

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**D. (No. 4)**

**v.**

**ITU**

**128th Session**

**Judgment No. 4153**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms C. D. against the International Telecommunication Union (ITU) on 9 February 2016 and corrected on 24 June, the ITU's reply of 18 October, the complainant's rejoinder of 2 December 2016 and the ITU's surrejoinder of 9 March 2017;

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 lawfulness of a competition procedure in which she participated and of the appointment made at the end of that procedure.

On 13 October 2014 the ITU published a vacancy notice for the grade G.6 post of Head of the Printing Section in the Conference and Publication Department. The complainant, who held a G.5 position in that section, applied and on 3 December she was notified that she had been shortlisted.

On 18 December 2014 the complainant was informed that her application had been rejected and that another candidate had been appointed. On 29 January 2015 she asked the Secretary-General to

review this decision, alleging, among other things, that the appointed candidate had benefited from favoritism. Her request having been rejected on 11 March, she filed an appeal with the Appeal Board on 11 June. She requested the cancellation of the appointment which had been made to the advertised post and her appointment to that post or, failing that, the resumption of the competition procedure. She also claimed compensation for the injury suffered and costs.

In its report of 16 September 2015 the Appeal Board stated that it found no evidence of favoritism. However, it noted that in the Recommendation table the Chief of the Conference and Publication Department had made changes to the comment of the Pre-selection Panel on the experience, education and languages of the appointed candidate and that this “error” may have had an influence in the decision of the Appointment and Promotion Board (APB). The Appeal Board therefore recommended to enquire whether, in light of this information, the APB would reconfirm the inclusion of the appointed candidate in the shortlist. If so, the Appeal Board recommended that the complainant’s claims be rejected and, if not, that the decision of nomination be revised.

By a memorandum of 11 November 2015 the complainant was informed that the Secretary-General had decided not to follow the recommendation of the Appeal Board to inform the APB that an “error” had been committed. Indeed, he considered that, for the purposes of the evaluation of the candidates, only the Evaluation table – and not the Recommendation table – established by the Pre-selection Panel was material; that the Pre-selection Panel had made an error in its comments on the selected candidate and the Chief of the Conference and Publication Department had corrected it so as to accurately reflect the qualifications and professional experience of the appointed candidate. According to the Secretary-General, this “update” was not such as to vitiate the procedure. Consequently, he had decided to dismiss the appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision as well as the decisions resulting from the competition, to order the ITU to resume the competition procedure at the stage where it was

flawed, to make good the entirety of the injury she considers she has suffered and, lastly, to award her 6,000 euros in respect of the procedural costs which she has incurred both before the Appeal Board and before the Tribunal.

The ITU asks the Tribunal to dismiss the complaint as wholly unfounded. It states that it has no obligation to reimburse the expenses incurred by an official during the internal appeal proceedings.

At the request of the Tribunal, the ITU provided a copy of the complaint to the successful candidate in the contested competition procedure for comments. The latter stated that he had no additional comments to make, but provided “further information” regarding his personal history form.

### CONSIDERATIONS

1. In her complaint, the complainant impugns the decision of 11 November 2015 by which the Secretary-General dismissed the appeal she had lodged on 11 June. In that appeal, she challenged the decision to reject her application for the position of Head of the Printing Section – the subject of a vacancy notice published on 13 October 2014 – and requested, among other things, the cancellation of the appointment that had been made at the end of the competition procedure.

2. According to the Tribunal’s case law, the decision of an international organisation to make an appointment is 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 law or fact, or if some material fact was overlooked, or if there was an abuse of authority, or if a clearly wrong conclusion was drawn from the evidence (see Judgment 3537, consideration 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 that every applicant must enjoy, whatever her or his hopes of success may be (see, inter alia, Judgment 2163, consideration 1, and the case law cited therein, as well as Judgment 3209, consideration 11). The case law also establishes that an organisation must be careful to abide by the rules on selection and, when the process proves to be flawed, the Tribunal will quash any resulting appointment, albeit on the understanding that the organisation must shield the successful candidate from any injury that may result from the setting aside of an appointment he accepted in good faith (see, for example, Judgment 3130, considerations 10 and 11).

The complainant must therefore demonstrate that the selection procedure is vitiated by a serious defect.

3. In the present case, the complainant submits in particular that the appointed candidate does not possess the qualifications required in the vacancy notice as regards education.

4. In her appeal of 11 June 2015 the complainant had already raised this argument. In its report of 16 September 2015 the Appeal Board had noted that the method used by the Human Resources Management Department to verify whether a candidate fulfilled the requirements relating to years of apprenticeship remained unclear. It noted that the ITU had not provided any clear explanation to support its assertion that the appointed candidate satisfied the education requirements. It further noted that a comment from the Pre-selection Panel that it was “waiting” for the complainant to provide a diploma or a certificate had subsequently been deleted.

In the impugned decision, the Secretary-General stated that there could be no doubt that the appointed candidate fulfilled the education requirements. He also pointed out that the Human Resources Management Department had confirmed the “validity of the certificates of the appointed candidate”.

5. According to the Tribunal’s case law, an international organisation must observe the essential rule in every selection procedure, which is that the person appointed must possess the minimum

qualifications specified in the vacancy notice (see Judgment 3372, consideration 19). It is also apparent from the case law that an international organisation which decides to hold a competition in order to fill a post cannot select a candidate who does not satisfy one of the required qualifications specified in the vacancy notice. Such conduct, which is tantamount to modifying the criteria for appointment to the post during the selection process, incurs the Tribunal's censure on two counts. Firstly, it violates the principle of *tu patere legem quam ipse fecisti*, which forbids the Administration to ignore the rules it has itself defined. Secondly, the appointment body's alteration, after the procedure has begun, of the qualifications which were initially required in order to obtain the post, introduces a serious flaw into the selection process with respect to the principle of equal opportunity among candidates. Irrespective of the reasons for such action, it inevitably erodes the safeguards of objectivity and transparency which must be provided in order to comply with this essential principle, a breach of which vitiates any appointment based on a competition (see Judgments 3641, consideration 4(a), or 4001, consideration 15).

6. In the present case, the vacancy notice of 13 October 2014 stated that the education requirements were the following: "Complete secondary education with a diploma OR completed equivalent technical studies with a diploma in the field of the post OR obligatory formal schooling plus three years apprenticeship in the field of the post".

7. The defendant argues before the Tribunal, as it did before the Appeal Board, that since the appointed candidate completed obligatory formal schooling and three years of apprenticeship in the field of the post, he possessed the qualifications enabling him to fulfill the third of the alternative conditions listed above.

8. However, it appears from the file that, in order to consider that the appointed candidate had completed three years of apprenticeship, the organisation took into account, among other things, a period of five months of management training. The Tribunal notes that this was a general training in the performance of managerial duties, which cannot,

therefore, be considered as training in the field of the post, such as the vacancy notice requires. Since that five-month period had to be included in order to consider that that candidate fulfilled the three-year apprenticeship requirement, this finding alone is sufficient to conclude that the person concerned did not possess the required qualifications. Moreover, the Tribunal notes that, as regards the two years of professional training carried out from 1994 to 1996 at the Lausanne School of Graphic Arts, which were also taken into account by the organisation, although the appointed candidate did indeed attend the training in question, he did not pass the end-of-apprenticeship exam.

The Tribunal therefore finds that the plea according to which the selection procedure was flawed by the fact that the appointed candidate did not possess the qualifications required by the vacancy notice for the post in question is well founded.

9. The decision of the Secretary-General of 11 November 2015, as well as those rejecting the complainant's application and appointing the successful candidate, must therefore be set aside for this reason, without there being any need to rule on the complainant's other pleas.

10. The competition procedure must be resumed at the stage where it became flawed. Thus, in accordance with the Rules of Procedure of the APB, the superiors will make a recommendation on the basis of the shortlist already established by the APB, from which the name of the appointed candidate will have been deleted.

11. The ITU shall ensure that the appointed candidate is shielded from any injury that may result from the cancellation of his appointment (see, for example, Judgment 3619, consideration 24).

12. The complainant is entitled to damages in compensation for the moral injury she has suffered as a result of the illegality that has been established. Having regard to all the circumstances of the case, the Tribunal considers that this injury will be fairly compensated by the payment of damages in the amount of 10,000 euros. The complainant is also entitled to costs, assessed in the sum of 5,000 euros.

DECISION

For the above reasons,

1. The decision of the Secretary-General of the ITU of 11 November 2015 is set aside, as are the decisions rejecting the complainant's application following the contested competition and the appointment of the successful candidate.
2. The competition procedure shall be resumed as stated in consideration 10, above.
3. The ITU shall pay the complainant 10,000 euros in moral damages.
4. It shall also pay her 5,000 euros in costs.
5. All other claims are dismissed.
6. The ITU shall ensure that the successful candidate is shielded from any injury that may result from the cancellation of his appointment.

In witness of this judgment, adopted on 9 May 2019, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

*(Signed)*

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ