

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

M.
v.
ITU

132nd Session

Judgment No. 4408

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. M. against the International Telecommunication Union (ITU) on 15 May 2018 and corrected on 7 June, the ITU's reply of 18 September 2018, the complainant's rejoinder of 22 January 2019 and the ITU's surrejoinder of 6 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 disputes the lawfulness and outcome of a competition procedure in which she participated.

On 8 February 2016 the position of Head of the Accounts Division in the Financial Resources Management Department was advertised. In terms of education, the vacancy notice required "[an] [a]dvanced university degree in accountancy, finance, business administration or a related field or education in a reputed college of advanced education with a diploma of equivalent standard to that of an advanced university degree in one of the fields above". For internal candidates, it specified that a first degree in one of the above fields, combined with 15 years of qualifying professional experience, could be accepted in lieu of an advanced university degree for the purposes of promotion. The complainant applied and was invited to sit a written test in May 2016.

When she learned that her name was not on the short list drawn up by the Appointment and Promotion Board, the complainant wrote to the acting Chief of the Human Resources Management Department to complain about the outcome of her application, obtain the results of her written test with a view to consulting a United Nations expert, and request information about the appointment of Ms E. to the subject position even though she did not have the requisite degree. She was told that the appointment procedure was still ongoing and that it was therefore not possible to grant her requests. On 12 August 2016 the complainant submitted a request for reconsideration, which was found irreceivable.

On 31 October 2016 the complainant was informed that her application had been rejected. After requesting to be informed of the reasons for that rejection and to be sent her written test with the corrections and marks provided by the evaluator, whose identity she asked to know, she had a meeting with the acting Chief of the Human Resources Management Department. Following that meeting, she was given a written explanation of the marking procedure by Mr B., who was the chief of the department concerned and supervisor of the post advertised.

On 15 December 2016 the complainant submitted a request for reconsideration of the decision of 31 October. She asked the Secretary-General to review and provide her with detailed information on the way in which the competition procedure had been conducted and to verify whether the application of the successful candidate, Ms E., satisfied the requisite qualifications, particularly in terms of education. On 24 January 2017 the acting Chief of the Human Resources Management Department explained to the complainant that her paper had been re-evaluated by an independent expert external to the ITU and that the mark awarded differed significantly from that awarded by Mr B. In view of the difference in marks, the Secretary-General considered it necessary to request a third independent external evaluation and the complainant was asked to accept an extension of the time limit for responding to her request for reconsideration, which she agreed to.

Following the rejection of her request for reconsideration on 9 March, the complainant submitted an appeal to the Appeal Board on 8 May. She requested the withdrawal of the contested decisions, the

reinitiating of the competition procedure, the reparation of all damage suffered and an award of costs.

In its report of 16 August 2017, the Appeal Board found that the procedure followed for the written test lacked in rigour; that the results obtained were unreliable and could not provide a sound basis for the opinion given to the Appointment and Promotion Board; and that even if the Secretary-General and Mr B. maintained their choice of successful candidate, the complainant should be given the opportunity to have any doubt removed with respect to the evaluation of her written test. The Appeal Board recommended that an anonymous version of that test be evaluated by a panel of three independent experts; that the Appointment and Promotion Board be reconvened if the pass mark was achieved; that the complainant be informed of the results of the new evaluation; and, should a revised short list be established, that the Secretary-General reconsider the outcome of the procedure. The Appeal Board likewise made some general recommendations regarding competitions. On 27 September 2017 the complainant was notified of the Secretary-General's decision to submit all the papers to a panel of three independent experts.

By letter of 20 February 2018, which is the impugned decision, the Secretary-General informed the complainant that the new evaluation performed by the experts showed that she had not achieved the pass mark required to be shortlisted and that he had decided to confirm the contested appointment.

On 15 May 2018 the complainant filed her complaint with the Tribunal, asking it to set aside the impugned decision as well as the "initial decisions" resulting from the contested competition procedure, to order the ITU to re-open the competition without Ms E. if it were found that she did not have the necessary qualifications, to compensate her for the damage she considers she has suffered, which she assesses in the amount of 19,000 euros and, lastly, to award her the sum of 10,000 euros for legal costs incurred before the Appeal Board and the Tribunal.

The ITU asks the Tribunal to dismiss the complaint as wholly unfounded. At the Tribunal's request, the ITU provided a copy of the complaint to Ms E. and invited her to share any observations. She did not wish to comment, as she did not consider that she personally was required to justify her appointment.

CONSIDERATIONS

1. The complainant impugns the decision of the Secretary-General of 20 February 2018 implicitly rejecting her internal appeal against the final results of the competition procedure for the post of Head of the Accounts Division in the Financial Resources Management Department, for which a vacancy notice had been published on 8 February 2016. She also seeks the setting aside of the “initial decisions” resulting from the contested competition, the re-opening of the competition procedure (without the successful candidate if she is found not to possess the required qualifications), compensation for the damage she considers she has suffered, assessed at 19,000 euros, and an award of costs for the internal appeal proceedings and the proceedings before the Tribunal.

2. The Tribunal’s case law has it that a staff appointment by an international organisation is a decision that lies within the discretion of its executive head. Such a decision is subject to only limited review and may be set aside only if it was taken without authority or in breach of a rule of form or of 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 (see, for example, Judgment 3537, consideration 10).

3. The complainant contends that the ITU failed to observe the adversarial principle in that the Appeal Board heard the acting Chief of the Human Resources Management Department on 21 July 2017 without inviting her to attend and without informing her immediately and in detail of what was said. She adds that the withholding of relevant information may have prejudiced the examination of her case.

4. The Tribunal points out that respect for the adversarial principle and the right to be heard in the internal appeal procedure requires that the official concerned be afforded the opportunity to comment on all relevant issues relating to the contested decision and, in particular, on all the organisation’s arguments (see Judgment 2598, consideration 6).

In this case, the Tribunal notes that, while the members of the Appeal Board met with the acting Chief of the Human Resources Management Department on 21 July 2017, it was only so that they could understand the ITU's recruitment procedure. The meeting was thus merely an investigative measure, the purpose of which was to enable the Board to obtain information on the recruitment of officials in general, and not an interview relating specifically to the competition procedure at issue. Therefore, contrary to what the complainant submits, it was not a hearing where she was required to be present or where the content of the discussion had to be disclosed. Consequently, the plea regarding a breach of the adversarial principle and the right to be heard in the internal appeal procedure must be dismissed.

5. The complainant also criticises the ITU for not complying with the requirement that the internal appeal procedure be conducted expeditiously, since the final decision was adopted more than six months after the Appeal Board delivered its report. She submits that, as it had been decided to have the papers re-marked by a panel of three experts, it was acceptable for an exception to be made to the time limit of 45 days prescribed in the rules for notifying the final decision, but that did not justify a waiting period of more than six months.

6. The Tribunal observes that six months did indeed elapse that between the date of the Appeal Board's report of 16 August 2017 and the date of the final decision of 20 February 2018. However, contrary to what the complainant maintains, this period cannot be regarded as inordinately long in the circumstances of the case. It was explained by the fact that, in order to respond to the complainant's challenge, the papers of all candidates were re-marked by a panel of three independent experts at the Appeal Board's request, which was bound to lengthen the procedure. The plea must therefore be rejected.

7. The complainant contends that the ITU breached her right to an effective internal appeal in that, in her view, the Appeal Board did not provide sufficient reasons in its report.

8. The Tribunal reiterates that the report of an internal appeals body must contain a statement of reasons that allows it to be ascertained that that body considered the matters at issue in sufficient depth (see,

for example, Judgment 4027, consideration 5). In this case, the Tribunal notes that, in its report, the Appeal Board expressed a view on all the objections submitted and, in particular, contrary to what the complainant argues, on whether the successful candidate met the requirements of the vacancy notice in terms of degrees and experience. This plea should therefore be dismissed as unfounded.

9. The complainant further alleges errors in respect of the qualifications required in that the successful candidate did not have the number of years of relevant professional experience specified in the vacancy notice. She argues that the bodies and people involved in the competition procedure at issue failed to scrutinise that candidate's qualifications in detail.

10. The vacancy notice of 8 February 2016 regarding the post of Head of the Accounts Division required the following qualifications in terms of education and experience:

“Education:

Advanced university degree in accountancy, finance, business administration or a related field OR education in a reputed college of advanced education with a diploma of equivalent standard to that of an advanced university degree in one of the fields above. For internal candidates, a first university degree in one of the fields above in combination with fifteen years of qualifying experience may be accepted in lieu of an advanced university degree for promotion or rotation purposes.

Experience:

At least ten years of progressively responsible experience in the field of accountancy, including at least five at the international level. A Doctorate in a related field can be considered as a substitute for three years of working experience.”

11. The evidence shows that the successful candidate had more than 15 years' relevant professional experience and that she holds a diploma certifying five years' study at university level awarded by the *École supérieure de commerce et management de Poitiers*, which, according to data in the national register of professional qualifications and to information provided by the French Ministry of Education, Higher Education and Research, is equivalent to a Master's degree, a *Diplôme d'Études Approfondies* (DEA), a *Diplôme d'Études Supérieures Spécialisées* (DESS) or an engineering degree. Furthermore, neither the statement in the vacancy notice that the required years of experience

had to have been gained in positions with “progressively responsible experience in the field of accountancy” nor any other applicable provision implied that these years of experience had to have been acquired solely in positions with the same level of responsibility as the post advertised. Contrary to the complainant’s allegations, the successful candidate thus fulfilled the criteria set out in the vacancy notice. The plea is therefore unfounded.

12. The complainant criticises the ITU for having breached the Rules of Procedure of the Appointment and Promotion Board in that the preselection panel failed to draw up a list of candidates who were not qualified and a list of candidates who should be eliminated. She also complains that the panel decided to organise a written test when, in her view, that was not within its power.

13. The Tribunal notes, however, that, contrary to what the complainant alleges, a table of preselected and non-preselected candidates was drawn up by the preselection panel. The table clearly indicated next to each candidate’s name whether they had been preselected or not. The fact that the table was produced before the Tribunal in a version that did not show candidates’ names does not alter the fact that it exists. This plea is therefore unfounded and so must be dismissed.

Moreover, the Tribunal does not consider it necessary to order, as the complainant requests, the production of a full version of that table, since it would not be useful for resolving this dispute.

14. As regards the decision to hold a written test, the Tribunal notes that it is apparent from the handwritten note on the abovementioned table, “[w]ritten test to be organized before the [meeting of the Appointment and Promotion Board]”, that, contrary to what the ITU submits, it must be found that the decision to arrange such a test was taken by the preselection panel. However, the Tribunal considers that there was no provision prohibiting the panel from taking such a decision, and it should be noted that the conduct of such a test was likely to ensure that candidates were preselected in an objective manner. This plea must therefore be dismissed.

15. The complainant alleges a breach of Staff Regulation 4.9 in that the Appointment and Promotion Board failed to fulfil its advisory role by merely drawing up a “rudimentary” list of candidates without providing any information to enable the Secretary-General to make an informed choice from among them. She adds that Staff Regulation 4.9f) was rendered meaningless by the Board relinquishing its duties to the supervisor of the post advertised, who substituted himself for the Board by providing reasoned advice to the Secretary-General.

16. In a similar case involving the same organisation and another official, the Tribunal held that the procedure for selecting candidates for a post on a competitive basis in accordance with, in particular, Staff Regulation 4.8d) is governed by Staff Regulation 4.9. This provision relevantly provides:

“a) The Secretary-General shall establish an Appointment and Promotion Board to advise him (and, if appropriate, the Director of the Bureau concerned) in all cases where a vacancy is advertised.

[...]

f) The Secretary-General shall report to the next regular session of the [ITU] Council whenever he proposes to take an appointment or promotion decision which is contrary to the advice of the Appointment and Promotion Board [...].”

In that case, the ITU submitted that by only drawing up a list of the candidates which it considered the best qualified for the advertised posts, the Appointment and Promotion Board simply complied with paragraph 16 of its Rules of Procedure, which provides that “[t]he Board shall establish the list of candidates which it considers to be the best qualified for the post advertised, accompanied, if appropriate, by special conditions concerning the listed candidates. This list (short list) shall contain not more than five names, unless the Board decides otherwise”. Although the complainant argued that the Rules of Procedure were unlawful inasmuch as they restricted the scope of Staff Regulation 4.9, the Tribunal found that “it is legitimate for the Rules to stipulate that the advice provided for in Staff Regulation 4.9 should take the form of a list of staff members considered the best qualified for each advertised post” (see aforementioned Judgment 4027, consideration 8). In accordance with this case law, the plea in question must be dismissed.

As regards the assertion that the supervisor substituted himself for the Appointment and Promotion Board, the Tribunal notes that, contrary to the complainant's allegations, the Board did perform its duties, in particular by drawing up the short list. The fact that the candidates' supervisors were invited to make recommendations to the Secretary-General merely reflects the application of paragraph 21 of the Board's Rules of Procedure, which expressly provides for such recommendations to be sought. There is nothing in the evidence to indicate that the supervisor of the post in question, in this case, *de facto* substituted himself for the Appointment and Promotion Board in the performance of its duties. The plea must therefore be dismissed.

17. The complainant complains that the panel of independent experts did not perform a joint evaluation of the tests on account of the fact that each member evaluated the papers in isolation and the differences in their evaluations were only taken into account in the form of the Administration calculating the average of the marks awarded by each of them. In her view, triple individual marking rather than joint marking was thus carried out.

18. However, it is apparent from an email dated 13 February 2018 sent to the Chief of the Human Resources Management Department by a member of the panel who had taken on the role of coordinator that, while it is true that the three members evaluated the papers individually, they nevertheless met to compare the marks awarded and decide on any adjustments that might be necessary. In the light of the foregoing, the Tribunal finds that, contrary to the complainant's assertions, the panel of experts discussed the marks awarded by each of them and joint decisions were therefore taken on the merits of the papers. The plea in question will therefore be dismissed.

19. The complainant criticises the Secretary-General for having committed an error of fact and an obvious error of judgement in considering that the marks awarded by the members of the panel of independent experts were consistent with the previous evaluations and that the evaluation of the papers was valid.

20. However, the written submissions show that the marks awarded to each candidate after the panel of independent experts became involved are based on the various evaluations carried out by these experts, from which it is apparent that the successful candidate achieved one of the best results. Moreover, the differences in the marks awarded by the various successive evaluators, which are by no means unusual given the inevitably subjective nature of the evaluation of such tests, do not prove that an error of fact was made. Lastly, the lack of precision in this regard in the Secretary-General's decision is not, in this case, such as to invalidate the choice of the successful candidate. Thus, the Tribunal finds that the impugned decision is not based on an error of fact and does not involve an obvious error of judgement. It follows that these pleas must be rejected.

21. The complainant alleges a breach of the principle of equal treatment between candidates and maintains that the supervisor of the post concerned was biased towards the successful candidate. She argues that this candidate had an excellent relationship with the chief of the department concerned, who set the questions and the expected answers for the written test and evaluated the candidates' papers, and that the papers were not anonymised, thus making possible a selection based on favouritism and tainted by bias.

In Judgment 107, the Tribunal held that for the right to take part in competitions to be effective, "it must necessarily include the right to demand that the arrangements for the competition ensure the appointment of the candidate who is really the best qualified. In other words, at every stage of the competition including the arrangements made, the conduct of the tests and the evaluation of their results, every candidate must be treated on an equal footing and with full impartiality" (see also Judgment 1071, consideration 3). In this case, it has not been established that the complainant was not treated on the same terms as the other candidates and she offers no proof that the successful candidate received preferential treatment. Asserting that the successful candidate had a good relationship with the chief of the department concerned, and that it was that chief who set the tests and evaluated the papers, is not sufficient to show that there was a breach of the principle of equal treatment. Moreover, the Tribunal notes that when the papers of all the candidates were re-marked by the panel of independent experts, they were anonymised. In these circumstances, the plea must be dismissed.

22. With regard to the alleged favourable bias shown by the supervisor towards the successful candidate, the Tribunal recalls its case law, illustrated in particular by Judgment 3914, consideration 7, according to which it is for the complainant to prove discrimination or bias. In this case, the complainant has confined herself to mere allegations, without providing any tangible evidence in corroboration. The plea must therefore be dismissed.

23. It follows from the above that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 June 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN GIUSEPPE BARBAGALLO FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ