

R. (No. 23)

v.

IAEA

134th Session

Judgment No. 4524

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-third complaint filed by Mr R. R. against the International Atomic Energy Agency (IAEA) on 15 June 2019 and corrected on 26 July, the IAEA's reply of 19 November 2019, the complainant's rejoinder of 25 March 2020 and the IAEA's surrejoinder of 17 July 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 decision to appoint, as a development reassignment, Ms V.M. to the post of Client Relationship Manager.

Facts relevant to this case can be found in the complainant's eighth complaint leading to Judgment 4467, delivered in public on 27 January 2022, in which the complainant challenged the lawfulness of the recruitment process and the resulting appointment for the post of Client Relationship Manager, for which he had also applied.

On 6 January 2017, Vacancy Notice 2017/0054 (014382) was issued internally for a six-month development reassignment for the P-4 level post of Client Relationship Manager in the Division of Information

Technology in the Department of Management, as part of the Organization's mobility policy for staff.

The complainant applied for this post on 13 January 2017 and was shortlisted for the next stage of the development reassignment selection process, which involved an automated online video interview (SONRU).

Another candidate, Ms V.M., was selected and reassigned to the post, with effect from 1 May 2017. On 17 May the complainant was informed that his application to the post was unsuccessful. On 23 May the complainant requested the Director General to review the decision to appoint Ms V.M. to the post.

By a letter of 16 June 2017 the Director General informed the complainant that, in light of the allegations made in his request for review, he was referring the matter to the Office of Internal Oversight Services (OIOS) for investigation and that he was not in a position to review the decision to reassign Ms V.M. at this stage. He would inform the complainant of the conclusion of the OIOS process, at which time he would also respond to the issues raised in the complainant's letter of 23 May 2017.

On 4 July 2017 the complainant submitted an appeal to the Joint Appeals Board against the decision of 16 June.

In its report of 30 October 2017 the Board found that, as the OIOS was still considering the complainant's allegations, the Director General was not in a position to review the matter at this stage. It recommended that he maintain his original decision and dismiss the appeal as irreceivable, which the Director General did by a decision of 21 November 2017.

On 6 March 2018 the Director of OIOS informed the complainant that there was no indication of fraud or attempt thereof, or of abuse or wrongdoing in connection with the contested selection process and, therefore, that the case was closed. On 12 March the complainant first expressed his opposition to the referral of his allegations to the OIOS.

On 5 April 2018 the Director General informed the complainant that, being satisfied that the selection process had been carried out in accordance with the applicable rules and selection practices, he had

decided to uphold the decision to reassign Ms V.M. to the post of Client Relationship Manager.

On 4 May 2018 the complainant appealed against the decision of 5 April. On 17 May 2018 he requested that three members of the Joint Appeals Board be disqualified on the ground that they had already expressed their opinion on the merits of his appeal in their report of 30 October 2017. On 6 July 2018 the Secretary of the Board informed him that the Chairperson of the Board had rejected his request for disqualification on the ground that, since the Board in its report of 30 October 2017 had not considered or made any recommendation with respect to the merits of his appeal, his request was not “warranted”.

On 18 September 2018 the complainant filed his ninth complaint before the Tribunal challenging the implied decision to reject his appeal against the 5 April 2018 decision. In Judgment 4200, delivered in public on 3 July 2019, the Tribunal summarily dismissed his complaint as clearly irreceivable.

In its report of 5 October 2018 the Joint Appeals Board found that the selection process for the development reassignment which was the subject of Vacancy Notice 2017/0054 had been properly conducted and that the requirements of the Staff Regulations and Staff Rules had been followed. It also found that there was no evidence of bias or prejudice against the complainant’s candidature, that the Director General was entitled to refer the matter to the OIOS for investigation and that the investigation had been comprehensive, properly conducted and its duration reasonable. It thus recommended that the Director General dismiss the complainant’s appeal.

In his decision of 7 March 2019 the Director General informed the complainant that he had decided to follow the recommendation of the Board to dismiss his appeal as unfounded. He enclosed with the final decision a redacted copy of the OIOS report dated 18 September 2017 outlining the process and findings of the investigation. That is the impugned decision.

Further to the Tribunal’s request the IAEA invited the successful candidate to express her views on the complaint, which she did on 29 October 2019.

The complainant requests the Tribunal to set aside the decision to appoint Ms V.M. to the post of Client Relationship Manager and any other subsequent decision based on that decision and to order that the selection process for the post be carried out anew. He also asks that the Tribunal order the IAEA to appoint him *ad interim* to the post for the whole duration of the new selection process. He claims material, moral and consequential damages. He also claims exemplary damages, as well as costs, with interest on all sums awarded. The complainant requested in his complaint to be provided with the OIOS reports referred to in the Joint Appeals Board's report of 5 October 2018, a series of documents relating to Ms V.M.'s performance during the selection process, as well as Ms V.M.'s employment record at the IAEA.

The IAEA asks the Tribunal to dismiss the complainant's twenty-third complaint as entirely devoid of merit. It submits that some of the complainant's claims are irreceivable. It points out that the complainant was already provided with the OIOS reports, as well as with some of the documents requested, in the context of his eighth complaint before the Tribunal. It states that it has provided the remaining documents as annexes to its submissions.

CONSIDERATIONS

1. In the decision, dated 7 March 2019, which the complainant impugns, the Director General accepted the recommendation of the Joint Appeals Board to dismiss the complainant's internal appeal, dated 4 May 2018, as unfounded. The Board concluded that the selection process for the post had been properly conducted and that the requirements of the Staff Regulations and Staff Rules had been followed. In the internal appeal the complainant centrally contested the appointment, as a six-month development reassignment, of Ms V.M. to the post of Client Relationship Manager in the Division of Information Technology in the Department of Management (the contested post). The complainant was an unsuccessful applicant for the post, which was advertised in Vacancy Notice 2017/0054 pursuant to the Agency's mobility policy.

2. In the impugned decision, the Director General stated that he was satisfied that the selection process for the contested post was carried out in accordance with the IAEA's Staff Regulations and Staff Rules and under fair and competitive conditions. Regarding the complainant's contention that he was fully qualified for the post, the Director General noted that he had been rated overall "Not Qualified" and that he endorsed the Joint Appeals Board's conclusion that the complainant had failed to substantiate his allegations of partiality on the part of the Director, Division of Human Resources.

3. In the impugned decision, the Director General also noted that the Joint Appeals Board had considered three claims the complainant made concerning his (the Director General's) decision to refer the complainant's case to the OIOS for investigation. The Director General had made the referral after the complainant lodged his 23 May 2017 request for review, in which the complainant had merely stated that the request followed "concerns over facts and evidence at [his] disposal indicating that the recruitment process was conducted in breach of rules of form or procedure, was based on errors of fact and law, was made having overlooked essential facts and was ultimately tainted with persisting abuse of authority". As the complainant provided no particulars to substantiate those allegations, the Director General informed him that he was not in a position at that stage to review the decision but had referred the matter to the OIOS for investigation and would make a decision on the request for review when the investigation was concluded.

4. Although on 16 June 2017 the Director General informed the complainant that he had referred the case to the OIOS for investigation, the complainant first expressed his opposition to the referral in his 12 March 2018 letter to the Director General. This was after the Director of OIOS had informed him that the OIOS found no flaw in the selection process and had decided to close the case. In that 12 March 2018 letter he challenged the decision to refer the case to the OIOS. He also alleged that the OIOS did not conduct a formal investigation into the matter and that the nine-month delay in completing its investigation was unjustified. In the impugned decision, the Director General accepted

the Joint Appeals Board's conclusion that these allegations were unmeritorious. He additionally determined that the challenges on the basis of the decision to refer the case to the OIOS were irreceivable. The complainant's submission that this conclusion was wrong is however of no moment as he does not raise those issues in this complaint. That is except for the issue of delay in the OIOS proceedings subsumed in his general claim that there was unreasonable delay in the internal appeal proceedings. Other challenges to the OIOS procedure, which the complainant raises for the first time in his rejoinder, are irreceivable (see, for example, Judgment 4092, consideration 10).

5. In his rejoinder, the complainant alleges that his non-selection to fill the contested post amounted to institutional harassment and that the conduct of Ms K., the hiring manager, was tantamount to harassment. As the IAEA however correctly submits, this claim is irreceivable on the basis of the Tribunal's case law which forbids a complainant from raising a claim for the first time in the rejoinder (see, for example, Judgments 4092, consideration 10, and 4467, consideration 5).

6. Before considering the merits of this complaint, one other procedural matter must be addressed. In his complaint brief, the complainant asks the IAEA to produce a number of documents with its reply "so as to be able to analyse and comment on [them] in his [r]ejoinder". In its reply, the IAEA states that most of the documents which the complainant requested were already provided to him and that it provides the remaining documents he requested with the said reply. In his rejoinder, the complainant requests the disclosure of the record of the interviews of two officials whom he said were mentioned in the OIOS report dated 18 September 2017. In the second place, he states that the IAEA provided an extensively redacted version of the selected candidate's employment record at the Agency, particularly omitting all of the job titles of each position she held since entering the service in 1993. He insists that the IAEA has a duty to produce the two documents based on the case law which states that 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 (see, for example, Judgment 4023, consideration 5).

The application for the disclosure of the documents is rejected. First, as the decision to appoint the successful candidate, which the complainant centrally contests, was not a decision which was made against the complainant, his application for disclosure does not fall within the general principle stated in consideration 5 of Judgment 4023 which mandates disclosure. Second, the complainant notes that the selected candidate's job titles appear with no redactions in the Appointment Proposal Overview, a copy of which was produced. Third, the duty to produce documents does not extend to confidential interview reports (see, for example, Judgments 3032, consideration 11, and 4023, consideration 8). In the Tribunal's view, the documents which the IAEA disclosed during these proceedings satisfied its duty to disclose under the case law.

7. The scope of the present complaint centrally concerns the complainant's challenge to the decision to appoint the successful candidate to the contested post as confirmed in the impugned decision.

8. 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 and is subject to only limited review. Such a decision 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. 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. An organisation must abide by the rules and the general precepts of the case law 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. A complainant must 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, for example, Judgments 4023, consideration 2, and 3669, consideration 4).

9. The complainant challenges the impugned decision essentially on the following grounds:

- (1) The selected candidate did not satisfy the required academic qualification or experience or the desired certification stated in the vacancy notice;
- (2) The selection process was vitiated by an undocumented practice of using a video interview assessment tool, SONRU, which contravened or unlawfully superceded written staffing procedures that were already in force thereby compromising the anonymity of selection tests; and
- (3) The selection process was tainted with abuse of authority, to wit, unequal treatment, bias and prejudice on the part of the decision making authority, as well as serious failures of due process and want of fairness and good faith.

10. Regarding the complainant's first plea, it is recalled that according to the case law, 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. In this respect, a modification of the applicable criteria during the selection procedure more generally undermines the requirements of mutual trust and fairness which international organisations have a duty to observe in their relations with

their staff. Secondly, the appointment body's alteration, after the procedure had 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, breach of which vitiates any appointment based on a competition (see Judgment 3073, consideration 4).

11. Vacancy Notice 2017/0054 required an applicant for the post to possess an "Advanced University degree in Computer Science, Information Technology Management or a related field". The complainant submits that there was no *bona fide* evidence that the selected candidate possessed the required academic qualifications during the subsistence of the vacancy notice (from 6 January 2017 to 16 January 2017). He argues that during that time she reportedly held a Masters Degree in Business Administration, which cannot reasonably be construed as an advanced degree in the field of Computer Science or in the field of Management of Information Technology but belonged to an entirely different field not mentioned in the vacancy notice. He accordingly contends that the decision to appoint the selected candidate to the contested post was vitiated with abuse of authority in that it violated the principle *tu patere legem quam ipse fecisti*, appears to be entirely arbitrary and was taken to satisfy an improper purpose such as allowing the selected candidate to participate in the competition. These contentions are unmeritorious.

12. The IAEA states that notwithstanding, inadvertently, the fact that the required academic qualification advertised in Vacancy Notice 2017/0054 did not have a comma between "Technology" and "Management" (as there was in Vacancy Notice 2017/0051, which was issued simultaneously to fill the same post of Client Relationship Manager in the Division of Information Technology in the Department of Management for the long-term) the academic requirement was the same.

13. The existence of the comma in the requirement to fill the post for the long term points clearly to the implication of a comma in the requirement to fill the same post under a six-month development reassignment. It would have been understood that way on any reasonable reading of the two Vacancy Notices. In consideration 11 of Judgment 4467 the Tribunal concluded, in effect, that Ms V.M. Masters' degree in Business Administration met the academic requirement to fill the post advertised in Vacancy Notice 2017/0051. It also met the requirement to fill the development reassignment post advertised in Vacancy Notice 2017/0054. Similarly, the complainant's contention that Ms V.M. lacked the experience required to fill the post under a development reassignment is unfounded. The experience stated to be required to fill the post under both Vacancy Notices was identical. In consideration 16 of the said Judgment 4467 the Tribunal concluded that the complainant's allegation that Ms V.M. lacked the required experience to fill the post advertised in Vacancy Notice 2017/0051 was unfounded. She possessed the same experience when she was selected to fill the same post under a development reassignment pursuant to Vacancy Notice 2017/0054. The Tribunal's conclusion, in consideration 13 of Judgment 4467, that not possessing the stated certification was not fatal to the appointment of Ms V.M. to the post as the certifications were desirable and not a required qualification, is also drawn in her selection in the present case to fill the same post under a development reassignment.

14. The complainant's second plea is premised on the contention that the selection process was vitiated by the use of a video interview assessment tool, SONRU. His contention that it is an undocumented practice which contravenes the staffing provisions already in force and compromises the anonymity of selection tests is unfounded. He argues that the hiring manager unlawfully used the results of his SONRU interview as if they were the results of a regular panel interview. He also argues that the use of the SONRU assessment, vis-à-vis the findings made by the OIOS into such undocumented practice, appears contradictory, inconsistent and unpredictable and a violation of provisions in force, such as the requirement of anonymity in the use of electronic assessment tools. He also states that the Joint Appeals Board should

have dealt with the scope and meaning of the terms “assessment” and “pre-screening”. These arguments are unmeritorious and accordingly rejected as neither the rules or case law prohibit the use of electronic assessment tools, which, as the OIOS noted, was not a substitute for the interview but was used in the pre-screening stage (rather than for the interview) to determine whether the candidates satisfy the requirement for the post and can proceed to the interview. Moreover, all of the candidates were subjected to it.

15. The third plea regarding abuse of authority is also unfounded. The complainant provides no persuasive evidence to prove that the decision to appoint the selected candidate was taken in bad faith or for an improper purpose (see, for example, Judgments 4261, consideration 10, and 4345, consideration 6). Neither has he provided evidence to prove that the decision to select Ms V.M. to fill the contested post was based on unequal treatment, bias or favouritism on the part of the decision making authority (see, for example, Judgments 3380, consideration 9, and 3032, consideration 18) as he contends. Moreover, the complainant’s assertions that the decision is vitiated by serious failure of due process and want of fairness are unsubstantiated.

16. The complainant claims moral damages for unreasonable delay in the internal appeal proceedings. He recalls that he lodged his internal appeal on 4 May 2018 and that Staff Rule 12.01.1D(9) mandated the Joint Appeals Board to provide its report within three months (by 4 August 2018), but it did so two months later, on 5 October 2018. Under Staff Rule 12.01.1D(9), the Joint Appeals Board is mandated to submit its report to the Director General within three months after undertaking consideration of an appeal, but that it could extend that time-limit in exceptional circumstances with the agreement of the Director General. There is no evidence that the Board sought or obtained the Director General’s agreement. It is however noteworthy that the complainant filed a request for disqualification of several members of the Board on 17 May 2018. His request was rejected by the Chairman of the Board on 6 July 2018 pursuant to Staff Rule 12.01.1(B)(2). The result was that the Board only considered his appeal as from July 2018

once it had rejected his request for disqualification and issued its report on 5 October 2018, which is within the three-month time-limit.

17. The complainant also contends that the Director General breached Staff Rule 12.01.1D(10), which relevantly states that the Director General should normally forward the final decision to the complainant within thirty days after the Board issues its report, but the Director General issued the final decision on 7 March 2019, some four months after the time limit. Even assuming that this delay was too long, as the complainant has not articulated the adverse impact which the delay had on him (see, for example, Judgment 4231, consideration 15), his request for compensation for procedural delay is rejected.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 23 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ