119th Session **Judgment No. 3450**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs L. N. against the International Labour Organization (ILO) on 17 November 2011, the ILO's reply of 21 February 2012, the complainant's rejoinder of 16 April and the ILO's surrejoinder of 16 July 2012;

Considering Articles II, paragraph 1, and VII 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. Facts relevant to this case can be found in Judgment 3250, delivered on 5 February 2014, concerning the complainant's first complaint. Suffice it to recall that the complainant joined the International Labour Office, the secretariat of the ILO, in 1990. She worked under a series of contracts of varying lengths until May 1995. After a break in service, as from June 1996 she was continually employed at grade P.4 and in March 2004 she was given a contract without limit of time with effect from 1 January 2003. Following the abolition of her post in January 2004 she was employed in various capacities. At the time of filing of her third complaint she held the

position of Senior English Editor at grade P.4 in the Official Documentation Branch.

On 14 February 2011 the complainant submitted a grievance to the Human Resources Development Department (HRD) in which she asserted that the assignment without competition of Ms N. (whose post had been abolished as a consequence of restructuring) to the position of Senior Partnerships Officer in the Bureau of Library and Information Services (INFORM) in December 2010 constituted a violation of Article 4.2(f) of the Staff Regulations. On 16 May she filed a grievance with the Joint Advisory Appeals Board (JAAB), challenging what she deemed to be the implied rejection by HRD of her grievance of 14 February. Her grievance with the JAAB was registered as Case No. 215. Also on 16 May, she received HRD's response to her grievance, which was dated 13 May 2011.

On 18 May the Administration returned the file concerning Case No. 215 to the JAAB Secretariat on the basis that it was irreceivable because the complainant had filed her grievance with the JAAB prior to the expiration of the statutory deadline for a response from HRD regarding her grievance of 14 February. On 15 June the complainant filed another grievance with the JAAB, registered by the JAAB as Case No. 217, concerning the same issue and appended HRD's response dated 13 May. The complainant was verbally invited by the JAAB Secretariat to withdraw Case No. 215, but she did not do so.

In its report of 27 July 2011 the JAAB unanimously recommended that Case No. 215 be dismissed as manifestly irreceivable and that Case No. 217 be dismissed as devoid of merit. With respect to the operation of Article 4.2(f), the JAAB noted that guidance could be found in Judgment 2755, but it decided to adopt a different interpretation of that provision than that which had been set out by the Tribunal in the aforementioned judgment. It considered that Article 4.2(f) should not be interpreted as excluding the possibility of a transfer without competition, and that in this case such a measure had been justified.

By a letter of 31 August 2011 the complainant was informed that, in accordance with the JAAB's recommendations, the Director-General had decided to dismiss her first grievance (Case No. 215) as manifestly

irreceivable and to reject her second grievance (Case No. 217) as devoid of merit. That is the impugned decision.

B. The complainant submits that the assignment of Ms N. to the position of Senior Partnerships Officer without a competition is a violation of Article 4.2(f) of the Staff Regulations. She asserts that, given Ms N.'s previous work experience, Ms N.'s qualifications for the position should have been compared with her own by way of a competitive recruitment process. Referring to the Tribunal's case law, the complainant argues that the ILO's failure to follow such a process gives rise to a cause of action. Furthermore, although she and Ms N. were similarly situated in that they were both established officials whose posts were abolished, the ILO failed to afford her equal treatment and the same duty of care as compared to Ms N.

The complainant points out that the JAAB's recommendation contradicts the finding of the Tribunal in Judgment 2755 with respect to the operation of Article 4.2(f) of the Staff Regulations.

She asks the Tribunal to set aside the impugned decision and she claims 2,000 Swiss francs in costs.

C. In its reply, as a preliminary matter, the ILO asks the Tribunal to join the complainant's first and third complaints on the basis that they are linked.

The ILO contends that HRD responded to the complainant's grievance within the statutory deadline. It therefore asks the Tribunal to dismiss as irreceivable the complainant's claim to set aside the Director-General's decision with respect to Case No. 215 before the JAAB. In addition, the ILO submits that the complaint should be dismissed for lack of cause of action, as the complainant does not have the necessary competencies or experience for the contested post and she suffered no prejudice by virtue of the fact that the post was not filled by way of a competition.

On the merits, referring to the case law, the ILO states that an international organisation has the power to restructure some or all of its departments or units, including by the abolition of posts, the

creation of new posts, and redeployment of staff, and that decisions on such matters, including the decision to fill a post without holding a competition, are discretionary and subject to only limited review. In addition, an organisation may not terminate the appointment of a staff member whose post has been abolished, at least if that staff member holds an appointment of indeterminate duration, without first taking suitable steps to find the staff member alternative employment. By transferring Ms N. to the contested post following the abolition of her post, the ILO complied with its obligation to find her suitable employment in order to avoid terminating her contract. Also, the ILO abided by an agreement with the Staff Union Committee that the field structure review that resulted in the abolishment of Ms N.'s position would have a "zero or close to zero" impact on employment and that any possible redundancy would be redeployed without competition following consultation with the officials concerned.

The ILO submits that the decision to transfer Ms N. was taken in accordance with the applicable rules and procedures. The use of the term "normal" in Article 4.2(f) acknowledges that there are cases where a competition may not be held for legitimate reasons, and the appointment of an official whose post has been abolished is such a case. In order to fully comply with its duty of care towards officials whose posts have been abolished, the ILO must be able to appoint them directly in appropriate positions without obliging them to follow competition procedures where they may be unsuccessful. The ILO considers that the impugned decision is not inconsistent with Judgment 2755. In addition, the ILO's actions were in line with Article 11.5(a) of the Staff Regulations.

The ILO points out that Ms N. is an established official who holds grade P.5. In order to maintain her employment with the ILO she agreed to accept a position at grade P.4 (while maintaining her entitlements and benefits at the P.5 level) pending the identification of an assignment more suited to her qualifications. Transfer to a lower grade is not one of the methods set out under Article 4.2(f) of the Staff Regulations and, in the ILO's view, requiring an established official to compete for

a position at a lower level in circumstances such as those of the present case would not respect the official's dignity.

Lastly, the ILO asserts that it has not violated the principle of equal treatment. It points to the findings of the JAAB in this respect and submits that the complainant was not in an identical situation to Ms N. following the abolition of her post.

D. In her rejoinder the complainant presses her pleas. She opposes the joinder of her first and third complaints. She states that she submitted a second grievance to the JAAB for procedural reasons and points out that she has filed only one complaint with the Tribunal regarding this matter. Furthermore, contrary to the ILO's position, she does have a cause of action. She asserts that she is challenging the fact that since 2004 she has been without a "real" assignment while another official, in clear violation of the rules, was assigned without competition to a post corresponding to her own qualifications, experience and grade.

E. In its surrejoinder the ILO maintains its position in full.

CONSIDERATIONS

1. The complainant joined the ILO in 1990 and was offered a contract without limit of time with effect from 1 January 2003. The complainant's post was abolished with effect from 1 January 2004. The background details of the complainant's employment history can be found in Judgment 3250.

2. The complainant filed the present complaint (her third), impugning the Director-General's decision dated 31 August 2011 to the extent that it endorsed the JAAB's recommendation to reject as devoid of merit her internal appeal (Case No. 217) contesting the assignment without competition of Ms N. to the P.4 position of Senior Partnerships Officer in INFORM in December 2010. In that same decision the Director-General also accepted the JAAB's recommendation

to reject the complainant's internal appeal (Case No. 215) as "manifestly irreceivable" as it was submitted prematurely. The complainant does not impugn that aspect of the decision.

3. The ILO requests that the complainant's first and third complaints be joined, arguing that they are linked and overlap in substance. The complainant rejects the suggestion of joinder. As the Tribunal has already ruled on the complainant's first complaint in Judgment 3250, delivered on 5 February 2014, the ILO's request for joinder has become moot.

4. The present complaint hinges on the interpretation of Article 4.2(f) of the Staff Regulations which provides:

> "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:
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> – 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."

5. The ILO notes that the official who was appointed without competition (Ms N.) was already at the P.5 level and submits that "requiring an established official to apply through a competition for a position at a lower level in circumstances such as in the instant case would not respect the official's dignity; therefore, transfer to a lower level should not require employing competition in all circumstances under the Staff Regulations".

6. In its report the JAAB adopted an interpretation of Article 4.2(f) different from that which the Tribunal set out in Judgment 2755, stating: "In the view of the Board, [the Tribunal's interpretation] is not the only possible interpretation of the provision, and nor is it impelled by the view that the final sentence of the paragraph could be considered to set out an exhaustive list of circumstances in which 'promotion or appointment' may take place without competition". The JAAB was of the opinion that the final sentence of Article 4.2(f) was silent with regard to in-grade transfers and that "[t]aken alone, it neither permits nor forbids in-grade transfers without competition, although it clearly does limit the possibility for promotion or appointment without competition to the cases that are listed, and subject to the condition that the Staff Union be advised". The JAAB further noted that "there may be good reasons why it would be appropriate and necessary to reserve to the Office the ability to fill a vacancy by an in-grade transfer", and that, while this should not happen frequently, there are cases where it should be allowed, as in the present case regarding the appointment of Ms N. by way of in-grade transfer.

7. Regarding the ILO's assertion that the complainant has no cause of action, the Tribunal notes that the JAAB's recommendation was based on an analysis of the merits of the case. The JAAB made no mention of a lack of cause of action and the impugned decision endorsed the JAAB's recommendation. Moreover, "[a]s the Tribunal has consistently held, any staff member who is eligible to occupy a post has cause of action in seeking the setting aside of the decision to give that post to another person, irrespective of his or her real chances of successful appointment to the post in question" (see Judgment 3206, under 11, and the judgments cited therein).

8. The Tribunal does not agree with the interpretation of Article 4.2(f) presented by the JAAB in this case (an interpretation which the JAAB had already adopted in a previous case which lead to Judgment 2755), as it goes against the wording of the article in question. In Judgment 2755 the Tribunal stated inter alia:

> "7. […] The point at issue is therefore whether, in the present case, the applicable provisions permitted the appointment of Mrs P. by an in-grade transfer without a competition.
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> 8. The provisions of Article 4.2(f) of the Staff Regulations specify that competition shall be the normal method of filling vacancies between grades G.1 and P.5, and that the Director-General may, in certain specific cases which are exhaustively listed, fill such vacancies without holding a competition by appointment or by promotion, but not by transfer in the same grade. This interpretation is borne out by the fact that the paragraph in question makes no mention of transfer in the same grade where it offers the possibility of filling vacancies between grades G.1 and P.5 inclusively without a competition, since this possibility is provided for only in the event of a promotion or appointment. Moreover, that same paragraph stipulates that the Staff Union representatives must be informed only of promotions and appointments made without a competition, but not of transfers in the same grade, which must therefore be preceded by a competition of which the staff members have been informed.
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> 9. In view of the current wording of Article 4.2(f) of the Staff Regulations, which cannot be interpreted in a manner that is contrary to its letter, the Tribunal can only conclude from the foregoing that the Director-General breached this provision by transferring Mrs P. in the same grade, by direct selection, without a competition.
>
> […]"

The Tribunal is of the opinion that the JAAB's reasoning for allowing in-grade transfers without competition is not sound for two reasons. Both reasons also infected the decision of the Director-General in adopting the recommendation of the JAAB. The first reason concerns the JAAB's approach to the reasoning and conclusions of the Tribunal in Judgment 2755 and the second is that the JAAB's reasoning is wrong.

In relation to Judgment 2755 the JAAB said:

> "Whether or not the decision in question may be set aside turns on the proper interpretation of Article 4.2 f) of the Staff Regulations. The Board notes that this provision has been considered in previous cases, both before the JAAB and before the [Tribunal]. The most recent guidance is to be found in [...] Judgment 2755 [...]. After careful and substantial consideration, the Board in this case has resolved, with the greatest of respect to the [Tribunal] and to the judges who decided [the case leading to Judgment 2755], to adopt a different interpretation than that which commended itself to the [Tribunal]. It is therefore incumbent on the Board in this case to explain its reasoning for doing so."

The Tribunal made a judicial determination of what the provision meant and its decision was not mere guidance. The ILO has submitted to the jurisdiction of the Tribunal as the final and judicial arbiter of employee grievances. The only reservation in the Tribunal's Statute concerns the Tribunal's jurisdiction which is reviewable by the International Court of Justice. This submission to jurisdiction binds the organisation, its officials and internal organs.

Judgment 2220 discusses, albeit briefly, the rule of *stare decisis*. It is to the effect that as a matter of judicial practice or of comity, the Tribunal will follow its own precedents and that "the latter have authority even as against persons and organisations who are not party thereto" unless it is persuaded such precedents were wrong in law or in fact or that for any other compelling reason they should not be applied. Another element of the *stare decisis* rule entrenched in many legal systems is that courts lower in the judicial hierarchy are obliged to follow legal principles (including the interpretation of documents) established by appellate courts higher in the judicial hierarchy. This principle does not exist to create the appearance of deference to more senior members of the judiciary. Rather it serves a much more fundamental and important purpose of creating consistency and predictability in a legal system. Even though a judge or judges lower in the judicial hierarchy may believe that a principle established or an interpretation given by judges in an appellate court higher in the judicial hierarchy is wrong or perhaps even patently wrong, they are obliged to, and do, apply the principle or interpretation. Parties should be able to make informed decisions about their legal rights and about whether they should commence or defend legal proceedings. Thus it is important for the law to be stable, predictable and certain.

It is for this reason that the Tribunal has adopted the rule of *stare decisis* in relation to its own decision making. Internal appeal organs and senior decision-making officials are, of course, neither courts nor judges. However, it is for the same reasons discussed above that internal organs should follow and apply principles established by the Tribunal and adopt and apply interpretations by the Tribunal of normative legal documents applicable to the staff of the organisation. That is necessary

in order to create a stable, predictable and certain legal system concerning the rights and obligations of both staff and organisations. If organisations and their internal organs feel unconstrained by decisions of the Tribunal, the result is likely to be legal instability and uncertainty. Also, as a practical matter, if a different position is adopted by the organisation or its internal organs and the Tribunal reverses the decision embodying that different approach, significant costs, both financial and in resources, are likely to have been expended in defending that different approach for no apparent good purpose. Organisations and their internal organs should follow the interpretation of normative legal documents decided by the Tribunal.

Both the JAAB and the Director-General have again tried to force an interpretation of Article 4.2(f) that allows for in-grade transfers which is simply not supported by the Article's wording. The proper interpretation of Article 4.2(f) has already been determined by the Tribunal in Judgment 2755. There is no warrant for the Tribunal to reconsider its interpretation. If the ILO finds that there are occasions in which in-grade transfers without competition are required, then Article 4.2(f) must be amended to reflect that need.

9. The ILO submits that Article 11.5 of the Staff Regulations permits it to appoint without competition, through a particular process, a staff member whose post has been abolished. The Tribunal observes that this point was not addressed by the JAAB, which considered specifically that the appointment without competition was made in conformity with Article 4.2(f); nor has the ILO provided evidence that it followed the process set out in Article 11.5. Considering this, the Tribunal finds the reference to Article 11.5 to be immaterial to the present case.

10. The Tribunal notes that Ms N. was at the P.5 level and was transferred without competition to a P.4 position, retaining her P.5 salary and benefits. Therefore, the Tribunal considers her appointment to be an in-grade transfer, though it could appear to some to have been a demotion or downgrade. It is useful to note that, in principle, it would not appear to be in the ILO's best interest, from a financial point of

view, to fill positions of lower grades with staff members from higher grades, nor would it demonstrate a particular respect for a staff member's dignity to assign her or him to a position at a lower grade.

11. The complainant raises the issue of violation of the principle of equality of treatment, arguing that she was treated differently than Ms N. following the abolition of her post. As the Tribunal finds Ms N.'s appointment to have been unlawful, there can be no violation of the principle of equality of treatment, as there cannot be equality in unlawfulness.

12. Considering the above, the Tribunal finds that the complaint is well founded. The complainant's right to be considered in a fair and open competition was violated by the unlawful in-grade transfer of Ms N. to the position of Senior Partnerships Officer in INFORM in December 2010, which was contrary to the procedure outlined in Article 4.2(f) of the Staff Regulations. The decision of the Director-General, dated 31 August 2011, rejecting the complainant's second grievance (Case No. 217) as devoid of merit, as well as the previous decision appointing Ms N. to the above-mentioned position without competition must be set aside. The ILO must ensure that Ms N. is shielded from any injury which might result from the cancellation of her appointment, which she accepted in good faith. The effect on the complainant of this unlawful decision merits an award of damages, as requested in her internal appeal (see Judgment 2457, under 4), as well as an award of costs. The Tribunal finds it appropriate to award 9,000 Swiss francs for damages and 1,000 Swiss francs for costs.

DECISION

For the above reasons,

1. The impugned decision of 31 August 2011 and the contested appointment of Ms N. are set aside in accordance with consideration 12, above.

2. The ILO shall pay the complainant damages in the amount of 9,000 Swiss francs.

3. It shall pay her costs in the amount of 1,000 Swiss francs.

4. The ILO shall ensure that Ms N. is shielded from any injury which might result from the cancellation of her appointment.

5. All other claims are dismissed.

In witness of this judgment, adopted on 5 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ