Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

R.

v.

ITU

131st Session **Judgment No. 4332**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. R. against the International Telecommunication Union (ITU) on 12 January 2018 and corrected on 16 February, the ITU's reply of 23 May, the complainant's rejoinder of 17 September and the ITU's surrejoinder of 19 December 2018;

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 lawfulness of a selection procedure in which he participated and the resulting appointment.

At the material time, the complainant held a G.3 post of security officer. On 19 October 2016 the ITU published a vacancy notice for the G.5 post of workplace safety and training officer. The complainant applied and was invited on 25 November to take a written test, which was held on 7 December 2016. On 24 January 2017 he was informed that he had not been shortlisted and that another candidate, whose profile more closely fitted the requirements of the post, had been appointed.

On 10 March 2017 the complainant requested the Secretary-General to reconsider the decision not to select him and the decision to appoint another candidate. In particular, he argued the candidates had not been treated equally. He also asked why his application had been rejected

and requested detailed information about the conduct of the procedure. On 24 April the Chief of the Human Resources Management Department (HRMD) informed him that the Secretary-General had decided to refuse his request for reconsideration because his argument that the candidates were not treated equally was unfounded. The Chief of HRMD further explained that the Appointment and Promotion Board had found that the complainant was not among the most qualified candidates and the Secretary-General was not in a position to express a view on the complainant's request for information because he had not stated his reasons for that request.

The complainant referred the matter to the Appeal Board on 22 June 2017. He requested that the decisions resulting from the competition procedure be withdrawn and that he be awarded compensation. In its report of 2 October, the Appeal Board recommended that the appeal be rejected. On 17 October 2017 the complainant was notified that the Secretary-General had decided, in accordance with the Appeal Board's recommendation, to reject his appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision as well as the decisions resulting from the competition, to order the ITU to resume the competition procedure at the stage where it was flawed, to award full compensation for the injury he considers he has suffered and, lastly, to award him 8,000 euros in respect of the costs incurred in the internal appeal proceedings and in the proceedings before the Tribunal.

The ITU submits that the complaint should be dismissed as unfounded.

CONSIDERATIONS

1. A vacancy notice for an internal competition to fill the new grade G.5 post of workplace safety and training officer was published on 19 October 2016. The complainant, who was employed by the ITU as a grade G.3 security officer, applied and was one of the six candidates preselected. However, he was informed on 24 January 2017 that he had not been shortlisted and that another candidate, whose profile more closely fitted the requirements of the post, had been appointed. The complainant unsuccessfully requested a reconsideration of this decision. He then lodged an appeal with the Appeal Board. On 2 October 2017 the Appeal Board submitted a report to the Secretary-General recommending

that he maintain his decision to appoint the successful candidate and to reject the complainant's appeal, which the Secretary-General did by a decision dated 17 October 2017. That is the decision impugned in these proceedings.

2. In order to identify the legal context in which the complainant's arguments must be assessed, it is convenient to quote from Judgment 4154, consideration 3, which likewise deals with the competition disputed in this case and repeats well-established principles of the Tribunal's case law:

> "[T]he Tribunal accepts that the appointment by an international organisation of a candidate to a position is a decision that lies within the discretion of its executive head. It is subject only to limited review and may be set aside only if it was taken without authority or in breach of a rule of form or 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. This formulation is found in many judgments of the Tribunal including, for example, Judgment 3209, consideration 11, and is intended to highlight the need for a complainant to establish some fundamental defect in the selection process."

3. In his first plea, the complainant asserts that there was a breach of the principle of transparency, in that the ITU did not disclose to him all the information relating to the procedure and did not explain why he had not been selected. The Tribunal observes, on this point, that in his decision of 24 April 2017, responding to the complainant's request for reconsideration of the initial decision of 24 January 2017 and confirming the latter decision, the Chief of HRMD explained to the complainant in detail why, although he had been one of the six preselected candidates, he had not been appointed to the advertised post: the complainant did not hold a certificate on Swiss safety standards, he had not undertaken crisis management training and, above all, he had failed the written technical test, which was the decisive factor. He had achieved a score of 23/60 whereas the minimum pass mark was set at 70 per cent of the maximum score, that is to say 42/60. The Chief of HRMD further explained that the fact that the successful candidate had "on his own initiative, undertaken a [Swiss] training course in March 2015 as a fire safety officer" did not breach the principle of equal treatment between the candidates.

Moreover, in the proceedings before the Appeal Board, the ITU provided the complainant with the list of the six preselected candidates and various documents which gave an account of the conduct of the competition

as annexes to the Secretary-General's reply to the complainant's appeal. All the documents that would allow the complainant to verify that the procedure had been lawful were thus made available to him.

The Tribunal hence finds that the principle of transparency was observed. This plea is therefore unfounded.

4. In his second and third pleas, the complainant complains, respectively, that the written test was unlawful and that the rules of the competition were breached.

In the second plea, the complainant alleges that a decision was taken to make candidates sit a written test without informing them of the subject matter, the marker's identity or the fact that a minimum pass mark had been set.

In the third plea, the complainant submits that the minimum pass mark was changed from 70 per cent to 50 per cent of the maximum score (60).

5. As regards the second plea, relating to the introduction and unlawfulness of the written test, the Tribunal notes that the procedure in question was conducted in compliance with the vacancy notice and the applicable rules. The vacancy notice expressly provided that "[t]he assessment of successful candidates [might] include an exam". It was therefore completely lawful for the Administration of the ITU to decide, on a proposal from the supervisor concerned, to set a written test as an assessment tool and an additional criterion for selecting candidates.

In his second plea, the complainant also alleges that insufficient information was available on the subject matter of the test, the arrangements for assessing the test and the marker's identity. The Tribunal considers that the lawfulness of the process was ensured in this regard since all the candidates were in the same position and the written test was on topics relating to the knowledge and skills listed in the vacancy notice and considered important by the relevant immediate supervisor for assessing the candidates' ability to carry out the duties associated with the new post. Moreover, in the absence of any rule or regulation specifying such an obligation, the ITU was not required to inform candidates of how the tests in which they participated would be assessed (see Judgment 3543, under 12). As for the markers' identity, the candidates could not be unaware that the tests would be assessed by the relevant supervisors.

Accordingly, the second plea is unfounded.

6. In his third plea, the complainant objects to the fact that, after a minimum pass mark of 70 per cent (42) of the maximum score (60) had been set for the written test, it was eventually reduced to 50 per cent (30) of the maximum score. He therefore argues that the decision to place the two best candidates, who had obtained a score of 34/60, on the short list is unlawful because the ITU breached a rule which it had set and by which it was bound.

With respect to this change in the minimum pass mark from 42 to 30/60, the Tribunal notes that, as the ITU stated, no minimum score had been indicated either in the vacancy notice, the email inviting candidates to sit the written test or the brief instructions provided with the test questions. In its submissions, the ITU explains that the test markers – both supervisors of the position to be filled – had initially considered setting a pass mark of 70 per cent of the maximum score. The Tribunal considers that the decision to lower the minimum pass mark, made by the immediate supervisor of the post with the agreement of the Chief of HRMD, as evidenced by the memorandum of 24 April 2017, instead of using the pass mark initially envisaged (a threshold of 70 per cent of the maximum score) is a legitimate exercise of the ITU's discretion. That decision was taken in the ITU's interest in filling the new post by internal competition, when it realised that none of the six preselected candidates had achieved the threshold of 42 in the written test and it decided to shortlist the two candidates who had obtained the highest score (34). In conclusion, the impugned decision is not affected by any of the flaws raised by the complainant in his third plea.

7. In his fourth plea, the complainant alleges that there were two errors of fact in the report of the Appeal Board, whose recommendation was adopted by the Secretary-General in the impugned decision. The first error arose from the Appeal Board's failure to take into consideration the rejection of the complainant's two requests, in 2015 and 2016, to be allowed to undergo the Swiss fire safety officer training, which gave the impression that he had never applied to participate in that training. The second error arose from the Appeal Board's finding that only 16 questions in the written test, instead of 19, out of 21 concerned fire safety.

8. As regards the first error of fact, the Tribunal observes that the Appeal Board found that, since the complainant could have also requested to undergo the Swiss fire safety officer training, the advantage gained by other candidates by participating in this training did not breach the principle of equal treatment ("Since the Appellant could have also applied for this training, the Panel concluded that any advantage from such training would not represent unequal opportunity").

Insofar as this finding suggests that the complainant had not applied for the training in question, it does indeed involve an error of fact. However, the evidence shows that this error is largely attributable to the complainant himself, as he did not clearly argue in his appeal that he had requested in vain to undergo this training. In these circumstances, the Tribunal cannot draw any conclusions from this error.

With respect to the second error of fact, namely the number of questions in the written test relating to fire safety, the criticism is not warranted. This error, assuming that it is established, is not such as to influence the Appeal Board's conclusions.

Both parts of the fourth plea are hence unfounded.

9. In his fifth plea, the complainant takes issue with the organisation of the competition, which, in his view, did not ensure equal treatment between the candidates.

The complainant submits in this regard that the two short-listed officials had received specialist training in the area relevant to the competition. He submits that this advantage was further accentuated by the nature of the written part of the competition since the test focused primarily on the topic of the aforementioned training.

However, the Tribunal considers that, although the candidates who had undergone the training in question had a better grasp of the topic than those who had not attended it, that circumstance does not constitute a breach of the principle of equal treatment between the candidates since this difference in level of knowledge, which did not result from training provided close to the competition, must be regarded merely as an objective circumstance.

It follows that this plea is unfounded.

10. In his sixth plea, the complainant submits that there was a misuse of authority. According to him, the alleged unequal treatment "reflected manoeuvring to have the successful candidate selected", in other words, that favouritism had taken place. In this case, although the complainant submits that the competition was flawed by "manoeuvring to have the successful candidate selected", he does not adduce any material evidence to substantiate that allegation. Under the case law, misuse of authority may not be presumed and the burden of proof is on the party that pleads it (see Judgment 4081, under 19).

It follows that this plea is unfounded.

11. Finally, the complainant submits: (a) that in violation of Staff Regulation 4.9, the marks awarded to the candidates in the written test were not communicated to the Appointment and Promotion Board; (b) that, in violation of article 11 of the Rules of Procedure of the Appointment and Promotion Board, the immediate supervisor of the post considered did not give an opinion on the candidates in writing, and other officials were also invited to give an opinion on their merits.

With regard to the violation of Staff Regulation 4.9, the allegation of a failure to communicate the marks awarded cannot be accepted as those marks are shown in the table drawn up on 12 December 2016 which sets out the recommendations made to the Appointment and Promotions Board by the immediate supervisors. The plea thus has no factual basis.

With respect to the alleged violation of article 11 of the Rules of Procedure of the Appointment and Promotion Board, the Tribunal notes that the immediate supervisor of the disputed post did in fact issue a written opinion on the candidates' merits since that opinion is included in the table of 12 December 2016. While it is true that this table was co-signed by two other supervisors of the position in question, that circumstance was not such, in this case, as to render the procedure unlawful.

It follows that these two pleas cannot be accepted.

12. The complaint will therefore be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2020, 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 December 2020 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN GIUSEPPE BARBAGALLO FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ