Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

112th Session **Judgment No. 3077**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. N. against the International Labour Organization (ILO) on 5 November 2009 and corrected on 22 December 2009, the Organization's reply of 4 February 2010, the complainant's rejoinder of 24 March and the ILO's surrejoinder of 28 May 2010;

Considering Article II, paragraph 1, 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, an Argentine national born in 1953, entered the service of the International Labour Office, the ILO's secretariat, in 1993 at grade G.3. After being initially employed on short-term contracts, he was granted a fixed-term contract in 1996, which was renewed periodically before being converted into an appointment without limit of time on 1 January 2007. At the material time he was carrying out duties at grade G.4.

On 14 November 2007 a competition was announced for the G.5 post of Assistant Supervisor of the Spanish Text-Processing Unit. The shortlisted candidates, who included the complainant, underwent technical evaluation consisting of an anonymous written test and an interview. The complainant was informed by an e-mail of 9 August 2008 that his application had been unsuccessful. Pursuant to paragraph 13 of Annex I to the Staff Regulations of the International Labour Office concerning recruitment procedure, he then requested an interview with the responsible chief in order to obtain feedback on the technical evaluation. This interview took place on 20 August. As he was dissatisfied with the result of this interview, in accordance with paragraph 14 of the annex he requested a written response, which he received on 5 September.

On 2 October 2008 the complainant submitted a grievance to the Joint Advisory Appeals Board. The latter asked to have the competition file forwarded to it, examined the file *in camera* and issued its report, in Spanish, on 12 June 2009. The Board, having stated that it had been guided by the Tribunal's well-established case law according to which an appointment, being a discretionary decision, is subject to only limited review, recommended dismissal of the complainant's grievance on the grounds that it was unfounded. The Executive Director of the Management and Administration Sector informed the complainant in a letter of 29 July 2009 that the Director-General had decided to endorse that recommendation. That is the impugned decision.

B. The complainant submits first that the impugned decision is tainted with an error of law because, in his view, in undertaking only a limited review of the decision not to appoint him to the post for which he had applied, the Board misconstrued the scope of its competence, thereby depriving him of his right to an effective internal appeal.

He then contends that the adversarial principle was breached, because he received no information about any of the items in the competition file which the Board had examined *in camera*. He regrets that the Board did not say why it regarded the file as so confidential

that it could not divulge the contents thereof during the appeal procedure, which was itself confidential.

Lastly, the complainant holds that the competition procedure proper was also flawed, in that the provisions of Annex I to the Staff Regulations were breached, because none of the candidates underwent the compulsory assessment by the Assessment Centre.

The complainant seeks the setting aside of the impugned decision, the cancellation of the competition procedure and resultant appointment, redress for the injury suffered, and an award of costs.

C. In its reply the ILO begins by pointing out that it is well established in the case law that an appointment by an international organisation is a discretionary decision and as such is subject to only limited review by the Tribunal. It notes that, under paragraph 17 of Annex I to the Staff Regulations, in the event of a grievance regarding recruitment, the competence of the Joint Advisory Appeals Board is confined to determining whether or not there has been a procedural flaw or unfair treatment. Nevertheless, it infers from the fact that the Board concluded that no unfair treatment had occurred that, when it examined the competition file *in camera*, it also examined the candidates' qualifications.

Referring to Judgment 2648 the Organization submits that if, in the case leading to that judgment, the Tribunal had considered that the examination *in camera* of the competition file by the Board violated the adversarial principle, it would have said so.

The ILO explains that paragraph 2 of Circular No. 652, Series 6, of 12 January 2005, which confirms a practice followed since 2003, states that "[s]taff recruited through the competitive process into the G.1-G.4 band no longer require assessment [by the Assessment Centre] to be considered for promotion through selection or reclassification into the G.5-G.7 level". It also comments that, according to paragraph 6 of Annex I to the Staff Regulations, the role of the Assessment Centre is to determine whether candidates are "suitable for appointment at the level of competence and responsibility to which the job pertains". It emphasises that, since all

the candidates shortlisted for the G.5 post advertised were in the G.4 grade and were also internal candidates, which meant that the Administration was familiar with their ability, assessment by the Assessment Centre was unnecessary in this case.

Further to the Tribunal's request that the successful candidate be invited to submit any comments she might have on the complaint, the Organization annexes two documents to its reply. One is a minute of 22 January 2010 in which this candidate states that she disputes the French translation of the Joint Advisory Appeals Board's report supplied by the complainant. The other is a "complete, accurate translation" of this report supplied by her.

D. In his rejoinder the complainant, referring to the principle of the hierarchy of rules, contends that the Staff Regulations, which in his opinion required that all candidates should undergo assessment by the Assessment Centre, cannot be amended by a circular. In his view, this assessment remains compulsory until such time as a draft amendment of the Staff Regulations is adopted. He also says that he is "astonished" that the Organization agreed to produce the translation of the Board's report furnished by the successful candidate. He requests that the document in question be removed from the file and that the ILO be censured for having made unfair use of the possibility offered to the said candidate to express her views.

E. In its surrejoinder the Organization maintains that, in this case, assessment by the Assessment Centre was not compulsory. It says that in producing the successful candidate's response it was merely complying with the Tribunal's request "to the letter". It points out that it had also annexed to its reply a translation of the Board's report prepared by its own services.

CONSIDERATIONS

1. The complainant has been employed by the ILO since 1993. He was carrying out duties at grade G.4 when he applied for the G.5 post of Assistant Supervisor of the Spanish Text-Processing Unit,

which had been advertised on 14 November 2007. Having been shortlisted, he had to undergo technical evaluation consisting of an anonymous written test and an interview. On 9 August 2008 he was informed that his application had been unsuccessful. As he was dissatisfied with the result of the interview which he had requested with the responsible chief in order to obtain feedback on the technical evaluation, the complainant asked the responsible chief for a written response, which he received on 5 September.

On 2 October 2008 the complainant submitted a grievance to the Joint Advisory Appeals Board in which he contended inter alia that he had been discriminated against in the course of the competition and that the members of the Selection Board had not acted independently. He also took issue with the fact that he had not been invited to undergo assessment by the Assessment Centre, which he considers to be compulsory. After a preliminary examination of the case, the Board asked the Human Resources Development Department to send it the competition file, which it then examined *in camera*. In its report of 12 June 2009, written in Spanish, the Board recommended that the Director-General dismiss the grievance as unfounded.

By a letter of 29 July 2009 the Director-General informed the complainant of his decision to follow this recommendation and to dismiss his grievance. It is that decision which the complainant impugns before the Tribunal.

2. At the request of the Tribunal, the ILO forwarded the complaint to the candidate who had been successful in the competition and invited her to submit any comments she might have. This person did not submit comments, but stated in a minute of 22 January 2010 that she was submitting a translation of the Board's report which she considered to be more faithful than that supplied by the complainant. In his rejoinder the latter argues that, by appending this translation to its reply, the Organization acted unfairly and should therefore be censured.

This criticism is misplaced. The Organization did no more than forward to the Tribunal, without comment, the response that it had

received from the successful candidate further to the Tribunal's request.

Furthermore, the Tribunal has in any case referred only to the translation of the Board's report supplied by the Organization.

3. The Board stated in its report that it had been guided by the Tribunal's well-established case law according to which an appointment is a discretionary decision, and that it therefore had to confine itself to determining whether or not unfair treatment had occurred and whether the competition procedure had been flawed. It added that it was not called upon to "give its opinion on the candidates' respective merits". Having thus defined its power of review, it recommended the dismissal of the grievance on the grounds that all the candidates had been subjected to the same procedure, had answered the same questions and had sat the same test, which had been marked anonymously and independently, and that the successful candidate had been considered to have the best qualifications and skills for the post.

The complainant submits that the Board, in undertaking only a limited review of the decision not to appoint him to the post for which he had applied, assumed the role of an administrative court and deprived him of his right to an effective internal appeal. The Board was certainly wrong to rely on the case law regarding the Tribunal's limited power of review when defining its own competence (see Judgment 3032, under 10), and the complainant is right to say that the Board is not an administrative court whose sole responsibility in principle is to review the lawfulness of decisions which are challenged. However, in this case the Board's power is in fact restricted by paragraph 17, *in fine*, of Annex I to the Staff Regulations, which specifies that a grievance concerning recruitment may only be based on "a procedural flaw or unfair treatment".

The plea that the Board misconstrued the scope of its competence is therefore unfounded.

It is true that, insofar as it requires the Board to determine whether any unfair treatment might have occurred, the above-mentioned paragraph 17 does not exempt it from considering the candidates' abilities and merits, but in the instant case that is precisely what the Board did. Indeed, it required the production of the whole competition file, and the reasons underpinning its recommendation show that it took care to determine whether the decision to discard the complainant's candidature was based on a procedural flaw or unfair treatment. The complainant was therefore not deprived in any way of his right to an effective internal appeal.

4. The complainant takes the Board to task for having violated the adversarial principle by not giving him access to the competition file, or by not even being prepared to discuss whether the file was so confidential that all or part of it had to be kept secret.

The Board's procedure is governed by Annex IV to the Staff Regulations, paragraph 20 of which provides that "[a]ll proceedings of the Board are confidential" and that "[a]ny breach of confidentiality shall be considered serious misconduct". In the above-mentioned Judgment 3032 the Tribunal held that the Board's *in camera* consultation of a competition file did not constitute a procedural flaw warranting the quashing of the impugned decision. A candidate in a competition is not in fact entitled to consult the records of the Selection Board's deliberations or to know the identity of the other candidates who have been eliminated (see Judgments 556, under 4(b), and 2142, under 16 and 17). In the instant case it is necessary to abide by this rule of confidentiality, the purpose of which is to protect both the general interest, thereby ensuring the Organization's proper functioning, and the candidates' privacy. The complainant, who was able to obtain all the relevant information from the responsible chief and to express his opinion thereon, also had an opportunity to comment as he wished on the ILO's substantive arguments during the internal appeal procedure.

It follows that this plea must also be dismissed.

5. The complainant further submits that the competition procedure was flawed in that none of the candidates underwent assessment by the Assessment Centre, which he views as compulsory.

The Board examined the lawfulness of the recruitment procedure applied in the Organization, having regard to the fact that some candidates must undergo assessment by the Assessment Centre while others do not have to do so. It considered however that the fact that the complainant was not invited to sit this test had caused him no injury because he was one of the shortlisted candidates.

In its reply the ILO bases its argument on paragraph 2 of Circular No. 652, Series 6, of 12 January 2005 – which confirms a practice introduced in 2003 – stipulating that "[s]taff recruited through the competitive process into the G.1-G.4 band no longer require assessment to be considered for promotion through selection or reclassification into the G.5-G.7 level". The Organization adds that since, according to paragraph 6 of Annex I to the Staff Regulations, the role of the Assessment Centre is to determine whether candidates in a competition are "suitable for appointment at the level of competence and responsibility to which the job pertains", assessment of the suitability of internal candidates is superfluous or pointless, as the Administration is familiar with their ability. It draws attention to the fact that in the instant case all the shortlisted candidates, including the complainant, were internal G.4 candidates competing for a post at grade G.5 and contends that it was therefore unnecessary to submit their candidature to the Assessment Centre.

In Judgment 2833, under 8, the Tribunal expressed a similar opinion. The complainant has not put forward any argument that would warrant reconsidering the merits of that precedent, which was confirmed in Judgment 3032, under 21, to which reference has already been made.

Hence this plea must be rejected.

6. Since none of the complainant's pleas succeeds, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 2011, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet