

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
ICGEB

125th Session

Judgment No. 3912

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs L. S. against the International Centre for Genetic Engineering and Biotechnology (ICGEB) on 5 July 2016 and corrected on 2 August, the ICGEB's reply of 14 September, the complainant's rejoinder of 12 November, corrected on 19 November 2016, the ICGEB's surrejoinder of 31 January 2017, the complainant's further submissions of 31 March and the ICGEB's final comments of 20 June 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges the classification of her post.

The complainant joined the ICGEB in its New Delhi Component in 1999. She was assigned to a General Service position of Staff Research Scientist at grade ND4, step I. In 2004 she was promoted to grade ND5, step I.

In 2006 a reclassification exercise took place and grade ND5 became the entry level for scientific staff at the New Delhi Component. On 26 September 2008 the complainant sent an email to the Director of the New Delhi Component stating that, in view of her promotion and seniority, she should have been placed at grade ND6, step III, in 2006.

She asked the Director to rectify the situation so that her seniority would be maintained. As she received no reply, on 3 November 2008 the complainant wrote to the Director-General, asking him to look into the matter personally with a view to remedying any “anomalies” at the New Delhi Component. That same day the Director-General told her that he hoped he could give her a reply by the end of the year.

In 2010 the complainant was promoted to grade ND6, step I.

In an email of 2 April 2015 to the new Director-General, the complainant argued that if the entry level for scientific staff was ND5, then after two promotions she should be at grade ND7. She asked to be placed at an “appropriate grade and level”. The Director-General replied that no restructuring of human resources would occur before the appointment of the new Director of the New Delhi Component. The new Director was appointed in November 2015 and a reclassification exercise ensued. It was then decided to elevate some of the scientific staff in the New Delhi Component – including the complainant – to the National Officer (NO) category as of 1 January 2016. On 21 December 2015 the complainant was issued a new letter of appointment that placed her at grade NO-A, step II. On 3 January 2016 the complainant wrote to the Director-General, claiming that her “position as a victim” would be perpetuated if she signed the letter of appointment without first obtaining confirmation that the “anomaly” in grade would be addressed. On 22 January 2016 the Director-General replied that in the complainant’s case the 2015 reclassification exercise had resulted in a “one-grade promotion”, and he added that in any case it would not be possible to review the matter in 2016 “for both budgetary reasons and opportunity”. In an email dated 25 January 2016 to the Director-General, the complainant asserted that she should have been placed in the NO-B grade and that she had obtained only a one-step increment. She signed the new letter of appointment that same day.

On 22 March 2016 the complainant filed an appeal with the Joint Appeals Board (JAB), asking to be placed in an appropriate grade. In its report dated 19 April, the JAB found that the level of recruitment was a discretionary decision depending on availability of funds and that, as the complainant had accepted her promotions, this matter, “[a]s such”,

could be considered closed. Since the “ICGEB Secretariat [had] clarified” that the “one-grade promotion” was an “unfortunate typographical error” and the complainant had accepted the one-step increment, the JAB concluded that no further action was necessary. On 3 May 2016 the Director-General forwarded a copy of the JAB’s report to the complainant, indicating that he was taking “due note” of its findings. Before the Tribunal, the complainant impugns the JAB’s “order” dated 19 April 2016.

The complainant asks the Tribunal to set aside the impugned decision, to “issue appropriate directions” regarding her grade and to “effect a grade promotion as per [her] just entitlement”. She seeks the payment of the corresponding arrears. She asks the Tribunal to hold the ICGEB responsible for causing prejudice and “mental agony” to her and seeks compensation on that account. She also claims costs.

The ICGEB asks the Tribunal to reject the complaint as being time-barred for the most part and unfounded for the remainder.

CONSIDERATIONS

1. The complainant challenges the classification of her post in the NO category and her placement at grade NO-A, step II, as of 1 January 2016 after a reclassification exercise which took place in November 2015. She did not at first sign her new letter of appointment (dated 21 December 2015) as she sought the assurance of the Director-General that the “anomaly” in her grade would be addressed. However, she relented and signed it when in his reply the Director-General stated, among other things, that it would not be possible to review the matter for budgetary reasons and because of the lack of opportunity. The present complaint was filed after the complainant’s internal appeal against the decision reflected in the new letter of appointment was unsuccessful.

2. At the outset, it is observed that the complainant requests to be provided an opportunity to be heard orally before the Tribunal. This request is rejected as the written pleadings and evidence which the parties provide are sufficient to permit the Tribunal to resolve this case.

3. In the complaint form the complainant sets out the relief which she seeks from the Tribunal as follows:

- i. set aside the impugned order dated 19 April 2016 as being bad and against principles of natural justice;
- ii. issue appropriate directions regarding [her] grade structure AND effect a grade promotion as per [her] just entitlement;
- iii. determine any such past arrears or entitlement that [she] deserves AND issue appropriate directions to the [ICGEB] to pay [her] such past dues and arrears, as [the Tribunal] may determine;
- iv. hold the [ICGEB] materially responsible for causing prejudice & mental agony to [her] AND direct the [ICGEB] to pay adequate compensation towards damages;
- v. issue appropriate directions to the [ICGEB] to bear the cost(s) of the instant proceedings;
- vi. pass any such other relief(s) as it may deem fit in the interests of justice, equity and fair play in the facts and circumstances of the present case.”

4. The “impugned order” dated 19 April 2016 was the JAB’s report which contained its advice on the complainant’s internal appeal to the Director-General in accordance with Staff Rule 12.01. The complainant states that she challenges that report because “it refused to address and rectify [a] grave anomaly concerning the failure by the [ICGEB] to correctly place [her] in an appropriate service grade over a service period of 16 years (and remaining) thereby, leaving [her] prejudiced and aggrieved on multiple counts”.

5. The JAB is established, under Staff Rule 12.01, to advise the Director-General on an internal appeal filed against an administrative decision by a staff member alleging the non-observance of her or his terms of appointment. The complainant had lodged her internal appeal with the JAB, pursuant to Staff Rule 12.02(b)(i), purportedly against the original decision to place her at grade NO-A, step II, rather than in the higher NO-B grade, following the 2015 reclassification exercise. It is convenient to reproduce Staff Rule 12.02, paragraphs (a) and (b), which provide the procedure for initiating an appeal:

- “(a) A serving or former staff member who wishes to appeal an administrative decision under the terms of regulation 12.1, shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing.
- (b) (i) If the staff member wishes to make an appeal against the answer received from the Director-General, the staff member shall submit his or her appeal in writing to the Joint Appeals Board within 60 days from the date of receipt of the answer;
- (ii) If no reply has been received from the Director-General within 60 days from the date the letter was sent to the Director-General, the staff member may, within the following 30 days, submit his or her written appeal against the original administrative decision to the Joint Appeals Board; alternatively, the staff member may, within the following 90 days, apply directly to the Administrative Tribunal of the International Labour Organization in accordance with the provisions of its Statute.”

6. The complainant engaged the procedure in Staff Rule 12.02(b)(i) which permitted her to appeal to the JAB. As such, the JAB’s report, which the complainant impugns, was not a final decision that was appealable to the Tribunal as Article VII, paragraph 1, of the Tribunal’s Statute requires. Staff Rule 12.03(b) requires that, before filing a complaint with the Tribunal, a staff member must submit the dispute to the JAB under Staff Rule 12.01 and the JAB should communicate its opinion to the Director-General. It is then for the Director-General to issue the final decision accepting or rejecting the JAB’s recommendation(s). The Director-General’s cover email of 3 May 2016 under which the JAB’s report was communicated to the complainant was the final decision which the complainant should have impugned. However, although the complainant purports to challenge the JAB’s report, the complaint is receivable as the Tribunal treats it as impugning the final decision of 3 May 2016 (see, for example, Judgment 3887, consideration 7).

7. It is observed that in her internal appeal, as in the complaint, the complainant alleges that the “anomaly” has caused her to be placed in a grade that was lower than her level of seniority following the 2006

reclassification exercise, when she was promoted in 2010 as a result of a performance review and pursuant to the 2015 reclassification exercise. Considering the complainant's allegations concerning the impact which this had upon her prior to her appointment in the NO-A grade, step II, the JAB stated that entry levels are somewhat flexible based on the ICGEB Human Resource Management Framework and recruitment at a given level is dependent upon the availability of funding. The JAB further stated that promotions are at the discretion of the management of the ICGEB and are not automatic. The JAB also observed that the complainant was promoted in 2004 and in 2010 and accepted those promotions. In the result, the JAB considered that the case concerning the complainant's pre-2016 "anomaly" was closed. It however recommended that the management of the ICGEB should rectify its failure to provide sufficient written clarification of the reasons for the complainant's grade placement at those times when the decision on her internal appeal was communicated to her.

8. The Tribunal finds that, to the extent that the complainant raises the issue of her alleged erroneous grade placement prior to the 2015 reclassification exercise and invites the Tribunal to take steps to rectify what she alleges was the grading "anomaly", her claims are irreceivable. This is because the complainant did not file an internal appeal against the decisions to place her in the subject grades within the required time under Staff Rule 12.02. She has not therefore exhausted the internal means of redress in respect of those decisions as Article VII, paragraph 1, of the Tribunal's Statute requires. She also did not apply directly to the Tribunal.

The result is that the only issue to be considered on the present complaint is that of the grade into which the complainant was placed following the 2015 reclassification exercise.

9. In its report, the JAB noted the complainant's reliance on the Director-General's statement in his communication of 22 January 2016, which reads:

“[...] having consulted [the Director, New Delhi Component] and [the Chief, Legal and Administration] [w]e have put in all possible attention to provide [Principal Investigators] with appropriate grades also taking into account

individual expectations. In your case, there has not only been a mere re-classification according to the new scale, **but also a one-grade promotion** considering our previous considerations.

I sincerely hope [that] this explanation is satisfactory. In any case, I am afraid that it is not possible for us to review this decision this year for both budgetary reasons and opportunity. All decisions are due by the end of each year and only once per year.” (Emphasis added.)

10. The complainant submits that the Director-General’s statement that she was awarded a “one-grade promotion” confirms that she was placed in the NO-A grade in error. This, she states, is because a one-grade promotion would have placed her in the higher NO-B grade group. The JAB noted this in its report. It stated that having reviewed all of the documents relating to the 2015 reclassification exercise it was clear that the Promotion Committee had moved the complainant from grade ND6, step VI, to NO-A, step II, which was a “one-step promotion”. This, the JAB noted, was what the Director-General accepted and signed off on. The JAB added that the “ICGEB Secretariat [had] clarified” that the “one-grade promotion” to which the Director-General referred in the 22 January 2016 email “was an unfortunate typographical error”. It further noted that the complainant had accepted the “one-step promotion”. Accordingly, the JAB considered that “no further action [wa]s necessary and [that] the matter c[ould] be considered closed”. In essence, the JAB recommended the dismissal of the complainant’s internal appeal.

11. In his email cover note of 3 May 2016, under which the Director-General transmitted the JAB’s report to the complainant, he relevantly stated as follows:

“I write in reference to the Appeal that you have made to the Joint Appeals Board on 22 March 2016. I wish to confirm that I have received the attached reply from the JAB in this regard.

I take due note of the findings of the JAB Board and am copying this message to both [the Director, New Delhi Component] and [the Chief, Legal and Administration] for due attention.”

Although that may be deduced from the statement, the Director-General should have stated, unequivocally, that he accepted the findings and

recommendation of the JAB. The Tribunal would usually remit the case to the Director-General for clarification. However that course of action is considered unnecessary as it would serve no useful purpose in the present case given that it is plain that the complaint is unmeritorious.

12. It is convenient, first, to set out the guiding principles in a case in which the classification of a post is challenged. They were stated as follows, for example, in Judgment 3589, consideration 4:

“It is well established that the grounds for reviewing the classification of a post are limited and ordinarily a classification decision would only be set aside if it was taken without authority, had been made in breach of the rules of form or procedure, was based on an error of fact or law, was made having overlooked an essential fact, was tainted with abuse of authority or if a truly mistaken conclusion had been drawn from the facts (see, for example, Judgments 1647, consideration 7, and 1067, consideration 2). This is because the classification of posts involves the exercise of value judgements as to the nature and extent of the duties and responsibilities of the posts and it is not the Tribunal’s role to undertake this process of evaluation (see, for example, Judgment 3294, consideration 8). The grading of posts is a matter within the discretion of the executive head of the organisation (or the person acting on her or his behalf) (see, for example, Judgment 3082, consideration 20).”

13. The complainant contends, in effect, that the decision to place her in grade NO-A, step II, rather than in grade NO-B, following the 2015 reclassification exercise seriously prejudiced her, was arbitrary, unfair and caused her mental agony. However, she presents no evidence to support the allegation that she suffered mental agony as a result of that decision, or at all. With regard to prejudice, the Tribunal relevantly stated the following in Judgment 1775, consideration 7:

“Although evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve the complainant, who has the burden of proving his allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where, as here, the actions of the Organization which are alleged to have been tainted by personal prejudice are shown to have a verifiable objective justification.”

14. The complainant chronicles what in her view is an “anomaly” by which she was mistakenly placed in grades lower than those in which she should have been placed. However, she provides no evidence to support her allegation that the decision to place her in grade NO-A, step II, following the 2015 reclassification exercise was prejudiced by the earlier grade placement decisions. Further, she provides no evidence to support her allegations of arbitrariness and unfairness attaching to the 2015 decision.

15. The evidence shows that the ICGEB lawfully instituted the 2015 reclassification exercise pursuant to Staff Regulation 2, which puts the classification of posts within the purview of the Director-General. The complainant has not challenged the constitution of the Promotion Committee established under paragraph 27 of the ICGEB Human Resource Management Framework of 1 January 2012, which was in force at the material time. She has not questioned its purview to conduct the reclassification exercise. There is no evidence that the reclassification exercise was conducted in breach of the principles of fairness or of the rules of the ICGEB. There is no evidence that in the conduct of the reclassification exercise the complainant was treated unequally to any other staff member who was in the same situation as she was in (see, for example, Judgment 3868, consideration 6, concerning the principle of equal treatment).

In the foregoing premises, the complainant’s claim that the decision to place her in grade NO-A, step II, following the 2015 reclassification exercise seriously prejudiced her, was arbitrary and unfair and caused her mental agony is unfounded.

16. The complainant challenges the way in which the JAB dealt with her internal appeal. She contends, in effect, that the JAB erred in its appreciation of the facts which led to its findings and recommendation. Accordingly, she insists that the JAB did not appreciate that the gravamen of her case was that there was a continuing “anomaly” in her grade placement, which the ICGEB had not subsequently rectified and which has subsequently resulted in the “trickle down” of the “anomaly” in her subsequent promotions and

appointments culminating in her misplacement in grade NO-A, step II. The Tribunal finds that there is no evidence of a causal link between the complainant's previous promotions and appointments and the decision to place her in grade NO-A, step II.

17. The complainant further takes issue with the JAB's statement that the case was closed because, among other things, she had accepted her previous grade placements. She insists that the JAB failed to appreciate that she had to accept her last promotion for fear of losing her emoluments and employment. These submissions are however untenable given the Tribunal's finding that there is no evidence of nexus between the previous decisions and the decision to place the complainant in grade NO-A, step II, following the 2015 reclassification exercise. Additionally, the complainant's further submission that the JAB erred because it did not appreciate that as a result of the Director-General's statement that she was awarded a "one-grade promotion" she should have been placed in grade NO-B, fails. The Promotion Committee had recommended the complainant's placement in grade NO-A, step II – a one-step increment –, and the Director-General had accepted and signed off on that recommendation. The Director-General's statement that she was awarded a "one-grade promotion" was clearly in error.

18. The Tribunal finds no merit in the complainant's further contention that the JAB erred in substantive law because it failed to appreciate the guidelines under the ICGEB Human Resource Management Framework. The Tribunal has already determined that any claims concerning the complainant's grade placement prior to the 2015 reclassification exercise are irreceivable. In any event, there is no nexus between those decisions and the decision to place the complainant into grade NO-A, step II, following the 2015 reclassification exercise. Additionally, the JAB did not err when it found that the documents concerning the 2015 reclassification exercise showed that the complainant's post should be classified as a grade NO-A post.

19. It is further determined that there is no merit in the complainant's contention that the JAB erred as a matter of procedural

law because it acted in direct contravention to the principles enshrined in the Staff Regulations of the United Nations Industrial Development Organization (UNIDO). The UNIDO regulatory regime is not applicable to the ICGEB.

20. The complainant also contends that the JAB erred, as a matter of procedural law, because its Secretary “had a direct conflict with the instant matter and ought to have recused herself from sitting in judgment over the same”. By way of explanation, the complainant states that the Secretary to the JAB was the Head of the Personnel Unit, ICGEB Italy, who was responsible for handling administrative matters concerning appointments, promotions and staff matters. The complainant states that even her (the complainant’s) representations to the JAB were filed through the Secretary and concludes that “such conduct of the [JAB] is in direct conflict with the staff regulations concerning [the JAB] as mandated by UNIDO”. This contention fails, as in the first place, UNIDO’s regulatory regime does not apply to the ICGEB. So do the complainant’s further submissions concerning the JAB’s process which she premises upon UNIDO’s rules and regulations. In the second place, the complainant has not shown that the Secretary to the JAB was in a position of conflict of interest in relation to her case. In the third place, the complainant did not object to the Secretary during the internal appeal process before the JAB. Moreover, regarding the complainant’s assertion that she should have been informed of the composition of the JAB, the Tribunal notes that the complainant and all members of the ICGEB staff were informed of the members who constituted the JAB in Information Circular 005-15/DR-dt, which was issued by the ICGEB on 23 January 2015. Accordingly, the complainant’s claims challenging the JAB’s recommendation and its process are unfounded.

21. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 25 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ