Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

117th Session **Judgment No. 3322**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Ms R. M. against the International Labour Organization (ILO) on 9 December 2011 and corrected on 10 January 2012, the ILO's reply of 10 April 2012, the complainant's rejoinder of 14 June and the ILO's surrejoinder of 13 September 2012;

Considering Article II, paragraph 1, 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 and the pleadings may be summed up as follows:

A. The complainant challenges the fact that she did not receive a personal promotion in the 2004-2005 consolidated exercise. Circular No. 334, Series 6, which governed the personal promotion system at the International Labour Office, the ILO's secretariat, was in force until 22 October 2009. According to this circular, the decision to grant such promotion was taken by the Director-General at the recommendation of a Personal Promotions Committee. The latter based its recommendations on an assessment of merit provided by the official's responsible chief. Paragraph 9 of the circular explained that a positive recommendation required a clear demonstration that "the

official ha[d] regularly performed at a level above the normal requirements of the job".

At the material time the complainant was performing the duties of a translator at grade P.3 in the German Section of the Official Relations and Documentation Branch. She retired on 31 October 2009. In a complaint which formed the subject of Judgment 2837, delivered on 8 July 2009, she impugned the Director-General's decision not to grant her personal promotion in the 2004-2005 consolidated exercise. She took the ILO to task for breaching paragraph 13 of Circular No. 334, Series 6, by failing to publish the list of officials to whom such a promotion had been granted. The Tribunal, which considered this plea to be well founded, held that the non-publication of the list in question "deprived the complainant of information that she might have found useful in filing a request for review" of the decision not to grant her personal promotion. It referred the case back to the ILO in order that it might publish the above-mentioned list, although in consideration 8 of its judgment it specifically stated that the complainant might, if she so wished, file a request for review "within a fixed period from the date of publication of the list in question" and that, if the said list had already been published, the prescribed period would "run from the date of notification of [the] judgment".

The Director of the Human Resources Development Department informed the complainant by a letter of 11 June 2010 that "the list of personal promotions for the 2004-2005 exercise and of all other staff movements between 2005 and 2008, ha[d] been produced and distributed within the Office in March 2008, in other words before the delivery of the judgment concerning [her] first complaint", and that this document – dated 14 March 2008 – could be consulted on the ILO's intranet site. The Director enclosed a copy of the list of officials who had received a personal promotion as shown in that document.

On 15 June 2010 the complainant filed an application for execution of Judgment 2837. She contended in particular that the list which she had been sent was of no use for the purpose of filing a request for review as provided for in consideration 8 of Judgment 2837, since it did not show whether the officials had received a personal promotion

by reason of merit or years of service; no comparison could therefore be made with her own case.

The Legal Adviser informed the complainant by a letter of 5 November 2010 that, as the list enclosed with the letter of 11 June 2010 was incomplete, a corrected version of the document dated 14 March 2008 had just been published on the ILO's intranet site; a copy of the new list was enclosed with the letter. The Legal Adviser told her that if she filed a request for review, her file would be compared with those of the four officials who had been promoted by reason of merit in the 2004-2005 exercise, including Ms K. K.-G. and Mr W.

The complainant filed a request for review on 18 December 2010, whereupon the Director of the Human Resources Development Department advised her in a letter dated 19 January 2011 that a joint panel responsible for personal promotions of officials in the Professional category (hereinafter the "Joint Panel") would re-examine her file – according to a procedure which she described in detail – and would compare it with those of the four officials mentioned in the Legal Adviser's letter. On 4 February 2011 the said Director informed the complainant that, as recommended by the majority of Joint Panel members, the Director-General had decided that there was no reason to alter the outcome of the 2004-2005 consolidated exercise.

On 7 March 2011 the complainant referred the matter to the Joint Advisory Appeals Board which, in its report of 2 September 2011, recommended that the grievance should be dismissed as unfounded. The complainant was informed by a letter of 15 September 2011 that the Director-General had followed the Board's recommendation. That is the impugned decision.

In Judgment 3066 concerning the application for execution of Judgment 2837, the Tribunal found that the ILO had not fully executed the latter judgment until 5 November 2010, in other words some five months after the said application had been filed, and it therefore decided to order the ILO to pay the complainant 2,000 Swiss francs in compensation for the moral injury which she had suffered.

B. The complainant considers that she has been treated in a manner incompatible with her terms and conditions of employment. She points out that, despite her excellent performance record, she was never promoted throughout her career at the ILO and she states that it is probable that the reason why she did not receive personal promotion lies in her immediate supervisor's prejudice against her. She draws attention to the fact that in February 2007 she had filed a grievance in which she had stated that she was being unfairly treated and mobbed and she submits that the assessment of her merits by her immediate supervisor was not objective and did not square with that which had appeared for many years in her performance appraisals. She fears that the Joint Panel was unfavourably influenced by this assessment. Referring to an e-mail from the Director of the Official Relations and Documentation Branch and to the minority opinion of a Joint Panel member, she also asserts that she was performing at a level above the normal requirements of the job, although the work in the German Section was organised in such a way as to prevent her from doing so.

In addition, the complainant explains that she has compared her "case" with that of Ms K. K.-G. and she submits that her own file should have been given preference. She points out that Mr W. never served in the field, whereas, according to her, the Staff Regulations made this a mandatory requirement for obtaining personal promotion. In her view, Circular No. 625, Series 6, of 21 January 2002, which had been "cited during the internal appeal proceedings in order to justify" this breach of the Staff Regulations, could not amend "one of the regulations". She also considers that the exception made in Mr W.'s case was unlawful, because the Joint Negotiating Committee had not been consulted on the matter.

Lastly, the complainant takes the Joint Advisory Appeals Board to task for having stated in its opinion that she did not fulfil one of the conditions laid down in Article 6.8.2, paragraph 2, of the Staff Regulations for obtaining personal promotion, namely that she had not consistently performed at a level above the normal requirements of the job. She contends that the Board ignored two documents proving that her claims were well founded.

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

C. The ILO recalls that, in accordance with the case law, decisions regarding personal promotion are taken at the discretion of the Director-General and may be set aside by the Tribunal only on certain grounds. In its view, the complainant has not demonstrated the existence of a flaw which would justify setting aside the impugned decision.

The ILO comments that the issues related to the complainant's allegations of mobbing have never been settled definitively and it contends that her immediate supervisor's assessment of her merits shows no prejudice against her, as it is "very largely" favourable. It explains that the Personal Promotions Committee had found that, although the complainant amply fulfilled the conditions for personal promotion, because of the quotas laid down in Circular No. 334, Series 6, it could recommend the promotion of only four officials in the 2004-2005 exercise. The complainant's file had not, however, been among the top four. The ILO also submits that there is no inconsistency between the assessment of the complainant's merits and her earlier performance appraisals.

The ILO denies that the complainant's file should have been given preference over that of Ms K. K.-G. It states that the condition laid down in Article 6.8.2, paragraph 4, of the Staff Regulations, i.e. that an official must have completed at least one posting outside Geneva in order to be eligible for personal promotion, had been suspended by Circular No. 625, Series 6, of 21 January 2002. It argues that, in its case law, the Tribunal has accepted that a staff regulation may be amended by a circular and it explains that the Joint Negotiating Committee was consulted about "this matter". In addition, relying on the above-mentioned paragraph 4, it asserts that the aforementioned condition was not mandatory. It comments that, if the complainant's argument were to be accepted, since she spent all her

career at the ILO's headquarters in Geneva, she would not have been eligible for personal promotion.

Lastly, the ILO submits that the fact that the Director-General approved the Board's recommendation does not mean that he agreed with all its comments. It explains that he did not base his decision on one particular comment by the Board, but on the fact that it had been "considered and confirmed several times" that the files of the four officials who obtained a personal promotion in the 2004-2005 consolidated exercise were better than that of the complainant.

D. In her rejoinder the complainant reiterates her arguments. She explains that she could not work in the field as there are no translator posts there. She contends that, despite that fact, some of her fellow translators have received personal promotion.

E. In its surrejoinder the ILO maintains its position. It states that the Director-General and the Staff Union have agreed to suspend Article 6.8.2, paragraph 4, of the Staff Regulations.

CONSIDERATIONS

1. The complainant was recruited by the ILO in 1987, at grade P.3, as a German translator.

2. She was informed by a letter of 29 September 2006 that the Director-General had decided not to grant her personal promotion in the 2004-2005 consolidated exercise organised pursuant to Article 6.8.2 of the Staff Regulations and Circular No. 334, Series 6, which was in force at that time.

In Judgment 2837 the Tribunal set aside the dismissal of a grievance filed against this decision, on the grounds that the list of officials who had received personal promotion at the end of that exercise had not been published in due and proper form, whereupon the complainant filed a request for review in accordance with the conditions specified in that judgment.

3. After a joint panel had reconsidered the complainant's case, on 4 February 2011 the Director of the Human Resources Development Department again refused to grant her personal promotion, on the grounds that the files of the four officials who were promoted in the context of the exercise in question were deemed to be better than hers.

She filed a grievance against this decision which, after it had been examined by the Joint Advisory Appeals Board, was dismissed by a decision of the Director-General of 15 September 2011. That is the decision impugned before the Tribunal in the instant case.

The complainant requests its setting aside, together with an award of damages in compensation for the injury which she considers she has suffered, and an award of costs.

4. As the Tribunal has already had occasion to find in Judgment 3063 concerning the complainant's complaint directed against the outcome of the 2006 exercise, by its very nature a decision regarding personal promotion lies at the discretion of the executive head of an international organisation and is therefore subject to only limited review. For this reason, it may be quashed only if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the evidence, or if there was abuse of authority (see, for example, Judgments 1815, under 3, 2668, under 11, or 3084, under 13).

5. Of the various pleas advanced by the complainant, the Tribunal considers one to be decisive, namely that Mr W., one of the four officials who received personal promotion within the quota applicable to the 2004-2005 exercise, could not lawfully be granted such advancement.

The aforementioned Article 6.8.2 of the Staff Regulations regarding "[p]romotion linked to the official's record of service" stipulates in paragraph 4 that "[a]s from 1 January 2000, for officials in the Professional category, completion of at least one posting outside Geneva shall normally be a condition of eligibility for any promotion

under this article, subject to exceptions which may be decided by the Director-General after consulting the Joint Negotiating Committee".

It has been ascertained that, as the complainant states, Mr W. did not satisfy the mobility condition required by this article in order to be eligible for personal promotion.

6. In response to this plea, the ILO says that the application of Article 6.8.2, paragraph 4, of the Staff Regulations was suspended by Circular No. 625, Series 6, issued by the Director of the Human Resources Development Department on 21 January 2002 in order to "give effect [to a] change in mobility policy decided by the Administration and the Staff Union".

However, the complainant raises what is plainly a well-founded objection to the lawfulness of this circular.

Barring the application of a provision of the Staff Regulations by means of a mere circular constitutes a gross breach of the hierarchy of rules governing the officials of the Organization, and the Director of the Human Resources Development Department clearly had no authority to adopt a measure with such a purpose.

7. The ILO submits that in Judgments 2833, 3032 and 3077 the Tribunal already "accepted the lawfulness of the amendment of a provision of the Staff Regulations by a circular". This astonishing contention is, however, based on a radical misinterpretation of the case law thus cited. In these judgments, the Tribunal had occasion to rule on the application of the provisions of Circular No. 652, Series 6, of 12 January 2005, which exempted internal candidates for posts to be filled by competition from the assessment referred to in Annex I to the Staff Regulations. The Tribunal considered that it was reasonable to construe the provisions of that annex as permitting a departure from the Assessment Centre's evaluation procedure as, by definition, these candidates' suitability for a post in the International Labour Office is already known. It cannot be inferred from this conclusion that the Tribunal accepts that a circular may lawfully disregard a provision of the Staff Regulations, let alone amend it, or suspend its application.

8. The ILO endeavours to argue that Article 6.8.2, paragraph 4, itself permits – or, as it states in its submissions, permitted "at the time when this provision was in force" – exceptions to the rule making personal promotion subject to the completion of a posting in the field. In this connection, it emphasises that, as is clearer from the English version of the paragraph in question, this condition is not meant to apply systematically in every case.

Making an "exception" to a rule cannot, however, consist in simply suspending its application, even for a theoretically temporary period, as Circular No. 625 did.

Moreover, the above-mentioned provisions of paragraph 4 stipulate that exceptions to their application must "be decided by the Director-General after consulting the Joint Negotiating Committee". Even assuming that the Director of the Human Resources Development Department adopted the aforementioned circular on behalf of the Director-General, the Organization offers no evidence to show that the requisite consultation was held before it was issued. The fact that this circular indicated that the application of the provisions in question had been suspended "[p]ending the outcome of further discussions within the Joint Negotiating Committee on a revised global mobility policy" does not signify, contrary to the ILO's submissions, that the Committee had been consulted on this measure before it was decided. The minutes of the Committee's meeting on 8 and 9 May 2001, which are included in the materials filed with the Tribunal and which show only that, at a later date, it would be asked to "hold a discussion on the interpretation of the field service clause in relation to personal promotions" and to "address the issue of the mobility policy", are not evidence that a consultation actually took place on the precise subject of the suspension of the application of paragraph 4. Lastly, while the ILO has annexed to its surrejoinder a copy of the initial draft of Circular No. 625, the agreement between "the Director-General and the Staff Union" regarding suspension, which is mentioned in this document, may not under any circumstances be equated with an opinion given by the Joint Negotiating Committee comprising the members and meeting in accordance with the terms set forth in the

Recognition and procedural agreement between the International Labour Office and the Staff Union of 27 March 2000.

9. Even if paragraph 4 were to be construed as permitting not only the exceptions laid down in the Staff Regulations in respect of categories of staff or duties but also individual exceptions decided on a case-by-case basis, the ILO would have no reason to contend, as it tries to do, that with regard to Mr W. a valid case had been made for the latter type of departure from the Staff Regulations. This would have been true only if the Director-General had been able to justify this exception on special grounds and, here again, had duly consulted the Joint Negotiating Committee. None of these conditions were met in the instant case, which is hardly surprising because the Organization mistakenly considered that the provisions in question no longer applied.

10. It follows from the foregoing that the impugned decision and that of 4 February 2011 are tainted by an error of law due to Mr W.'s personal promotion. They must therefore be set aside for this reason.

11. However, there is no reason for the Tribunal to order the granting of the personal promotion requested by the complainant or, in the instant case, the referral of the case back to the Organization for review.

Indeed, it is plain from the evidence in the file that the complainant, who spent her entire career at the headquarters of the International Labour Office, in Geneva, did not meet the mobility condition which she cites in order to contest Mr W.'s personal promotion any more than he did.

The complainant contends, without being contradicted by the ILO on this point, that there are no translator posts in the Office's services in the field, which meant that she could not have a job in her profession anywhere other than at headquarters. Nevertheless, in the absence of a decision by the Director-General making an exception to the aforementioned paragraph 4 for translators, in accordance with the

procedure laid down in that provision, this condition was no less applicable to the complainant. In addition, the fact that, as the complainant asserts, personal promotions had been granted to other translators who likewise did not satisfy the mobility condition would not entitle her to benefit from the same unlawful measure.

It follows that the complainant, who did not meet one of the conditions of eligibility for personal promotion, could not in any case form the subject of such a decision, hence all her other pleas are of no avail.

12. As the complainant could not have received the additional salary accompanying the new grade to which she aspired, the unlawfulness of the impugned decision caused her no material injury in the instant case.

13. On the other hand, the fact that personal promotion was granted in the context of the same exercise to another official who did not fulfil the mobility condition required by the provisions in force at that time, whereas the complainant was deprived of the possibility of such advancement on the same grounds, constitutes unequal treatment causing moral injury. In the circumstances of this case, the Tribunal considers that this injury will be fairly compensated by the payment to her of 10,000 Swiss francs by the Organization.

14. As the complainant succeeds in part, she is entitled to costs, which the Tribunal sets at 1,000 francs.

DECISION

For the above reasons,

1. The decision of the Director-General of the International Labour Office of 15 September 2011 and that of 4 February 2011 are set aside.

2. The Organization shall pay the complainant moral damages in the amount of 10,000 Swiss francs.

3. It shall also pay her 1,000 francs in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN

DRAŽEN PETROVIĆ