

EIGHTY-THIRD SESSION

In re Pinto

Judgment 1646

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Antonio Pinto against the International Telecommunication Union (ITU) on 12 September 1996, the ITU's reply of 30 October, the complainant's rejoinder of 26 November and the Organisation's surrejoinder of 19 December 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Bolivian who was born in 1950, joined the staff of the ITU on 6 June 1984 and was assigned to its Library and Archives Service. He was granted short-term contracts and then, on 2 October 1987, a permanent appointment at grade G.5.

On 21 April 1995 he applied for the grade P.3 post of head of the Registration and References unit, which belongs to the Terminology, References and Computer Aids to Translation Section of the Department of Conferences. The notice of vacancy required a "university degree in languages or documentation or equivalent, or education in a reputed college of advanced education, with a diploma of equivalent standard to that of a university degree in the field of the post". It also required "a minimum of four years of experience as a documentalist". By a letter of 27 September 1995 the chief of the Personnel and Social Protection Department told the complainant that he had not got the post.

On 3 November 1995 the complainant put to the Secretary General a request for review of that decision on the grounds that the process of preselection had been improperly carried out and was not impartial. The Secretary General rejected his request in a memorandum of 27 November 1995.

On 8 December he repeated his request on the grounds that the appointment of the successful candidate, Mrs. Sylvie Pitt, was in breach of Staff Rule 4.7.1(b), which forbade employing members of the same family in the same department if one of the posts they held was subordinate to the other. In a memorandum of 11 December the chief of Personnel dismissed that objection as irrelevant.

On 26 February 1996 the complainant went to the Appeal Board. In its report of 5 June 1996 the Board held that the lists of candidates drawn up by the preselection panel and by the Appointment and Promotion Board were flawed because they included Mrs. Pitt and others who were not qualified for the post. The Board further held that, since Mrs. Pitt's post and her husband's were not in the same line of authority, there had been no breach of Rule 4.7.1(b). It recommended having the two lists revised with due regard to the qualifications required in the post description and to the candidates' own. By a memorandum of 5 July 1996, however, which is the impugned decision, the Secretary General rejected that recommendation.

B. The complainant is objecting to the lawfulness of the two lists on the grounds that Mrs. Pitt and some of the others included lacked the qualifications stipulated in the notice of vacancy. In his submission the appointment was a foregone conclusion, Mrs. Pitt being added to the short list at the last moment on the instructions of the chief of Personnel acting as secretary to the Appointment and Promotion Board. The complainant believes that he was the only properly qualified internal candidate. In assessing the candidates the Secretary General did not lend due weight to the qualifications and experience required.

The Secretary General acted in breach of the confidentiality of the appeal proceedings by sending a copy of his appeal to the head of the section to which the post belonged and to Mrs. Pitt's husband, the head of the English Translation Section.

He seeks the quashing of the appointment of Mrs. Pitt; the cancellation of the preselection list and the short list; the review of those lists with due regard to the qualifications required in the post description and to the candidates' own; and awards of 100,000 Swiss francs in damages for moral injury and 320,000 in damages for "injury to career". He asks the Tribunal to set a time limit for the execution of its judgment.

C. In its reply the Union says that the Appointment and Promotion Board has wide discretion under paragraph 17 of its Rules of Procedure, which reads:

"In establishing this short list, the Board shall give primary consideration to the qualifications of the candidates in relation to the job requirements set out in the vacancy notice. However, it may decide that some of the required degrees and diplomas may be replaced by special experience, over and above the minimum required in the field of work of the advertised post."

In the defendant's submission Mrs. Pitt's qualifications and good record of service made up for her lack of a university degree and earned her a place on the short list.

Relevant, too, are the texts that exhort the Union to employ women and to improve the career prospects of staff in the General Service category and afford them access to the Professional category.

The Appointment and Promotion Board properly assessed the complainant's qualifications and experience by putting him too on the short list. But his record was not quite up to scratch and persuaded the Secretary General that he was not the best candidate.

Mrs. Pitt was not added at the last moment to the short list: indeed it is offensive to the members of the Board to suggest any such thing.

The plea of breach of the rule against employing members of the same family is mistaken because Mrs. Pitt's post and her husband's are not in line of authority.

As for the alleged breach of confidentiality in the appeal proceedings, the Secretary General is free, indeed bound, to consult anyone he thinks fit, especially someone who has been named in proceedings.

D. In his rejoinder the complainant questions the Union's profession of eagerness to employ more women but submits that in any event the policy must not preclude the fair geographical distribution of employment. Though paragraph 17 allows the "replacement" of "required degrees and diplomas", it does not dispense with experience: the notice of vacancy required experience of documentation, but Mrs. Pitt did not have it.

E. In its surrejoinder the Union argues that the complainant can show no cause of action since he had no hope of success anyway. Fair geographical distribution is not a prime criterion in rating candidates and in any event applies only to recruitment. The complainant puts too narrow a construction on paragraph 17.

CONSIDERATIONS

1. The complainant joined the staff of the ITU on 6 June 1984 as a library assistant. He held short-term appointments. After probation he got a permanent appointment on 2 October 1987. Reforms entailed the redeployment of staff and on 1 January 1996 he moved to the Archives and Microfilm Section.

2. On 28 March 1995 the Union issued a notice, No. 8-1995, approving a vacancy for head of the Registration and References unit. The post was numbered CF15/P3/907. On 21 April the complainant applied for it. On 27 September 1995 the chief of the Personnel and Social Protection Department told him that he had not got it.

3. On 3 November 1995 he put to the Secretary General of the Union a request for review of that decision on the grounds that the successful candidate, Mrs. Sylvie Pitt, and others should never have been put on the preselection list and the short list because they lacked the required university degree and experience. By a memorandum of 27 November the Secretary General answered that he was upholding his decision. On 8

December the complainant pressed his request. The chief of Personnel told him in a memorandum of 11 December that it was rejected and on 26 February 1996 he went to the Appeal Board. In its report of 5 June 1996 the Board recommended setting aside the two lists and redoing them. But by a memorandum of 5 July 1996 the Secretary General rejected that recommendation and upheld his decision of 27 September 1995. That is the impugned decision.

4. The material issue is whether it was lawful to appoint Mrs. Pitt to the vacancy on the strength of the notice and the outcome of the process of selection. There is a firm line of precedent about the sort of review that the Tribunal may exercise in such cases. As it has often said, a decision by an international organisation to make an appointment, being at the executive head's discretion, is subject only to limited review. The Tribunal will interfere only if there is some fatal flaw, such as a formal or procedural defect, or a mistake of law or of fact. And it will be especially cautious in reviewing an appointment because it may not substitute its own assessment of the candidates for the organisation's. See Judgments 1077 (*in re Barahona*) under 4 and 1549 (*in re López-Cotarelo*) under 9.

5. The complainant challenges the lawfulness of Mrs. Pitt's appointment on the grounds of procedural flaws and mistakes of law, any one of which should, he says, prove fatal. In his submission the appointment offended against Regulation 4.9 because Mrs. Pitt did not have the qualifications stipulated in the notice and because the Appointment and Promotion Board made a mistake of procedure in drawing up the short list. He further pleads breach of Rule 4.7.1(b), which is about the employment of members of the same family.

6. Since the first plea is allowed there is no need to entertain any other. When an organisation chooses to hold a competition it must abide by its written rules and by the general principles set forth in the case law, particularly insofar as they govern the formal side of the process.

7. The Union issued on 28 March 1995 the notice about the vacancy that the complainant applied for. The post was head of the Registration and References unit, and among the stated qualifications were:

"1. University degree in languages or documentation or equivalent, or education in a reputed college of advanced education, with a diploma of equivalent standard to that of a university degree in the field of the post.

2. A minimum of four years of experience as a documentalist, within a national telecommunications administration or with an international organization."

8. The complainant objects that appointing Mrs. Pitt overlooked requirement 2: she did not have the proper experience as a documentalist.

9. The Union argues that the Appointment and Promotion Board's choice was proper because paragraph 17 of its Rules of Procedure confers wide discretion, in making the short list, to give "primary consideration to the qualifications of the candidates in relation to the job requirements set out in the vacancy notice" and to "decide that some of the required degrees and diplomas may be replaced by special experience, over and above the minimum required in the field of work of the advertised post". The Union argues that in reliance on that text the Board took stock of Mrs. Pitt's experience of the ITU's documentation and publications, grasp of languages, proficiency in computer work, sound character and record of service, and felt that they so far made up for her lack of formal qualifications as to warrant short-listing her.

10. The plea fails. As the Appeal Board gathered from the personal records of the candidates on the preselection panel's list, Mrs. Pitt had neither the university degree nor the experience that the notice required.

11. The defendant contends on the strength of the complainant's personal file and his supervisors' reports on his conduct and performance that he was not up to the job anyway. That is neither here nor there. The Union has neglected the cardinal rule of any process of selection: the chosen candidate must have at least the qualifications stipulated in the notice.

12. The conclusion is that the administrative process for appointing the head of Registration and References was flawed and must be set aside in its entirety. The rejection of the complainant and the appointment of Mrs. Pitt cannot stand: see Judgments 1049 (*in re Dang, Kapoor and Seshadri*) and 1223 (*in re Kirstetter No. 2*).

13. The Union must now carry out anew the procedure for filling the post, this time in keeping with the rules. It may, however, in the meantime take whatever action it wishes to ensure that the work is still done and that Mrs. Pitt, who accepted her appointment in good faith, suffers no injury.

14. Since this judgment affords the complainant satisfaction, the Tribunal will not entertain his claim to damages.

DECISION

For the above reasons,

1. The Tribunal sets aside the decision of 5 July 1996 confirming the one of 27 September 1995 rejecting the complainant's application for the post announced in notice No. 8-1995 and Mrs. Pitt's appointment to that post.

2. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

**William Douglas
E. Razafindralambo
Julio Barberis
A.B. Gardner**