

NINETY-SIXTH SESSION

Judgment No. 2287

The Administrative Tribunal,

Considering the complaint filed by Mrs M. P. V. N. against the International Labour Organization (ILO) on 3 March 2003, the Organization's reply of 30 May, the complainant's rejoinder of 9 July and the ILO's surrejoinder of 29 August, supplemented by comments provided on 16 September 2003 by Mr P. at the Tribunal's request;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Spanish national born in 1951, joined the International Labour Office, the secretariat of the ILO, in 1984 as a translator at grade P.3. In 1989 she was promoted to the position of reviser at grade P.4. From 1995 onwards, she occasionally replaced the Head of the Spanish Unit of the Official Documentation Branch. At times in 1999, and from 2000 onwards, she was in charge of the final checking of the *Provisional Record* and of procedural matters during the sessions of the International Labour Conference. When the Head of the Spanish Unit left the Office in 2001, she took over all his duties on an interim basis for eight months, until the end of March 2002.

By Vacancy Announcement No. 2001/4, dated 23 May 2001, an internal and external competition was opened to fill the post of senior translator/reviser (Head of Spanish Unit) at grade P.5. The complainant applied for the post on 18 June 2001. On 22 March 2002 she was informed by the Director of the Relations, Meetings and Document Services Department that Mr P. had been placed on the post she had applied for.

On 14 May the complainant submitted a grievance to the Joint Panel, asking it to recommend that the Director-General set aside the decision to include Mr P. in the shortlist of candidates having the minimum qualifications required by Vacancy Announcement No. 2001/4, and hence his appointment, appoint instead the most highly rated candidate possessing the required qualifications, and award her compensation for the material and moral injury she had suffered. In its recommendation dated 2 September, the Joint Panel, while recognising that Mr P. may not have possessed all the required qualifications, noted that he had been appointed to the disputed post only at P.4 level. According to the Panel, this decision did not suffer a procedural flaw such as to invalidate the selection process. It considered therefore that the grievance did not call for any further action by the Administration.

In letters dated 30 September and 4 October, the complainant sent the Director-General several documents concerning Mr P.'s career and asked him to re-examine the Joint Panel's recommendation and to cancel Mr P.'s appointment. On 7 October 2002 the Director of the Director-General's Office informed the complainant that the case had been sent back to the Joint Panel. He wrote to her on 6 December 2002 saying that the Panel had decided not to alter its recommendation and that the Director-General would take a final decision on the matter. Having received no final decision, the complainant filed a complaint with the Tribunal on 3 March 2003.

By a letter of 9 April 2003 the complainant was informed that the Director-General had recognised that the selected candidate did not have all the required qualifications in terms of professional experience and that the competition had not been held with the degree of "transparency and objectivity" which candidates were entitled to expect. He had therefore decided to cancel the competition and the ensuing appointment, to order that a new competition be

opened and to pay the complainant the special allowance provided for in Article 3.7 of the Staff Regulations with retroactive effect for the period 1 January to 31 March 2002, as well as 6,000 Swiss francs for the legal costs she had incurred in the course of the internal procedure.

B. The complainant contends that Mr P. does not possess the minimum qualifications required by Vacancy Announcement No. 2001/4, that is, "[a]t least ten years of professional translation and revision experience and at least five years at the international level in a senior level position", as well as "[e]xperience in the organization of translation and revision work in in-session meetings and conferences". She asserts that the information he supplied when applying for the post was "untruthful".

She points out that, from 1999 and until his appointment in March 2002, Mr P. devoted most of his time to ILO Staff Union activities unrelated to translation or to revision. From 1991 to 1994 he translated only for very short periods as a beginner in several international organisations, which report that he never revised, planned or organised his colleagues' work. On only one occasion, from October to December 1994, did he perform duties defined as those of a "Spanish editor/reviser" at the ILO.

Lastly, she draws attention to the fact that the Joint Panel expressed the view that it would suffice for the Office to appoint the preferred candidate for a test period of one year at a lower grade in order to circumvent the basic rule of any selection procedure, namely that any successful candidate must possess the minimum qualifications required by the vacancy announcement. She contends that these "considerations" of the Panel are incompatible with the Tribunal's case law. She adds that applications from women were encouraged in the vacancy announcement.

She asks the Tribunal "to set aside with retroactive effect the decision arrived at on fraudulent premises to appoint Mr P. to the advertised post" and to order the ILO, in compensation for the moral and material injury she has suffered, to pay her the equivalent of the special allowance provided for in Article 3.7 of the Staff Regulations for the whole period during which Mr P. occupied the disputed post, as well as 6,000 Swiss francs in costs.

C. In its reply, although it considers that the complaint should be considered premature insofar as it was filed before the internal grievance procedure had been completed, the ILO states that it will abstain from entering an objection to receivability on that ground.

It argues that since the decision of 9 April 2003 granted the complainant's main request, namely the cancellation of the competition and of the ensuing appointment, the present dispute has lost its principal cause of action. Referring to Judgment 1331, the ILO maintains that the parties differ only in their interpretation of one of the reasons for cancellation put forward by the complainant. The Director-General cancelled the competition because he considered that the successful candidate was not eligible in the light of the professional experience requirements stipulated in the vacancy announcement. The complainant, on the other hand, "seems to have wanted the candidate's appointment to be likewise expressly cancelled on account of the untruthful nature of the information he supplied with his application, which she describes as fraudulent". But even if the candidate concerned had intended to deceive the Organization, once the competition had been cancelled the other candidates would not be entitled to demand that he be publicly sanctioned.

According to the ILO, the only aspect of this dispute which could be referred to the Tribunal concerns the scope of the compensation granted to the complainant by the Organization, and it considers that the injury alleged by the complainant was suitably compensated by the decision of 9 April 2003.

It concludes that the complainant has no objective cause of action.

D. In her rejoinder the complainant points out that she never asked for the competition to be cancelled. Before the Joint Panel she primarily sought the quashing of the decision, taken on the basis of a false statement, to include Mr P. on the shortlist of candidates meeting the minimum requirements of the vacancy announcement, and - as a consequence - the retroactive cancellation of his appointment.

She contends that the Organization fails to distinguish between disciplinary sanctions and the retroactive cancellation of a decision obtained through fraud. She comments further that, three months after the decision of 9 April 2003, all the qualified candidates working in the Spanish Unit still have to report to Mr P., the disqualified candidate, whose chances of "ultimately qualifying at their expense" increase over time. Referring to Judgments 1394 and 1680, she considers that "the cancelled decision still produces effects" and that these

"constitute an objective cause of action".

The complainant alleges that she has received no compensation for the moral and material injury she has suffered. In her opinion, in view of new developments since she filed her complaint and in particular the decision of 9 April 2003, the effects of which add to the injury that has accumulated throughout the procedure, she considers that she is "no longer bound by the framework of Article 3.7" under which she had originally made her claim. She therefore now asks the Tribunal to order the ILO to pay her whatever sum it deems equitable in compensation for the injury suffered.

She asserts that what has caused her the most serious moral injury has been the bias shown by the Organization's representatives. She says that in addition to the withdrawal of her special allowance after she lost her position as acting Head of Unit, she has had to endure the medical and financial consequences of a health problem which occurred in October 2002. The complainant also avers that she was the victim of sexual discrimination.

E. In its surrejoinder the ILO contends that the complainant cannot modify or increase the scope of the claims expressed in her complaint merely because, as she submits in her rejoinder, she disagrees with the express decision taken in response to her grievance.

While admitting that on occasions the Tribunal may have ordered that a procedure be resumed from the point where it became flawed, it considers that such action would not be justified in this case.

The Organization explains that it merely followed the Tribunal's case law, according to which a staff member who accepts an appointment and then has it withdrawn without having committed any fault must be protected from injury. The fact that Mr P. remained in charge of the Spanish Unit after the competition was cancelled was purely due to service requirements.

With regard to the material injury alleged by the complainant, the ILO argues that she was never formally appointed acting Head of the Spanish Unit and cannot rely on her health problems at this stage since the Office was only recently informed of them. As for the alleged moral injury, the Organization denies that the complainant was ever the victim of bias or sexual discrimination.

F. In the comments the Tribunal invited him to submit, Mr P., who considers that he has rights in this case "as a party directly affected" by the Tribunal's decision, takes issue with the ILO's refusal to allow him access to all the submissions. In his view, this refusal violates both the ILO's Staff Regulations and his "fundamental right to a fair trial", as guaranteed by the European Convention on Human Rights.

He rejects as incorrect and/or libellous allegations to the effect that he did not meet all the requirements for the disputed post. He points out that he started working as a translator in 1982 and that he has worked as a reviser both in the ILO - as shown by his performance reports - and in the private sector.

He adds that he "coordinated" the Spanish Unit's night shift for the European Regional Meeting in December 2002, as well as the Spanish translation team for the Finance Committee of the June 2001 session of the International Labour Conference.

He contends that the fact that he accepted an initial appointment at a lower grade is unrelated to his potential ability to hold a post at a higher grade. In his view, the reason was rather that promotions from grade P.3 to grade P.5 are unusual in the international organisations, whereas appointments at a lower grade - in this case P.4 - for a probationary period are common practice.

CONSIDERATIONS

1. The complainant, who has held the position of reviser at grade P.4 since 1989, occasionally replaced, from 1995 onwards, the Head of the Spanish Unit of the Official Documentation Branch.

On 18 June 2001 she applied for a vacant P.5 post as senior translator/reviser (Head of Spanish Unit). The successful candidate, however, turned out to be Mr P. On 14 May 2002 she submitted a grievance to the Joint Panel alleging that the selected candidate did not have all the qualifications required by the vacancy announcement.

The Panel expressed the opinion that, in the light of the circumstances in which the post had been filled, the selection process was not flawed.

After the complainant had requested a review of her grievance on the basis of new evidence, she was informed, on 6 December 2002, that the Panel had decided not to alter its recommendation and that the Director-General would take a final decision on the matter and inform her as soon as possible. The letter added that in order to safeguard her rights the statutory time allowed for filing an appeal would be extended as necessary.

Having waited for the final decision for more than 60 days after receiving the letter of 6 December 2002, the complainant, on 3 March 2003, filed a complaint with the Tribunal against what she considers to be an implicit decision dismissing her grievance.

2. The Organization considers that the complaint, which was filed before the internal grievance procedure had been concluded, should be considered premature and hence irreceivable, in accordance with Article VII(1) of the Statute of the Tribunal. It has opted, however, to abstain from entering an objection to receivability. The Tribunal shall therefore consider the case on the merits.

3. In her complaint, the complainant asks the Tribunal to set aside with retroactive effect the decision to appoint Mr P. to the post advertised in Vacancy Announcement No. 2001/4, to award her, in compensation for the moral and material injury she has allegedly suffered, the equivalent of the special allowance provided for in Article 3.7 of the Staff Regulations for the whole period during which Mr P. occupied the post concerned, as well as 6,000 Swiss francs in costs.

In her rejoinder, altering her claims somewhat, she asks the Tribunal to award her whatever sum it deems equitable in compensation for the moral and material injury she has suffered. She also asks the Tribunal to note that the defendant organisation has already paid her the sum of 6,000 francs she had claimed in costs.

Her main argument is that the Joint Panel based its recommendation on considerations which were opposed to the Tribunal's case law on competition procedures. She points out that the Panel recognised that the successful candidate did not have the minimum qualifications required by the vacancy announcement, but did not draw the necessary conclusions in the light of the Tribunal's relevant case law.

4. In response to the complainant's main claim regarding the cancellation of Mr P.'s appointment, the Organization submits that, once her complaint had been filed, the Director-General cancelled both the competition and the appointment. It contends that, even though his reasons for cancelling the competition were not exactly the same as those put forward by the complainant, the fact that she was successful in having the competition declared illegal deprived this dispute of its main cause of action. The only issue which may be referred to the Tribunal, in its view, concerns the scope of the compensation granted to the complainant by the Organization.

5. At the Tribunal's request, the complaint was forwarded to Mr P. who has given his point of view, but emphasises that, since he has not had access to all the evidence in this case, nothing he writes may be used to assert that any subsequent claim, complaint, appeal, or action brought by him is irreceivable on the basis of the principle of *res judicata*.

6. In the light of the evidence available, and in particular of the letter sent to the complainant on 9 April 2003, the Tribunal notes that the Director-General has cancelled both the competition and Mr P.'s appointment since the filing of the complaint. That being so, even though the decision challenged in the grievance may have produced effects, the complainant's main claim for the cancellation of the successful candidate's appointment, as initially submitted and considered by the Joint Panel, has been deprived of any substance. Nevertheless, and in accordance with the Tribunal's case law (see Judgment 1680 in particular), since Mr P.'s appointment was not cancelled with retroactive effect, it has to be determined to what extent this disputed decision, which produced effects, caused the complainant an injury for which compensation may be claimed.

7. The Organization has recognised that the competition procedure was not conducted according to the rules, or with the necessary degree of transparency and objectivity.

For this reason, the competition and therefore Mr P.'s appointment have been cancelled.

The Tribunal notes that the complainant held the vacant post on an interim basis but, as indicated above, had seen it

filled in unlawful circumstances by a candidate who did not have the required qualifications - as she became aware. It finds that she has suffered moral injury warranting compensation, which may be equitably set at 5,000 Swiss francs.

8. However, the Tribunal has not found a material injury in respect of which compensation is due. The injury allegedly arising from the loss of the special allowance appears purely hypothetical, since the complainant had no guarantee that she would have remained in charge of the Spanish Unit had the disputed appointment not been made. Another candidate having the required qualifications might in legitimate circumstances have been appointed to the desired post.

9. With regard to the complainant's health problem which occurred on 30 October 2002, she has failed to prove a causal link between that problem and the disputed decision. In any event, such proof can be provided only in accordance with the appropriate procedure for determining service-incurred illnesses and disabilities, within the prescribed time limits.

DECISION

For the above reasons,

1. The defendant shall pay the complainant the sum of 5,000 Swiss francs in compensation for moral injury.
2. All other claims are dismissed.

In witness of this judgment, adopted on 19 November 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet