

A.-M.

v.

IAEA

126th Session

Judgment No. 4023

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. A.-M. against the International Atomic Energy Agency (IAEA) on 25 January 2016 and corrected on 2 February, the IAEA's reply of 10 May, corrected on 20 May, the complainant's rejoinder of 25 July, corrected on 2 August, and the IAEA's surrejoinder of 8 November 2016;

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 validity of a competition procedure in which he participated and the lawfulness of the ensuing appointment.

In October 2013 the complainant applied for a vacant post at grade P-3. He took a written test and was interviewed, but on 11 December 2014 he was informed that his application had been unsuccessful. On 30 January 2015 he asked the Director General to reconsider his application and appointment to that post, pointing out that the Division of Human Resources (MTHR) had not provided him with "[his] final mark compared to the selected candidate and the marking system that was used". His request was rejected on 26 February. The Director General noted that the decision not to disclose the competition

documents was consistent with the applicable legal framework; however, he asked MTHR to ensure that the complainant received “general feedback” as provided for in Administrative Manual, Part II, Section 3 (AM.II/3), in order to assist him in preparing for future applications.

On 20 March 2015 the complainant filed an appeal with the Joint Appeals Board (JAB) against the decision of 26 February. On 15 May, relying on Judgment 3272, he asked the Director General to reverse his decision “not to provide [him] with copies of the recruitment documents”. On 12 June the Director General advised him that, as the request for documents fell within the scope of the appeal before the JAB, he would await the outcome of the JAB’s deliberations before taking a final decision on that issue.

In its report dated 24 August 2015, the JAB concluded that the statutory requirements relating to the competition procedure had been observed and that the complainant’s qualifications and suitability had been properly considered. Concerning the request for documents, it noted that “general feedback” had been provided to the complainant, but it considered that the disclosure of documentation on the competition procedure itself would be contrary to the rules. It recommended that the Director General uphold his previous decision not to select the complainant for the disputed post and dismiss the appeal. Additionally, the JAB made a more general recommendation aiming at clarifying some aspects of the competition process within the Agency.

By a letter of 5 November 2015, which constitutes the impugned decision, the Director General informed the complainant that he had decided to follow the JAB’s recommendation to uphold his previous decision, but that the relevant competition documentation would nevertheless be made available to him with appropriate redactions to ensure that confidentiality was maintained for third parties.

The complainant asks the Tribunal to quash the impugned decision and to order the production of the competition documents without any redactions. He also seeks an order for the evaluation of the competition procedure and its outcome by an independent external consultant or

Human Resources professional. Lastly, he claims moral damages and costs.

The IAEA asks the Tribunal to dismiss the complaint as devoid of merit. As to the request for production of documents, the IAEA notes that the complainant has already been provided with the key documents. Moreover, in its view, the request for an independent evaluation should be rejected.

At the Tribunal's request, the IAEA forwarded a copy of the complaint to the candidate appointed as a result of the disputed competition procedure and invited her to share any observations. The latter provided her comments in May 2016.

CONSIDERATIONS

1. The complainant, a staff member of the IAEA holding grade P-2, was an unsuccessful internal applicant for the post of IT Systems Engineer in the Infrastructure Services Section of the Division of Information Technology, Department of Management, at the P-3 level (the contested post), for which vacancy notice No. 2013/101 was issued. In the internal appeal process, he challenged the decision not to select him for the post and, in particular, the process by which the appointment decision was made. He filed his complaint in the Tribunal after the Director General, accepting the recommendation of the JAB, notified to him, in the impugned decision of 5 November 2015, that his internal appeal was dismissed.

2. The Tribunal has stated the basic principles which guide it, where a decision such as this is challenged, as follows, 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 candidature. It is not enough simply to assert that one is better qualified than the selected candidate (see Judgment 3669, consideration 4).

However, when an organization 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. The complainant summarizes the grounds on which he challenges the impugned decision as follows:

- “a. Lack of credibility of the assessment in the absence of a transparent and objective scoring system and in the absence of anyone from MTHR.
- b. Unfairness, [p]rejudice, bias and not acting in good faith on [the] part of the selecting officer.
- c. Gender bias and discrimination throughout the whole recruitment process.
- d. [Non-]compliance with [the] staff rules and regulations.”

4. At the outset, the Tribunal holds that the allegations of unfairness, prejudice, bias and lack of good faith on the part of the selecting officer are unfounded. The complainant has not presented sufficiently cogent evidence to prove that these considerations prevented his selection to fill the contested post.

5. Preliminarily to examining the other grounds relied on by the complainant, however, the Tribunal will consider his request for the disclosure of the competition documents without any redactions. According to the case law, a staff member must, as a general rule, have access to all evidence on which the authority bases or intends to base its decision against him, and, under normal circumstances, such evidence cannot be withheld on grounds of confidentiality. It follows that a decision cannot be based on a material document that has been withheld from the concerned staff member. The Tribunal has consistently affirmed the confidentiality of the records of the discussions regarding the merits of the applicants for a post. However, this does not extend to the reports regarding the results of the selection process with appropriate redactions to ensure the confidentiality of third parties (see Judgment 3272, considerations 14 and 15, and the case law cited therein, as well as Judgment 3077, consideration 4).

6. The IAEA states that it had disclosed the key documents from the selection process to the complainant, including the Recruitment Action Monitoring System (RAMS) report that sets out the entire selection process “with redactions where appropriate to protect the confidentiality of third parties, consistent with Judgment 3272”. The complainant argues that the selection process was suspicious and not transparent, among other things, because the information which the IAEA disclosed to him, including the RAMS report, was quite heavily redacted. He insists that confidentiality could have been maintained by only redacting the names of the candidates.

7. The Director General sent additionally to the complainant, with the impugned decision, the following documents which had been disclosed to the JAB: the complainant’s career history with the IAEA, the table of scoring for the contested post and the written test questions. The IAEA also attached to its reply in these proceedings the list of core questions which all of the candidates were asked.

8. The IAEA did not disclose to the complainant the evaluator’s notes from the testing process and the related candidates’ identification

keys. It considered that, on the basis of Judgment 3272, the discussions of the members of the selection panel concerning the relative merits of the candidates should remain confidential. The Tribunal agrees with this last contention and further determines that the other documents were not inappropriately redacted. Therefore, it will not order the disclosure of the transcripts of the interviews in these proceedings. The request for disclosure is dismissed.

9. The complainant claims that a number of rules and regulations were breached during the assessment and selection process. He contends, in particular, that the IAEA's adherence to paragraph 58 of AM.II/3 is "questionable" in this case. Paragraph 58 requires MTHR to prepare periodically a forecast of vacancies, "which serves as a basis for seeking candidates in order to secure adequate geographical distribution and improve the representation of women". The complainant argues that no forecast was provided with the recruitment documents for the contested post that indicated that gender and geographical considerations were relevant. The plea fails as paragraph 58 does not require a forecast for individual vacancies which are advertised.

10. The complainant also contends that paragraph 73(b) of AM.II/3 was breached during the pre-screening process as there is no evidence that MTHR had provided his Performance Review Reports (PRRs) to those officially involved in the selection process. He points out that the selecting officer actually made comments during the process which were contrary to some which he had made in his (the complainant's) PRRs for 2010 and 2014. The complainant further contends that paragraph 74 of AM.II/3 was breached because the shortlist of candidates was prepared by the selecting officer and not the Division Director.

However, inasmuch as the complainant's application for the subject post was not adversely affected in those stages of the procedure given that the consideration of his application continued beyond them, those pleas are moot.

11. The complainant centrally contends that the selection process was flawed as paramount importance was not accorded to securing the person of the highest standards of efficiency, technical competence and integrity and that considerations of gender balance unduly influenced the final selection of the successful candidate. He also raises some other issues regarding the appointment of the successful candidate. Inasmuch as the complainant did not reach this last stage of the selection procedure, aspects of which he contests in those pleas, these issues had no impact upon his candidature and are accordingly moot.

12. The complainant argues that the interview process was procedurally flawed because it was conducted in breach of paragraph 76 of AM.II/3.

He contends that, contrary to this provision, the Division Director was not the person responsible for the interviews and that the unit head was the main person who conducted the evaluation. This plea is misconceived because paragraph 76 merely requires the Division Director to be responsible for organizing interviews of the short-listed candidates: a responsibility which the Division Director could have lawfully exercised through the unit head.

The complainant's further contention that there was no proof that MTHR was involved in the evaluation of the interviews as no person from that Division sat on the interview panel is also misconceived. This is because paragraph 76 did not mandate MTHR to be involved in the evaluation. It states that "MTHR may provide advice in the preparation of the questions, particularly those relating to non-technical skills".

The complainant argues that the interview process was flawed because although the interviews were recorded by video and MTHR was requested to keep the recorded interviews in order for them to be checked by an independent recruitment professional, no one from MTHR seemed to have reviewed the recorded interviews to ensure that the evaluation and selection were done in a fair and impartial way. This plea is also misconceived. Paragraph 76(a) mandates that "[a]ll interviews for posts at the P-5 and Director level shall be recorded, and retained for a period of at least six months". According to the provision, the

recorded interviews for posts at lower grades “may be reviewed [...] by the interview panel and/or the selecting authority by requesting access to the Head [of] MTHR”.

The complainant contends that, contrary to paragraph 76(b) of AM.II/3, there was no evidence that the questions asked during the interviews were the same for all candidates. However, the provision does not mandate that all candidates are to be asked the same questions. It states that “[n]ormally, all candidates for a particular vacancy will be asked the same core questions based on the competencies of the position, with supplementary questions being asked as the need may be”. The IAEA states that all of the candidates for the subject post were asked the same core questions and provides the questions to the Tribunal. Paragraph 76(b) does not require the reproduction of the questions which each candidate was asked, the answers which they gave or “what the reference answers were”, as the complainant asserts.

In the foregoing premises, the contention that the conduct of the interview process breached paragraph 76 of AM.II/3 is unfounded.

13. The complainant has requested that the interviews be checked or that the selection be redone by an independent external consultant or Human Resources professional. There is no legal basis for such external intervention in the selection process. The request for a new independent evaluation is therefore dismissed.

14. The complainant’s contention that the interview process was procedurally flawed because it breached paragraph 78 of AM.II/3 is also unfounded. Paragraph 78(a) provides as follows:

“The Division Director concerned shall ensure that an evaluation report is prepared by the interview panel in line with the following:

(a) The evaluation must be based solely on the statutory requirement of securing staff of the highest standards of efficiency, technical competence and integrity. It shall conclude with an overall rating of each candidate, according to the following categories:

- (i) Well qualified
- (ii) Qualified
- (iii) Not qualified.”

The complainant contends, in effect, that no evidence was provided to show how the elements which this provision contains were applied by the interview panel differentiating between the candidates who were “well qualified” and those who were “qualified”. However, in the Tribunal’s view, this was reasonably explained in the RAMS report, and further, contrary to the complainant’s contention, the report does contain an individual report for him, pursuant to paragraph 78(b). It explains why he was rated as “qualified”. Further, contrary to the complainant’s contention, a scoring system is discernible in the report. It shows, for example, that the complainant scored 27 points for the interview and that on that score he was placed sixth out of the eight candidates. It is further found that, pursuant to paragraph 78(c) of AM.II/3, the RAMS report contains a short evaluation of the internal candidates and of all candidates who were rated as “qualified”. Moreover, contrary to the complainant’s further contention, the report also contains a short statement explaining why each qualified or well qualified internal candidate was not rated more highly than the successful external candidate. The report also identifies the composition of the interview panel, the process which it followed and how it made its assessment in keeping with paragraph 78(d) of AM.II/3. Additionally, in keeping with paragraph 78(e), the RAMS report also explains why the successful candidate was recommended. Accordingly, the complainant’s contention that paragraph 78 of AM.II/3 was breached during the interview process is unfounded. Neither does the Tribunal discern any reviewable error resulting from the breach of any other provision of the Administrative Manual.

15. In the foregoing premises, the complaint is unfounded in its entirety and will accordingly be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 17 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ