Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

C. L. L.

v.

ILO

133rd Session **Judgment No. 4480**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms J. L. C. L. L. against the International Labour Organization (ILO) on 1 March 2019 and corrected on 27 March, the ILO's reply of 29 April, the complainant's rejoinder of 5 June and the ILO's surrejoinder of 5 July 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, an official of the International Labour Office ("the Office"), the ILO's secretariat, challenges the decision not to grant her a personal promotion in the 2015 exercise.

On 22 October 2009 the Office published Office Procedure IGDS No. 125 (Version 1) governing the personal promotions system. The system allows a change in grade within a category which can follow one of two possible tracks. Under paragraph 7 of IGDS No. 125, officials who have completed 13 years of service for the Office in the same grade are eligible for a personal promotion under the first track. Paragraph 8 stipulates that to be eligible under the second track, officials must have completed 25 years of service at the Office, including at least 13 years in their current grade.

The complainant joined the ILO in 1990 under a short-term appointment which was renewed several times. In 1994 she was awarded a fixed-term contract at grade G.3, and in 1998 she was promoted to grade G.4. After she was found to have committed misconduct in January 2001, she received a censure in August 2002, which was placed in her personal file. She was later granted an appointment without limit of time with effect from 1 March 2008, and in 2009 she was awarded a special merit increment under Article 6.5 of the Staff Regulations.

In June 2012 the director of her department requested that her post be reclassified at grade G.5, which was refused.

As she met the eligibility criteria to be considered for personal promotion in the 2011 and 2013 exercises under the first track, the complainant completed the form provided for that purpose but, on consideration, the Personal Promotion Joint Panel ("the Joint Panel") did not recommend her. In November 2016 the Joint Panel reconsidered her file with a view to personal promotion in the 2015 exercise under the second track and, in its report of 12 December 2016, recommended that a personal promotion not be granted to her on account of the information in her personal file regarding the censure issued in 2002. On 9 January 2017 she was informed by the Chief of the Staff Operations Branch that the Director-General had decided to endorse this recommendation and that the Joint Panel had held that her case could not be reconsidered in future personal promotion exercises.

On 9 May 2017 the complainant lodged a grievance against the Joint Panel's findings and recommendations refusing her, on the one hand, a personal promotion under the second track and, on the other hand, the right to have her case reconsidered in future promotion exercises, and also against the decision of 9 January 2017. She requested that the decision be reviewed and that she be granted a promotion. Her grievance was rejected on 9 August 2017.

The complainant appealed to the Joint Advisory Appeals Board ("the JAAB") on 6 September 2017. She requested that the decision of 9 January 2017 be set aside and that she be awarded a personal promotion to grade G.5 in the 2015 exercise with a retroactive adjustment of her salary. In the alternative, in the event that she was not promoted,

she requested that her case be reconsidered in the 2016 exercise, with it being made clear in her personal file that the censure received in 2002 could not prevent her from being promoted. Lastly, she claimed 2,000 Swiss francs in moral damages and requested that any other appropriate measures be taken with a view to remedying her situation fully and finally.

In its report of 15 November 2018, the JAAB found that the grievance was receivable and well founded. It recommended that the decision of 9 January 2017 be set aside, that a personal promotion to grade G.5 in the 2015 exercise be awarded with the corresponding retroactive adjustments or, alternatively, that the complainant's file be sent back to a newly constituted joint panel for a fresh examination of her record of service, and that she be compensated for the injury caused by the length of the internal appeal procedure. By letter of 4 December 2018, which constitutes the impugned decision, the complainant was informed that her grievance had been rejected by the Director-General on the ground that she did not meet the eligibility criteria for a personal promotion on account of the disciplinary sanction imposed in 2002.

On 17 December 2018 the complainant wrote to the Director-General asking him to reconsider his decision in view of her serious state of health and her record of service since the censure was issued. On 21 December 2018 the Director-General replied that the decision of 4 December was maintained.

In her complaint of 1 March 2019, the complainant requests the Tribunal to set aside the impugned decision, to grant her a personal promotion to grade G.5 in the 2015 exercise and to adjust retroactively all salary, benefits and other allowances, with interest at the legal rate. In the alternative, if she is not promoted, she wishes her file to be reconsidered by the Joint Panel and that it be clearly stated therein that the disciplinary measure imposed in 2002 cannot prevent her being awarded a promotion. She also seeks damages for the moral injury she submits that she has suffered, taking into account the fact that at the time the complaint was filed she was on sick leave and in poor health, and an award of costs.

The ILO contends that the complaint should be dismissed as unfounded. Furthermore, it criticises the approach taken by the Staff Union, which, in its words, denigrated the ILO and misled the complainant.

In response to this criticism, the complainant, in her rejoinder, asks the Tribunal to condemn the Organization for its inappropriate comments regarding the way in which the Staff Union defended her interests and for interference in the Staff Union's conduct of its procedures. She also seeks an order for exemplary damages for breach of the duty of care, as well as additional damages for the moral injury allegedly suffered.

CONSIDERATIONS

1. The complainant asks the Tribunal to aside the decision of the Director-General refusing to award her a personal promotion under the second track in the 2015 exercise. She further requests that the Tribunal grant her this personal promotion in the 2015 exercise and, in the alternative, if the Tribunal does not grant the promotion, that it state that her file may be reconsidered by the Personal Promotion Joint Panel ("the Joint Panel") for subsequent years and indicate clearly that the disciplinary measure imposed on her in 2002, which is the reason for the refusal to grant her promotion, does not preclude her promotion under the second track. The complainant also seeks an award of damages for the moral injury she submits she has suffered, as well as an award of costs.

2. Article 6.8.2 of the ILO Staff Regulations specifies that there are two routes to personal promotion linked to the official's record of service, commonly referred to as the first and second tracks. The first track is a discretionary personal promotion for which there is a limited quota; it rewards fully satisfactory conduct and consistently superior performance. The second track is more focused on length of service and rewards satisfactory conduct and performance.

3. This dispute between the complainant and the Organization raises, first of all, the matter of the interpretation of the applicable provisions. The main difficulty to be resolved is determining the period during which the complainant's conduct and performance should be examined for the purpose of granting personal promotion under the second track. The complainant submits that the period should be limited to the 13 years preceding the year of the promotion exercise in question, which, in her view, precludes any consideration of the censure issued in 2002 in respect of misconduct committed in 2001. The ILO replies that the period in question should, on the contrary, include all the years in which the complainant has served in her current grade and that, since it is established that the complainant had been in her current grade since 1998 at the time when her file was appraised for the purposes of personal promotion in the 2015 exercise, the censure concerned could warrant a refusal to grant her promotion.

4. Two provisions are central to the interpretive exercise to be undertaken by the Tribunal.

First, Staff Regulation 6.8.2, paragraph 3(a) and (b), states as follows:

> "*Promotion linked to the official's record of service*
>
> [...]
>
> 3. Officials [in the Professional category below the grade of P.5, officials in the National Professional Officers category below the grade of NO-D and officials in the General Service category who have not reached the top grade of their category] shall be promoted to the next higher grade of their category if:
>
> (a) their conduct and their performance of duties in their present grade have been satisfactory; and
>
> (b) they have served at least 25 years in the Office, the United Nations or another specialized agency with at least 13 years in their present grade."

Second, paragraph 12 of Office Procedure IGDS No. 125 (Version 1) of 22 October 2009 governing personal promotions provides:

> "Under the second track, the assessment of merit will be based entirely on the staff member's personal file, which must report satisfactory conduct and performance for 13 years of service in the current grade."

5. As the Tribunal has consistently held (see, for example, Judgments 4145, consideration 4, and 4701, consideration 4), the principles of interpretation of statutory texts such as the Staff Regulations are well settled. The primary rule is that words are to be given their obvious and ordinary meaning. A reading of the text of Article 6.8.2, paragraph 3(a), of the Staff Regulations shows that the official's conduct and performance of their duties "in their present grade" must be satisfactory, without any restriction as to the length of time during which their conduct and performance in that grade must be assessed as satisfactory. The reference to 13 years' service in subparagraph (b) of the same paragraph is a criterion relating to seniority that is also applicable and has neither the object nor the effect of limiting to those 13 years the period over which the official's conduct and performance in her or his grade are assessed.

6. With regard to IGDS No. 125, this is an Office Procedure which aims, according to paragraph 1 thereof, to give effect to Article 6.8.2 of the Staff Regulations. As regards the assessment of merit under the second track, paragraph 12 of this procedure refers to the need to demonstrate satisfactory conduct and performance for 13 years in the official's current grade, which appears to indicate that the assessment is restricted to the most recent 13 years of service in that grade.

7. Under Office Directive No. 1 (Version 1) of 7 January 2008 regarding the Internal Governance Documents System, basic and regulatory texts, such as the Staff Regulations, are at the top of the hierarchy in the classification structure of such documents. Office Procedures used to give effect to the Staff Regulations, such as IGDS No. 125, are only intended to complement the Office's basic and regulatory texts and must therefore be read in conjunction with the relevant governing text.

8. It follows that while, under the Office Directive concerning the Internal Governance Documents System, an Office Procedure is intended to supplement basic and regulatory texts which are at the top

of the hierarchy of rules, an Office Procedure cannot limit or restrict the scope of the terms of a provision of the Staff Regulations.

9. Therefore, since the wording of Article 6.8.2, paragraph 3(a), in its obvious and ordinary meaning, does not place any restriction on the length of service in the current grade for which the staff member must satisfy the condition in respect of satisfactory conduct and performance, Office Procedure IGDS No. 125 cannot limit its scope. It follows that in assessing whether the complainant's conduct and performance in her current grade had been satisfactory, the Joint Panel and the Director-General should not have confined themselves to considering the 13 years preceding the application for personal promotion. It would be adding to the text of Article 6.8.2, paragraph 3(a), of the Staff Regulations to impose such a restriction.

On this particular point, the JAAB report of 15 November 2018, which concludes that the assessment of the merits of the staff member concerned by a personal promotion under the second track must be limited to the 13-year period preceding the year of the promotion exercise, adds to the text of Article 6.8.2, paragraph 3(a), an element that is not there, even though by so doing the JAAB merely applied a provision of IGDS Procedure No. 125.

In the light of the foregoing, the Tribunal is compelled to find that paragraph 12 of Office Procedure IGDS No. 125 supplements Article 6.8.2, paragraph 3 (a) and (b), in a manner contrary to the principle of the hierarchy of rules. Accordingly, that provision must be disregarded on this point.

10. Moreover, in Judgment 4252, consideration 7, the Tribunal stated the following with regard to the correct interpretation of Article 6.8.2, paragraph 3(a), of the Staff Regulations:

> "For the purposes of the second track, satisfactory performance is, under Article 6.8.2, paragraph 3, of the Staff Regulations, appraised **in the light of the official's overall performance in the grade**.
>
> However, the **Joint Panel**'s report shows that it **assessed the complainant's performance only on the basis of his last 13 years of service**. The Joint Panel thus committed an **error of law**. In this case, the

> complainant had been in his grade since 1988, thus for 23 years in 2011. His performance had been assessed as meritorious or even particularly meritorious up to 2005, that is, over a period of 17 years. As the JAAB correctly pointed out, his performance over the entire period was hence satisfactory overall." (Emphasis added.)

The complainant's plea on this point cannot therefore be accepted.

11. The complainant also submits, in essence, that in assessing her conduct and performance in her current grade, the Joint Panel and the Director-General could not in any event consider only the censure she received in 2002. In that regard, the Tribunal observes, in the light of the evidence, that the Director-General relied solely on the existence of that censure in issuing both the decision of 9 January 2017, which endorsed the Joint Panel's recommendation of 12 December 2016, and the decision of 4 December 2018, which informed the complainant that her appeal of 6 September 2017 had been rejected. Both the decision of 9 January 2017 and the decision of 4 December 2018 are unequivocal in that regard: the first pointed to "in particular [the] disciplinary measure imposed in 2002", while the second specified for the complainant's benefit that: "in your case, [the] condition [laid down in Article 6.8.2, paragraph 3(a), of the Staff Regulations] is not fulfilled, given that you were subject to the disciplinary measure of a censure in your current grade". As for the Joint Panel's report of 12 December 2016, it stated unambiguously that the recommendation not to award a personal promotion to the complainant was made "in the light of the information contained in her personal file concerning the misconduct for which a disciplinary sanction was imposed on the staff member in 2002". Lastly, in the comments that he sent to the JAAB on 12 October and 9 November 2017, the Director of the Human Resources Development Department likewise mentioned only this censure to support his contention that the Joint Panel's recommendation and the Director-General's decision which endorsed it were fully justified, adding that the sanction imposed in 2002 was "particularly lenient".

12. In aforementioned Judgment 4252, consideration 7, the Tribunal stated that "[f]or the purposes of the second track, satisfactory performance is, under Article 6.8.2, paragraph 3, of the Staff Regulations, appraised in the light of the official's overall performance in the grade" and that "performance over the entire period [must] hence [be] satisfactory overall" before concluding that, in that other case, the Joint Panel and the Director-General had therefore erred in law by confining their appraisal to a shortened period of 13 years.

In this case the Director-General committed a different breach of the applicable provisions and made an error of law in failing to conduct an overall appraisal of the complainant's conduct and performance over the entire period from 1998 to 2015 in her current grade and by confining himself to considering a single circumstance (the censure issued in 2002) without accounting for the rest of the period concerned.

13. It is true that, in the same judgment, in consideration 4, the Tribunal reiterated that, under its case law, "an organisation enjoys wide discretion with regard to staff promotion" and that "[f]or this reason, such decisions are subject to only limited review". However, as is made clear in Judgment 3322, consideration 4, such a decision may nevertheless "be quashed [...] 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)".

14. It follows from the foregoing that the Director-General's impugned decision of 4 December 2018 and his previous decision of 9 January 2017 are both tainted with the same error of law identified in consideration 12, above.

15. The Tribunal notes that the complainant requests, in the alternative, if she is not awarded a personal promotion in the 2015 exercise, that the Tribunal order that her file be reconsidered by the Joint Panel for exercises after 2015. On that point, the complainant

submits, inter alia, that in its report of 12 December 2016 the Joint Panel did not determine when her file was to be reconsidered, but in the letter of 9 January 2017 the Chief of the Staff Operations Branch wrongly stated that the Joint Panel had ruled that the complainant could not be reconsidered in future personal promotion exercises, whether under the first or second track.

16. In this case, the Director-General's decision not to reconsider the complainant's file in exercises after 2015 in any event involves the same error of law as that already identified in consideration 12, above, with regard to the refusal to grant the complainant a personal promotion under the second track. This aspect of the Director-General's impugned decision of 4 December 2018 and his previous decision of 9 January 2017 is hence also flawed.

It is also factually incorrect to suggest, as the Chief of the Staff Operations Branch did in his letter of 9 January 2017, that the Joint Panel had determined this issue in its report of 12 December 2016. The Joint Panel did not say anything on this matter in the complainant's respect. In its reply and surrejoinder, the ILO suggests that the Joint Panel's report should be understood as implicitly confirming that it considered that the censure imposed on the complainant in her current grade also precluded her from being reconsidered in subsequent personal promotion exercises. In support of this suggestion, the Organization refers to the Joint Panel's reports for the 2011 and 2013 exercises. However, these reports are inconclusive in this respect. The re-examinations referred to concerned the first track alone. As for the table annexed to the Joint Panel's report of 12 December 2016 on personal promotions under the second track in the 2015 exercise, it only stated "not recommended" without further clarification as to the possibility of a subsequent reconsideration. Moreover, in its report to the Director-General of 15 November 2018, the JAAB rightly noted that the Joint Panel had not made such a recommendation in its report, despite what paragraph 24 of Office Procedure IGDS No. 125 provides in this regard:

> "When reviewing the files of officials eligible under the second track, the relevant joint panel will determine during each exercise the date on which the file of an official who does not meet the merit requirement can be re-examined. [...]"

17. It follows from all these considerations that the Director-General's impugned decision of 4 December 2018 and his previous decision of 9 January 2017 must be set aside, without there being any need to rule on the complainant's other pleas.

The question of the complainant's possible personal promotion under the second track in the 2015 exercise and that of the reconsideration of her file in subsequent exercises must therefore be referred back to the Organization so that the Joint Panel may re-examine the complainant's case in accordance with the applicable provisions and in compliance with this judgment.

It follows that the complainant's request that the Tribunal order her promotion cannot be granted, it being recalled, in any event, that the Tribunal has no jurisdiction to make such an order (see, for example, Judgment 4377, consideration 2).

18. With regard to the complainant's claim for moral damages, the Tribunal observes that, according to her complaint, she claims these inter alia "on account of the defendant's failure to observe the applicable provisions and its duty of care, the length of the internal appeal procedure, and the impact and stress caused by the current proceedings in view of her fragile state of health".

19. The flaws that warrant the setting aside of the impugned decision and the decision of 9 January 2017 denied the complainant her right to an examination of her file in accordance with the applicable provisions. The Tribunal considers that this injury will be fairly redressed by awarding the complainant compensation in the amount of 5,000 Swiss francs.

With regard to the other points on which the complainant partly bases her contention that moral injury was caused, the Tribunal observes, first, that the Director-General was not empowered to grant promotions on humanitarian grounds, as the complainant requested in December 2018. To do so would have been arbitrary on his part and would have had no legal basis. Second, the Tribunal finds that the

length of the internal appeal procedure has been duly explained and justified by the ILO in its pleadings.

20. Lastly, regarding the language used in the parties' respective pleadings, in which both the complainant and her counsel, on the one hand, and the ILO and its counsel, on the other hand, criticise each other and invite the Tribunal to sanction each other's conduct, the Tribunal finds that, although each party has asserted its interests and defended its views in a manner that is at times extremely robust, the pleadings are not such as to warrant the imposition of a sanction or an award of damages or even exemplary damages. The Tribunal considers that, although their unnecessarily argumentative tone is regrettable, the parties' pleadings do not exceed the bounds of the freedom of expression that they must be accorded during legal proceedings.

21. As the complainant largely succeeds, she is entitled to costs, set by the Tribunal at 1,000 Swiss francs.

DECISION

For the above reasons,

1. The decision of the Director-General of the International Labour Office of 4 December 2018 and his previous decision of 9 January 2017 are set aside.
2. The case is remitted to the ILO so that it may take the action stated under consideration 17, above.
3. The Organization shall pay the complainant moral damages in the amount of 5,000 Swiss francs.
4. It shall also pay her costs in the amount of 1,000 Swiss francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2021, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ