SEVENTY-SIXTH SESSION

In re MORRIS (No. 2)

Judgment 1323

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Robert Morris against the World Health Organization (WHO) on 15 December 1992 and corrected on 25 February 1993, the WHO's reply of 15 April, the complainant's rejoinder of 21 May and the Organization's surrejoinder of 23 June 1993;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal and WHO Staff Regulations 4.2 and 4.4, Staff Rules 1050 and Manual paragraph II.9.370;

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

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

A. The complainant joined the staff of the WHO's Regional Office for the Americas in 1975. After a string of short appointments he was assigned to a project in Guyana in 1982 as a dental officer at grade P.4. On 31 December 1984 funding for the project ran out and the Organization released him under the rule on expiry of contract. That prompted his first complaint, on which the Tribunal ruled in Judgment 891 on 30 June 1988, ordering the WHO to apply the reduction-in-force procedure under Staff Rule 1050.2.

A reduction-in-force committee met in August and December 1988. It found a single post that might suit the complainant but took the view that he did not meet the language requirements. In an undated report it recommended granting him a terminal indemnity under Rule 1050.4 and "priority in consideration of re-employment for any vacancies which may occur during the next twelve months in preference to any external candidates". In a letter of 22 December 1988 the Director-General told him he had accepted the committee's recommendations.

Over the next twelve months the Organization announced two vacancies for dental officers, one at grade P.4 in the Oral Health Unit at headquarters in Geneva and one at P.5 in its Regional Office for Africa at Brazzaville. The complainant applied for both. The selection procedure having been delayed, the Director of Personnel told his counsel in a letter of 1 December 1989 that the period of his priority would be extended "until a selection had been made" for both posts.

By a letter of 27 February 1990 the acting Director of Personnel informed him that his application for the P.4 post had been unsuccessful because another candidate's "qualifications and experience were more suited to the job"; that the technical officer who had appraised his qualifications found he lacked necessary experience in "research, top level education and global international contact areas" and that was why he had not been chosen; and that as to the P.5 vacancy he still had priority.

In a message of 6 April 1990 the complainant's counsel asked the acting Director of Personnel to say who had been appointed to the P.4 post. In his reply of 3 May the Director said that it was "not the practice ... to disclose any information" on the candidates chosen.

On 8 May 1990 the complainant put his case to the headquarters Board of Appeal. In its report of 14 July 1992 the Board observed that the reduction-in-force committee had failed to consider him for the P.4 post at headquarters even though it had been created on 1 January 1988; that the Administration had impaired the secrecy of the selection committee's proceedings by divulging the technical officer's appraisal of him; and that criteria that officer had applied were at odds with the duties and qualifications listed in the notice of vacancy. Since the post was again vacant the Board recommended reconsidering him for it "without delay" and paying him 1,000 United States dollars towards costs.

In a letter of 16 September 1992 the Director-General told him that he found nothing wrong with the technical officer's appraisal of his suitability for the post nor any flaw in the procedure and that the post had been

"established and approved" on 1 February 1989, not 1 January 1988. Though vacant the post had been "frozen" since 1 August 1991, and so he agreed to consider the complainant's candidature whenever it was "unfrozen". He also granted the complainant $250 in costs. That is the impugned decision.

B. The complainant relies on Manual paragraph II.9.370, which reads:

"Staff members whose appointments are terminated by reduction in force whose service has been satisfactory and who wish to be considered for vacancies during the twelve months after their separation are considered for vacancies for which they are qualified in preference to any external candidates."

In his letter of 22 December 1988 the Director-General expressly gave him such priority until 22 December 1989. The WHO announced the P.4 vacancy at headquarters on 14 April 1989 and his qualifications and experience fitted the requirements set out in the notice. So the crucial issue is whether the Director-General appointed an external candidate.

The WHO has withheld that information from him and from the Board of Appeal on the grounds of the secrecy of the selection procedure. But why should the successful candidate's colleagues know who he is and where he came from but not the Board? Under the circumstances it must be assumed that the Organization gave preference to an external candidate.

The complainant seeks retroactive appointment to the post, moral damages and costs.

C. In its reply the WHO owns to taking an external candidate and submits that that was lawful. Priority under Manual paragraph II.9.370 is neither absolute nor applicable to all vacancies in the areas where a candidate with priority has worked. The paramount consideration, as laid down in Staff Regulation 4.2, is to secure the highest standards of efficiency, competence and integrity.

The Director-General endorsed the selection committee's view that another candidate was better qualified than the complainant. His decision being discretionary, he is not under any duty to justify it. Besides, the acting Director of Personnel explained the complainant's shortcomings in the letter of 27 February 1990. His appointment would have been "automatic" only if his qualifications had been satisfactory and at least on a par with those of the other candidates. The technical officer's appraisal of him did not, as the Board of Appeal found, introduce criteria that were not in the notice of vacancy: it merely stated in so many words the level of qualification which the announced requirements implied.

Since the Tribunal may not assess candidates it will not determine whether the complainant's own view of his qualifications is sounder than the Director-General's. In any event disclosing selection committee's reports would limit their members' freedom to discuss the candidates' merits.

D. In his rejoinder the complainant objects to the construction the WHO puts on Regulation 4.2: if the requirement of meeting the highest standards of efficiency, competence and integrity were absolute, geographical distribution could not weigh as heavily as it should. The purpose of Manual paragraph II.9.370 being to safeguard employment, reducing priority to a criterion for breaking the tie between two otherwise equal candidates would frustrate its intent.

As to qualifications, the complainant had only to be good enough to do the job competently, not equal to or better than the external candidate. Insofar as the complainant meets the announced requirements for the post the WHO's case turns on an excerpt from the technical officer's evaluation of him, which the Board of Appeal has declared invalid. In the absence of the selection committee's report the complainant should get the benefit of the doubt.

Since the Director-General refuses to substantiate his decision there is no telling whether he regarded the complainant as unfit for the post or merely less qualified than the successful candidate. The Organization is wrong to suggest that utterly free discussion in the selection committee must take precedence over due process: that the report of a selection committee may go to an appeals body must not preclude sound selection.

E. In its surrejoinder the WHO answers the complainant's objections in the rejoinder and observes in particular that geographical considerations do not outweigh its paramount concern for high standards of competence and integrity. Selection is an administrative, not a judicial process and would be hampered if any disgruntled candidate had access to a selection committee's report and could challenge it if he saw fit. Only evidence of a fundamental flaw in

the process warrants producing such information and in this case there is none.

CONSIDERATIONS:

1. In Judgment 891 of 30 June 1988 the Tribunal ordered the WHO to apply to the complainant the reduction-in-force procedure prescribed in Staff Rule 1050.2. The reduction-in-force committee that the WHO accordingly set up found only one post to which the procedure might be applied and concluded that the complainant failed to meet the language requirements of that post. It therefore recommended paying him an indemnity in accordance with Rule 1050.4 and giving him "priority in consideration of re-employment for any vacancies which may occur during the next twelve months in preference to any external candidates". Manual paragraph II.9.370, which is reproduced in B above, provides indeed for such preference. By a letter of 22 December 1988 the Director-General informed the complainant that he accepted the committee's recommendations.

2. On 14 April 1989 the Organization announced a vacancy for a dental officer at grade P.4 in its Oral Health Unit at headquarters in Geneva. The complainant applied for the post. By a letter of 27 February 1990 the acting Director of Personnel told him that his application had been "given full consideration" but that "another candidate whose qualifications and experience were more suited to the job was selected". The acting Director went on to explain that the "reasons for [his] non-selection as per the appraisal of the responsible technical officer" were that his background was unsuitable for the post "in the research, top level education and global international contact areas" and he had "no experience in more advanced research and education or in preventive methodology development".

3. In ensuing correspondence with the complainant's counsel the Director of Personnel refused to disclose, even for the purpose of appeal, any particulars about the successful candidate. Eventually, but not until it filed its reply to the present complaint, the Organization revealed that that candidate had been an external one.

4. The complainant filed an appeal with the headquarters Board of Appeal on 8 May 1990 against the decision not to select him for the P.4 post. In its report of 14 July 1992 the Board held that the technical officer's appraisal of the complainant had not been in conformity with the "Guidelines for the selection of candidates for Professional posts and the preparation of submissions to headquarters selection committees". Point 6 of those guidelines read:

"... care should be taken to use only selection criteria which are specifically mentioned in the vacancy notice; additional requirements added post facto, particularly if used to justify the selection of a specific candidate, may not be introduced in your submission."

The Board took the view that the technical officer's "submission" to the selection committee which had made the recommendation for filling the P.4 post had not been "consistent with the duties and qualifications mentioned in the vacancy notice" and it concluded that "the established selection procedures were not fully adhered to". It recommended reconsidering the complainant "without delay" for the post, which by then had again fallen vacant, and awarding him 1,000 dollars in costs.

5. In a letter of 16 September 1992 the Director-General informed the complainant that he disagreed with the Board's conclusion about the technical officer's appraisal, though he gave no reasons for doing so. He accepted the recommendation for reconsidering the complainant for the post but said that it had been "frozen" since 1 August 1991 and he would be given "due consideration alongside other qualified candidates when the post is unfrozen". He granted $250 in costs. The complainant is now impugning that decision and seeks retroactive appointment to the post and awards of moral damages and costs.

6. The WHO argued before the Board that though the complainant was "a highly qualified Dental Officer" he "did not meet the standards required for the position". But the Organization may not now properly deny that he had the required qualifications for the P.4 post he had applied for: the impugned decision recognises as much, otherwise the Director-General could not have assured the complainant that he would be considered for the post along with "other" qualified candidates.

7. The Organization contends that he was entitled to preference over an external candidate, not as a matter of course, but only if his qualifications were just as good, and that the external candidate was better qualified than he. It relies on Regulation 4.2:

"The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of

securing the highest standards of efficiency, competence and integrity. ..."

8. The Organization offered no evidence to the Board of the external candidate's qualifications and on the grounds of privilege it has vouchsafed no information on that score to the Tribunal either. It relies on a memorandum which the Director-General addressed on 28 March 1983 to the Chairman of the headquarters Board of Appeal and in particular on the following passage:

"In future, in order to protect the indispensable confidentiality of selection documentation, the contents of ... Selection Committee papers shall be disclosed neither to staff members who have applied for a vacancy notice, nor to the Ombudsman, nor to Appeal Boards. ... members of Selection Committees should be free ... to state their views frankly and without constraint so that the most qualified and best candidate is selected. They must therefore feel assured that their views are expressed, recorded and protected as privileged material. Full confidentiality of such internal documentation and discussions must also be guaranteed in order to protect the interests of third parties, i.e. other candidates for the vacancy."

9. The Tribunal does not accept that the disclosure of a candidate's identity and qualifications may be properly regarded as likely in any way to inhibit the free expression of views by members of selection committees or to prejudice the interests of other candidates. In this case the external candidate's qualifications were of essential importance to the selection committee in making its choice and to any appeal against the appointment made. As was held in Judgment 1177 (in re Der Hovsépian), an item that forms part of the proceedings that led to the impugned decision may not be withheld from the Tribunal's scrutiny. The Organization's plea under this head fails because of the utter lack of evidence to suggest that the external candidate was better qualified than the complainant.

10. In any event, even on the assumption that the external candidate was better qualified, the Organization is misconstruing Manual paragraph II.9.370. The principle that is set out in the passage from Regulation 4.2 above is not absolute but is subject to the following express qualifications in 4.2 in fine and in 4.4:

"4.2 ... Due regard shall be paid to the importance of recruiting and maintaining the staff on as wide a geographical basis as possible."

"4.4 Without prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Organization in preference to persons from outside. This preference shall also be applied, on a reciprocal basis, to the United Nations and specialized agencies brought into relationship with the United Nations."

Moreover, the particular rule in Manual paragraph II.9.370 is not in conflict with the general provision in Regulation 4.2. That Manual paragraph and the Director-General's decision of 22 December 1988 entitled the complainant to preference over "any" external candidates, not just over less well qualified, or equally qualified, external candidates. The reasons why it is proper to grant such preference to serving and former employees over candidates from outside were stated in Judgment 133 (in re Hermann):

"... it is consonant with the spirit of the rules and regulations that a staff member who has served the Organization in a fully satisfactory manner for a particularly long period, and who might reasonably have expected to finish his career in the same Organization, should be treated in a manner more appropriate to his situation. If he loses his post, he may claim to be appointed to any vacant post which he is capable of filling in a competent manner, whatever may be the qualifications of the other candidates. Not only does this interpretation of the relevant rules take account of the legitimate expectations of staff members, but it is not prejudicial to the Organization itself, which has every interest in employing staff members who have shown themselves deserving of confidence over a long period of employment."

11. The Tribunal will not send the case back for the Director-General to consider whether to give the complainant an appointment. The P.4 post is, it appears, still frozen, and it is not known when it or any other suitable post may become available. The complainant served the Organization for only just over nine years, there has been a similar lapse of time since his post was abolished, and he does not even give any information about loss of earnings since leaving the Organization. In the circumstances the Tribunal decides, in accordance with Article VIII of its Statute, to award him damages for all forms of injury and it sets the amount at 30,000 United States dollars. It also awards him $5,000 in costs.

DECISION:

For the above reasons,

1. The Organization shall pay the complainant 30,000 United States dollars in damages for material and moral injury.

2. It shall pay him $5,000 in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda
William Douglas
Mark Fernando
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.