Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session **Judgment No. 3125**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. K. on 3 May 2010 against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom), the Commission's reply of 2 July, the complainant's rejoinder of 14 August and the Commission's surrejoinder of 27 September 2010;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 5 of its Rules;

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

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

A. The complainant is a Croatian national born in 1962. She joined the Provisional Technical Secretariat (hereinafter "the Secretariat") of the Commission in January 2007 as a personnel officer at grade P-4 in the Personnel Section of the Division of Administration, on a three-year fixed-term appointment. On 21 July 2009 her appointment was extended until 6 January 2012.

On 3 October 2008 and 5 February 2009 respectively, two vacancy announcements were issued in the same terms for the post of Chief of the Personnel Section. On both occasions the complainant applied for the post. By a memorandum dated 11 May 2009 from the Executive Secretary, two Personnel Advisory Panels comprising the same six members, one of whom was the Director of the Division of Administration, were constituted in order to interview the shortlisted candidates, including the complainant, and to evaluate the interview results, and at the same time to consider the possibility of granting an exceptional extension of the incumbent's appointment, because, according to a policy adopted by the Commission under Administrative Directive No. 20 (Rev.2) of 8 July 1999, the maximum period of service for staff in the Professional and higher categories was seven years. Paragraph 4.2 of the Directive provides that exceptions to the period of seven years may be made "because of the need to retain essential expertise or memory in the Secretariat". The arrangements for implementing the Directive are partly explained in a Note from the Executive Secretary dated 19 September 2005.

Following their deliberations, the Personnel Advisory Panels submitted to the Executive Secretary a joint report dated 20 May 2009, unanimously supporting the proposal of the Director of the Division of Administration not to grant an exceptional extension to the incumbent of the post concerned. However, there was no consensus on the Director's recommendation to rank the complainant as the best candidate for the vacancy.

By an e-mail of 17 June 2009 addressed to all the staff of her Section, the complainant was informed that an extension of appointment until 28 May 2010 had been granted to the incumbent of the post. She was also informed, by an e-mail of the same date, that her candidacy had not been successful. Having met with the Executive Secretary, at her own request, on 18 June 2009, she asked him on 16 July to review his decisions not to appoint her to the post in question and to offer an extension of contract to its incumbent. On 17 August 2009 he told her that he had not at any time taken a decision not to appoint her; rather, exercising his discretionary

authority and in conformity with Administrative Directive No. 20 (Rev.2) and the Note of 19 September 2005, he had decided to offer the incumbent of the post an exceptional extension for a period of six months, and she (the complainant) did not have *locus standi* to contest that decision.

On 11 September 2009 the complainant filed an internal appeal with the Joint Appeals Panel, reminding it of the extent of its power of review. She contended that the decision to grant an exceptional extension of contract to the incumbent of the post for which she had applied was vitiated by an error of law. She asserted that the Executive Secretary had told her, at their meeting on 18 June, that the reason for his decision was that he intended to appoint a staff member "from a developing country" to the post, so as to maintain diversity in the geographical origins of the staff. She sought inter alia annulment of the decision of 17 August 2009 and of the decisions taken following the selection process. She also claimed compensation for the material and moral prejudice she suffered. In its report of 10 February 2010 the Joint Appeals Panel stated that the decision to grant an exceptional extension of contract fell within the discretionary authority of the Executive Secretary and was subject only to limited review. Apart from the alleged error of law, which the Panel considered to be without merit, the complainant had not argued that the decisions of the Executive Secretary were tainted with any of the flaws which, according to the Tribunal's case law, warrant setting aside a discretionary decision. The Panel also considered that the appeal lacked merit and recommended that the Executive Secretary should maintain the decisions taken following the selection process and not grant the complainant any compensation. By a letter of 15 February 2010 the Executive Secretary informed her that he had decided to endorse the Panel's recommendations. That is the impugned decision.

B. In the opinion of the complainant, the Joint Appeals Panel committed an error of law by misconstruing the extent of its competence and confining itself to a limited review of the decision to grant an exceptional contract extension, whereas she had argued that

internal appeal bodies should exercise a broader power of review than the Tribunal. She contends that, as a result, the Panel violated her right to an effective internal appeal.

On the merits, the complainant argues that the reason underlying the aforementioned decision is mistaken and discriminatory. She asserts that the Executive Secretary decided to grant an exceptional contract extension to the incumbent of the post in order to ensure greater diversity of geographical origin among the staff of the Secretariat. However, according to paragraph 4.2 of Administrative Directive No. 20 (Rev.2), departures from the maximum period of seven years' service can only be justified by the need to retain essential expertise or memory in the Secretariat. Further, she contends that the decision is flawed by an obvious error of judgement, since from her point of view she herself possessed skills and experience which would debar an exceptional extension of the incumbent's appointment beyond the seven-year limit.

The complainant requests the annulment of the impugned decision and of the decisions of 17 June and 17 August 2009. She also requests the Tribunal to require the Commission to restart the recruitment process at the point at which it was flawed, and to award her 60,000 euros in compensation for the injury she claims to have suffered, as well as 8,000 euros in costs. Lastly, she asks the Tribunal to rule that, if these sums are subject to national taxation, she will be entitled to claim reimbursement from the Commission of the tax paid on them.

C. In its reply the Commission asserts that the complainant's agent, who signed the complaint on her behalf, did not provide a power of attorney as required by Article 5 of the Rules of the Tribunal. It infers from this that the Tribunal lacks jurisdiction to deal with the case, because the complaint as filed is not a complaint either *de jure* or *de facto*, within the meaning of Article II, paragraph 5, of the Statute of the Tribunal "taken in conjunction" with Article 5, paragraphs 1 and 2, of its Rules, and that the complaint is irreceivable.

On the merits, it submits that the Joint Appeals Panel acted within its competence as defined by Staff Regulation 11.1, and that it was not required to decide according to considerations of equity or appropriateness. It would have been "improper" for the Panel to substitute its judgement for that of the Executive Secretary in the exercise of his discretion. Moreover, in view of that discretionary authority, it was open to the Executive Secretary to decide, after having considered all the documents relating to the selection process, including the report of the two Personnel Advisory Panels, and in accordance with the provisions of Administrative Directive No. 20 (Rev.2), to extend the contract of the incumbent of the post concerned on the basis that she possessed essential expertise and knowledge that had to be retained within the Secretariat, without having to take any decision regarding the appointment of the candidates who had applied for the post. The Commission also rejects the allegation of discrimination and contends that the argument relating to the principle of geographical distribution is irrelevant, since the decision in question had no impact on "the possible application of that principle". As for the alleged obvious error of judgement, the Commission states that neither the Executive Secretary nor the Joint Appeals Panel was bound by the complainant's estimation of her own expertise.

D. In her rejoinder the complainant asserts that the jurisdiction of the Tribunal is not open to doubt and she adds that her agent filed a power of attorney which was acknowledged by the Registry of the Tribunal. On the merits, she maintains her arguments in their entirety and submits that a decision must be sufficiently reasoned, even if it is based on a discretionary power.

E. In its surrejoinder the Commission reiterates its pleas that the Tribunal has no jurisdiction and that the complaint is irreceivable, the complainant having failed to produce in her rejoinder the power of attorney given to her agent. On the merits, it maintains its position.

CONSIDERATIONS

1. On 8 July 1999 the Commission issued Administrative Directive No. 20 (Rev.2) on the recruitment, appointment, reappointment and tenure of staff, containing in paragraph 4.1 a rule whereby appointments to the Professional and higher categories, and all appointments of internationally recruited staff, are subject to a maximum period of service of seven years. Paragraph 4.2 of the Directive provides that exceptions may be made to that rule because of the need to retain essential expertise or memory in the Secretariat of the Commission. However, any such exceptions must be kept to an absolute minimum compatible with the efficient operation of the Secretariat.

2. On 19 September 2005 the Executive Secretary of the Commission issued a note setting out the system for implementing the provisions of the above-cited Administrative Directive, and providing inter alia that approximately one year before the expiry of a contract taking the period of service of a staff member to seven years or more, the post must be advertised, in parallel to considering the incumbent for an exceptional extension of his or her appointment. The possibility of obtaining such an extension must be judged against what the general job market can offer.

3. The complainant, who had joined the Commission on 7 January 2007 as a personnel officer at grade P-4 in the Personnel Section, applied for the post of Chief of that Section in November 2008. The post in question was held by her supervisor, who would reach the limit of seven years' service at the end of November 2009.

For a reason which, according to the defendant, was related to the number of applications received, the same post was advertised in a second vacancy announcement on 5 February 2009. The complainant applied again. She sat a written examination and in May was interviewed by the Personnel Advisory Panel.

On 17 June she was informed that her application for the post of Chief of the Personnel Section had not been successful. She was also informed, in her capacity as a staff member of that Section, that the extension of the incumbent's appointment for six months had been accepted.

On the same day she requested a meeting with the Executive Secretary. In the course of that meeting, which took place on 18 June in the presence of the Director of the Division of Administration, the recruitment process in which she had participated and the extension of contract granted to the incumbent were discussed.

4. On 16 July 2009 the complainant requested a review of the decisions not to appoint her to the post in question and to offer its incumbent an extension of her contract.

The Executive Secretary replied in a letter of 17 August that, contrary to her assertion, he had not at any time taken a decision not to appoint her to the post of Chief of the Personnel Section. At the end of the recruitment process he had simply decided to offer the incumbent of the post an exceptional six-month extension of her appointment, in full conformity with the rules in force, and the complainant did not have *locus standi* to request a review of that decision.

5. On 11 September 2009 the complainant lodged an internal appeal with the Joint Appeals Panel against the decision to reject her request for review.

On 15 February 2010, in accordance with the recommendation made by the Panel in its report of 10 February 2010, the Executive Secretary dismissed the appeal.

6. Following a fresh round of recruitment for her post in August 2009, the Chief of the Personnel Section had her contract extended until 28 August 2010, and subsequently until 28 November. A candidate other than the complainant was ultimately appointed to the post with effect from 8 November 2010.

7. Before the Tribunal, the complainant is impugning the decision of 15 February 2010. In support of her complaint, she submits a number of pleas challenging the lawfulness of that decision on both procedural and substantive grounds.

8. The defendant argues, first, that the Tribunal has no jurisdiction to deal with the complaint because, from a "strictly legal and procedural" point of view, it is neither *de jure* nor *de facto* a complaint within the meaning of Article II, paragraph 5, of the Statute of the Tribunal, read in conjunction with the provisions of Article 5, paragraphs 1 and 2, of its Rules, according to which:

> "1. The complainant may plead his own case or appoint for the purpose an agent […].
>
> 2. The complainant's agent shall provide, in English or French, a power of attorney."

The Tribunal cannot decline to exercise its jurisdiction on the basis of the defendant's allegations which, if framed more clearly, might at most give grounds for an objection to receivability, but not a challenge to jurisdiction.

9. The defendant further asserts that the complaint is irreceivable because it was not signed by the complainant herself and the person who is presented as her agent has not submitted a power of attorney, as required by Article 5, paragraph 2, of the Rules cited above.

The complainant states that a power of attorney was filed with the Registry of the Tribunal, which acknowledged it, and this has been verified.

This objection to receivability must therefore be dismissed as factually unsound.

10. Concerning the procedural legality of the impugned decision, the complainant argues that the Joint Appeals Panel misconstrued the extent of its power of review by wrongly aligning itself, as if it were an administrative court, on the practice of the Tribunal, which exercises only a limited power of review over

discretionary decisions. She rests this argument on the fact that she contended before the Panel that there had been an error of judgement, but the Panel dismissed that plea without considering it.

She asserts that an authority, including an advisory body, which misconstrues the extent of its competence commits an error of law, and that when "such an error occurs during the consultation preceding the adoption of the contested decision", it must be deemed to constitute a procedural flaw.

11. The Joint Appeals Panel expressly stated that it was following the Tribunal's case law, including Judgment 2040, according to which a discretionary decision is subject to only limited review. It also concluded that, apart from the alleged error of law, which it considered had not been established, the complainant had not argued that the decisions of the Executive Secretary were vitiated by any of the flaws mentioned in that judgment, and nor did the Panel itself find any such flaws. Consequently, the Panel took the view that the decisions in question could not be subject to any more extensive review, and must be confirmed.

12. In Judgment 3077 the Tribunal held that an appeal board had been wrong, when defining its own competence, to rely on the Tribunal's case law concerning its limited power of review, and that a complainant was right in saying that the board was not an administrative court whose sole responsibility in principle was to review the lawfulness of contested decisions.

13. In the present case, the defendant submits that, under Article 11.1 of the Staff Rules, the Joint Appeals Panel has to advise the Executive Secretary on the basis of the Regulations and Rules of the Commission. However, the general provisions to which it refers cannot be construed as limiting the power of review of the Joint Appeals Panel. Contrary to the defendant's argument, a review of an error of judgement will invariably touch upon the lawfulness of a decision, and does not merely involve considerations of what is equitable or appropriate.

14. It follows from the foregoing that, as the Board misconstrued the extent of its competence when examining the internal appeal, the decision taken on the basis of its report is unlawful. For this reason alone, the decision must be set aside, without the need to consider the other pleas raised against it, and bearing in mind that the plea based on alleged discrimination is wholly unsupported by evidence.

15. The complainant is requesting the Tribunal to set aside the decisions of 17 June 2009 not to accept her candidacy and to extend the contract of the incumbent of the post to which she aspired, as well as the decision of 17 August 2009 rejecting her request for review, and to order the defendant to "restart the recruitment process at the stage it had reached before it was tainted by unlawfulness".

16. Taking account of the time which has elapsed and the fact that the fresh recruitment process has resulted in the selection of another candidate, the Tribunal will not accede to these requests.

17. The complainant is, however, entitled to compensation for the moral injury she has suffered because of the unlawfulness of the impugned decision. The Tribunal sets the amount of this compensation at 15,000 euros.

18. The complainant is entitled to costs, set at 3,000 euros.

19. The complainant has asked the Tribunal to rule that, if the sums awarded to her are subject to national taxation, she will be entitled to claim reimbursement from the Commission of the tax paid on them. In the absence of a present cause of action in this regard, this claim must be dismissed.

DECISION

For the above reasons,

1. The impugned decision of 15 February 2010 is set aside.
2. The Commission shall pay the complainant 15,000 euros in compensation for moral injury.
3. It shall also pay her 3,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2012, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet