

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

T. F.

v.

CERN

138th Session

Judgment No. 4903

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. T. F. against the European Organization for Nuclear Research (CERN) on 24 February 2020 and corrected on 9 April 2020, CERN's reply of 23 July 2020, the complainant's rejoinder of 3 September 2020 and CERN's surrejoinder of 17 December 2020;

Considering Articles II, paragraph 5, 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 refusal to select him for a post of civil engineering technician.

The complainant joined CERN's General Infrastructure Services Department on 1 March 2011 as a professional firefighter in the Fire and Rescue Service, on secondment from the Fire and Rescue Service of Haute-Savoie (France) under a fixed-term contract of five years. His duties consisted of providing an emergency response in connection with various risks on the CERN site, as well as other responsibilities relating to the ongoing training of his colleagues, maintaining response equipment, in particular fire extinguishers, and acting as operator in the fire service control room.

On 30 April 2013 the complainant sustained an accident while handling fire extinguishers. On 24 June 2013 this accident was recognised by CERN as an occupational accident. After a period of sick leave, the complainant resumed work on 10 July 2013 but was assigned solely duties that were not physically demanding. Following an operation on the complainant's injured shoulder on 28 July 2016, he was left with after-effects that made it necessary to keep him in non-physically demanding duties in the Fire and Rescue Service.

In the meantime, on 1 March 2016 the complainant's contract was extended for three years, thereby reaching a total of eight years of service on 1 March 2019, which is the maximum duration for a fixed-term contract at CERN under Article R II 1.17 of the Staff Rules and Regulations and paragraph 44 of Administrative Circular No. 2 (Rev. 7).

On 29 August 2018, a few months before his contract ended, the complainant, who had been on sick leave again since 26 March 2018, submitted his application for a post of civil engineering technician in the Site Engineering group in the Site Management and Buildings department ("the SMB Department"), a vacant post for which an indefinite contract was to be awarded. On 10 September 2018 representatives of the Human Resources Department ("the HR Department") and of the SMB Department examined the application files of the two candidates who had applied and drew up a shortlist to be submitted for consideration by the Review Board. The complainant's name was not chosen to be included in this list. On 29 October 2018 the complainant was informed in writing that his application had been rejected, without any further details.

On 19 December 2018 the complainant lodged an internal appeal against the rejection of his application. After holding a day-long hearing on 24 September 2019, the Joint Advisory Appeals Board (JAAB) issued its report on 17 October 2019, concluding unanimously that the appeal should be dismissed because the application had been rejected in accordance with the applicable rules and that the contested decision had been taken in compliance with the procedures in force. However, the Board recommended that "the possibility be considered of allowing

[the complainant] to reapply”^{*} for a limited duration post in the Fire and Rescue Service should one become vacant. By a letter of 22 November 2019, which the complainant states he received on 29 November 2019, the Director-General informed him that his appeal had been rejected and that she had decided not to follow the Board’s aforementioned recommendation.

The complainant’s contract ended on 28 February 2019. From that date, the complainant administratively rejoined the Fire and Rescue Service of Haute-Savoie, but without resuming active service.

On 5 December 2019 the complainant, on the basis of a promise allegedly made to him by the Director-General to that effect in a previous letter of 11 April 2019, requested that she reconsider the decision of 22 November 2019 not to allow him to reapply for a limited duration post in the Fire and Rescue Service in the event that such a post became vacant, regardless of the fact that his contract had ended on 28 February. On 20 December 2019 the Head of the HR Department, stating that he was acting on the Director-General’s behalf, reiterated the decision taken by the latter.

The complainant asks the Tribunal to order CERN to provide him with all the relevant documents relating to the selection process for the post to which he had applied. He also asks the Tribunal: (1) to set aside the decision of 22 November 2019 rejecting his internal appeal; (2) to set aside the decision not to select him for the post of civil engineering technician; (3) to order that the selection process for that post be re-started; (4) subsidiarily to claims (2) and (3), to order the Organization to offer him an alternative post at the same grade as his previous post; (5) in the alternative to those two claims, to order CERN to adopt the recommendation made by the JAAB in its opinion of 17 October 2019; (6) in all cases, to award him moral damages of at least 10,000 Swiss francs; (7) to award him the sum of 10,000 Swiss francs for the cost of legal representation.

CERN asks the Tribunal to reject the complaint as partly irreceivable and otherwise unfounded.

^{*} Registry’s translation.

CONSIDERATIONS

1. The complainant asks the Tribunal to set aside the Director-General's decision of 22 November 2019 rejecting his internal appeal against his non-selection for the post of civil engineering technician.

2. In her decision of 22 November 2019 on the complainant's internal appeal, the Director-General ruled on the two recommendations issued by the Joint Advisory Appeals Board (JAAB). It is appropriate to consider these two aspects separately, that is to say, firstly, the decision to reject the complainant's internal appeal against the initial decision of 29 October 2018 rejecting his application for the post of civil engineering technician and, secondly, the decision not to follow the JAAB's recommendation to allow the complainant to apply for another limited duration post in his previous department.

3. As regards the first part of that decision, the complainant asks the Tribunal to order CERN to produce "all the relevant documents relating to the selection process for the post of civil engineering technician [...], in particular the selection file of the Human Resources Department and the recruiting department, as well as correspondence with Human Resources regarding that file".*

The Organization submits that it does not have to disclose the complete selection procedure file in respect of the other candidate's application. In this regard, it emphasises that it has already sent the complainant a copy of the internal working note entitled "Shortlisting for SMB-SE-2018-47-IC" in a form that anonymised this other candidate's data.

The Tribunal considers that, in view of the circumstances of the case and the legal context in which it arises, it has a sufficiently complete file to be able to rule on the case in full knowledge of the facts.

There is therefore no need to grant the complainant's request that the Organization produce additional documents.

* Registry's translation.

4. The complainant submits that the procedure followed for examining his application for the post of civil engineering technician was tainted with various flaws: firstly, his right to information was not respected because the reasons for the rejection of his application were only communicated to him during the internal appeal procedure, whereas they should have been during the selection procedure; secondly, the only document mentioning the reasons for shortlisting or not candidates does not bear a date, a signature or any other confirmation of the identity of its authors or of the fact that this document belongs to the procedure file; thirdly, he was not given access to the file of the candidate who was eventually selected, which prevented him from verifying the justification of that choice and the absence of discrimination; fourthly, the non-selection decision was itself tainted by errors of fact and law in that it omitted to take account of fundamental competencies which the complainant possessed and in that only an incomplete examination of the criteria included in the vacancy notice was carried out; fifthly and lastly, the Organization also breached its duty of care in that it did not take into consideration the complainant's professional situation following his accident in April 2013, which, however, had been recognised as an occupational accident.

5. It should firstly be stated that paragraphs 50 to 72 of Administrative Circular No. 2 (Rev. 7) of 31 March 2015, on the recruitment, appointment and possible developments regarding the contractual situation of staff members, as applicable at the material time, provide for five stages in the procedure for awarding an indefinite contract at CERN: (1) the opening of posts within an Organization-wide exercise and the publication of vacancy notices for posts with a view to the award of an indefinite contract; (2) the receipt of applications and a preselection by the HR Department of candidates who meet or are likely to meet the criteria specified in paragraph 56 of that circular; (3) the agreement by the HR Department and an official of the department for which the post under consideration has been opened ("the recruiting department") of a shortlist solely including candidates whose technical competencies, qualifications and/or professional experience appear to correspond to those stipulated in the vacancy notice; (4) the selection

by a Review Board for the award of indefinite contracts from among shortlisted candidates of those who satisfy the technical and behavioural competencies indicated in the vacancy notice and who also possess the requisite potential to make a valid contribution to the Organization's mission in the long term; (5) a final decision taken by the Director-General on the basis of the selection recommendation of the Review Board and, if necessary, of a written report drawn up by the HR Department and of the complete file.

In the present case, the complainant's application did not progress beyond the third stage, that is to say the shortlisting stage.

6. The Tribunal recalls its settled case law under which, in matters of appointment, the choice of the candidate to be appointed lies within the discretion of the authority competent to make the appointment within the organisation concerned. Such a decision is therefore subject to only limited review by the Tribunal 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, in particular, Judgments 3652, consideration 7, and 3372, consideration 12). As a result, a person who has applied for a post that an organisation has decided to fill by a competition and whose application is ultimately unsuccessful must prove that the selection procedure was tainted by a serious defect (see to that effect, in particular, Judgments 4625, consideration 3, 4001, consideration 4, 3669, consideration 4, and 1827, consideration 6). The Tribunal also recalls that, in relation to competitions, it is not its role to replace the assessment made by the competent selection bodies with its own assessment (see Judgments 4594, consideration 8, 4100, consideration 5, and 1595, consideration 4).

7. As far as the first plea is concerned, the Tribunal observes that, according to its case law, the duty to state the reasons for the rejection of an application in a selection procedure does not mean that they must be notified at the same time as the decision itself. These reasons may be disclosed at a later date to the staff member concerned,

for example in the context of internal appeal proceedings (see, in particular, Judgments 4683, consideration 12, 4467, consideration 7, and 2978, consideration 4). In the present case, these reasons were in fact disclosed to the complainant during the internal appeal proceedings, as he himself acknowledges. It must also be noted that the complainant did not either, as the Organization had invited him to, contact directly his HR adviser, the first point of contact specified in the Organization's "admin e-guide" to respond to questions of staff members.

The first plea must therefore be dismissed.

8. In respect of the second plea, the Tribunal observes that the only internal document produced by the Organization concerning the shortlisting stage is the document drawn up by mutual agreement of a member of the HR Department and an official (group leader) from the recruiting department when drawing up the shortlist, entitled "Shortlisting for SMB-SE-2018-47-IC", of which an anonymised copy was provided to the complainant on 20 April 2020. Although the document mentions the two people who drew it up, it does not in fact contain a date, a signature or a confirmation of its official existence. However, the Tribunal notes in this regard that there is no express requirement for these details to be included for the document to be valid. It further considers that, in the light of the circumstances of the case and the practice followed in this area – as explained by the officials who drew up the document, at their hearing by the JAAB – there is no reason to doubt the authenticity of this document.

It follows that the second plea is also unfounded.

9. As regards the third plea, the Tribunal does not see in what respect the non-communication to the complainant of the file of the candidate eventually selected would by itself render the rejection of his own application unlawful. Since this rejection – assuming it is otherwise lawful – was based on reasons relating to the fact that the complainant did not fulfil the required criteria, any flaws tainting the processing of other applications during the establishment of the shortlist did not affect the lawfulness of the rejection.

Admittedly, the complainant submits on this point that he was thus unable to ensure that he had not been discriminated against in relation to the only shortlisted candidate. However, he does not provide any *prima facie* evidence in support of his allegation that he may have been subjected to discrimination and the Tribunal sees no evidence of this in the file (see, for a comparable case, Judgment 4027, consideration 12).

The third plea is also unfounded.

10. In his fourth plea, the complainant submits that his non-selection is tainted with errors of fact or of law. In this regard, he argues that the shortlist was drawn up on the basis of an incomplete examination of his application, that this examination did not take account of some of his fundamental competencies and that the examiners did not take into consideration all the competency and professional experience criteria listed in the vacancy notice.

11. The Tribunal observes that the vacancy notice for the post in question stated that this was a job of “civil engineering technician” opened by the SMB Department with “designer-draftsperson” as the post title, and that the post consisted of designing civil engineering structures and systems in collaboration with a civil engineer. The duties to be performed were, in particular, described as follows: “In close collaboration with the engineers, provide, for any study in the Design Office, all types of drawings and 3D models [...] for any project phase [...] using [...] CAD & BIM software; Prepare studies and projects for any type of work in surface or underground (new buildings or tunnels, galleries, refurbishment, structural modifications, VRD – roads, network, landscape – etc.) [...]; Follow, review and control the design of the different studies prepared in the Design Office [...]; Collaborate in the preparation of the quality plan for the Design Office [...]”. The section “Experience and Competencies” placed emphasis on “experience in the design of different types of drawing in the various fields of building – civil engineering, architecture, roads and networks, etc. – coupled with experience in the use of computer-assisted design in a range of software [...] [as well as] good knowledge of other building trades and their integration (electricity, heating, cooling and ventilation,

handling needs, etc.)” and the obtention of “experience in the organisation and evaluation of timing for projects and for a team of designers”. The required technical competencies essentially covered design in various fields, such as civil and industrial buildings, underground infrastructure (in particular, tunnels and galleries), roads, excavations and drainage works.

The vacancy notice also specified that applications would be assessed on the basis of the criteria set out in paragraphs 56 and 62 of aforementioned Administrative Circular No. 2. Under paragraph 56, “[o]nly candidates [...] whose technical competencies, qualifications and/or professional experience correspond to the requirements stipulated in the indefinite contract vacancy notice are eligible to be shortlisted” by a member of the HR Department and an official from the recruiting department with a view to this list being submitted to the Review Board, while paragraph 62 stipulates that “[s]hortlisted candidates are assessed and examined [by the Board] against the technical and behavioural competencies indicated in the vacancy notice and, furthermore, as to whether they possess the requisite potential to make a valid contribution to the Organization’s mission in the long-term”.

12. In his application, the complainant mainly referred to the following professional experience as regards designing civil engineering structures and systems: “2006–2008: SERIA – industrial insulation, works supervisor – Assembly of buildings constructed from sandwich panels: positive and negative temperature cold rooms for industry, agriculture and pharmaceutical laboratories [...]; 2004–2006: Groupe 4807: house builders, works supervisor [...]; 2003–2004: Maçonnerie du Fier – mason, then team leader”. In the “Strengths and skills” section, the complainant also mentioned the following: “Mastery of building construction, renovation and maintenance techniques – Mastery of operations management methods – Quantity surveys, estimates, planning, technical drawing, reading plans, price studies, site preparation – Mastery of Word, Excel, PowerPoint and Outlook software – Knowledge of autocad, allplan, EDH, DAI, Snow and EAM software”. The complainant added the following in a separate document: “My career path has enabled me to work in technical and

administrative construction trades from structural to finishing work as a skilled worker, team leader and site manager. After resuming my studies, I worked as a project manager for single-family homes, then in industrial building insulation [and] construction, which has allowed me to undertake all the important tasks performed on building sites, such as studies, financial management, site preparation, project design, coordination/supervision of site teams, exterior/interior fittings, roads and utility networks, drainage, insulation of underground galleries in the agri-food industry and site meetings”. Similarly, in a testimonial supporting the complainant’s application, one of his colleagues from the Fire and Rescue Service stated that “[h]is knowledge [...] of building and construction is an invaluable aid in carrying out our work safely. His studies in the field of civil engineering and several years of experience as a works manager allow us to carry out a more detailed and rapid risk assessment before sending our colleagues to sites where a response is required”.

13. After the complainant’s application was preselected, along with another application, by the HR Department (second stage of the selection procedure), a member of the HR Department and an official (group leader) from the recruiting department finally agreed not to include the complainant on the shortlist drawn up for the Review Board (third stage of the selection procedure). Under paragraph 15 of aforementioned Administrative Circular No. 2, it means that ultimately those officials took the view that the complainant’s competencies, qualifications and/or professional experience did not correspond to the requirements and level of the post to be filled.

In this respect, it is apparent from the document entitled “Shortlisting for SMB-SE-2018-47-IC”, drawn up by those officials after examining the complainant’s application, that they mainly based their decision on the facts that the complainant’s professional experience as a works manager, acquired outside CERN, dated back 10 years; that he did not have professional experience as a designer-draughtsperson; that, although he had one year’s experience in house building, he did not have technical design competencies in this area; that, although he had been a works manager in industrial building

construction from 2006 to 2008, he did not have technical design competencies in that area either; and lastly, that he did not have technical competencies in designing tunnels and roads. Similarly, it is apparent from the hearing of those two officials, conducted by the JAAB on 24 September 2019 in the presence of the complainant, that those officials explained that, although the complainant did have experience in civil engineering works, it did not correspond to the specific profile sought for the reasons indicated in the abovementioned “Shortlisting” document.

14. Before the Tribunal, the complainant has also submitted a testimonial from a previous employer concerning the position of designer-draughtsperson that he had held from 2006 to 2008 to establish that the position had required him to participate in developing and designing the infrastructure needed to construct tunnels and galleries for the agri-food and pharmaceutical sectors. However, this document, which was not drawn up until 6 April 2020, was in any event not included in the complainant’s application file and so cannot as such be taken into consideration by the Tribunal in its assessment of the lawfulness of the contested decisions.

15. It is clear from all the foregoing that the Tribunal cannot admit that, as the complainant attempts to argue in his written submissions, the shortlist was drawn up on the basis of an incomplete examination of his application or that the examination did not take account of some of his fundamental competencies.

Contrary to what the complainant also seems to argue, the examiners did not need to examine all the competency and professional experience criteria listed in the vacancy notice, as they considered that several essential criteria in view of the particular nature of the post to be filled were not met.

In reality, it appears from the written submissions that the complainant is in fact seeking to invite the Tribunal simply to substitute its own assessment for that of the two examiners, the JAAB and the

Director-General of CERN. However, as stated in consideration 6 above, the Tribunal is not competent to do so.

The fourth plea must therefore also be dismissed.

16. Lastly, regarding the plea concerning a breach of the duty of care, the Tribunal considers, like the Organization, that the circumstance that the complainant suffered an accident while working as a firefighter at CERN - however obviously unfortunate that accident may have been - cannot be taken into consideration in a procedure for opening a post by means of a competition with a view to obtaining an indefinite contract. A finding to the contrary would contravene the rules applicable in this area and could legitimately be considered by other candidates as constituting a breach of the principle of equality in their respect. The various judgments cited by the complainant in support of his plea are irrelevant in that regard, since they relate to situations that are entirely different from that in the present case.

The fifth plea is therefore also unfounded.

17. The complainant also requests, subsidiarily, the setting aside of the Director-General's decision of 22 November 2019 in as much as she refused to take into consideration the second recommendation put forward by the JAAB in its opinion.

However, it is sufficient to note that the complainant does not raise any specific plea concerning the unlawfulness of that aspect of the Director-General's decision of 22 November 2019 or of the subsequent decision of the Head of the HR Department of 20 December 2019 by which the latter reiterated the position previously adopted by the Director-General.

The claim for the setting aside of the refusal to take into consideration the JAAB's second recommendation is accordingly irreceivable.

18. It follows from all the foregoing considerations that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER