Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

107th Session **Judgment No. 2833**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. D. V. C. against the International Labour Organization (ILO) on 6 March 2008, the Organization's reply of 27 May, the complainant's rejoinder of 8 July and the ILO's surrejoinder of 18 September 2008;

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. Annex I to the Staff Regulations of the International Labour Office, the Organization's secretariat, deals with the recruitment procedure. It stipulates, inter alia, the following:

> "6. Subject to paragraph 10 below, any candidate applying for a job open to competition must be assessed as suitable for appointment at the level of competence and responsibility to which the job pertains. Such assessment shall be carried out, within the framework of the Assessment Centre […].
>
> […]

> 10. Any external candidates shortlisted by the responsible chief in agreement with the Human Resources Development Department, as well as, where required, any internal candidate, will be invited to participate in the relevant assessment referred to in paragraph 6 above. […]
>
> 11. The responsible chief will undertake and ensure rigorous technical evaluation of all candidates who have successfully completed the Assessment Centre's process, and will prepare a report."

The complainant, a national of Sao Tome and Principe, was born in 1954. He was recruited by the ILO in 1991 at grade P.3 and assigned to the Technical Co-operation Equipment and Subcontracting Branch (EQUIPRO) at the headquarters in Geneva. He was later promoted to grade P.4. He is currently a Senior Programme Officer at the ILO Subregional Office for Southern Africa in Harare (Zimbabwe).

On 30 March 2006 he applied for the grade P.4 post of Senior Procurement Officer in the Procurement Section, formerly EQUIPRO, which in his case implied a transfer in the same grade. On being informed that he had not been selected, he requested an interview, in accordance with paragraph 13 of Annex I to the Staff Regulations, with the responsible chief, who was the Chief of the Procurement Section, but an interview could be arranged only with the complainant's representative. In the course of that interview the latter ascertained that the complainant had not been shortlisted. As he was dissatisfied with the result of this interview, the complainant requested a written response pursuant to paragraph 14 of the Annex. The chief of the above-mentioned section informed him, in a minute of 17 November 2006, that he had not been shortlisted because he did not fulfil three of the core requirements listed in the vacancy notice.

The complainant then submitted a grievance to the Joint Advisory Appeals Board, which issued its report on 7 November 2007. As it considered that the competition procedure was flawed, the Board recommended that the Director-General should cancel it and order a rerun. It found that the principle of equality of treatment had been breached. By a letter of 21 December 2007, which constitutes the impugned decision, the Executive Director of the Management and

Administration Sector informed the complainant that his grievance had been rejected.

B. The complainant enters five pleas. Firstly, he asserts that the vacancy notice for the post to which he aspired stated that applications for transfer submitted by internal candidates in the same grade would be given "prior consideration". He also notes that under Article 4.2(g) of the Staff Regulations account should be taken first of applications from former officials whose appointments have been terminated on account of a reduction of staff and then to applications for transfer. In his opinion, the Organization did not abide by the terms of either the vacancy notice or the above-mentioned provision, for it has not proved that his application was given prior consideration because he was an internal candidate applying for a transfer in the same grade. He therefore asks the ILO to "show how it gave 'prior consideration' to [his] application".

Secondly, the complainant contends that the ILO acted unlawfully by disregarding the provisions of Circular No. 479, series 6, of 15 April 1992 concerning mobility of staff between the field and headquarters. He refers in particular to various measures to facilitate the implementation of the Office's rotation policy which are described in that circular.

Thirdly, he submits that paragraph 10 of Annex I to the Staff Regulations should be construed as meaning that internal candidates must systematically be invited to participate in the assessment conducted by the Assessment Centre, but that in his case this "mandatory step" was omitted. He adds that, although it is clear from the minute of 17 November 2006 that his application underwent a technical evaluation, the Organization also breached its "statutory duty" to organise such an evaluation for all internal candidates.

Fourthly, the complainant argues that he had the right profile for the post to which he aspired. He considers that his experience and qualifications were not examined meticulously.

Fifthly, the complainant deplores the fact that no representative of the Staff Union Committee was involved in the selection procedure.

He points out that, according to the Collective Agreement on a Procedure for Recruitment and Selection concluded between the International Labour Office and the ILO Staff Union on 6 October 2000, technical evaluation guidelines were to have been elaborated before the entry into force of the Agreement, but no guideline aimed at ensuring a transparent and objective selection procedure has been adopted to date.

The complainant requests the setting aside of the impugned decision and of the disputed competition, compensation for the injury suffered and costs in the amount of 3,000 Swiss francs.

C. In its reply the ILO asserts that it followed a completely objective, impartial, fair and transparent procedure and that it complied with Article 4.2 of the Staff Regulations. It explains that the criteria in paragraph (g) of that article must be viewed in context, for according to paragraph (a) the "paramount consideration" in filling any vacancy is the necessity to obtain staff of the highest standards of competence, efficiency and integrity. The same paragraph stipulates that due regard must be paid to considerations of geographical distribution, gender and age. The Organization adds that, according to the case law, priority may be given to an internal candidate only if his or her qualifications prove to be at least equal to those of external candidates. As the complainant did not meet three of the core requirements listed in the vacancy notice, there was no reason to give him priority because of his status as an internal candidate.

The Organization states that Circular No. 479, series 6, was no longer in force at the time the disputed competition was held because it had been replaced by Circular No. 658, series 6, of 9 November 2005, which entered into force on 1 January 2006.

According to the ILO, the complainant is misconstruing paragraph 10 of Annex I to the Staff Regulations. It emphasises that Circular No. 652, series 6, of 12 January 2005 introduced some interim changes to recruitment and selection procedures, for example by stipulating that, as from November 2003, "assessment centres are used exclusively for the recruitment of external candidates and for

any internal candidates of the General Service or National Officer categories who have been short-listed for selection into the international Professional category under the regular budget". The complainant's view that all internal candidates must automatically be admitted to the technical evaluation stage is untenable given the time and cost constraints of recruitment.

The ILO draws attention to the fact that, according to the case law, since appointment decisions are made at the organisation's discretion, they are subject to only limited review by the Tribunal. It considers that the Chief of the Procurement Section did not commit any error in determining that the complainant failed to meet three core requirements listed in the vacancy notice. It points out that the responsible chief carries out a technical evaluation when drawing up a shortlist, albeit not necessarily the evaluation mentioned in paragraph 11 of Annex I to the Staff Regulations.

Lastly, the defendant comments that in consideration 8 of Judgment 2648 the Tribunal found that, even though the guidelines envisaged by the Collective Agreement of 6 October 2000 had not been adopted, "their absence could not prevent the Administration from carrying out the objective technical evaluations incumbent upon the authority responsible for selecting candidates in a competition".

D. In his rejoinder the complainant, relying on Judgment 2558, adds that since the Executive Director of the Management and Administration Sector furnished no proof of a delegation of authority by the Director-General, the impugned decision was not taken by the competent authority and must therefore be set aside. In his view it was "the Director-General and his Office" who should have taken this decision because the Executive Director was "already involved in various ways in the internal procedure". He infers from this that the spirit of the Collective Agreement on Conflict Prevention and Resolution, concluded between the International Labour Office and the ILO Staff Union on 24 February 2004, has been disregarded.

The complainant observes that Circular No. 652, series 6, has not been approved by the Governing Body and that the amendments to the Staff Regulations contemplated therein have not been adopted.

Pointing out that the Joint Advisory Appeals Board found that the principle of equal treatment had been breached, the complainant contends that the Organization demanded qualifications in his case that were not required of the successful candidate and he casts doubt on the latter's qualifications. He asserts that the advertised post was in fact that which he had previously held in EQUIPRO. When he was transferred to Zimbabwe in 1996, Circular No. 479, series 6, specified that the normal length of service in a field assignment was from three to five years and it listed a number of measures to facilitate a return to headquarters. He submits that the abolition of the guarantees provided for in the circular drastically altered the terms of his contract of employment, since he might not have agreed to leave headquarters to work in one of the most difficult duty stations had he not been sure of being able to return one day.

E. In its surrejoinder the ILO reiterates its position. It considers that it is clear from the wording of the impugned decision that it was indeed taken by the Director-General, who authorised the Executive Director to inform the complainant thereof. This practice has been followed since the entry into force of the Collective Agreement of 24 February 2004. The reference to Judgment 2558 is therefore not pertinent. It follows that this new plea, apart from being irreceivable under Article VII, paragraph 2, of the Statute of the Tribunal, is unfounded.

On the merits the Organization acknowledges that the changes introduced by Circular No. 652, series 6, were submitted to the Governing Body, at its March 2005 session, for information only. It points out that since the complainant's previous post at headquarters was at grade P.3 and the post to which he aspired was at grade P.4, it was not the same post. It adds that the duties of the Senior Procurement Officer have undergone major changes during the 12 years he has spent in the field, particularly owing to the introduction of enterprise resource planning (ERP) systems. It draws attention to the

case law according to which those who would have the Tribunal interfere in a selection process must demonstrate that it was seriously flawed, for it is not enough to assert that a particular candidate was better qualified than the selected candidate. On this point, it submits that the report of the Joint Advisory Appeals Board is based on a misreading of some of the evidence.

CONSIDERATIONS

1. On 30 March 2006 the complainant, who at that time held a position in Harare (Zimbabwe), applied for a transfer, in the same grade, to ILO headquarters in Geneva to occupy the advertised post of Senior Procurement Officer in the Procurement Section. His candidature was rejected after an initial examination and he was not included in the shortlist of candidates invited to participate in the assessment conducted by the Assessment Centre. The chief of the above-mentioned section stated the reasons for his rejection during an interview with the complainant's representative on 31 October 2006.

The complainant requested a written answer and on 17 November 2006 the Chief of the Procurement Section informed him that his candidature had been rejected because he failed to meet three of the core requirements listed in the vacancy notice.

2. On 15 December 2006 the complainant filed a grievance with the Joint Advisory Appeals Board, which unanimously recommended to the Director-General in its report of 7 November 2007 that he should cancel the competition. It held that the principle of equality of treatment had been breached because external candidates who failed to meet the requirements set out in the vacancy notice had been shortlisted, whereas internal candidates who met the requirements had not.

The complainant was informed in a letter of 21 December 2007 that the Director-General had decided to reject the Joint Advisory Appeals Board's recommendation, essentially because he considered

that the decision to reject his candidature was based on objective grounds. That is the decision impugned before the Tribunal.

3. The complainant challenges the authority of the signatory of the decision, which does not bear the Director-General's signature but that of the Executive Director of the Management and Administration Sector. He claims that the latter had received no delegation of authority from the Director-General and was also "involved in various ways in the internal procedure".

The Tribunal finds, without needing to rule on the Organization's objection to receivability, that this plea is manifestly devoid of merit inasmuch as the impugned decision was not taken by the Executive Director, who merely conveyed the Director-General's decision to the complainant.

4. In his decision of 21 December 2007 the Director-General departed from the Joint Advisory Appeals Board's recommendation. He was entitled to do so provided that he gave clear reasons for not following it, which he did. He stated that before it was concluded that the complainant lacked the qualifications listed in the vacancy notice, a technical evaluation of his candidature had been undertaken, that the decision not to shortlist him was based on objective reasons and that no unfair treatment was involved. From a formal point of view, therefore, the impugned decision is beyond criticism.

5. The complainant maintains that the Organization failed to acknowledge the "priority status" of his application for a transfer in the same grade and breached the terms of Article 4.2(g) of the Staff Regulations. He further contends that it disregarded the provisions of Circular No. 479, series 6, concerning mobility of staff between the field and headquarters, and breached those of paragraph 10 of Annex I to the Staff Regulations, which, according to him, stipulates that internal candidates must systematically be invited to participate in the assessment conducted by the Assessment Centre. The complainant also takes the Organization to task for failing to recognise that he met the requirements listed in the vacancy notice. Lastly, he objects to the fact

that no representative of the Staff Union Committee was involved in the selection procedure.

6. Article 4.2 of the Staff Regulations, which is to be found in Chapter IV entitled "Recruitment and appointment", lays down the rules to be followed in filling vacancies. The relevant passage, paragraph (g), reads as follows:

> "In filling any vacancy account shall be taken, in the following order, of –
>
> (1) applications from former officials whose appointments were terminated in accordance with the provisions of article 11.5 (Termination on reduction of staff);
>
> (2) applications for transfer;
>
> […]."

The vacancy notice to which the complainant responded on 30 March 2006 stated, inter alia, the following:

> "Applications for transfer submitted by officials in the same grade will be given prior consideration."

These provisions must be read in conjunction with those of Article 4.2(a)(i) of the Staff Regulations, which reads in part:

> "The paramount consideration in the filling of any vacancy shall be the necessity to obtain a staff of the highest standards of competence, efficiency and integrity. Due regard shall be paid to the importance of maintaining a staff selected on a wide geographical basis, recognizing also the need to take into account considerations of gender and age."

Thus, the aim that the competent bodies must seek to achieve in filling any vacancy is the optimum functioning of the Organization. If the priorities established in Article 4.2(g) jeopardise the achievement of this primary aim, they cannot be taken into account.

7. Circular No. 479, series 6, to which the complainant refers, ceased to have effect on 31 December 2005. It was therefore no longer applicable on 22 March 2006 when the vacancy notice to which he responded was issued and, in the circumstances of the case, it clearly created no acquired rights that the complainant could seek to enforce.

The above-mentioned circular was replaced, from 1 January 2006, by Circular No. 658, series 6, entitled "Mobility policy", which underscores the need for an effective mobility policy so that staff can broaden "their collective knowledge and understanding of the work of the Organization as a whole" and for the Office to be able to deploy staff "when and where their competencies are most needed". It recalls that mobility is an important means of improving the timeliness and quality of services provided to constituents. In paragraph 13 it states that the Office should ensure, in particular, that "priority for mobility is given to staff members who have completed their tours of duty", i.e. their assignment in a particular duty station.

It is not disputed that the complainant can avail himself of the mobility rules to return, as and when appropriate, to the Organization's headquarters. But that does not, of course, mean that he has a right to return to headquarters to take up a particular post without it being determined beforehand that the post to which he aspires corresponds to his skills.

8. Pursuant to paragraph 6 of Annex I to the Staff Regulations, candidates applying for a job open to competition must be assessed by the Assessment Centre to determine whether they are suitable for appointment at the level of competence and responsibility to which the job pertains. The paragraph contains an explicit reference to paragraph 10 of the same annex, which reads as follows:

> "10. Any external candidates shortlisted by the responsible chief in agreement with the Human Resources Development Department, **as well as, where required, any internal candidate, will be invited to participate in the relevant assessment referred to in paragraph 6 above**. Feedback on the Assessment Centre's evaluation process will be given to the candidate participating in the evaluation concerned." [Emphasis added.]

The complainant construes this provision to mean that internal candidates are exempt from the shortlisting procedure applicable to external candidates. The defendant argues, however, that the French version of the provision is unclear and that reference should be made to the English version to clarify its meaning. If paragraph 10 of Annex I is read in conjunction with paragraph 6 and with the

Collective Agreement on a Procedure for Recruitment and Selection concluded between the International Labour Office and the ILO Staff Union on 6 October 2000, it can be construed unambiguously, according to the Organization, as meaning that internal candidates must also undergo the shortlisting procedure and are assessed by the Assessment Centre only if they are shortlisted.

This literal interpretation is borne out by a purposive and systematic interpretation of paragraph 10.

The selection procedure envisaged in paragraphs 6 and 10 of Annex I to the Staff Regulations is basically designed to achieve the aim set out in Article 4.2(a)(i) of the Staff Regulations. This aim, as well as the expeditious conduct of selection procedures, would be severely undermined if all internal candidates had to be automatically shortlisted in each case and hence invited to participate in the Assessment Centre's evaluation procedure, regardless of whether their qualifications and skills matched those required for the vacant post.

An internal candidate is entitled to be shortlisted only if he or she clearly meets the requirements of the post open to competition. It remains to be established whether the complainant fell into that category.

9. As mentioned above, the Organization stated in the minute issued in response to the complainant's request on 17 November 2006 that his candidature had been rejected on the grounds that he did not fulfil three of the core requirements listed in the vacancy notice.

10. The complainant, on the other hand, submits that he possessed the qualifications required for appointment to the post to which he aspired.

(a) He notes that, first of all, his lack of a "Procurement Certificate" was held against him. He points out, however, that the vacancy notice required candidates to hold an advanced university degree in business administration, commerce, law or another relevant field, a requirement that he met. In its reply the Organization contends that this argument is based on a misunderstanding, since the

responsible chief was in fact referring in his minute of 17 November 2006, written in English, to the requirement of "[p]articipation in [the United Nations] certification programme for procurement officials or other similar recognized schemes", which is one of the required competencies listed in the vacancy notice.

The Tribunal attributes this misunderstanding to the shorthand used by the responsible chief, who simply referred to "Procurement Certification". This terse wording does not, however, lead the Tribunal to doubt the fact that this ground for rejection of the complainant's candidature referred in fact to participation in the above-mentioned certification programme, which is one of the requirements listed in the vacancy notice.

The complainant asserts in his rejoinder that neither he nor the successful candidate could have held the certificate in question since the certification programme had not yet been implemented. However, the defendant produces a document as an annex to its surrejoinder which proves the contrary.

The complainant's first criticism is therefore devoid of merit.

(b) The complainant's next point is that his lack of "experience" in using ERP systems, particularly the IRIS system used by the Office, was held against him. He notes, however, that the list of required competencies in the vacancy notice referred to a "knowledge" of such systems. He claims that he was well acquainted, through his work, with ERP systems in question, particularly IRIS, and that it was "unfair and unlawful" to reject his candidature on the basis of a "criterion that had not been checked". The defendant replies that the complainant could not have been familiar with the IRIS system because the first IRIS modules were not deployed in the field until 2005. It adds that the successful candidate – a former staff member of the International Telecommunication Union (ITU) – had acquired the requisite experience in that area through his work on similar systems at the ITU.

On this point the Tribunal cannot substitute its assessment for that of the Organization, and the complainant's second criticism must therefore be dismissed.

(c) Lastly, reviewing his experience as a trainer, the complainant maintains that it was wrong to claim that he had no experience in providing training in procurement and contracting.

It has to be acknowledged that the Organization fails to present a clear-cut response, either in its reply or in its surrejoinder, to this argument. That does not suffice, however, for the Tribunal to find that the defendant abused its discretionary authority since, as already stated, it was already justified in rejecting the complainant's candidature on the grounds that he failed to meet two of the requirements listed in the vacancy notice.

The defendant adds that another reason for its rejection of the complainant's candidature was the fact that major changes have occurred in the duties of the Senior Procurement Officer during the 12 years since the complainant left headquarters.

Under these circumstances, the Organization cannot be accused of having failed to undertake a sufficiently detailed investigation of the complainant's knowledge.

11. Lastly, the complainant objects to the fact that no representative of the Staff Union Committee was involved in the selection procedure. This, he claims, is due to the fact that the guidelines envisaged in the Collective Agreement on a Procedure for Recruitment and Selection, which were supposed to ensure a transparent and objective procedure for the selection of candidates at the technical evaluation stage, have not been established. This plea is in any case of no avail because, as stated above, the complainant was not shortlisted.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2009, 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 July 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet