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

EIGHTY-FIRST SESSION

In re LOPEZ COTARELO

Judgment 1549

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jesús López-Cotarelo against the International Atomic Energy Agency (IAEA) on 9 May 1994 and corrected on 18 April 1995, the Agency's reply of 25 July, the complainant's rejoinder of 6 October 1995 and the IAEA's surrejoinder of 11 January 1996;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

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, a Spaniard born on 29 November 1933, joined the staff of the IAEA on 19 June 1988 under a three-year appointment. He was a nuclear power plant engineer at grade P.4. On 15 January 1990 he was promoted to grade P.5 as head of the Middle-East and Europe Section of the Division of Technical Co-operation Programmes (TCPM). The Agency replaced his then appointment with another that was to expire at 14 January 1993. He had it extended to 30 November 1993, when he reached the age of retirement and left.

On 16 October 1990 the IAEA issued a notice of vacancy, No. 90/068, for a post as director of a division known as TCPM.

The complainant applied on 7 December 1990. The post was to be free from 1 June 1991 and the closing date for applications was 15 February 1991.

By a letter of 6 September 1991 the Director of the Division of Personnel told the complainant that the post would not be vacant until early in 1992, that selection would go on until February and that he should say whether he was still in the running. In his reply of 10 September 1991 he said he was.

The IAEA extended the appointment of the then director to 31 December 1992. By a letter of 8 December 1992 the Director General told Mr. Paulo Barretto, who was at the time Director of the Division of Technical Co-operation Implementation, that after consulting the Board of Governors he was appointing him Director of the Division of Technical Co-operation Programmes as from 1 January 1993 without change of grade or step.

By a letter of 18 December 1992 the Director of the Division of Personnel told the complainant that an inside candidate had been put on the post. In a letter of 11 January 1993 the complainant asked the Director to let him know whether the successful candidate had been "transferred or appointed" and had applied by the deadline. The Director's answer of 15 January was that it was in line neither with custom nor with the rules on safeguarding "personnel data" to let one candidate have such information about another.

By a letter dated 22 February the complainant asked the Director General to reverse the appointment of Mr. Barretto. On 22 March the Director General upheld his decision. By a letter of 21 April the complainant put his case to the Joint Appeals Board. In its report of 28 January 1994 the Board recommended rejection but invited the Director General to review the procedure for announcing vacancies and see to it that he got timely written notice of applications for any post of director. By a letter of 11 February 1994 the Director General informed the complainant that he had endorsed the Board's recommendations. That is the decision impugned.

B.The complainant pleads breach of the rules on appointment to advertised posts as set out in Part II, Section 3, of the Agency's Administrative Manual. He believes that Mr. Barretto did not apply for the vacancy or at any rate not in time. Nor did he supply the required curriculum vitae. The Division of Personnel did not record his alleged

application and, although the Director General did consult the Board of Governors on the applications duly filed, Mr. Barretto was not on the computer list. So the IAEA broke its own rules.

The appointment of Mr. Barretto offended against equality of opportunity, a principle that Judgment 729 (in re Ilomechina) affirmed, and the attempt to put things right retroactively was a breach of good faith.

The complainant claims the quashing of the decision of 11 February 1994, the proper resumption of the process of selection, moral damages and costs.

C.The Agency replies that the complaint is irreceivable because it shows no cause of action. For one thing, the complainant fails to establish that he would have qualified for the post; for another, had he been appointed he would in any event have had to leave the Agency by 30 November 1995, no-one having a right to stay on more than two years after sixty, the normal age of retirement.

The IAEA produces a letter of 8 May 1992 from Mr. Barretto asking the Director of Personnel to consider him for the post.

On the merits the Agency points out that since Mr. Barretto was already in its employ the Division of Personnel had his curriculum vitae in its records and did not need to ask for one. The Director General did consult the Board of Governors, at its meeting of 3 December 1992, about filling the vacancy.

The Agency admits to not following to the letter the rules on closing dates and the recording of applications in the Division of Personnel. But the rules, it says, are just administrative guidelines and do not entail discarding late or unrecorded applications. In any event the complainant suffered no injury since the Administration duly considered his merits.

D.In his rejoinder the complainant answers the Agency's objections to receivability. He says he is surprised at its producing what purports to be an application of 8 May 1992 from Mr. Barretto. He challenges the authenticity of that letter, especially since the appeals Board found that the application had gone astray. He says the Agency had a duty to comply with the binding rules in the Manual. He enlarges on his pleas about flagrant flaws in the process of appointment.

E.In its surrejoinder the IAEA cites precedent in support of its contention that a procedural flaw is fatal only if without it the decision would probably have been different. The outcome would have been no different even if the Agency had strictly abided by all the rules.

CONSIDERATIONS:

1.The complainant joined the staff of the Agency on 19 June 1988 under a fixed-term appointment as a nuclear power plant engineer at grade P.4. On 15 January 1990 he was promoted to a post as head of section at grade P.5 in the Division of Technical Co-operation Programmes (TCPM). On 16 October 1990 the Agency issued a vacancy notice for the post of Director of TCPM. The deadline for applications was 15 February 1991 and the complainant applied on 7 December 1990.

The appointment of the official who held the post was to expire at 1 June 1991, but for exceptional reasons the Agency extended it to 31 December 1992. In the meantime it neither amended the notice nor changed the deadline nor issued any further notice about the post.

2.By 15 February 1991, the stated deadline, there were 17 applications. On 15 July 1991 the Division of Personnel made a second list of 31 candidates.

On 6 September 1991 the Director of Personnel informed all of them that the process of selection would not be over before February 1992 and asked whether they were still interested.

On 10 September 1991 the complainant said he was.

3.By a letter dated 8 May 1992 another inside candidate, Mr. Barretto, the then Director of the Division of Technical Co-operation Implementation (DIR-TCIM), appears to have applied for the post.

A letter of 18 December 1992 told the complainant that after consulting the Board of Governors the Director General had put an inside candidate on the post, that the post of Director of TCIM was vacant, and that since the requirements for both posts were much the same he would also be considered for the other one unless he said he was not interested.

Without answering that question he asked the Director of Personnel by a letter of 11 January 1993 whether the new Director of TCPM, Mr. Barretto, had been "appointed" or "transferred".

Having got no satisfactory answer, he wrote to the Deputy Director General in charge of Administration on 25 January and again on 17 February, but to no avail.

4.On 22 February he asked the Director general himself to reverse Mr. Barretto's appointment.

His request was refused on 22 March and he put his case to the Joint Appeals Board. In its report of 28 January 1994 the Board recommended rejection.

The Director General rejected his claims by a decision of 11 February 1994, which he now impugns.

Receivability

5.The IAEA objects to receivability on the grounds that the complaint discloses no cause of action: the complainant has not shown that he was fit for the advertised post and, even if he was, he had to retire by 30 November 1995 anyway.

Those pleas fail.

6.As the Tribunal has held, an official of an international organisation who applies for a vacancy is entitled to have his application considered and assessed according to the set procedure once the organisation admits it under the terms of the vacancy notice It may not deny that an applicant has a cause of action after it has appointed someone else, especially if the applicant is challenging the appointment on the grounds of breach of his rights in failure to apply the proper procedure: see for example Judgments 1316 (in re van der Peet No. 17) under 4 and 1359 (in re Cassaignau No. 4) under 6 and 7.

So there is no merit in the contention that the complaint discloses no cause of action.

7.Nor will the Tribunal uphold the plea that because the complainant was not qualified for the post his complaint is irreceivable: that issue goes to the merits.

8.The Agency's other objection to receivability is that the complainant has already retired and so was not eligible for appointment. He explains that it is because he retired on 30 November 1993 that he is claiming only moral damages. The Agency points out that he would in any event have had to retire at the age of 62, by 30 November 1995. He retorts that he might nevertheless have had the exceptional benefit of extension past that age. Whether he still has any interest in the quashing of someone else's appointment is moot; but he still has an interest in exposing a breach of due process which may warrant an award of damages: see Judgment 729 (in re Ilomechina).

The merits

9.The dispute turns on the lawfulness of the appointment to the advertised post and of the process of selection.

What power of review does the Tribunal have in such matters? As it has often held, an appointment by an international organisation is a discretionary decision. Being subject to only limited review, it may be set aside if it shows some fatal flaw, and breach of a rule of form or of procedure will amount to such a flaw. The Tribunal will be especially wary in such cases: it will not replace the organisation's rating of the candidates with its own. But any applicant, whatever his hopes of success, must be considered in good faith and in line with the basic rules of fair competition.

10.The complainant pleads several fatal flaws in the appointment of Mr. Barretto.

The appointing authority was wrong, he says, to consider an application that came in after the deadline, and there

were also procedural flaws: the applicant supplied no curriculum vitae; the Agency did not record his application; there was no proof of receipt of it; and he was not on the computer list that went to the Board of Governors.

Since the first of those pleas succeeds the tribunal need not take up any of the others.

11.When an organisation wants to fill a post by competition it must comply with the material rules and the general precepts of the case law.

This case turns on whether an application lodged after the deadline may be allowed.

12.The Agency mentions no written provision that may authorise it to do so.

Paragraph II.3.48 of the Administrative Manual reads:

"The closing date to be established for the submission of applications shall, normally, be four months from the date of issue of the vacancy notice for posts in the Professional and higher categories ..."

That rule is about the deadline to be set in the notice of vacancy for entering a competition, not about the validity of late applications or the circumstances, if any, in which such application is allowable.

The Agency argues that the practice of the Personnel Department is to go on allowing applications until the whole process of selection is over.

But such practice cannot make good the lack of a rule or of an explanation in the announcement of the competition. An undeclared practice fails to provide the openness that competition requires. And when the notice demands timely application the practice offends against the rule, affirmed in the case law, that after the process of selection has begun the terms of competition may not be changed: see Judgment 1158 (in re Vianney) under 6.

13.The purpose of competition is to let everyone who wants a post compete for it equally. So precedent demands scrupulous compliance with the rules announced beforehand: patere legem quam ipse fecisti. See Judgments 107 (in re Passacantando), 729 (in re Ilomechina), 1071 (in re Castillo), 1077 (in re Barahona), 1158 (in re Vianney), 1223 (in re Kirstetter No. 2) and 1359 (in re Cassaignau No. 4).

Judgment 729 required observance of the announced deadline on the grounds that officials were entitled "to hear of the vacancy early enough to be able to make up their minds and, if they so wanted, get their application in by the deadline". So the deadline does matter.

So does equal opportunity when applications come in late. Some apply in time; some may have wanted to apply but were too late. If the organisation considers a late application it gives the impression of preferential treatment. Someone who has applied in time sees therein a bending of the rules and may feel that the late applicant has had inside information about the earlier applicants and can act accordingly, perhaps even at the prompting of the Administration. And to those who might have wanted to apply after the deadline the acceptance of a late application will look like favouritism: for want of an announcement they may not have realised that application was still allowable and might succeed.

Letting late applications through offends against equality of treatment, as the Tribunal has often held: "at every stage of the competition ... every candidate must be treated on an equal footing ..." (Judgment 1071). An approach that tends to favour outside candidates under short-term appointments over candidates from within the organisation gives "inside candidates the impression of subterfuge ... It is in the [organisation's] interests to avoid arousing suspicion" of that sort: Judgment 1077. Even though the organisation "may have believed that it was acting in its own best interests ... it was not entitled to achieve that purpose by a process of selection that cancelled one stage of the procedure it had already announced. So long as the notice remained valid the organisation was bound by the wording of it and was not free to amend it secretly. The only proper way of doing so would have been to withdraw the notice altogether and open a new competition on terms that better matched actual requirements. The procedure followed must have left the complainant with the unfortunate impression that he had not been given a fair chance to compete": Judgment 1223.

Although an organisation's rightful interests may warrant considering late applicants, it must, whenever a competition is required or desired, announce a new deadline in the same way as it did the vacancy. It will then

commit no breach of equality and the competition will be seen as fair.

14.There is no need to consider whether exceptional circumstances may warrant allowing a late application, without announcing a new deadline, simply by so informing those who applied in time. Perhaps that would do if someone was late through no fault of his own and applied just after the dead-line. But that was not Mr. Barretto's case: there is no suggestion that he missed the deadline through no fault of his own, and he applied long thereafter.

15.The whole business gave the unsuccessful applicants the impression of a bending of the rules to let through a late applicant. Indeed the evidence the complainant has provided bears that out.

The conclusion is that there was breach of the material provisions.

16.The complainant implicitly acknowledges that having retired on 30 November 1993 he himself does not stand to gain from resumption of the competition. No other complainant has challenged Mr. Barretto's appointment or questioned his qualifications. As in like cases (Judgments 729, 1071 and 1077), the Tribunal finds it inadvisable to set aside the appointment. Instead it will award the complainant damages under Article VIII of its Statute. All he claims is moral damages, and the amount is set ex aequo et bono at 3,000 United States dollars.

Having succeeded in the main, he is entitled to 10,000 French francs in costs.

DECISION:

For the above reasons,

1.The Agency shall pay the complainant 3,000 United States dollars in moral damages.

2.It shall pay him 10,000 French francs in costs.

3.His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas
E. Razafindralambo
Egli
A.B. Gardner

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