

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

P.
v.
ILO

129th Session

Judgment No. 4251

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms P. P. against the International Labour Organization (ILO) on 17 August 2018 and corrected on 14 September, the ILO's reply of 19 October, the complainant's rejoinder of 23 November, corrected on 29 November 2018, and the ILO's surrejoinder of 3 January 2019;

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 may be summed up as follows:

The complainant challenges the lawfulness of a selection procedure in which she participated and the appointment made at the end of that procedure.

At the material time the complainant, who had commenced working for the ILO in April 2000, held the post of Deputy Liaison Officer at grade P.4 within the ILO Liaison Office in Myanmar. She was employed under a contract without limit of time. On 25 May 2015 the ILO issued a call for expression of interest for the post of Liaison Officer (Myanmar) at grade P.5. The complainant applied, was shortlisted and undertook the High-Level Assessment Centre (HLAC) on 24 August 2015 but she was not invited for a subsequent interview.

As from 1 October 2015, the complainant served as Liaison Officer ad interim pending the outcome of the selection process. By a minute of 22 March 2016 she was informed that the Director-General of the International Labour Office, the ILO's secretariat, had decided to appoint an external candidate to the disputed post. As the latter took up his duties in August 2016, the complainant served as Liaison Officer ad interim until 31 July.

On 21 April 2016 the complainant submitted a grievance to the Human Resources Development Department (HRD). She complained that she had not been invited for a final interview and alleged that the decision "not to consider [her] further for the post" was contradictory given that she was serving as Liaison Officer ad interim, which indicated, in her view, that she had the capacity to occupy the post. By a letter dated 26 July the Director of HRD explained that only the three candidates with the strongest competency assessment results had been invited to the interview and that it was not unusual for staff members who took on higher level duties on an ad interim basis not to be ultimately appointed to the posts concerned.

On 22 August the complainant submitted a grievance to the Joint Advisory Appeals Board (JAAB). In its report dated 18 April 2018 the JAAB found that the selection process was neither transparent, fair nor objective insofar as the complainant had been excluded from interview solely on the basis of her HLAC results and there were significant discrepancies in the scoring and ranking of candidates. According to the JAAB, the complainant had been denied a fair chance to compete for the disputed post. The JAAB found that "a recommendation to cancel the competition would be warranted". It recommended that the complainant be awarded moral damages and 2,500 Swiss francs for the delay in the appeal procedure.

On 22 May 2018 the complainant was informed that the Director-General found that the JAAB's conclusions that the selection process was neither transparent, fair nor objective and that the complainant had been denied a fair chance to compete were "totally unfounded" and predicated on "false assumptions". The Director-General was satisfied that the applicable procedures had been duly followed and despite the

complainant's understandable disappointment, he considered that she had been treated with due respect and dignity. Consequently, he was not in a position to accept the JAAB's recommendation to award her moral damages. Nevertheless, he awarded her 2,500 Swiss francs for the delay in the appeal procedure. That is the impugned decision.

The complainant asks the Tribunal to set aside that decision and to order the ILO to pay its contributions to the United Nations Joint Staff Pension Fund (UNJSPF) in order to allow her immediate early retirement as if she had twenty-five years of continuous service. In her rejoinder, she states that she can no longer contemplate working for the ILO and requests the Tribunal to order an agreed termination of her appointment. She also requests moral damages in the amount of 200,000 euros.

The ILO submits that the claim for payment of contributions to UNJSPF is irreceivable, because the complainant has not exhausted internal means of redress on this issue and because this claim falls beyond the scope of the Tribunal's competence. It asks the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded.

At the Tribunal's request, the ILO forwarded a copy of the complaint to the candidate appointed as a result of the disputed selection process and invited him to share any observations, which he did in a minute dated 1 October 2018.

CONSIDERATIONS

1. The complainant impugns the decision of the Director-General communicated to her by letter dated 22 May 2018, to reject the JAAB's recommendations as detailed in its 18 April 2018 report. The Director-General considered that the conclusions of the JAAB that "the selection process was neither transparent, fair, nor objective" and that the complainant "was unequivocally denied a fair chance to compete" were "totally unfounded and [...] predicated on several false assumptions". The Director-General denied the assertions that the selection process was tainted by "a series of shortcomings and flaws" and that the complainant was not treated with all due respect and dignity, and he found "paragraph 83 of the report to be without foundation". He

therefore decided not to accept the recommendation that the complainant be awarded moral damages, and further noted that the JAAB “did not in fact recommend” that the impugned selection process be cancelled. As further justification for the decision, it was noted that the complainant had been “fully informed in advance of the steps in the process, in particular, that following the HLAC, only a limited number of candidates would be considered for the technical panel interview” and that there was therefore nothing to suggest that there was a flaw in the decision not to invite her to an interview. It was also noted that the JAAB’s observations regarding the scoring and ranking of candidates, and the assertions that a candidate holding a law degree should receive a higher score, and one with fewer languages should receive a lower score even if both fully met the linguistic requirements of the vacancy, were incorrect. Additionally, it was stated that “the fact that an official performs tasks of a higher position ad interim does not and should not create any expectation of preferential treatment as regards the eventual filling of that position”. The Director-General decided to award the complainant 2,500 Swiss francs for the delay in the appeal procedure before the JAAB.

2. On 25 May 2015 the ILO published a call for expression of interest for the post of Liaison Officer in Myanmar at grade P.5. It was specified, inter alia, that “[u]nder Article 4.2, paragraph (e) of the Staff Regulations, the filling of vacancies in grades D.1 and D.2, as well as in grade P.5 for all Director positions in field offices does not fall under Annex I of the Staff Regulations and is made by direct selection of the Director-General”. The call for expression of interest applied to both internal and external candidates, and also specified that “[s]taff members with at least five years of continuous service with the Office are encouraged to apply and will be given special consideration at the screening and evaluation stage”. The complainant applied for this post. Subsequently, HRD pre-screened 160 applications in total: 147 external candidates and 13 internal applicants. The 42 candidates who passed the initial screening were assessed against nine weighted criteria and assigned scores which ranged from 80 to 58. Two candidates were assigned scores of 80 points each and the complainant was ranked third with a score of 78 points; they

were shortlisted, along with two other candidates, for the August 2015 HLAC. Following the HLAC, three of the shortlisted candidates were recommended for final interviews, the complainant was not included in that list. Following the interviews of the remaining two candidates (one of the three withdrew) in September 2015, the Director-General chose Mr R.M. for assignment to the post of Liaison Officer on 3 March 2016.

3. On 1 October 2015, the complainant took up duties as Officer-in-Charge and Liaison Officer ad interim with the ILO Liaison Office in Myanmar. She was notified by a minute dated 22 March 2016 that she had not been selected for the post. On 21 April 2016, the complainant submitted a grievance against the decision not to call her for an interview and to instead eliminate her from consideration based on her HLAC results, without any consideration of her experience, performance, her dedication to work and her positive outcomes. She also contested the length of time between her application for the post and her notification of her non-selection, particularly as she was fulfilling the duties of the post in question as Liaison Officer ad interim in the meantime. Her grievance was rejected in a letter from the Director of HRD on 26 July 2016. The complainant submitted her grievance to the JAAB on 22 August 2016.

4. In its report, dated 18 April 2018, the JAAB found the grievance receivable in all respects. The JAAB noted that it was “incumbent on [it] to carefully review the impugned selection process in order to ascertain whether the [ILO] strove to apply a properly informed process, considered all the applications in good faith and in keeping with the basic rules of fair and open competition”. In light of this consideration, “the [JAAB] questioned the reasons for shortlisting [two of the candidates] given their respective scores of 72 and 68, and the fact that they were ranked in 10th and 26th position, meaning that there were a number of better ranked candidates who were not considered for the shortlist. [...] Moreover, and insofar as there was no record on file to explain why the candidates ranked 10th and 26th were pre-selected over higher-ranked candidates, the decision to retain them on the short-list lacks transparency and objectivity.”

5. With regard to its review of the candidates' qualifications, the JAAB "noted that the [complainant] was the only candidate with qualifications in law. Given that law was listed first [in the education requirements of the call for expression of interest], the [JAAB] surmised that the vacancy [notice] conferred greater importance on possessing qualifications in this area. The [JAAB] therefore questioned why the [complainant] was not granted a higher score on this account." While reviewing the weighting of UN system experience and ILO experience, the JAAB noted that the complainant was awarded 8 points for her 15 years' ILO experience and 6 points for her 18 years' UN system experience, while the successful candidate was awarded 4 points for 0 years' ILO experience and 8 points for 11 years' UN system experience. The JAAB thus concluded that there were "significant discrepancies in the marking system". With regard to language skills, the JAAB noted that there were again "significant discrepancies in the marking system" as the successful candidate was awarded 8 points for being fluent in English and possessing a working knowledge of French and basic Urdu while the complainant was also awarded 8 points although she was fluent in English, Thai and Laotian, and possessed a basic knowledge of French and working knowledge of Burmese. According to the JAAB, these discrepancies "demonstrated that the [ILO] had failed to 'support the best informed process' as it was bound to do". The JAAB found that these considerations, which evidenced a "serious lack of scrupulousness, served only to compound the shortcomings of the impugned selection process owing to lack of transparency, fairness and objectivity".

6. In reviewing the HLAC part of the process, the JAAB noted that it appeared that the complainant was excluded from the interview stage solely on the basis of her HLAC results although the Deputy Director-General for Management and Reform (DDG/MR) had specifically stated that the HLAC "is not a pass or fail process", which the JAAB understood to imply that "no candidate should be excluded from further consideration based solely on assessment centre results". The JAAB opined that "the decision to interview candidates should have been based on an overall evaluation that combined (i) an objective assessment of their proven track record; and (ii) their HLAC results". However, as the

complainant had a much higher score and ranking prior to the HLAC than another candidate who was subsequently interviewed, the JAAB concluded that the complainant “was denied a fair chance to compete in the challenged selection process”. It considered that the complainant’s track record as Deputy Liaison Officer and Liaison Officer ad interim “should have been taken into consideration by the [ILO] when it evaluated [her] application”, and that the ILO, by not considering past performance appraisals, “render[ed] any attempts at ensuring preferential treatment for internal candidates null and void” and thus had “failed to respect the requirement it had set itself in the [call for expression of interest]: ‘Staff members with at least five years of continuous service with the Office are encouraged to apply and will be given special consideration at the screening and evaluation stage’ (emphasis added [by the JAAB])”.

7. The JAAB determined that “there was reason to believe that the impugned selection process lacked transparency, was unfair and failed to take account of the [complainant]’s service in the Office, evidenced by her position [...] in the initial ranking”. It thus agreed with the complainant that the selection process was flawed “owing to the [ILO] having decided to exclude her from the interview stage solely on account of her HLAC results”.

Consequently, the JAAB found that the complainant “was unequivocally denied a fair chance to compete in the challenged selection process”. It further found that, as a matter of courtesy and respect for the complainant, the ILO could have informed her as early as August 2015 that her application was unsuccessful, without breaching any confidentiality on the status of other candidates. The JAAB “found no indication that the [complainant] had been openly discriminated against on account either of her gender or her ethnic origin”, but that there was “nothing to indicate that the [ILO] had paid any particular attention to its goals and objectives concerning diversity and gender parity”, despite the emphasis on those goals and objectives in the call for expression of interest.

8. In conclusion, the JAAB found the grievance to be receivable and founded and that “a recommendation to cancel the impugned competition would be warranted”. It explicitly recommended that the Director-General award the complainant “compensation [...] for the moral damages she suffered resulting from the considerable flaws identified in the impugned selection procedure” in an amount in keeping with amounts awarded by the Tribunal in similar cases and taking into account that the complainant was not treated with all the respect and dignity due to her. It also recommended an award of 2,500 Swiss francs for the delay in the internal appeal procedure.

9. The complainant’s grounds for complaint are as follows: the ILO failed to apply the established selection procedure to identify candidates for the Director-General’s final selection decision, in breach of Article 4.2(a)(i) of the Staff Regulations; unfairness and lack of transparency in the selection process; failure to apply the proposed procedure and undertakings made in the call for expression of interest; inconsistency and lack of transparency in the initial screening procedures; the selection process failed to achieve the objective of highest standards of competencies and as such compromised the Director-General in respect of his compliance with Article 4.2(a)(i); unfairness in the ILO’s lack of communication and transparency and failure to respect the complainant’s dignity; discrimination; and failure to accept the findings, conclusions, and recommendations of the JAAB.

10. In the 21 April 2016 grievance to the Director of HRD, and the 22 August appeal to the JAAB, the complainant essentially impugned the selection process as it adversely impacted on her candidature, that is, the fact that the ILO apparently relied exclusively on the outcome of the HLAC to determine that she could not be considered for the interview. While the JAAB was entitled to review the entire administrative procedure, the Tribunal must limit its review of the selection process to the alleged defects which may, in isolation or collectively, have adversely affected the complainant.

11. The assessment of managerial competence conducted within the HLAC and the following evaluation by the senior management, were conducted in accordance with the call for expression of interest, which specified under the heading “Additional Information” that “[a]s part of the recruitment process, candidates will be required to take the ILO High-Level Assessment Centre before being considered for interview”, and was in line with the principles of a fair competition. The complainant does not appear to question the way the competition was conducted, but challenges the same provisions referred to in the call for expression of interest. The contested competition followed a selection procedure for filling vacancies of managerial posts although the post in question could be filled by direct appointment by the Director-General. Thus, this procedure represented a self-imposed limitation of the Director-General’s power of appointing by direct selection, referred to in Article 4.2(e) of the Staff Regulations. The complainant contends that the HLAC assessment did not take into consideration the particularities of the post in relation to the specific abilities and experience of the candidates.

Specifically, in the case of the complainant, she contends that her great successes in the difficult situation of Myanmar were not considered. However, it is not out of the ordinary that in a competition for a managerial position an abstract evaluation phase is used to preliminarily assess the general managerial capacity of the candidates. It must also be observed that neither the complainant nor the JAAB have demonstrated the unreasonableness of this administrative choice. Furthermore, it was the senior management which, taking into account the HLAC reports on the shortlisted candidates, had to provide the names of the candidates to be invited for an interview, as was clarified in the letter of the Director of HRD of 26 July 2016 to the complainant. This also explains the meaning of the phrase reported by the JAAB and cited by both parties according to which the HLAC “is not a pass or fail process” contained in the 24 March 2016 email sent by the DDG/MR to the complainant.

12. The complainant claims that her dignity was not respected, as the decision that she was no longer in contention for the post in question was communicated to her only on 22 March 2016, whereas the ILO

management had decided that she was no longer in contention from 27 August 2015. She submits that it was particularly disrespectful considering that, in that period, she was requested (and she accepted) to undertake the interim responsibility of ILO Liaison Officer in addition to her duties as Deputy Liaison Officer. The Tribunal finds that the Organization's long-established practice of communicating substantive information on the selection process only at its formal end, is correct, as until that time, there cannot be any certainty as to the final outcome.

13. In light of the above considerations, the selection process, insofar as it concerned the complainant, was not flawed and the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ