

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

**105th Session**

**Judgment No. 2754**

The Administrative Tribunal,

Considering the complaint filed by Mr P.D. S. against the International Labour Organization (ILO) on 16 March 2007, the Organization's reply of 4 June, the complainant's rejoinder received by the Tribunal's Registry on 4 July and the ILO's surrejoinder of 24 August 2007;

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. Article 4.2(e) and (f) of the Staff Regulations of the International Labour Office, the ILO's Secretariat, provide as follows:

“(e) Transfer in the same grade, promotion or appointment by direct selection by the Director- General shall be the normal method of filling vacancies:

- of Chiefs of Branch and Directors of offices in the field;
- in technical cooperation projects;
- in the Office of the Director-General;
- of principal secretary to a Deputy Director-General;
- of a purely temporary nature, up to two years, of a specialist nature, not expected to lead to a career in the ILO, any extension beyond two years being subject to article 4.2(f);
- in the National Professional Officers category in external offices;
- in the General Service category in external offices.

The Director-General may in such cases, at his or her discretion and after consulting the Staff Union representatives mentioned in Annex I, decide on the use of one or other of the methods of filling vacancies referred to in article 4.2(f).

(f) In accordance with the provisions of the Collective Agreement on a Procedure for Recruitment and Selection, competition shall be the normal method of filling vacancies between grades G.1 and P.5 inclusive. The methods to be employed shall comprise transfer in the same grade, promotion or appointment, normally by competition. Promotion or appointment without competition may be employed only in:

- filling vacancies requiring specialized qualifications;
- filling vacancies caused by upgrading of a job by one grade or in the case of a job upgraded from the General Service to the National Professional Officers category or to the Professional category or in the case of a job upgraded from the National Professional Officers to the Professional category by one grade or more;
- filling vacancies in urgency;

– filling other vacancies where it is impossible to satisfy the provisions of article 4.2(a) [...] by the employment of any other method.

The Staff Union representatives mentioned in Annex I shall be informed of any promotions or appointments made without competition.”

The officials of the ILO were informed by a circular of 8 December 2005 that Mrs P. had been appointed Deputy Chief of the Internal Administration Bureau (INTER), at grade P.5, with effect from 1 January 2006.

The complainant, a Swiss national born in 1955, is an official of the Office at grade G.6. On 20 January 2006, under Article 13.2(1) of the Staff Regulations, he filed a grievance with the Human Resources Development Department, in which he challenged the above-mentioned appointment on the grounds that it had been made without a competition, or even a call for candidatures. The Director of the Department informed the complainant by a minute of 27 April that his grievance was rejected. On 10 May the complainant therefore filed a grievance with the Joint Advisory Appeals Board under Article 13.3(2) of the Staff Regulations. The Board, in its report of 7 November, recommended the dismissal of the grievance on the grounds that it was “without substance”. By a letter of 19 December 2006, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had dismissed his grievance.

B. The complainant states that, in the internal appeal proceedings, the Organization queried the admissibility of his grievance, alleging that he did not possess the requisite qualifications for the post of Deputy Chief of INTER. In his view, candidates’ qualifications must be evaluated in a competition, and since no competition was held prior to the disputed appointment, the fact that he did not possess qualifications which were not stipulated in any vacancy announcement cannot be held against him.

On the merits he considers that the appointment of Mrs P. is illegal because the procedure set out in Chapter IV of the Staff Regulations was not observed. He explains that the Regulations provide for two kinds of recruitment. The first is recruitment (transfer, promotion or appointment) by “direct selection” under Article 4.2(e), which allows the Director-General very wide discretion. It is reserved for political posts or those not expected to lead to a career. The second type of recruitment (transfer, promotion or appointment) is the ordinary procedure laid down in Article 4.2(f) for officials between grades G.1 and P.5. In this case, recruitment is normally by competition. Some appointments and promotions are, however, made without a competition. At all events and in accordance with established practice, the Office always issues a call for candidatures before filling any post.

The complainant draws attention to the fact that in its reply to his grievance the Human Resources Development Department acknowledged that “the appointment of Mrs. [P.] was made by direct selection by the Director-General”. In his opinion, however, the post concerned does not belong to any of the categories of jobs normally filled by direct selection by the Director-General.

He explains that Article 4.2(f) makes it plain that a competition is the rule, the absence of competition being the exception, and that justification has to be provided for every exception. Yet there is no justification for the exception made in the case of the appointment of Mrs P. In the complainant’s view, the Staff Regulations are unclear, in that they do not mention the case of an in-grade transfer such as Mrs P. was given. He contends that a restrictive interpretation would require that a competition be held for this kind of transfer and that no exceptions to this rule should be allowed. A broad interpretation would lead to the view that an in-grade transfer should normally involve a competition, but that exceptions are possible. The Joint Advisory Appeals Board and the Director-General opted for the latter interpretation. However, in the complainant’s opinion, the Director-General acted illegally by not justifying the exception to the “rule”, by not making the appointment in a transparent and objective manner, by not stating the reasons for his decision to make an appointment without a competition before announcing the appointment and by informing Staff Union representatives only through a circular addressed to the whole of the staff.

The complainant asks the Tribunal to set aside the impugned decision and the appointment of Mrs P. and to award him compensation for the injury he has suffered, as well as costs in the amount of 2,000 Swiss francs.

C. In its reply the ILO points out, on the issue of receivability, that since the complainant did not have the requisite qualifications for the disputed post, he has no cause of action with respect to the decision to appoint Mrs P., which, in its view, cannot injure the complainant in any way.

On the merits the Organization explains that the new post of Deputy Chief of INTER, to which Mrs P. was appointed, was created as part of the process of reorganising the Office, which began in 2004. For most of that period a Senior Building Maintenance Officer had been absent (on sick leave, followed by retirement). That absence had made it all the more urgent for the Organization to ensure adequate services in that area. Mrs P. was therefore appointed by means of an in-grade transfer.

Relying in particular on Judgment 535, it emphasises that an international organisation enjoys wide discretion when effecting such a transfer instead of holding a competition.

As for the legality of the disputed decision, the Organization points out that the Joint Advisory Appeals Board commented that Article 4.2(f) of the Staff Regulations, which specifies that vacancies between grades G.1 and P.5 must normally be filled by a competition, does not explicitly refer to in-grade transfers without a competition. In particular, the Board noted that the promotion and appointment without competition could be resorted to only in certain specific circumstances. In the present case there was an in-grade transfer, an instance where the Director-General's margin of discretion is not confined to a list of particular examples. The Board likewise drew attention to the fact that under paragraph (f) the Staff Union must be informed of any promotions or appointments made without a competition, but not of transfers in the same grade. The reason for the difference in treatment is plain: the rules could certainly not permit an official to benefit from promotion outside the cases listed exhaustively in paragraph (f); nevertheless depending on the circumstances, the interests of the service and, in particular, the need for swift action might warrant an in-grade transfer without having to refer to one of the circumstances mentioned in that provision.

The Organization explains that once it had been decided to restructure INTER, the Administration had taken the view that waiting until a competition had been held would not be in the Office's interests. It emphasises the wide discretion enjoyed by international organisations in matters of restructuring.

At the Tribunal's request, the Organization forwarded a copy of the complaint to Mrs P. and invited her to submit her comments. In the comments she submitted on 10 May 2007, which the Organization produces as an annex to its reply, Mrs P. states that she accepted her appointment in good faith.

D. In his rejoinder the complainant points out that at the material time he was the Chairperson of the Staff Union Committee and that it was mainly in that capacity that he challenged the disputed appointment. However, he filed his complaint in his capacity as an official to avoid it being declared irreceivable.

Referring to the Tribunal's case law, he submits that the issue of whether an international civil servant has a cause of action with respect to an appointment decision does not, as the Organization appears to believe, depend on the likelihood that their candidature would be favourably considered, or indeed on their reasons for applying for the position in question. All that is required is that he or she could apply for the vacancy, and whatever his or her qualifications or prospects of success might be, the Tribunal will acknowledge the cause of action by enforcing any rights the organisation might have infringed.

He considers that the case law on which the ILO relies is valid only with respect to the Staff Regulations of the organisation concerned by the ruling in question. The Office's Staff Regulations and constant practice indicate that a competition is the normal method for recruiting officials between the grades of G.1 and P.5. In his opinion there was no justification for following an exceptional procedure in the present case, and the Organization does not remedy that flaw by giving reasons extraneous to the exceptions allowed by the Staff Regulations.

He terms the Organization's arguments concerning restructuring and urgency "irrelevant".

Lastly, the complainant withdraws his claim that the appointment of Mrs P. should be set aside.

E. In its surrejoinder the ILO notes that another complaint concerning the same facts has been filed with the Tribunal and submits that it would be advisable to join the two complaints.

It holds that the complainant's withdrawal of his claim that the appointment of Mrs P. should be set aside "deprives the dispute of its substance and therefore renders the complaint irreceivable". It asks the Tribunal to find that the complaint no longer shows a cause of action.

The Organization points out that, as the complainant has acknowledged, he is no longer the Chairperson of the Staff Union Committee and cannot therefore act on behalf of the Staff Union. Moreover, the latter has no *locus standi* before the Tribunal. In this connection, it states that the possibility of granting *locus standi* to staff unions and associations of organisations which have recognised the Tribunal's jurisdiction is being discussed, but that the discussion has not yet produced any tangible results.

On the merits the Organization reiterates all its submissions. It adds that, as is clear from the circular of 8 December 2005, the new post created by restructuring comprised not only the responsibilities of Deputy Chief of INTER, but also those of Chief of Protocol. It considers it obvious that the choice of a Chief of Protocol necessarily lies within the discretion of the Director-General.

## CONSIDERATIONS

1. The complainant, an official of the International Labour Office at grade G.6, learnt from a circular of 8 December 2005 that the Office's Director-General had appointed Mrs P. Deputy Chief of INTER with effect from 1 January 2006.

He was informed by a minute of 27 April 2006 that the grievance he had filed to challenge the legality of that appointment had been rejected, firstly because he had no cause of action and secondly because Article 4.2(f) of the Staff Regulations provided for the possibility of filling a vacancy by transfer in the same grade, which is what had been done in the present case.

The Joint Advisory Appeals Board, to which the matter was referred, concluded in its report of 7 November that the in-grade transfer which had occurred did not constitute an illegal decision and it recommended that the Director-General dismiss the grievance as being without substance.

The complainant was informed by a letter of 19 December 2006 that the Director-General had followed the Board's recommendation and had dismissed his grievance. That is the decision impugned before the Tribunal.

The complainant contends that the appointment of Mrs P. is illegal in that the procedure laid down in Chapter IV of the Staff Regulations – entitled "Recruitment and appointment" – has been disregarded.

2. In his complaint he requested the setting aside of the decision of 19 December 2006 and of the appointment of Mrs P., as well as an award of compensation for the injury suffered and costs.

In his rejoinder he announced that "[w]hile maintaining [his] claim that the impugned decision be set aside, [he was] withdraw[ing] [his] claim that the appointment of Mrs [P.] be set aside".

3. The Organization contends that the complaint is irreceivable because the complainant has no cause of action since he is an official in the General Services category, whereas the post in question is a grade P.5 post for which he does not possess the requisite qualifications.

The Organization considers that the withdrawal of the claim that the appointment of Mrs P. should be set aside "deprives the dispute of its substance and therefore renders the complaint irreceivable".

Moreover, it points out that another complaint concerning the same facts has been filed with the Tribunal and it submits that it would be advisable to join the two cases.

4. The Tribunal considers that there is no reason to join this case with that mentioned by the Organization, since the impugned decisions are not the same and the objections to receivability raised in each case are different.

5. Since the complainant has withdrawn his claim that the disputed appointment should be set aside, it must be noted that he has partially withdrawn his suit. There is no need for the Tribunal to rule on the complainant's other claims since they are, in any case, irreceivable for want of a cause of action. Indeed, he supplies no convincing evidence that, contrary to the Organization's submissions, he could have been selected for the post at issue, notwithstanding the grade that he currently holds.

## DECISION

For the above reasons,

1. The withdrawal of the claim that the disputed appointment should be set aside is hereby recorded.
2. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2008, 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 9 July 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet