Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

112th Session **Judgment No. 3073**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms E.A. M.-P. against the International Labour Organization (ILO) on 4 March 2010 and corrected on 18 March, the Organization's reply of 27 May, the complainant's rejoinder of 27 July and the ILO's surrejoinder dated 27 October 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, a French national born in 1954, entered the service of the International Labour Office, the Organization's secretariat, in 1981. She holds a post at grade G.5. On 3 December 2008 the Office published a vacancy notice for a post of Human Resources Assistant-Statutory Travel at grade G.6. It stipulated that at least six to eight years of experience in the Organization in that occupational area were required. The complainant applied, but was not included among the three candidates who were shortlisted. At the end of the competition the successful candidate was appointed to the post in question at grade G.5.

Wishing to find out why she had not been shortlisted, the complainant requested an interview with the responsible chief for the job concerned in order to obtain feedback on the technical evaluation, in accordance with paragraph 13 of Annex I to the Staff Regulations. The interview was held on 14 May 2009. As she was dissatisfied with its result, she requested a written response. In an e-mail of 20 May the responsible chief explained that candidates who had specific skills in the occupational area, namely statutory travel, had been shortlisted, but that her application had not contained enough specific information demonstrating her competencies in that area.

On 9 June the complainant submitted a grievance to the Joint Advisory Appeals Board in which she principally sought the cancellation of the competition procedure and ensuing appointment. In its report of 12 October the Board explained that it had concluded that, since none of the candidates had the specific technical competencies as well as the requisite length of experience within the Organization in the occupational area in question, the Office had "chosen, as it was entitled to do, to give technical competence priority over years of service and to allow for the fact that the successful candidate did not have the requisite number of years experience within the Office by initially giving her a grade below that of the post". The Board recommended the dismissal of the grievance on the grounds that it was unfounded. By a letter of 2 December 2009 the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had endorsed this recommendation. That is the impugned decision.

B. The complainant is surprised that, as an internal candidate whose qualifications met the requirements of the post advertised, she was not invited to participate in the technical evaluation provided for in paragraph 11 of Annex I to the Staff Regulations. She points out that the successful candidate did not possess all the qualifications specified in the vacancy notice. She therefore considers that she has received unfair treatment and that the Board's recommendation, which formed the basis of the impugned decision, rests on an error of law. In her opinion, if there were no candidates who satisfied all the criteria listed

in the vacancy notice, the Organization ought to have organised a new competition by issuing a new vacancy notice amending the required minimum qualifications.

She asks the Tribunal to quash the impugned decision, the competition procedure and the ensuing appointment, and to award her compensation for the injury suffered. In addition, she claims costs in the amount of 5,000 Swiss francs.

C. In its reply the Organization requests the joinder of the instant case with the complainant's second complaint (see Judgment 3072, also delivered this day), on the grounds that the impugned decisions are liable to influence her career in a very similar manner because, in each case, the complainant's appointment would have resulted in her promotion to grade G.6. At the Tribunal's request, the defendant invited the candidate appointed as a result of the competition to submit any comments she might have on this complaint. It annexes to its reply the minute in which the successful candidate stated that she had no comments.

The Organization explains that, since none of the candidates possessed all the qualifications specified in the vacancy notice, especially with respect to professional experience, the decision was taken to shortlist the candidates who, in addition to the other required qualifications, had the best technical experience, rather than those with the greatest seniority within the Organization. The ILO submits that this choice is consistent with the Tribunal's case law and that the complainant may not complain that she was treated unfairly, because her situation in fact was different to that of the successful candidate.

The Organization further contends that the competition procedure was lawful. In order to meet its "immediate needs", it was deemed to be in the interests of the service to appoint one of the applicants rather than cancel the competition and publish a new vacancy notice. Since the successful candidate did not satisfy the requirements of the vacancy notice in terms of experience, it was decided that for a period of one year she should be appointed at a lower grade than that announced. The ILO considers that this choice is consistent with a

practice originating in Circular No. 334, Series 6, of 20 July 1985, which has been codified by the insertion of a standard phrase in vacancy notices and which the Tribunal has held to be legitimate and lawful.

D. In her rejoinder the complainant objects to the joinder of her second and third complaints, since they do not have the same purpose. She submits that urgency was no justification for changing the minimum qualifications specified in the vacancy notice in the course of the procedure. In this connection she adds that when "clear and cogent reasons" are given for an "emergency procedure", the latter may be used for recruitment by direct selection by the Director-General.

E. In its surrejoinder the Organization submits that the complainant was not treated unequally because the successful candidate's professional experience was more relevant than hers. It explains that, as a competition had been organised, it was impossible to make an appointment by direct selection by the Director-General.

CONSIDERATIONS

1. The complainant entered the service of the International Labour Office in 1981. She has worked as an administrative assistant since 1999. In December 2008 she took part in a competition for a post of Human Resources Assistant-Statutory Travel at grade G.6. The vacancy notice for this post stipulated, inter alia, that at least six to eight years of experience in handling the administrative arrangements for statutory travel in the Organization were required.

The complainant was not placed on the shortlist of three candidates whom the responsible chief chose from among the 15 applicants.

As the Office found that none of the candidates possessed all the required qualifications, it gave technical competence priority over seniority. It chose a candidate who had worked for a travel agency for 11 years, five of which had been on the Organization's premises. Since this person did not have the required number of years of experience in

the Office, she was initially given a 12-month fixed-term contract at grade G.5.

By a decision of 2 December 2009 the Director-General followed a recommendation of the Joint Advisory Appeals Board and dismissed the grievance which the complainant had lodged against the decision to reject her application. That is the decision impugned before the Tribunal.

2. There is no reason to join the instant complaint with that which the complainant filed on 9 February 2010 and which also challenged an appointment made after a competition, for the two complaints do not relate to the same facts and do not raise the same issues of law.

3. The complainant challenges the lawfulness of the procedure. She submits in particular that by appointing a candidate who did not possess all the required qualifications, the Organization unduly altered the selection criteria after the competition had been opened. As there were no candidates who satisfied all the criteria, she argues that the Office had either to open a new competition and, if necessary, to amend the criteria related to applicants' qualifications, or to make an appointment by direct selection by the Director-General if the post in question had to be filled as a matter of urgency.

This criticism is not without merit.

4. In this case the Organization altered its own competition rules after having determined at the end of the procedure that none of the applicants had the requisite profile and that its "immediate needs" were such that the post had to be filled as soon as possible. It chose, from among the applicants who had taken part in the competition, the person whose skills seemed best suited to the interests which it had the duty to safeguard.

According to the case law, an international organisation which decides to hold a competition in order to fill a post cannot select a candidate who does not satisfy one of the required qualifications

specified in the vacancy notice. Such conduct, which is tantamount to modifying the criteria for appointment to the post during the selection process, incurs the Tribunal's censure on two counts. Firstly, it violates the principle of *patere legem quam ipse fecisti*, which forbids the Administration to ignore the rules it has itself defined. In this respect, a modification of the applicable criteria during the selection procedure more generally undermines the requirements of mutual trust and fairness which international organisations have a duty to observe in their relations with their staff. Secondly, the appointment body's alteration, after the procedure had begun, of the qualifications which were initially required in order to obtain the post, introduces a serious flaw into the selection process with respect to the principle of equal opportunity among candidates. Irrespective of the reasons for such action, it inevitably erodes the safeguards of objectivity and transparency which must be provided in order to comply with this essential principle, breach of which vitiates any appointment based on a competition. (See Judgments 1158, 1646, 2584 and 2712.)

In accordance with this case law, having realised that the competition had been fruitless, the ILO should either have opened a new competition on fresh bases, or made a direct selection according to the procedural rules applicable when a vacancy must be filled as a matter of urgency. It should not have deliberately limited its choice to the candidates who took part in the fruitless competition, or taken account of information gleaned as a result of that competition.

5. The fact that both Circular No. 334, Series 6, of 20 July 1985 and the vacancy notice mentioned the possibility of appointing a candidate at a grade below that of the advertised post did not entitle the Organization to modify the vacancy notice's criteria regarding required qualifications.

6. The complaint must therefore be allowed and the impugned decision set aside. The Organization shall ensure that the successful candidate is shielded from any injury that might result from the cancellation of an appointment which she accepted in good faith.

7. The complainant's claim for compensation for the moral injury caused by the unlawful nature of the decision set aside by this judgment is well founded. She will therefore be awarded compensation in the amount of 2,000 Swiss francs.

8. She will also be awarded 1,000 francs for costs.

DECISION

For the above reasons,

1. The Director-General's decision of 2 December 2009 is set aside.
2. The ILO shall ensure that the successful candidate is shielded from any injury that might result from the quashing of that decision.
3. It shall pay the complainant compensation in the amount of 2,000 Swiss francs for moral injury.
4. It shall also pay her 1,000 francs in costs.

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