

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

N.
v.
ILO

135th Session

Judgment No. 4623

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. B. N. against the International Labour Organization (ILO) on 17 April 2019 and corrected on 25 April, the ILO's reply of 28 May 2019, the complainant's rejoinder of 28 June 2019, the ILO's surrejoinder of 17 July 2019, the ILO's additional submissions of 30 September 2022 and the complainant's final comments thereon of 5 October 2022, corrected on 6 October;

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 and seeks its cancellation.

The complainant joined the International Labour Office, the ILO's secretariat, on 13 May 2008 as a Senior Specialist, Skills and Employability, at grade P.4, in the ILO Decent Work Team and Office for the Caribbean, Port of Spain, Trinidad and Tobago (DWT/CO Port-of-Spain). He was promoted to grade P.5 with effect from 1 October 2011.

By vacancy announcement RAPS/3/2014/EMPLOYMENT/01 of 22 August 2014, the ILO advertised, internally and externally, the position of Senior Skills and Employability Specialist, at grade P.5, in the Employment Policy Department, in Geneva, Switzerland. The vacancy announcement required an “[e]xcellent command of one working language of the Organization” and “[f]luency in a second working language”. The complainant applied for the position and was pre-screened, but not selected. The selection procedure was subsequently cancelled by the Director-General.

By vacancy announcement RAPS/1/2017/EMPLOYMENT/02 of 3 March 2017 (the vacancy announcement), the ILO advertised again, this time only internally, the position of Senior Skills and Employability Specialist, at grade P.5, in the Employment Policy Department. The vacancy announcement required an “[e]xcellent command of one working language (English, French, Spanish) of the Organization” and a “[w]orking knowledge of a second ILO working language”. The complainant applied for this position on 9 March 2017 and was shortlisted as eligible for consideration at Stage 2 of the recruitment process. Ultimately, he was not selected and was relevantly notified by an email of 12 July 2017.

On 3 August 2017 the complainant submitted a grievance to the Director of the Human Resources Development Department (HRD) challenging the decision conveyed to him on 12 July 2017. By a letter of 16 November 2017, the Director of HRD rejected the complainant’s grievance.

On 22 December 2017 the complainant filed a grievance with the Joint Advisory Appeals Board (JAAB). The JAAB submitted its report to the Director-General on 20 December 2018. Although it found that the competition process was flawed at certain stages, which would justify the cancellation of the whole competition and ensuing appointment, the JAAB considered it more appropriate, with a view to shielding the selected candidate from injury and preserving legal certainty, for the complainant to be compensated for the moral injury he had suffered. It thus recommended that the Director-General award the complainant 50,000 Swiss francs for the loss of an opportunity to have his application duly considered at Stage 2 of the selection process, and

2,500 Swiss francs for the delays in the review of his case before the JAAB. The JAAB also recommended that the complainant be considered “a priority candidate, within the meaning of paragraph 4(2) of Annex I to the Staff Regulations”, should a similar or equivalent position be advertised and that the Director-General take general measures to ensure the integrity of the selection and recruitment process.

By a letter of 28 January 2019, the complainant was notified of the Director-General’s decision to reject the JAAB’s recommendations and to award him 20,000 Swiss francs as fair compensation for any injury he might have suffered due to “procedural weaknesses” in the recruitment process. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to cancel the competition advertised through the vacancy announcement of 3 March 2017, and to uphold the JAAB’s recommendations. He claims 50,000 Swiss francs in moral damages for the missed opportunity to be properly considered as a Stage 2 candidate, especially in light of the fact that a comparable career opportunity is unlikely to present itself in the future, and 2,500 Swiss francs for the JAAB’s delay in reviewing his case. He seeks an order that the ILO consider him as a priority candidate, within the meaning of paragraph 4(2) of Annex I to the Staff Regulations, should a similar or equivalent position be advertised and that it take any and all appropriate measures to remedy fully the situation and make him whole.

The ILO asks the Tribunal to dismiss the complaint as entirely devoid of merit. It submits that there is no valid reason for setting aside the impugned decision and the contested selection process or for granting the complainant any additional relief, including for the length of the JAAB proceedings which, in its view, was not excessive.

In its additional submissions, the ILO brings to the Tribunal’s attention the fact that the complainant resigned from the Organization effective 31 July 2022.

CONSIDERATIONS

1. The dispute turns on the lawfulness of a vacancy announcement and of the process of selection. By a letter of 28 January 2019, the complainant was notified of the Director-General's decision to reject the JAAB's recommendations and to award him 20,000 Swiss francs as fair compensation for any injury he might have suffered due to procedural deficiencies in the recruitment process. In his decision, the Director-General, though agreeing with the JAAB's conclusion that steps in certain stages of the recruitment process had not been rigorously followed or properly documented, considered that the complainant's application had been properly identified by HRD as not meeting the minimum linguistic requirements of the vacancy announcement. Accordingly, the Director-General disagreed with the recommendation of the JAAB that the complainant be considered a priority candidate should a similar or equivalent position be advertised. He also considered that the length of the proceedings before the JAAB had not been excessive and that no additional payment was warranted. This is the impugned decision.

2. The basic principles are well settled in the Tribunal's case law, where a decision such as this is challenged, as explained in Judgment 3652, consideration 7:

“The Tribunal's case law has it that a staff appointment by an international organisation is a decision that lies within the discretion of its executive head. Such a decision is subject to only limited review and may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence (see Judgment 3537, under 10). Nevertheless, anyone who applies for a post to be filled by some process of selection is entitled to have her or his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right which every applicant must enjoy, whatever her or his hope of success may be (see, *inter alia*, Judgment 2163, under 1, and the case law cited therein, and Judgment 3209, under 11). It was also stated that an organisation must abide by the rules on selection and, when the process proves to be flawed, the Tribunal can quash any resulting appointment, albeit

on the understanding that the organisation must ensure that the successful candidate is shielded from any injury which may result from the cancellation of her or his appointment, which she or he accepted in good faith (see, for example, Judgment 3130, under 10 and 11).”

A complainant is required to demonstrate that there was a serious defect in the selection process which impacted on the consideration and assessment of her or his candidacy. It is not enough simply to assert that one is better qualified than the selected candidate (see Judgment 3669, consideration 4).

However, when an organisation conducts a competition to fill a post, the process must accord with the relevant rules and the case law (see Judgment 1549, considerations 11 and 13, and the case law cited therein).

3. Before the Tribunal the complainant submits that the impugned decision should be set aside on four grounds, namely:

- (a) the linguistic requirements of the vacancy announcement were applied to his candidacy in breach of the provisions of Annex I to the Staff Regulations;
- (b) the general principle of fair and equal treatment was breached in the recruitment process;
- (c) there were fatal flaws and irregularities in the selection process; and
- (d) his candidacy should have been given priority for an in-grade transfer to the disputed position without competition, and special consideration should have been given to geographical mobility.

4. The ILO contends that the complainant’s allegations are unfounded, that his claim for damages is excessive and that, in any case, adequate compensation for the procedural deficiencies in the selection process was paid to the complainant. It further submits that insofar as the complainant did not meet the minimum requirements of the vacancy announcement pertaining to language skills, he could not be considered for an in-grade transfer from his current field duty station to the advertised position at headquarters.

5. In its report of 20 December 2018, the JAAB identified four major flaws in the selection procedure which rendered it unlawful. The first flaw is that both Stage 2 candidates, that is the complainant and another internal candidate, had been considered as not meeting the minimum language requirements of the disputed vacancy; however, HRD did not report this circumstance in the HRD Ranking Matrix or in its communication to the responsible chief. The second flaw is that no evidence proved that the responsible chief had, in fact, reviewed the list of Stage 2 candidates or had properly assessed their suitability, a fact which constituted a procedural flaw in breach of paragraph 9 of Annex I to the Staff Regulations. The third flaw is that HRD had overstepped its authority in forwarding to the responsible chief the list of Stage 3 candidates, that is the other internal candidates and the candidates having more than five years' service under Technical Cooperation contracts, before the Recruitment, Assignment and Mobility Committee (RAMC) had met to review the Stage 2 candidacies and had apprised the Director-General of its advice and recommendations. The fourth flaw is that the RAMC had failed to adequately examine the list of Stage 2 candidates. The JAAB considered the second, third, and fourth procedural flaws as major flaws vitiating the impugned competition process. As to the first procedural flaw, the JAAB recommended that in the future the provision of paragraph 1 of Annex I to the Staff Regulations be clearly mentioned by HRD, in particular in the HRD Ranking Matrix sent to the responsible chief for review, pursuant to paragraph 9 of Annex I. The JAAB did not agree that paragraph 1 of Annex I was, as the ILO argued in the internal appeal, only a "statement of general principle" which "broadly stipulates general benchmarks for language requirements" for Professional staff.

6. The complainant argues that the determination regarding his "not meeting minimum requirements" was made in violation of paragraph 1 of Annex I to the Staff Regulations, and the fact that his mother tongue was not one of the three ILO working languages was not duly considered in the determination of his qualifications. He relies on the JAAB's opinion that paragraph 1 of Annex I to the Staff Regulations is

not a “statement of general principle” and he argues that it should have been applied in the recruitment and selection procedure.

7. The ILO submits that there was no valid reason for not applying the linguistic requirements of the vacancy announcement to the complainant’s candidacy. As he speaks only one working language, English, and has no knowledge of a second working language, HRD properly identified his application as not meeting the minimum requirements of the vacancy announcement. The ILO further asserts that the complainant entered in the employment of the ILO in May 2008 and has since been specifically encouraged to acquire a working knowledge of Spanish but has, nevertheless, failed to do so.

8. In his rejoinder the complainant contends that the language requirements in the vacancy announcement should not be written to deviate from Annex I, as this could easily place some candidates from certain geographical areas at a disadvantage while others at an advantage. He argues that the ILO’s submission that he should have acquired a satisfactory working knowledge of a second language after a considerable period of time in service amounts to changing the rule selectively, since no provision of the Staff Regulations or the recruitment and mobility policy articulates such a requirement, and neither does his contract. He further submits that he has registered for independent Spanish classes over the years and his continuing study was indicated in his performance appraisal.

9. In its submissions, the ILO explains the reasons why the needs of the service required the incumbent of the advertised post to possess a “[w]orking knowledge of a second ILO working language”, namely: (i) to ensure that the ILO remains a multilingual organisation and that its officials are mobile and versatile, capable of serving in different duty stations and providing services to various constituencies; (ii) pursuant to paragraph 3 of Annex I to the Staff Regulations, it is the responsible chief who is in charge of preparing a description of the responsibilities, objectives and minimum requirements that are specific to the job and, in the present case, the responsible chief considered that a working

knowledge of a second working language was necessary; and (iii) the linguistic requirements of the generic job description of a Senior Technical Specialist at grade P.5, which corresponds to the post advertised through the vacancy announcement, specifically stipulate an “[e]xcellent command of one working language of the Organization” and also that “some technical positions may require proficiency in one or more additional working languages”.

10. In Judgment 3372, consideration 23, the Tribunal recognised an organisation’s prerogative to define the required qualifications for a post having regard to the needs of the service. It specifically said:

“[I]n any event it is not for the Tribunal to substitute itself for the Organization, whose task it is to define the responsibilities and qualifications required for the posts it seeks to fill having regard to the needs of the service, in setting the required qualifications and ultimately deciding upon the respective merits of the various candidates”.

11. The provision regarding language requirements in paragraph 1 of Annex I to the Staff Regulations, entitled “Recruitment and selection procedure”, relevantly states:

“GENERAL CONSIDERATIONS

1. In the filling of any vacancy account shall be taken of linguistic knowledge. Officials in the Professional category whose mother tongue is one of the working languages shall normally be required to have a good working knowledge of a second working language and may be required to acquire a knowledge of a third working language. **Officials in the Professional category whose mother tongue is not one of the working languages shall be required to possess a fully satisfactory working knowledge of one of the working languages of the Office, as prescribed in article 4.2(a) (Filling of vacancies) and may be required to acquire a knowledge of a second working language.** Officials in the Professional category who undertake duties as translator or such other duties as may be designated as similar by the Director-General shall be required to have a thorough knowledge of two working languages as well as the main language into which they translate.” (Emphasis added.)

12. The Tribunal discussed the legitimacy of the language requirements in the ILO in Judgment 524. In that case, the complainant argued that requiring the same language qualifications, namely “an

excellent command of English, French or Spanish and a good working knowledge of the other languages”, for all applicants in the vacancy announcement was in breach of article 4.2(a) of the Staff Regulations and paragraph 1 of Annex I thereto, and favoured those whose mother tongue is an ILO working language. In the last consideration, the Tribunal held that:

“To stipulate particular language qualifications [...] is not contrary to Annex I, paragraph 1, of the Staff Regulations. This sets out merely the minimum requirements, and such others may be added as may be desirable for any particular vacancy. Nor is it in breach of the principle of equality of treatment to demand any particular language qualifications or specialised knowledge for a vacancy. The principle requires equal treatment and absence of discrimination only where the circumstances are similar. Where the very nature of the post to be filled makes special qualifications necessary, it is reasonable and right for the Organisation to require that candidates possess them.”

However, as observed in the passage just quoted from Judgment 524, the provision in paragraph 1 of Annex I sets out merely the minimum requirements, and such others may be added as may be desirable for any particular vacancy. The complainant’s first argument is therefore unfounded.

13. With regard to the unequal and unfair treatment allegation, the complainant contends that HRD wrote different language requirements in the vacancy announcement, compared to the requirements in several other vacancy announcements for a Skills and Employability Specialist, to fit a purpose, namely to deny him an in-grade transfer without competition. In support of this argument, he provides specific examples of vacancy announcements in the same department advertised since January 2017 for Skills and Employability Specialists and which did not have knowledge of a second official ILO language as a requirement.

14. The ILO submits that there is no provision in the internal ILO legal system that dictates uniformity of linguistic requirements across different vacancy announcements, including in the same department. In order for discrimination to be established, the complainant would have to demonstrate that officials in the same situation as himself, in fact and

in law, received different treatment; however, this is not the case: one other P.5 grade internal candidate in this disputed selection procedure was also not considered for an in-grade transfer because he did not meet the language requirements.

15. The Tribunal recalls its case law, as stated, for example, in Judgment 2313, consideration 5:

“The principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently. In most cases involving allegations of unequal treatment, the critical question is whether there is a relevant difference warranting the different treatment involved. Even where there is a relevant difference, different treatment may breach the principle of equality if the different treatment is not appropriate and adapted to that difference.”

Furthermore, according to the case law, unequal treatment “can be taken into consideration by the Tribunal and, if need be, give rise to redress on condition that it is based on precise and proven facts which establish the discrimination has occurred” (see Judgment 4067, consideration 10).

16. The Tribunal notes that in accordance with paragraph 3 of Annex I to the Staff Regulations, each vacancy announcement is prepared by the responsible chief, who “will prepare a description of the responsibilities, objectives and minimum requirements that are specific to the job”. The vacancy announcement is subsequently reviewed by HRD and then submitted to the RAMC along with additional information. There is no evidence indicating discriminatory requirements against the complainant in the vacancy announcement. Contrary to the complainant’s allegation, one other internal candidate at grade P.5 applied for the advertised position and, as his mother tongue was other than English, French, or Spanish and he was only fluent in one of the three ILO working languages, his application was similarly rejected as not meeting the minimum linguistic requirements of the vacancy announcement. On the other hand, it is observed that the successful candidate, whose mother tongue is not one of the three ILO working languages either, possessed an excellent command of English and a working knowledge of French and her application was therefore identified as meeting the

minimum linguistic requirements of the vacancy announcement. The complainant has not produced sufficiently persuasive evidence to prove his allegation of unequal treatment. His second argument is therefore unfounded.

17. The complainant further argues that the procedural flaws at all stages of the recruitment process were not simply “procedural weaknesses” or “lack of rigor in documentation”, as stated in the impugned decision, but, rather, a problem of integrity, an ILO core value that requires full compliance with the rules established in Annex I to the Staff Regulations and relevant Office Directives to allow for fair and equal treatment of all staff during the recruitment process. The complainant insists that the procedural flaws vitiate the contested competition.

18. The ILO rejects as unfounded the complainant’s allegations about the supposed lack of integrity of HRD officials in charge of recruitment and selection. It submits that the fact that the responsible chief was given the HRD Ranking Matrix and the curricula vitae of other candidates before the RAMC reviewed the list containing the names of the two internal candidates who had applied for an in-grade transfer did not affect the complainant’s chances in the contested recruitment process, as he did not meet the minimum linguistic requirements. It further contends that the aforementioned non-critical procedural deficiencies were duly acknowledged in the impugned decision and the complainant was awarded compensation for the injury suffered.

19. It is indisputable that the ILO officials in charge of the recruitment process did not rigorously follow the procedure established in Annex I to the Staff Regulations, as there was no separate evaluation on the part of the responsible chief and the latter was given the HRD Ranking Matrix and the curricula vitae of Stage 3 candidates before the RAMC’s review of the Stage 2 candidates. The Tribunal also notes that in the impugned decision, the Director-General agreed with the JAAB’s conclusion that the recruitment process had been tainted with procedural deficiencies, insofar as steps in certain stages had not been rigorously followed or properly documented. The Director-General therefore

decided to award the complainant 20,000 Swiss francs as compensation for the injury suffered in this regard. The Director-General also requested HRD to take additional measures to ensure that the recruitment and selection processes are strictly and diligently applied in all circumstances.

20. However, in the present case, it should be noted that the complainant's application was considered in good faith and he was excluded in Stage 2 because he did not meet the minimum linguistic requirements of the vacancy announcement. HRD's failure to state explicitly in the HRD Ranking Matrix, under "Comments", that the complainant's mother tongue was not one of the ILO working languages and the absence of an evaluation of Stage 2 candidates by the responsible chief did not, and could not, affect the complainant's chances to be appointed to the advertised position because he did not meet the language requirements set out in the vacancy announcement.

It should also be noted that the circumstances of the present case are different from those considered in Judgment 3032, on which the complainant relies to request setting aside the impugned decision. In that case, the ILO not only failed to respect the order established for the evaluation by the Assessment Centre and the technical evaluation but also, as the Tribunal held in consideration 22, "the possibility that this reversal of the order had an impact on the results of the competition [could not] be ruled out". Therefore, the case leading to Judgment 3032 is distinguished from the present case.

21. Considering the effect and extent of the procedural defects in the selection process, the Tribunal finds that the complainant has not produced sufficient evidence to demonstrate that these defects were so serious as to have impacted the consideration and assessment of his candidacy. The complainant's third argument is therefore unfounded.

22. The complainant finally alleges that the ILO violated the provisions of article 10.6(1) of the Staff Regulations which states, among other things, that the RAMC shall "facilitate geographical and functional mobility" and "make recommendations for transfers in the same grade without competition". He argues that the Coordinator of the Resourcing

Unit, was well aware of the statement in the vacancy announcement that “[w]ithin the context of the Office’s renewed efforts to promote mobility, staff members seeking mobility are encouraged to apply to vacancies. Mobility will be given special consideration at the screening and evaluation stages”. He asserts that he had a right to an in-grade transfer and alleges that the ILO circumvented paragraphs 9 and 10 of Annex I to the Staff Regulations.

23. The ILO maintains that the complainant had no right to an in-grade transfer to the advertised position and that only an internal candidate meeting the minimum requirements of a vacancy announcement may be considered by the RAMC for an in-grade transfer at Stage 2 of the recruitment and selection process. It submits that insofar as the complainant did not meet the minimum linguistic requirements set forth in the vacancy announcement, his application could not qualify for any priority consideration by the RAMC.

24. The Tribunal observes that, despite the provision of article 10.6(1) of the Staff Regulations, article 4.2(f) relevantly states as follows:

“The methods to be employed to fill vacancies in the General Service, National Professional Officer and Professional categories shall comprise transfer in the same grade, promotion or appointment, **normally by competition** in accordance with the procedure set out in Annex I [...] However, promotion or appointment **without competition may be employed only in:**

- 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) above by the employment of any other method.

The [RAMC] shall be consulted on any transfer in the same grade, promotions or appointments made without competition.” (Emphasis added.)

25. In the present case, the RAMC did recommend that the vacant post be advertised and filled through competition, according to the procedure of Annex I to the Staff Regulations, and that eligibility to apply be limited to internal candidates and candidates with more than five years' service within the Office. Furthermore, the statement in the vacancy announcement that "[w]ithin the context of the Office's renewed efforts to promote mobility, staff members seeking mobility are encouraged to apply to vacancies. Mobility will be given special consideration at the screening and evaluation stages" can only be read to mean, as the ILO correctly points out, that priority consideration for an in-grade transfer could only be given to applications from internal candidates meeting the minimum requirements of the vacancy announcement. As the complainant did not meet the minimum linguistic requirements, he could not have been given priority consideration for an in-grade transfer. His fourth argument is therefore unfounded. Accordingly, the complainant's requests to set aside the impugned decision, to cancel the contested selection process, and to award him compensation for the alleged injury should be dismissed.

26. With regard to the alleged delay of the JAAB in reviewing the complainant's case, the Tribunal notes that it took one year for the JAAB to review the complainant's grievance. The complainant submitted the grievance to the JAAB on 22 December 2017. The JAAB met to review the case on 10 December 2018 and it issued its report only ten days later. Given the time needed to deal with multiple procedural issues that arose in the course of the proceedings before the JAAB, the Tribunal concludes that there was no unreasonable delay. The complainant's claim in this respect is therefore dismissed.

27. In the result, the complaint should be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HONGYU SHEN

DRAŽEN PETROVIĆ