

115th Session

Judgment No. 3219

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. S. against the International Labour Organization (ILO) on 22 February 2010 and the Organization's reply of 7 June 2010;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgment 3050, delivered on 6 July 2011, concerning the complainant's third complaint. Suffice it to recall that the complainant, who is an American national, joined the International Labour Office – the ILO's secretariat – in 1999 as an Internal Auditor at grade P.3. He was promoted to grade P.4 in June 2001 and was transferred to the position of Senior Personnel, Administrative and Finance Officer in the Regional Office for the Arab States in Beirut, Lebanon, on 1 February 2004. In early 2007 he requested to be transferred out of Beirut, explaining that he had had to work under extremely difficult circumstances during the 2006 war. In June 2007 he was injured in a terrorist attack in Beirut. On 1 August 2007 he was transferred to the Office of Internal Audit and Oversight (IAO) at headquarters in Geneva. He was assigned on a

temporary basis to the same position that he held prior to leaving for Beirut pending identification of a longer term assignment.

In November 2007 a vacancy announcement was published for the grade P.5 position of Principal Investigator/Chief of Investigation and Inspection Unit in the IAO. The complainant applied and was shortlisted together with two other candidates. A selection panel, composed of the Chief Internal Auditor acting as responsible chief, the Chief of the Budget and Finance Branch (Mr A. C.), the Chief Internal Auditor of the International Telecommunication Union (Mr S.) and a representative of the Human Resources Development Department (HRD) (Mr A.), was established. The responsible chief shortlisted two internal candidates – one of whom was the complainant – and one external candidate and designated an independent marker, Mr W., to mark their written tests, which they sat in early February 2008. The candidates were then interviewed by the selection panel on 20 February. All members of the panel agreed to “eliminate” the external candidate, but they disagreed as to which of the remaining candidates should be recommended for appointment. They therefore decided to conduct a second interview, but they could not reach a unanimous decision at that stage either and they therefore made a split recommendation to the Director-General.

In February 2009 the complainant was informed that he had not been selected for the position. The other internal candidate, Mr C., was appointed. The complainant subsequently requested an interview with the responsible chief in order to obtain feedback on the technical evaluation, as provided for in paragraph 13 of Annex I to the Staff Regulations of the International Labour Office. Following that interview, on 17 February he asked her to confirm in writing the panel’s position in accordance with paragraph 14 of Annex I. The responsible chief replied on 20 March that she and another panel member ranked him first for the written test, whereas the independent marker ranked Mr C. first. She added that the complainant had demonstrated a sound knowledge of ILO policies and procedures on fraud and misconduct during the first interview, but that some of his answers had been unclear; that he had obtained a total of 201 points

and that Mr C. had obtained 176; he possessed the requisite qualifications as he had a Masters of Business Administration and the Certified International Audit qualification, whereas Mr C. was only a Chartered Accountant with a Master of Arts degree in languages; and that he also had the requisite experience, particularly as he had worked in the field, which Mr C. had not. However, the Panel had considered that neither he nor Mr C. could perform at the P.5 level immediately as they lacked experience in conducting investigations and fraud examinations.

On 23 March 2009 the complainant submitted a grievance to the Joint Advisory Appeals Board (JAAB) alleging that the decision to appoint Mr C. was flawed. He asserted that, in light of the feedback he received from the responsible chief, he was the best qualified candidate and that Mr C. did not meet the minimum requirements for the post, as he had no experience in investigation and did not have the required educational degree. He therefore contended that the selection process was unfair and asked that it be cancelled. He also asked to be compensated for the damages suffered. In its reply of 28 May HRD submitted to the JAAB that the feedback provided by the responsible chief to the complainant did not provide a fair and objective picture of the selection process. It explained that the independent marker, who had marked the tests anonymously, had given 58 points to the complainant and 64 points to Mr C. The responsible chief had been informed of the results but, being unhappy with them, she had decided that the members of the panel could mark the tests themselves if they so wished. Thus, the tests had been marked again by the responsible chief and by one of the panel members, the other members having declined to do so. HRD added that the responsible chief had forgotten to inform the complainant that the panel unanimously found that Mr C. had performed better than him during the first interview, and that she had engaged in a “significant lobby” to have the members of the panel conduct a second interview, although this was not foreseen by the rules on recruitment. HRD asserted that Mr C. fulfilled the minimum requirements set out in the vacancy announcement and regretted that the complainant had been “misled” by the feedback he had received. On 16 June 2009 the complainant submitted additional

comments to the JAAB, pointing to the contradictions between the feedback he had received from the responsible chief and HRD's reply to the JAAB, which, in his view, confirmed that the competition process was flawed and unfair. He also alleged conflict of interest on the part of some members of the selection panel. In its final comments of 30 June 2009 the ILO emphasised that the appointment decision had been taken by the Director-General, and not by the panel or by HRD.

In its report of 25 September 2009 the JAAB recalled that an appointment was a discretionary decision taken by the Director-General and that, as such, it was subject to only limited review. It found no procedural flaw in the selection process, explaining that the panel had concluded that both the complainant and Mr C. fulfilled the minimum requirements laid down in the vacancy announcement. The JAAB considered that the only valid marks for the written test were those given by the independent marker, who had ranked Mr C. higher than the complainant, but it emphasised that the written test was only one part of the selection process and should not be viewed in isolation. It added that, after a careful consideration of the competition file, including correspondence between the panel members, it found that, while "a certain potential for conflict of interest undoubtedly existed", there was no evidence that it had influenced in any way the outcome of the competition. It therefore recommended that the Director-General reject the grievance.

By a letter of 25 November 2009 the complainant was informed of the Director-General's decision to endorse the JAAB's recommendation. That is the impugned decision.

B. The complainant contends that the competition procedure was unfair and flawed. He asserts that Mr C. did not meet the minimum requirements for the post as he did not have an advanced degree in auditing, accounting, finance, economics, management or law, as required in the vacancy announcement, nor did he have experience in investigation. In his view, the JAAB failed to provide any evidence to support its finding to the contrary. According to the complainant, the

considerable contradictions between the feedback he received from the responsible chief and HRD's position before the JAAB show that the competition procedure was flawed, regardless of who is to blame. Consequently, the Director-General was misled, as he took his appointment decision on the basis of a flawed competition procedure.

He also contends that the Director-General failed to take into account certain material facts. For instance, he disregarded the fact that, as from May 2008, he acted as Officer-in-Charge of the Investigation and Inspection Unit pending the outcome of the competition, and that in January 2009 he was granted a merit increment. The complainant further criticises the Director-General for giving no reason for rejecting his candidature, despite the fact that half of the members of the panel thought he was the best candidate. He adds that, had the Director-General appointed him, the issue of his "temporary status" would have been solved.

Referring to the office guideline on conflicts of interest of 17 June 2009, he alleges that Mr A. had a potential conflict of interest, given that the selected candidate, Mr C., served as a member of the panel that examined the candidatures for the competition which resulted in the appointment of Mr A. Moreover, Mr C. and Mr A. had previously worked together in HRD. According to the complainant, another member of the panel, Mr A. C., also had a potential conflict of interest insofar as he had worked with Mr C. as an external auditor in the National Audit Office of the United Kingdom (UK) prior to joining the ILO. The complainant adds that the "independent" marker was not really independent, given that he and Mr C. were both former external auditors from the UK National Audit Office and were friends. Nor was the marking of the written test really anonymous, as the "independent marker" had previously supervised two of the candidates, including the complainant, and would thus have been familiar with their writing styles.

The complainant also alleges breach of due process in the internal appeal proceedings insofar as the JAAB relied on e-mail exchanges between the responsible chief and other members of the selection panel without communicating them to him. He adds that HRD's

submissions to the JAAB were entirely based on the opinions of only two members of the panel and that the JAAB refused to hear the other members of the panel while acknowledging that there was considerable disagreement among them. He contests the JAAB's conclusion that the only "official" marks were those given by the independent marker, explaining that, contrary to the JAAB's assertion, there is no rule prohibiting the responsible chief from specifying the criteria for marking a written test, particularly in a case such as this, where the independent marker, after having marked the tests, recused himself from further participation in the competition process due to his close personal relationship with Mr C.

The complainant considers that he has been treated without due respect for his dignity and that he has suffered retaliation for having filed multiple grievances for denial of promotion opportunities and unfair treatment. He emphasises that he was misled into accepting an in-grade transfer to the field in 2004 and that he had to return to headquarters under emergency circumstances in 2007. Since then he has been assigned on a temporary basis to the IAO and has been denied all promotion opportunities, which has had a harmful and irreversible impact on his health.

He asks the Tribunal to cancel the disputed competition and to compensate him for the damages suffered.

C. In its reply the ILO recalls that, according to the Tribunal's case law, an appointment decision is discretionary and subject to only limited review. It asserts that the Director-General's decision was lawful and that the recruitment procedure was strictly followed. It explains that the independent marker ranked the external candidate first, Mr C. second and the complainant third, and that the second round of marking, in which the complainant was ranked first and Mr C. a close second, was "inconclusive". The members of the panel considered that Mr C. had given a better interview than the complainant during the first interview. The Organization indicates that the file concerning the competition procedure was communicated to the Staff Union Committee, which made no comment concerning any

procedural irregularity. The panel's report was then forwarded to the Director-General who, giving more weight to certain criteria, decided to appoint Mr C.

The ILO asserts that Mr C. did meet the minimum requirements set out in the vacancy announcement. As to the reasons for preferring Mr C. to the complainant, it recalls that, according to the case law, the reasons for choosing a candidate need not be given at the same time as announcing the results of the competition. The complainant was provided with reasons during the oral and written feedback given by the responsible chief. The Organization points out that he did not contact HRD to obtain further information, and it provides a copy of the e-mail of 6 February 2007 by which the Executive Director of the Office of the Director-General informed HRD of the decision to appoint Mr C., "taking due account of his duties prior to joining the ILO and the extensive and broad experience in operational issues that he ha[d] acquired over the years", as well as "the importance of having an internal candidate with a deep understanding of the Organization".

The defendant rejects the allegations of conflict of interest on the part of Mr A., Mr A. C. and the independent marker. It states that Mr A. and Mr C. did participate in a number of selection panels as part of their official duties, but that their relationship was purely professional. It asserts that the relationship between Mr A. C. and Mr C. was likewise purely professional and that, according to the comments they provided on the complainant's complaint, they had not worked together or socialised for at least ten years. The ILO adds that the complainant has failed to show that the aforementioned members of the panel expressed views that might indicate prejudice or predetermination in their decision, and asserts that there are no reasonable grounds to question their impartiality. Concerning the independent marker, the Organization acknowledges that he was a friend of Mr C., but it points out that he was also a friend of the complainant. It stresses that the responsible chief had initially asked the independent marker to sit on the panel, which he had refused to do on the grounds that he was a friend of both the complainant and

Mr C.; however, considering his technical expertise, the responsible chief decided to have him mark the written test. The ILO asserts that there are no grounds to doubt that the independent marker was impartial.

Lastly, the Organization denies any breach of due process in the internal appeal proceedings, indicating that the e-mails provided to the JAAB for *in camera* examination were confidential and concerned all the candidates. It submits that, according to the case law, the records of a selection panel are confidential and there is no general requirement of disclosure of these records. It adds that the JAAB has wide discretion with respect to the hearing of witnesses, and that the complainant has failed to provide conclusive reasons warranting such hearings; consequently, the JAAB's decision on this matter was justified.

CONSIDERATIONS

1. This is the complainant's first of a series of four complaints to the Tribunal. In Judgment 3050 the third complaint was dismissed as irreceivable for failure to exhaust the internal means of redress as required by Article VII, paragraph 1, of the Tribunal's Statute. The Organization and the complainant submit that the remaining complaints should be joined. As the relevant facts and applicable law are sufficiently distinct, they will not be joined.

2. The present complaint concerns a competition in which the complainant was one of three shortlisted candidates for the position of Principal Investigator/Chief of Investigation and Inspection Unit, a P.5 post.

3. He alleges that the competition was tainted by conflict of interest on the part of Mr W., the independent marker of an anonymous written test, and makes allegations of bias and lack of objectivity against two members of the selection panel. He claims that he was the more meritorious candidate and that the successful candidate did not have the required qualifications for the position.

4. Lastly, the complainant asserts that the internal appeal proceeding was flawed because the JAAB did not hear from the selection panel and certain documents examined by the JAAB were not disclosed to him.

5. Two issues are determinative of the outcome of this complaint. The first concerns the allegation of conflict of interest against Mr W. He was asked to sit on the selection panel but declined the request because of his long-time friendship with one of the three candidates taking the written test. He indicated that he was also friends with the complainant. However, at the request of the responsible chief, he agreed to be the independent marker of the anonymous written test administered as part of the selection process.

6. The complainant submits that the written test was not in fact anonymous. Mr W. knew the identity of the three individuals taking the test and had previously worked with the complainant and the successful candidate. Based on writing style, British versus American English language usage, and the types of examples used by the candidates in their essays, Mr W. would be able to identify easily the person whose paper was being marked. In his comments in reply to the complaint, Mr W. insisted that the marking was anonymous. The Organization maintains that Mr W., an acknowledged friend of the selected candidate and of the complainant, did the right thing by excluding himself from the selection panel.

7. The office guideline on conflicts of interest of 17 June 2009 explains that a “potential conflict of interest can arise where an official’s personal relationships [...] can compromise or be seen to compromise objectivity and impartiality in the discharge of official duties for the ILO”.

8. In Judgment 2520, under 8, the Tribunal observed:

“It is well settled that candidates are entitled to equal treatment in a competition for an advertised post (see Judgment 1990). It is an important aspect of the principle of equality that all candidates be considered objectively. Necessarily, a person’s candidacy should not be evaluated by a

person whose impartiality is open to question on reasonable grounds. The rule applies not only to those making or participating in the actual decision but also to those who have an advisory role, for they may exert influence on the ultimate decision (see Judgment 179).”

9. As the Organization points out, Mr W. properly excluded himself from the selection panel. This was a recognition on his part that he was in a position of conflict of interest. It cannot be said that the written test was a truly anonymous testing for the reasons advanced by the complainant, and given Mr W.’s own acknowledgement, his impartiality was reasonably open to question in the circumstances and he should have declined the request to mark the written test. Alone, this warrants the setting aside of the decision.

10. The second issue relates to the proceeding before the JAAB which is also problematic. In making its findings and recommendation, the JAAB considered the submissions of the parties. It did not hear evidence from the four members of the selection panel as the complainant requested. In light of the Organization’s response to and characterisation of the responsible chief’s feedback in the Minute of 20 March 2009 and its allegation of bias against the responsible chief, it was incumbent on the JAAB as a fact-finding body to make its own assessment of the veracity of the parties’ allegations and its own findings of fact instead of relying on the assertions of one party. In the circumstances, this could only be achieved by obtaining the evidence of the panel members and the independent marker. While it is true that an internal appeals body enjoys a broad discretion in the conduct of its proceedings, it cannot abdicate its statutorily mandated role.

11. As the selection process is tainted by conflict of interest and the JAAB proceeding is fundamentally flawed, the disputed appointment will be cancelled and the impugned decision will be set aside. The Organization must shield the successful candidate from any injury that might result from the cancellation of his appointment which he accepted in good faith.

12. In these circumstances, a consideration of the complainant's other pleas is unnecessary and his request for an oral hearing and the production of documents examined by the JAAB are rejected.

13. The complainant is entitled to material and moral damages for the flawed selection process and JAAB proceeding in the amount of 8,000 Swiss francs and costs in the amount of 750 francs.

DECISION

For the above reasons,

1. The decision of 25 November 2009 is set aside.
2. The selection process and resultant appointment are cancelled and the candidate who was appointed shall be shielded from any injury.
3. The ILO shall pay the complainant material and moral damages in the amount of 8,000 Swiss francs.
4. It shall also pay him costs in the amount of 750 francs.

In witness of this judgment, adopted on 10 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet