

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**M.**  
**v.**  
**ICC**

**136th Session**

**Judgment No. 4683**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms R. M. against the International Criminal Court (ICC) on 7 June 2019, corrected on 27 June, the ICC's reply of 10 October 2019, the complainant's rejoinder of 26 November 2019 and the ICC's surrejoinder of 14 April 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 contests her non-selection to a post.

In November 2009, the Assembly of States Parties (ASP) adopted a resolution by which it decided to establish the Independent Oversight Mechanism (IOM). The IOM was responsible for inspection, evaluation and investigation of the ICC. In November 2013, the ASP adopted Resolution ICC-ASP/12/Res.6 providing in its Annex, inter alia, that the IOM should "exercise operational independence under the authority of the President of the [ASP]", and that its Head should be selected by the Bureau of the ASP (Bureau). The ASP invited the Bureau to commence the recruitment of the Head of the IOM at the earliest possible date. Given the *sui generis* nature of the position and the need to guarantee the IOM's independence, the Bureau prepared in 2014 the

terms of reference (hereinafter “the 2014 ToR”) for the recruitment panel in charge of assisting it in recruiting the first Head of the IOM.

The complainant applied for the P5 position of Head of the IOM advertised in vacancy announcement No. 4045 EE-RE published in 2014. The recruitment panel recommended the following two candidates in the order of ranking shown for taking up the post: Mr F. and the complainant. Mr F. was appointed on 15 October 2015. A few days later, on 19 October 2015, the complainant was informed that she had been “placed [...] on a roster for [the] position”. She was further informed that the ICC did not have a vacancy available, but it remained interested in her candidature should “the need arise in the near future.”

In October 2017, Mr F. resigned from the position, leaving it vacant as of 10 December 2017. In January 2018, a new vacancy announcement was issued for the position of Head of the IOM and, in February 2018, the Bureau adopted the terms of reference for the recruitment panel (hereinafter “the 2018 ToR”).

At that time, the complainant, who was an ICC staff member, applied again for the vacancy. On 11 July 2018, the recruitment panel, also referred to as the Panel of Ambassadors, issued the Recruitment and Selection Panel Report recommending the candidates to be appointed as Head of the IOM and the placement of another candidate on the roster for the next 24 months. The complainant was notified on 13 July 2018 that she had not been shortlisted to participate in the recruitment process. In August 2018, she filed a request for an administrative review of that decision. Her request for review was rejected in September 2018. She subsequently filed an appeal with the Appeals Board alleging that the contested decision of 13 July 2018 contained two parts: a decision not to appoint her from the roster of suitable candidates selected on the basis of the first vacancy announcement (No. 4045 EE-RE), and a decision not to shortlist her for the post advertised in the second vacancy announcement (No. 17741). She contended that the decision of 13 July 2018 was taken without authority, was vitiated by a breach of procedure, an error of fact and an error of law. She also alleged misuse of authority insofar as the decision not to select her was not motivated. She sought the reversal of the decision to

run a new selection process and the cancellation of the selection process organised pursuant to vacancy announcement No. 17741. She asked to be appointed immediately as Head of the IOM arguing that she should have been appointed straightaway after Mr F. resigned in October 2017. She further claimed compensation for the material loss incurred as a consequence of her delayed appointment as well as moral damages and costs.

In its report of 14 February 2019, the Appeals Board noted that the complainant was contesting two decisions. Regarding the challenge to the decision to open a new selection process, it considered that the appeal was receivable insofar as the challenge constituted a plea in support of her claim that she had not been shortlisted for the contested position as a result of a pattern of bias and discrimination against her. The Appeals Board unanimously recommended rejecting the appeal on the ground that the decision to open a new selection process and the decision not to shortlist the complainant were legally sound and did not demonstrate a general pattern of discrimination against her. It noted that the complainant was placed on a roster in 2014 and was selected as an alternate candidate in case the preferred candidate, Mr F., did not take up the post, but Mr F. was the selected candidate. Hence, there was a reasonable explanation for opening a new selection process when Mr F. resigned in 2017, which is the second decision she contested. The Appeals Board found no bias or discrimination against the complainant. It also found that the procedure set up by the Bureau in the 2018 ToR for the recruitment panel of the Head of the IOM's position and "the ICC Recruitment Guidelines" were not breached. There was no error in not shortlisting the complainant because the decision was based on an objective criterion, namely the insufficient length of her experience in general, and her lack of experience in the inspection area.

By a letter of 12 March 2019, the Registrar of the ICC informed the complainant that he had endorsed the Appeals Board's recommendations and thus rejected her appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to instruct the ICC to appoint her as Head of the IOM and to grant her financial compensation for the material harm she suffered.

If she is appointed Head of the IOM, the material damages paid should compensate the difference between the salaries, allowances and benefits she would have earned as Head of the IOM since December 2017 and “her actual earnings over the same period”. If she is not appointed, the material damages should compensate “five-year salary, benefits and allowances at P5 level”. She also claims moral damages and 5,000 euros for the costs she incurred in the course of the internal appeal and before the Tribunal. She further seeks an award of punitive damages for the ICC’s bad faith.

The ICC asks the Tribunal to reject the complaint as devoid of merit.

#### CONSIDERATIONS

1. The complainant impugns the Registrar of the ICC’s decision dated 12 March 2019 endorsing the Appeals Board’s recommendations and rejecting her appeal.

2. In her first plea, the complainant argues that by opening a new recruitment procedure, the Bureau of the Assembly of State Parties (hereinafter “the Bureau”) acted in breach of its own delegation of authority under the 2014 terms of reference (hereinafter “the 2014 ToR”) and of the complainant’s acquired right to be appointed to the contested position. A number of arguments are raised: (1) the “reopening” of the recruitment procedure was decided without authority, as the recommendation of the Recruitment Panel in 2014 (hereinafter “the 2014 recommendation”) was not limited in time and remained valid at the time of the resignation of Mr F. in October 2017; (2) the decision to open a new recruitment procedure was taken on the basis of an advice provided by the organisation to the Bureau that the validity of the roster established in July 2015, at the end of the first recruitment procedure, was of a two-year duration; however, the advice was irrelevant and without merit, because the notification from the Human Resources Section (HRS) dated 19 October 2015 that she was placed on a roster was erroneous and should have read that she had been selected as

alternate incumbent for the position, and in any event, the two-year duration of validity of the roster had no legal basis; (3) the 2014 recommendation remained valid because it referred to the “first and second highly recommended candidates”, and accordingly she had an acquired right to be given an opportunity to take up the position.

3. The organisation submits that Resolution ICC-ASP/12/Res.6 and the 2014 ToR are clear in that the decision to select the Head of the Independent Oversight Mechanism (IOM) rests with the Bureau. As the 2014 recommendation ceased to apply when Mr F. took up the position, the complainant’s contention that she had an acquired right under such recommendation to be appointed to the contested position is misconceived. The organisation argues that it has a longstanding practice that the roster is valid for a maximum of two years, which is not at odds with the statutory provisions already in force.

4. The Tribunal finds that the decision to open a new selection process for the contested position falls within the Bureau’s discretionary authority. Article 112(3) of the Rome Statute of the ICC stipulates that the Bureau shall assist the Assembly of States Parties (ASP), the supreme legislative body of the organisation, in the discharge of its responsibilities. In paragraph 5 of Resolution ICC-ASP/12/Res.6, adopted by the ASP, the Bureau is invited to “commence the recruitment of the Head of the [IOM]”. Its Annex, in paragraph 51, provides that “the Head of the IOM shall be selected by the Bureau of the [ASP]”. Consequently, the Bureau possesses the discretionary authority to open a new selection process when the need for recruiting the Head of the IOM arises. Even if a valid roster exists, it is open for the Bureau to determine whether it is necessary to open a new selection process. The Tribunal observes that during the Bureau’s 11th meeting of 14 December 2017, after considering one of the States Parties’ stance that the complainant should be appointed Head of the IOM, the Bureau discussed the need for a new recruitment procedure, and decided to open a new recruitment procedure “concerned with the principles of transparency, inclusion, and the democratic values which the Bureau represented”.

5. Concerning the complainant's argument that the Bureau's authority was constrained by the 2014 recommendation, the Tribunal observes that in the 2014 recommendation quoted below, it is clear and unambiguous that when Mr F., the first highly recommended candidate, took up the position, the complainant as the second highly recommended candidate would not be appointed to the position:

"From the list of candidates found suitable, the panel highly recommends the following two candidates in the order of ranking shown below for taking up the post of Head, IOM:

1. Mr [...] [F.] [...];
2. [The complainant] [...]

Second tier of suitable candidates are shown below in no ranking order:

[...]

Other suitable candidates indicated above are to be kept in the roster of suitable candidates for future vacancies, should the need arise. Should the first and second highly recommended candidates, Mr [F.] and [the complainant] respectively not be able to take up the [position], further discussion and decision will need to be made by the panel and the Bureau to determine which candidate is to be recommended." (Emphasis added.)

The last sentence containing the phrase "the first and second highly recommended candidates" means that if Mr F. and the complainant were respectively unable to take up the position, the recruitment panel and the Bureau would have further discussions on the recommendation. Obviously, Mr F.'s resignation in October 2017, after he had fulfilled the mandate in the said position for two years, cannot possibly be construed as his inability to "take up" the position within the meaning of the 2014 recommendation. The Tribunal further observes that the 2014 ToR, in paragraphs 1 and 2, explicitly stated that the recruitment panel's mandate was "to assist the Bureau in its decision-making on the recruitment of the Head of the [IOM]" and that this mandate "would conclude upon the appointment of the Head of the IOM." It is thus clear that, with Mr F.'s appointment as the Head of the IOM in October 2015, the recruitment panel's mandate consequently terminated. The complainant's assertion that the 2014 recommendation continued to bind the Bureau is therefore rejected.

6. As regards the complainant's reliance on acquired rights, consistent case law has it that "a staff member has no entitlement or right to be selected for a contested post. The Director-General's decision to order a new selection process for the subject post was entirely within her discretionary authority" (see Judgment 4100, consideration 5). The complainant, regardless of the roster's validity, had no acquired right to be directly appointed.

7. In her first plea, the complainant also contests the decision not to shortlist her. She argues that the shortlist was made by the HRS or a group of experts, and not by the "chairperson of [the] interview panel, in consultation with other [i]nterview [p]anel[s]", as required by Section 6.1 of the ICC Recruitment Guidelines for Established Posts (although she contests its lawfulness), and thus breached the guarantee of fairness. She stresses that the organisation's allegation that her application was actually submitted to the "Selection Panel" is unsubstantiated and demonstrates bad faith in an attempt to cover up the manifest flaws invalidating the recruitment process, which constitutes a basis for an award of punitive damages. She further alleges that the terms of reference for the recruitment panel (hereinafter "the 2018 ToR") were unlawful as they were not promulgated by way of an administrative issuance as defined in Presidential Directive ICC/PRES/D/G/2003/001 and they departed from the ICC Recruitment Guidelines.

8. Concerning the rules that applied to the 2018 recruitment procedure, as discussed in the preceding consideration, the Bureau has the authority to select the Head of the IOM, and the promulgation of the 2018 ToR to determine the modalities for a new recruitment process is an integral part of such authority. As the Bureau's authority was derived from the legislative organ, ASP itself, the 2018 ToR were lawful and directly applicable to the 2018 recruitment procedure. There was no need to have an administrative instruction or a presidential directive to give effect to the ToR.

9. Concerning whether the organisation entrusted the selection authority to the HRS, the 2018 ToR clearly defines different functions among the recruitment panel, the HRS and the experts. It provides that the recruitment panel “shall submit to the Bureau a ranked short-list of qualified candidates”, shall request the assistance “by the HRS of the [ICC] in its long-listing, which shall be done by criteria on the basis of eligibility requirements for education and experience set forth in the vacancy announcement”, and shall request the assistance “of subject matter experts [...] and the HRS in its shortlisting, which shall be done by criteria on the basis of suitability to the post of the Head of the IOM based on the candidate’s submitted application”. The records of the Recruitment and Selection Panel Report of 11 July 2018 also show that it was the recruitment panel itself that shortlisted 15 candidates to participate in the written exams. The records further state that the HRS provided the long list, which comprised all 121 applicants, including the complainant, to the recruitment panel on 6 April 2018 for the purpose of establishing the shortlist, with the HRS’s initial assessment of those eligible and non-eligible candidates. This long list was reviewed by experts, including a double-checking of the eligibility of candidates who were deemed suitable during the 2014 recruitment. The HRS specifically drew the Chairperson of the recruitment panel’s attention to some candidates, including the complainant, who were deemed eligible in the 2014 recruitment procedure but were not eligible in the 2018 recruitment procedure. Both the HRS and experts fulfilled their functions to assist the recruitment panel defined by the 2018 ToR. There is no indication that the organisation entrusted its authority to select the Head of the IOM to the HRS.

10. In light of the foregoing considerations, the complainant’s first plea is unfounded and should be rejected.

11. In her second plea, the complainant presents three allegations of procedural breaches: (a) the decision to “reopen” the contested position to competition was taken without checking the complainant’s availability to take over Mr F.’s position; (b) the procedure for shortlisting candidates was not followed, and the Appeals Board erred



in concluding that the complainant's application had been disclosed to the recruitment panel and that the procedure under Section 6.1 of the ICC Recruitment Guidelines had been complied with; (c) no reasons were provided in the email of 13 July 2018 informing the complainant that her application was rejected.

12. The complainant's second plea is unfounded. First, the Bureau had no obligation to consult the complainant on her availability since the complainant's status was no longer that of an alternate appointee after Mr F. took up the position, let alone in the new recruitment process. Second, as discussed in consideration 9 above, the procedure for shortlisting candidates was in line with the 2018 ToR. Third, the Tribunal's case law states that the duty to state the reasons for the choice does not mean that they must be notified at the same time as the decision. These reasons may be disclosed at a later date, for example in the context of appeal proceedings (see Judgments 4467, consideration 7, and 2978, consideration 4).

13. In her third plea, the complainant not only reiterates that the Appeals Board erred in holding that the Bureau had discretion to reopen the selection process, but also emphasizes that she met all the requirements specified in the vacancy announcement (No. 17741) in terms of education and work experience, which were exactly the same as in vacancy announcement No. 4045 EE-RE.

14. The Tribunal observes that the vacancy announcement (No. 17741) for the 2018 recruitment process outlined essential qualifications, including "a minimum of ten years of relevant professional experience (twelve years with a first level university degree) in inspection, evaluation, and investigation-related areas" (emphasis added). In the matrix of the long list prepared by the HRS for the vacancy announcement, four boxes were required to be filled in under the "work experience" column, namely "Inspection", "Evaluation", "Investigation", and "ten years of relevant work experience". The complainant was marked "No" in the first and fourth boxes and "Yes" in the second and third boxes. The experts confirmed this assessment.

As there is no evidence to support the claim that the complainant had enough years of relevant experience in inspection, the Appeals Board did not err in concluding that neither HRS nor the experts had committed an error of fact to the extent that the complainant's experience had been objectively evaluated and that she was not selected on an objective criterion, namely the insufficient length of her experience as well as her lack of experience in the inspection area. Her third plea is therefore unfounded.

15. In her fourth plea, the complainant challenges the Bureau's decision to open a new selection process based on errors of law, presenting two main arguments: first, she asserts that the ICC Recruitment Guidelines can only be considered a *sui generis* document with no defined legal basis or authority. As a result, the decision to rely on the discretionary power of the Head of Organs to "reopen" a selection process, set out in Section 11.5 of the ICC Recruitment Guidelines, was unlawful. Second, she asserts that the decision was made upon the erroneous advice from the organisation that the roster was no longer valid. The complainant further argues that the decision not to shortlist her violated her right to compete.

16. The complainant's fourth plea is unfounded. First, the issue of lawfulness of the ICC Recruitment Guidelines is not relevant to the present case as they were not applied to the 2018 recruitment procedure. Second, as discussed in consideration 4 above, the Bureau's decision to use the roster or to issue a new vacancy announcement is at its own discretion. The fact that the Bureau had requested HRS to explain and confirm whether the roster remained valid does not mean that the Bureau was bound by either the 2014 recommendation or the creation of the 2015 roster. Additionally, HRS had responded to the Bureau's query that there was a practice that a roster remained valid for two years. The complainant cannot produce concrete evidence to prove that the practice on the duration of the roster is at odds with the organisation's statutory provisions already in force. Third, as discussed in consideration 9 above, the complainant was allowed to compete, and

her application was considered against the requirements of the position in good faith and evaluated fairly and objectively.

17. In her fifth plea, the complainant contends that the decision to “reopen” the selection process and not to shortlist her amounted to misuse of authority. She further argues that the decision not to appoint her in replacement of Mr F. was not in the organisation’s interest and that the impugned decision forms part of a general pattern of bias and discrimination against her.

18. It is worth noting that the Tribunal stated, in Judgment 1732, consideration 9, that: “[w]here there is a rational and legitimate explanation for a decision, [...] the Tribunal should not be overzealous to infer bad faith or improper motive simply because the individuals concerned do not enjoy good personal relations”. The Tribunal finds that this is a case where the 2018 recruitment procedure was grounded in the organisation’s necessity to ensure transparency and credibility in the appointment of the Head of the IOM. The decision not to shortlist the complainant was based exclusively on the findings that she lacked the required work experience. The possible reasons put forward by the complainant for her non-selection for the contested position were speculative, and she has failed to provide corroborating evidence to substantiate her claim that her candidacy was not considered in good faith or that the selection process was not conducted in compliance with the basic rules of open competition. The complainant’s fifth plea is therefore unfounded and should be rejected.

19. It follows from the foregoing that the complaint must be dismissed in its entirety.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 23 May 2023, 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 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ