Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

C.

v.

ITU

121st Session **Judgment No. 3590**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms E. C. against the International Telecommunication Union (ITU) on 10 July 2013 and corrected on 19 August 2013, the ITU's reply of 6 January 2014, the complainant's rejoinder of 13 February and the ITU's surrejoinder of 26 May 2014;

Considering Article II, paragraph 5, 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 may be summed up as follows:

The complainant disputes the validity of the competition procedure in which she participated and the lawfulness of the appointment announced at its end.

From 21 March 2011 to 31 August 2012 the complainant, whose grade was G.6, was detached to the Telecommunication Development Bureau to work as administrative assistant for the Bureau's Director and received a special post allowance at grade G.7. When that post was advertised, she submitted an application and was preselected, and then shortlisted by the Appointment and Promotion Board. She was invited to an evaluation interview on 24 April 2012.

By an e-mail of 13 June 2012, the complainant was informed that her application had been turned down. After having asked the Chief of the Human Resources Management Department to explain why she had been rejected, on 29 June she submitted a request for review of this decision, the competition procedure and the resulting appointment to the Secretary-General. On 3 August her request was dismissed. At that point she was told that the selected candidate's profile had been considered better than hers, particularly in light of the evaluation interview.

On 5 November 2012 the complainant filed an appeal with the Appeal Board requesting it to examine the validity of the competition procedure, to decide whether "the applicants' merits [had been] assessed correctly" and to verify whether the application submitted by the selected candidate complied with the formal requirements and the qualifications specified by the vacancy notice. She asked the Appeal Board to recommend that the decision of 3 August be withdrawn and that she be compensated for the injury she considered she had suffered.

In his response dated 3 December, the Secretary-General invited the Appeal Board to dismiss the complainant's claims as unfounded. Regarding the merits, he explained the grounds on which the successful applicant had appeared to possess qualities that made her the appropriate candidate for the post. Lastly, he told the Appeal Board that the full competition file was available if the Board wished to consult it.

In an e-mail of 7 December 2012, the complainant asserted that the Administration was clearly trying to conceal from her the manner in which the competition procedure had taken place. She requested the Appeal Board to allow her to file a rejoinder in order to address the arguments put by the Secretary-General, and she asked for non-confidential information on the procedure to be disclosed to her. By a memorandum of 10 December 2012, the Appeal Board, without answering the aforementioned e-mail, advised both parties that the time limit for delivery of its report had been extended owing to the end-of-year holiday period.

On 13 February 2013, having consulted the competition file and decided not to hold oral proceedings, the Appeal Board delivered its report. It held unanimously that the appeal was receivable. On the merits, it underscored that it could exercise only a limited power of review over an appointment and stated that, inasmuch as the seven shortlisted candidates had been treated equally, the supervisor enjoyed wide discretion to choose the applicant whom he judged the most suitable for the vacancy advertised. The Appeal Board hence recommended that the appeal be dismissed. By a memorandum of 12 April 2013, which constitutes the impugned decision, the complainant was informed that the Secretary-General had decided to follow this recommendation.

On 10 July 2013 the complainant referred the matter to the Tribunal, asking it to quash the impugned decision and the decisions resulting from the competition, to order the ITU to restart the competition from the point at which the flaw occurred, to compensate her for the injury she considers she has suffered, which she assesses in the amount of 30,000 euros and, lastly, to award her the sum of 6,000 euros for procedural costs incurred before the Appeal Board and the Tribunal.

The ITU asks the Tribunal to dismiss the complaint as entirely unfounded. It states that it has no obligation to reimburse the costs incurred by an official during internal appeal proceedings. At the Tribunal's request, it forwarded a copy of the complaint to the candidate appointed as a result of the disputed competition procedure and invited her to share any observations, but she did not wish to comment.

CONSIDERATIONS

1. First, the complainant criticises the internal appeal proceedings. She contends that she was denied the right to an effective appeal as the Appeal Board unduly limited its mandate and deprived her of the right to submit a rejoinder. She also alleges that the adversarial principle was breached and that the Appeal Board was improperly constituted.

2. The defendant organisation states that its rules governing internal appeal proceedings do not contain any provision defining the scope of the Appeal Board's review of an appeal against the outcome of a competition.

The Appeal Board therefore defined the limits of its power of review independently. Contrary to what happened in the cases cited by the complainant (see Judgment 3125, under 11 and 12, which itself refers to Judgment 3077, under 3), when limiting its mandate the Board did not make any reference to the case law by which this Tribunal, an independent administrative tribunal, restricts its own review of discretionary decisions (see Judgments 2040, under 5, and 3209, under 11).

Noting that the candidates had been treated equally, the Appeal Board recognised that the appointing authority enjoyed wide discretion to appoint the person whom it considered to be the most qualified for the post advertised from a shortlist of candidates, all of whom met the requirements specified by the vacancy notice.

This self-restraint on the part of the appeal body is completely justified to the extent that, when conducted correctly, a competition and selection procedure calls for a complex assessment of multiple criteria that relate as much to the candidates' personalities and qualities as to the organisation's particular interests. Without compromising the objective assessment of these criteria, the appeals body cannot be vested in every circumstance with the same power of review that must be granted to the bodies responsible for selecting candidates.

This does not relieve the appeal body of its duty to examine the competition file closely and to provide plausible reasons for its recommendation within the limits of its power of review. It is apparent from all of the circumstances that this is what in fact happened in this case and that the complainant's criticism is groundless in this respect.

3. The impugned decision draws substantively on the reply given to the appeal on 3 December 2012 by the Secretary-General. This reply sets out for the first time the reasons why the complainant's application was not ultimately successful in a manner that is clear and

precise enough for the impugned decision, which refers to this reply, to be considered sufficiently reasoned within the meaning of the case law. The complainant requested permission to file a rejoinder responding to this document and for this purpose she asked to be provided with any non-confidential information on the competition procedure. The Appeal Board did not deal with this request and merely answered that the time limit for delivering its report had been extended for reasons of "*force majeure*", i.e. the end-of-year holiday period.

However, regardless of whether the right to file a rejoinder is provided for in the rules governing appeal proceedings or not, this right must be granted to the official concerned whenever the Administration submits decisive arguments to the advisory body of which the appellant could not be aware (see Judgments 3223, under 6, and 3438, under 9). Such was the case here. The implied refusal to permit the complainant to comment on the reply of 3 December 2012 is all the more unacceptable as it could not be justified for reasons of speed, given that the Appeal Board had just announced that the delivery of its report was postponed.

By not allowing the complainant to make a fully informed rejoinder as she requested, the Appeal Board therefore infringed the right to be heard that is inherent in the adversarial principle. The complaint must be allowed on this ground, as this procedural flaw cannot be remedied during the current proceedings, since the power of review exercised by the Tribunal over the discretionary matters raised by this case is even more limited than that of the Appeal Board.

4. The complainant alleges that the Appeal Board was unlawfully composed since one of its members, namely, the member appointed as staff representative, was absent from one of the meetings organised by the Board and then replaced.

This criticism is not relevant.

It is certainly regrettable that even one working session had to be held in the absence of this member, who did not excuse herself until the last moment. However, no decision or measure was adopted at that meeting. As soon as it became clear that the absent member would be

unavailable on a permanent basis, a new member, who likewise represented the staff, was appointed to replace her. The new member was fully informed of the previous proceedings, and all the documents gathered by the Appeal Board were made available to him; there is no evidence to suggest that the new member did not have the time or information necessary for him to arrive at a free and informed view on a par with the other members of the Appeal Board. This is hence not the same situation as described in Judgment 3272, under 13, cited by the complainant.

Although in principle the composition of an advisory body should remain unchanged from the beginning to the end of review proceedings, it is clear that, faced with the unusual circumstance of a member's absence at the end of the proceedings, the Appeal Board ensured this principle was respected by acting correctly and in a manner that allowed it to issue an opinion within a reasonable period and in a composition that complied with the applicable rules.

5. Second, the complainant criticises the way in which the competition procedure was conducted.

The procedure for selecting candidates for a post on a competitive basis in accordance with, in particular, Regulation 4.8(d) of ITU's Staff Regulations and Staff Rules (Staff Regulations) is governed by Staff Regulation 4.9.

(a) This provision relevantly provides:

> "(a) The Secretary-General shall establish an Appointment and Promotion Board to advise him (and, if appropriate, the Director of the Bureau concerned) in all cases where a vacancy is advertised.
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> (b) The Appointment and Promotion Board shall comprise a representative of the General Secretariat and of each Bureau of the Union and, for posts in the General Service (G.1 to G.7) and Professional (P.1 to P.5) categories, two staff representatives or their alternates designated by the Secretary-General from a list of names submitted by the Staff Council. […]
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> […]
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> (e) The Appointment and Promotion Board shall establish its own Rules of Procedure. Its proceedings shall, in principle, be secret. Its Rules of Procedure

may, however, authorize the transmission of certain information to candidates. […]"

(b) The Rules of Procedure adopted pursuant to Staff Regulation 4.9(e) provide that, for all vacancies advertised in the General Service and Professional categories, the Appointment and Promotion Board is to be advised by a preselection panel, which is to present it with a list of candidates whom it considers eligible. This panel makes its selection by examining the vacancy notice and all the relevant documents available concerning the candidates and then eliminating the applicants whom it does not consider qualified owing to their lack of the basic qualifications set out primarily by the vacancy notice (paragraphs 4 to 7 of the Rules of Procedure). The detailed provisions on the composition of the preselection panel are set out in paragraph 5 of the Rules of Procedure.

The procedure of the Appointment and Promotion Board is set out in paragraphs 10 *et seq.* of the Rules of Procedure. Paragraphs 16 to 20 read as follows:

"16. The Board shall establish the list of candidates which it considers to be the best qualified for the post advertised, accompanied, if appropriate, by special conditions concerning the listed candidates. This list (short list) shall contain not more than five names, unless the Board decides otherwise.

17. In establishing this short list, the Board shall give primary consideration to the qualifications of the candidates in relation to the job requirements set out in the vacancy notice. However, it may decide that some of the required degrees and diplomas may be replaced by special experience, over and above the minimum required in the field of work of the advertised post.

18. In principle, the Board shall adopt its recommendations by consensus. Failing a consensus, the Chairman shall make a final decision on the basis of the prevailing view and the Secretary shall send the Secretary-General a note to this effect.

19. If no candidate is selected, the Board may make a recommendation on the action to be taken concerning the vacancy notice.

20. The proceedings of the Board shall, in principle, be secret; the Chief of the Personnel Department may, however, inform a candidate who so requests whether his or her name is included in the short list. If it is not, the Chief of the Personnel Department may, on the basis of the written opinion of the Board, indicate those qualifications referred to in the vacancy notice

> which the candidate lacks, or the reasons why his or her name is not included on the short list."

6. The complainant submits that the competition procedure was not transparent since the reasons why the Appointment and Promotion Board chose to raise the number of shortlisted candidates to seven and to designate those candidates were not provided; in addition, although she initially stated that she did not know the names of the people sitting on the preselection panel and the Appointment and Promotion Board, she alleges that the composition of these bodies was unlawful. Lastly, she claims that the procedure set out in paragraph 20 of the Rules of Procedure was not followed.

(a) The Rules of Procedure establish in principle that five applicants are to be shortlisted. However, paragraph 16 of these Rules allows the Appointment and Promotion Board to increase that number. This provision does not stipulate any obligation to justify this derogation. It is plain this was a purely expedient decision. Moreover, in view of all of the circumstances of the case, it is not clear how raising the number of shortlisted candidates to seven could have been prejudicial to the complainant's rights and expectations.

(b) It may be concluded from the explanations provided by the defendant organisation in its reply and surrejoinder and from the evidence that the names of the members and alternates comprising the Appointment and Promotion Board are available on the organisation's website and that the candidates' right to request explanations and to submit observations was not in the least restricted. The same applied to the panel that interviewed the complainant, who has not established that she ever raised any objection regarding its composition.

(c) Paragraph 20 of the Rules of Procedure provides that the Appointment and Promotion Committee is to provide a written opinion on the basis of which the Chief of the Personnel Department can inform the candidates excluded from the short list of the reasons for this decision. It appears that no such opinion was produced. However, the complainant does not allege that she was deprived, during interviews that followed the preselection procedure, of the right to

receive any information on the qualifications that led to her inclusion on the short list. Subsequently, during the internal appeal proceedings, she received adequate information on the reasons why she had been placed on the short list and then eliminated in favour of another shortlisted candidate. In these circumstances, none of her criticisms in this regard are relevant and the procedure followed in this respect was lawful.

7. The complainant next pleads that the Appointment and Promotion Board did not provide the Secretary-General with the comparative data that formed the basis for its recommendations, which suggests that it had not conducted a meaningful comparative evaluation of the applications. She submits that this approach was all the more open to criticism since the Board merely rubber stamped the supervisor's opinion and presented it in tabular form. In her view, the fact that the Appointment and Promotion Board was not involved in the evaluation interviews that took place after the short list was drawn up and was not informed of the outcomes of these interviews rendered consultation of this body futile. Were it to be inferred from the Rules of Procedure that the Board's role is confined to drawing up a short list, it would have to be concluded that these Rules are not compatible with Staff Regulation 4.9.

This plea is founded on the suspicion that the selection bodies, contrary to the principle of good faith, had decided at the outset not to appoint the complainant to the advertised vacancy. However, there is no evidence to support that suspicion. On the contrary, it appears that a meaningful comparative assessment was conducted and that the procedure followed in this case enabled an appointment to be made in compliance with the principles underlying Staff Regulation 4.9. This plea must therefore also be dismissed.

8. Lastly, the complainant alleges a breach of the principle of equality. Two of the applicants who were included with her on the short list – one of whom was the person ultimately appointed to the post – allegedly had the benefit of an additional interview with the supervisor after the evaluation interviews of the other candidates

on that list. She states that she made the appointment for one of the interviews herself, saw the successful candidate leaving the supervisor's office and related the incident to the President of the Staff Union and a former colleague. These two people have confirmed that she had given them this information.

In its reply, the defendant organisation states that it brought this allegation to the attention of the supervisor concerned and that he refuted it. The evidence provided by the complainant is not sufficient to show that this denial is tainted with bad faith. The plea based on an alleged breach of the principle of equality must therefore be dismissed.

9. The complaint must be allowed in part on the ground that the complainant's right to file a rejoinder was denied by the Appeal Board (see consideration 3, above). The decision by which the Secretary-General endorsed the Board's recommendation was procedurally flawed. This decision must therefore be quashed, without there being any need to examine the complainant's other pleas.

10. As the complainant has now reached retirement age, there is no need, in these particular circumstances, to refer the case back to the organisation for a fresh review by the Appeal Board. However, it is appropriate to compensate the complainant for the injury suffered by awarding her damages. The complainant claims that flawed appeal proceedings deprived her of a valuable opportunity to be appointed at the end of the competition procedure. The Tribunal finds that, in view of the fact that the complainant was already performing the duties of the advertised post and that she was shortlisted, which attests to the quality of her work, she did suffer a loss of opportunity.

Furthermore, the flaw identified by the Tribunal caused the complainant serious moral injury. In these circumstances, the Tribunal considers an award in the amount of 30,000 euros under all heads to be fair compensation for the harm suffered by the complainant.

11. As the complainant succeeds in part, she is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The Secretary-General's decision of 12 April 2013 is quashed.
2. The ITU shall pay the complainant damages of 30,000 euros under all heads.
3. It shall also pay her costs in the amount of 5,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ