organizational objective to promote GS staff to the P category and further their career development. More directly, he argues that he should have been appointed to the post pursuant to UNIDO Staff Regulation 4.2, as he had been carrying out at least 80 per cent of the seven main functions of the advertised

position. Staff Regulation 4.2 relevantly states that: “Subject to the provisions of regulation 3.2 [...] and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the Organization.” Staff Regulation 3.2 relevantly states that: “The paramount consideration in the employment of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity [...]”. Simply put, while the provision required that full regard be paid to the requisite qualifications and experience of the complainant, that consideration was not to prejudice the recruitment of fresh talent externally, which UNIDO eventually did in that process. There is no evidence that Staff Regulation 4.2 was breached during the selection process to fill the contested post.

17. Additionally, the complainant’s reliance on positive written comments which his first and second reporting officers made concerning his performance prior to the subject selection process, including an inter-office memorandum recommending the complainant’s temporary reassignment to a P-2 post to support ground 2, is misplaced. These considerations do not, in themselves, demonstrate that he should have been selected to fill the contested post. Furthermore, there is no legal basis for the complainant’s allegation that it was an act of bad faith that his second reporting officer recommended his temporary reassignment to the P-2 post and then denied his appointment to the contested post when he sat as recruiting manager in the selection process. The complainant provides no evidence to prove his allegation that the interview panel penalized him for not holding an advanced university degree, in breach of the principle of equality of treatment. On the foregoing bases, ground 2 of the complaint is unfounded.

18. Regarding ground 3, the complainant contends that in selecting the candidate to fill the contested post UNIDO acted in bad faith because the selected candidate did not meet the minimum experience requirements advertised in the vacancy announcement. The Tribunal recalls its consistent case law, stated, for example, in Judgment 3652, consideration 12, that an international organization which decides to hold a competition in order to fill a post cannot select a candidate who does not satisfy one of the required qualifications stipulated in the

vacancy announcement. The vacancy announcement required a minimum of three years “of relevant working experience such as in the field of accounting, transaction processing, financial management or auditing. Relevant practical experience of which some should be at the international level. Good knowledge of international accounting standards [...]”

19. The complainant states that while the vacancy announcement required purely financial expertise, the selected candidate was employed in UNIDO as an Electronic Resource Processing Application consultant for six years prior to his selection to fill the contested post and that his LinkedIn profile shows that prior to that, from July 2008 to January 2010, he worked as a business analyst on an electronic resource processing software. It is noteworthy, however, that the complainant lodged a complaint with IOE on 9 December 2016 alleging wrongdoing in the selection process. He specifically alleged that the “pre-selected” candidate did not meet the expertise and job experience required for the contested post and that there was manipulation in the selection process. The IOE noted that the selected candidate held a Master’s degree in Economics, with finance as the main field of study. It concluded from its investigation that he met the minimum work experience requirement as it confirmed that at the time of his application, the external candidate had been working for at least three years and that 75 per cent of his work with UNIDO related to financial accounting. Since the complainant presents no evidence (as against conjecture) that the selected candidate did not meet the minimum experience required by the vacancy announcement, ground 3 of the complaint is unfounded.

20. In ground 4, the complainant argues that the Administration did not pay due regard to equitable geographical representation because at the time of the interview and selection, the country of the selected candidate’s nationality was over-represented. On the other hand, UNIDO submits that the nationality of the recommended candidates was considered by the Appointment and Promotion Board and that, in any event, the complainant’s nationality was not a relevant consideration, because his candidacy was not submitted to the Appointment and Promotion Board due to the results of his personal assessment. This last submission is correct. Moreover, in Judgment 3652,

consideration 25, for example, the Tribunal recalled the principle that possession of the nationality of a country which is non-represented or under-represented in the geographic distribution of staff members is only to be taken into account when candidates are equally well qualified. This is consistent with Article 11, paragraph 5, of UNIDO's Constitution, as well as Staff Regulation 3.2, which states that: "The paramount consideration in the employment of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity, and due regard shall be paid to the importance of recruiting the staff on a wide and equitable geographical basis." As the complainant was not found to be equally well qualified as the selected candidate, ground 4 is unfounded.

21. In the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 26 June 2020, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, 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.

PATRICK FRYDMAN

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ