

## NINETIETH SESSION

*In re Matthews*

Judgment No. 2004

The Administrative Tribunal,

Considering the complaint filed by Mr Mark S. Matthews against the World Health Organization (WHO) on 22 November 1999 and corrected on 7 December 1999, the WHO's reply of 9 March 2000, the complainant's rejoinder of 12 April, the Organization's surrejoinder of 13 July, the letter from the Registrar of the Tribunal dated 9 August requesting further information and the Organization's submissions of 15 August 2000;

Considering Articles II, paragraph 5, and VII 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, an American national born in 1948, joined the Pan American Health Organization (PAHO) on 1 June 1995 as Chief of the Department of Finance at grade P.5. The PAHO, located in Washington D.C., serves as the World Health Organization's Regional Office for the Americas. On 1 April 1996 the complainant was promoted to the PAHO post of Chief of the Department of Budget and Finance at grade P.6.

On 9 September 1998 he applied for the post of Director of the Department of Financial Services (grade D.2) at the WHO's headquarters in Geneva which had been announced in vacancy notice P98/70. There were approximately 650 applicants for this post and the complainant was one of the six that were short-listed. He was classified as an internal candidate because of the PAHO's relationship with the WHO. As part of the competition all six candidates took a three-hour written test and were interviewed. The complainant was the only candidate to be interviewed by video conference and not in person. During the written examination only the complainant noticed that the United States dollar and Swiss franc interest rates had been reversed in the test papers; however, both he and the selected candidate received perfect scores. Based on the written examination, the interview and an overall assessment the complainant was ranked third in the competition. The Selection Panel unanimously recommended an external female candidate for the post based on the fact that she had been placed first in all three categories. The Director-General accepted this recommendation. The complainant was informed by telephone that he had not been selected, and a system-wide e-mail announced Ms W. as the selected candidate on 21 January 1999.

Since the complainant, although a PAHO employee, was appealing against non-selection to a post at the WHO's headquarters, the WHO agreed that he could bypass the Regional Board of Appeal and submit his appeal directly to its Headquarters Board of Appeal. On 24 February 1999 he did so. In its report dated 30 June the Board recommended that the successful candidate's appointment be upheld and that his appeal be dismissed. On 27 August 1999 the Director-General informed the complainant that she accepted the Board's recommendations. That is the impugned decision.

In November 1999, the complainant was selected as the successful candidate in a competition for a D.1 post as the Director of Administration and Finance at the WHO's International Agency for Research on Cancer (IARC), but he turned it down.

B. The complainant makes three pleas. First, he argues that the competition and the appeal procedure were flawed by procedural errors. He claims that it is not possible that he and the successful candidate performed equally in the written examination because he was the only candidate to have noticed an error in the test papers. He has asked for the curriculum vitae of the successful candidate and other information on the scoring of the examinations which, he asserts, are necessary to prove his claims, but the Organization has refused his request. He contends that the Tribunal's case law supports disclosure of such information to an unsuccessful candidate. The Board of Appeal was also at fault: it failed to recognise the significance of the above-mentioned error and it did not address the main

points that he challenged.

Secondly, he pleads unequal treatment. During the selection process he was the only candidate to be interviewed by video conference. This "clearly worked to his detriment" given the fact that his examination score was perfect. Furthermore, as an internal candidate he should have been given preference over an external candidate.

Thirdly, he contends that WHO Staff Regulations 4.2 and 4.3 were violated: selection based on gender was considered more important than appointing the most qualified candidate. During the selection process he was told by the Executive Director of the General Management Cluster (GMG) at the WHO that "there was a gender mountain to climb" because of the Director-General's policy of achieving a gender balance. He points to a speech made by the Director-General on 2 March 1999 in which she stated that "Cabinet has decided to secure that 6 out of 10 new appointments are women until parity is reached". This policy has resulted in discrimination based on gender and the appointment of an external female candidate over a qualified internal male candidate, which is in direct violation of the above-mentioned regulations. The complainant cites American and European case law to support his argument of discriminatory treatment.

He requests the Tribunal to: (1) declare the selection process void and order the WHO to hold a new competition for the post of Director of the Department of Financial Services; (2) pronounce that the selection of the successful candidate was "tainted with gender bias" in violation of the Staff Regulations and Rules; (3) declare that the policy of giving preference to female candidates discriminates against serving male staff, is contrary to Regulation 4.3 and is therefore *prima facie* void; (4) order that he be awarded the difference between his current salary and that which he would have received if selected, "for the balance of his career"; (5) award moral damages; and (6) award costs.

C. In its reply the WHO denies that the selection process was seriously flawed. In order to ensure equal treatment, each candidate was given the same written examination and subjected to the same time constraints. While it is true that the complainant noticed a reversal of interest rates in the test papers, this error is not as significant as the complainant believes. The test was not designed to assess technical skills but rather analytical and communication skills.

Even if the complainant did not have an interview in person, the procedure and the content of the interview were the same in his case as that of the other candidates: all candidates were asked identical questions in the same order. The interviews were conducted in this manner precisely to provide "a consistent and objective basis to assess candidates with full impartiality". Furthermore, interviewing candidates by video conference permits the Organization to open up the selection process to more people, which is in the best interests of the Organization and its staff. Although the WHO does not contest the receivability of the complaint in general, it objects to the plea regarding the interview, since the complainant did not address this issue before the Board of Appeal.

The Organization also contends that the selection process was not flawed by gender bias. An internal candidate must be given preference only when the candidates are equal; in this instance, after applying objective criteria, the selected external candidate was considered better qualified than the complainant, who was an internal candidate. It also points out that another male candidate ranked higher than the complainant.

According to the WHO the complainant's reliance on American and European case law is misplaced, as neither the Tribunal nor the Organization is bound by them. Nonetheless, the Organization has complied with its own rules and procedures and the Tribunal's case law. Regarding the disclosure of information about a selected candidate, the Tribunal's precedent is clear: such information must be made available to an appeals body, and the Organization shall produce this if requested by the Tribunal.

The WHO objects to the complainant's claim to an award of a salary differential. First of all, this presupposes that he would have been selected if the successful candidate had not been appointed and there is no basis for this supposition. Secondly, it cannot be presumed that he would have accepted the post given the fact that he turned down a D.1 post at the IARC.

Although Ms W., the successful candidate, was given by the Tribunal the opportunity to respond to the complainant's allegations, she chose not to do so.

D. In his rejoinder the complainant asserts that gender bias and discrimination are often subtly concealed. Although each flaw in the selection process, taken individually, does not provide proof of discrimination, "taken together,

these shortcomings paint a clear picture of bias". For instance, an external female candidate who lives and works close to PAHO headquarters was flown to Geneva for an interview in person, whereas he was interviewed only by video conference.

He states that he will not address the Organization's comments regarding the candidate ranked second since he lacks the information necessary to do so.

The complainant explains that he did not accept the post with IARC because it "was at the same grade and level as the one he currently holds" and, therefore, did not represent a promotion; it is bad faith for the WHO to raise this matter.

E. In its surrejoinder the Organization asserts that it was proper to grant an interview in person to an external candidate who was unknown to WHO officials, that this is not proof of bias, and that it caused no harm to the complainant. Interviewing internal candidates by video conference can now be done at all regional offices, which enables the Organization to interview a larger number of candidates.

The complainant is wrong in asserting that there is a requirement that six out of ten appointees must be female. World Health Assembly Resolution 50.16 of 12 May 1997 calls for "the target for representation of women in the professional categories to be increased to 50%". Consequently, the WHO seeks qualified female candidates to compete for posts.

Since the complainant has argued that there is a gender bias in selection, it is indeed relevant for the Organization to mention the fact that he was selected for a post at the IARC, even though he did not accept it.

F. On the Tribunal's instructions, the WHO has produced an internal memorandum and other documents pertaining to the Selection Committee's deliberations. Although the complainant was ranked equally with the selected candidate in the written examination, he was ranked fourth overall (and not third as previously noted by the Organization). Consequently, there were two other unsuccessful male candidates who were considered better qualified for the post than the complainant. One of them was also an internal candidate.

## CONSIDERATIONS

1. The complainant contests the decision of the World Health Organization (WHO) to appoint Ms W. to the post of Director of the Department of Financial Services of the WHO at grade D.2.
2. The complainant is a senior (grade P.6) staff member of the Pan American Health Organization (PAHO) which serves as the WHO's Regional Office for the Americas. On 9 September 1998 he applied for the position of Director of the Department of Financial Services of the WHO.
3. He was invited for interview by video conference for the position in early December 1998. The five other candidates on the WHO's short list were brought to Geneva, Switzerland, for an interview in person.
4. A test was distributed to the applicants. In his reply to the test, the complainant noted that there was a material error in the information that had been furnished to candidates, namely a reversal of interest rates for the United States dollar and the Swiss franc. It was later confirmed that the examination was indeed based on an erroneous hypothesis. The complainant was the only candidate to notice the error.
5. Ms W. was the selected candidate. The complainant was placed fourth, after Ms W. and two other male candidates.
6. The complainant filed a letter of notification of his intent to appeal against the decision of the Director-General on 24 February 1999. In that letter, he asked for details of the competition to enable him to assess the efficacy of the proceedings. On 4 March 1999, the Human Resources Services Department informed the complainant that no information would be provided, including the curriculum vitae of the selected candidate.
7. The Headquarters Board of Appeal considered the appeal and delivered its report, dated 30 June 1999, to the Director-General who notified the complainant, by letter dated 27 August 1999, of her decision to confirm the

appointment of Ms W.

8. In its report, the Board concluded that:

"the selection procedure had been properly carried out in accordance with WHO Rules and Regulations. The applicant with the highest overall score had been selected, and there was no evidence that gender bias had affected the selection procedures."

9. The Board further concluded that:

"the selection of an external candidate over the Appellant (and the other internal candidate who was short listed) was justified by her higher overall score when the results of the written test and the interview assessment were combined."

(In fact, this finding is erroneous: the complainant was placed behind two external and one internal candidates, but the mistake is of no consequence.)

10. The following are the relevant provisions of the WHO Staff Regulations:

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

4.3 Selection of staff members shall be without regard to race, creed or sex. So far as is practicable, selection shall be made on a competitive basis.

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."

### *Analysis*

11. The selection records were made available to the Headquarters Board of Appeal and it found that the complainant had been recommended as the third best candidate for the position. (As pointed out above, that finding was wrong, but the matter is of no consequence.) These documents contain a memorandum from the Executive Director of the General Management Cluster (GMG) recommending the appointment of Ms W. They also contain a table summarising the Selection Panel's detailed assessment of each candidate, based on the interviews and the written test.

12. According to the WHO, all six candidates on the short list were interviewed for approximately the same length of time. The same questions were posed to each candidate by the same Panel member in the same order. In all material respects, the circumstances surrounding the interviews were the same.

13. The complainant alleges that just prior to the interview, he asked the Executive Director of GMG why he was the only candidate who was not brought to Geneva for an interview in person. He alleges that he was told that his name had been added to the list at the last moment. He replied that he did not want to be "gender fodder" to protect the WHO from accusations of showing gender bias in the selection process. He was assured that his candidacy would be seriously considered. Additionally, the Executive Director is alleged to have told him that she was under some pressure due to the "overwhelming" number of senior male managers she had "reconfirmed in the rotation phase" and that "there was a gender mountain to climb". It is noteworthy that these serious and damaging allegations have not been denied or explained by the Organization. A suggestion by a very senior official (and the very person who later recommended to the Director-General to make the contested appointment) that a candidate is under a disadvantage by reason of gender cannot be just brushed off; that is wholly unacceptable.

14. The complainant also points out that another of the six short-listed candidates, a woman, was, like him, from the Washington area, yet she was flown to Geneva and was interviewed in person. The Organization alleges that to do so was reasonable, keeping in mind that the candidate in question was an external candidate, without any WHO performance record, who was unknown to WHO officials. The Organization's suggestion that it was not necessary

to bring the complainant to Geneva is not acceptable. While the Tribunal is not to be understood as saying that a video conference is not a perfectly acceptable method of conducting interviews, care must always be taken to ensure that no candidate is given a potentially unfair advantage by that process. Flying one person across the ocean to be interviewed while leaving a competitor from the same area at home is open to the interpretation of unequal treatment.

15. The complainant alleges that failure to notice the interest rate reversal in the test papers was an important factor in assessing the candidates; the qualifications for the post of anyone who did not notice it must be called into question.

The WHO alleges that, whether or not the candidates mentioned the material error in the test data sheet, was far from being the most significant factor in assessing the test answers, nor was it a factor that could have led to the disqualification of any candidate who did not refer to it. The test was designed to assess the candidate's ability to synthesise financial information and data and to summarise it in an understandable way for a lay person. It was also designed to assess the candidates' ability to communicate clear information and advice and to do so in a short period of time, relying only on their own knowledge and experience. The Board of Appeal agreed with this conclusion.

16. Both Ms W. and the complainant obtained 30 points on the test, a perfect mark. The WHO has not denied that none of the candidates, with the exception of the complainant, noticed the error in the test papers. The test was a blind test with each candidate being assigned a number. The complainant's allegation that he ought to have received more marks than Ms W. presupposes that his skills in synthesising and summarising the data were equal to those of Ms W. The Organization has said that the complainant's identification of the error was taken into account in the overall evaluation of his written replies to the test, although the material supplied to the Tribunal neither confirms nor negates this assertion. However, it is not the function of the Tribunal to mark the test. The Selection Panel was entitled to mark the test as it saw fit and award marks accordingly. It would be absurd to suggest that candidates who failed to notice the error should be eliminated from the competition. The purpose of the test remained valid in spite of the error found in it.

17. The complainant makes the serious complaint of gender discrimination.

The Headquarters Board of Appeal observed as follows:

"The Board noted that the selected candidate had the highest overall score of all those short listed, including the Appellant. The Board agreed with the statement made by the Appellant, that 'the preference which internal candidates enjoy is to be applied where qualifications are equal', and that as an internal candidate he should indeed have priority over an external candidate, **all else being equal**. All else was not equal, however. The selected candidate had a higher overall score than the Appellant based on the results of the written test and their interviews. Indeed, the Appellant was third in the interview score, first in the test score (tied with the successful candidate), second in the total score (interview plus test) and third [sic] in the overall assessment score, while the successful candidate scored first in all cases. The Board was satisfied that the selection of the external candidate was justified."

And further:

"The [Board] concluded that the selection procedure had been properly carried out in accordance with WHO Rules and Regulations. The applicant with the highest overall score had been selected, and there was no evidence that gender bias had affected the selection procedures."

18. Among the documents produced before the Board and the Tribunal and also furnished to the complainant was a memorandum from the Executive Director of the GMG recommending the appointment of Ms W. The following passages are relevant:

"The applications were reviewed and assessed for suitability in a three stage process, first by GMG/HRS, then by my office and finally by the selection panel. At the end of each stage, the number of applications retained were respectively 270, 14, and 6 (3 male candidates of which one was an internal candidate and 3 female candidates).

...

You will find annexed a table summarising the Panel's detailed assessment of each candidate as well as the

curriculum vitae of all the candidates short listed by the panel.

Four of those interviewed were rated as suitable for the position. But two external candidates, namely [Ms W. and Mr A.], significantly outranked the others in both the test score and the interview assessment.

Given the current gender inequity in GMG (no female Directors) and the desirability of both International Organization experience and private sector investment experience, I would like to recommend that you consider [Ms W.] (who rated highest on total scores) for the post of Director FNS."

The Organization has not furnished the curriculum vitae mentioned in the memorandum. The memorandum is inaccurate in that Mr A. did not outrank the complainant in the test score. He received 22.5 points whereas the complainant got 30 points, the full mark.

19. Annexed to the memorandum was a table summarising the interview and test scores. There are two different final result columns - the total column and the assessment column. The total column is arrived at by adding the sub-total result (which is supposed to reflect the total marks for the interview but is not the arithmetical sum of the figures which precede it) to the test result. The actual sub-total of the interview marks has been multiplied by the figure of approximately 1.28 to bring the maximum possible total from 54.7 to 70. So that the respective weightings of the interview and the test were altered. There is no explanation why a higher value than the actual marks awarded was given.

According to the results in the total column Ms W. obtained 95.6/100, the complainant 85.2/100, Mr A. 83.3/100 and Mr S. 74.2/100. In the assessment column Ms W. and Mr A. were each awarded 4 out of 4, Mr S. 3.6 and the complainant 3.4. There is no explanation as to how Mr A. was given an equal assessment with Ms W. or how the complainant came fourth with an assessment of 3.4.

The Tribunal is left in the position that it has no way of assessing the fairness of the process which produced these results.

20. To support his claim of gender bias the complainant has produced an extract of the Director-General's speech of 2 March 1999:

"The World Health Assembly has repeatedly called for gender parity. I intend to follow up on that call. Cabinet has decided to secure that 6 out of 10 new appointments are women until parity is reached."

The Tribunal wishes to emphasise that there is nothing wrong in having a policy aimed at gender parity. For too long women have been subjected to discrimination in appointments to senior posts which can be proved by statistics. But this policy cannot be achieved by setting quotas and by reverse discrimination, in other words, by the appointment - for particular posts - of women who are less qualified than men. This is contrary to Regulation 4.3 which provides that selection shall be "without regard to race, creed or sex". The policy can be achieved by different means such as actively encouraging qualified women to apply for senior posts, and by ensuring that work practices do not discourage women from applying. But the bottom line must always be that the person best qualified should be appointed. The quoted words of the Director-General could lead to the interpretation that a quota is being set.

21. In the particular circumstances of this case, it was highly irresponsible for the Executive Director of GMG to talk of "a gender mountain to climb" thus giving the impression to the complainant that he was at a disadvantage because of his sex. She was rightly censured by the Headquarters Board of Appeal for making such a remark.

But that remark pales into insignificance when compared with her memorandum to the Director-General announcing the results of the Selection Panel. In the assessment column of the table attached to it Ms W. was rated equally with a man, Mr A. As quoted above under 18 she said "Given the current gender inequity in GMG (no female Directors) ... I would like to recommend that you ... consider [Ms W.] (who rated highest on total scores) for the post of Director FNS".

This was an invitation to make the sex of Ms W. a factor in the choice of candidate. The Director did no favour to Mr A. who is an innocent third party to this affair.

In these circumstances, the Tribunal cannot let the appointment stand in light of this flaw in the appointment

process. The Organization will have to hold another competition in which Ms W. can of course be a candidate.

22. The complainant's claim that he should receive the difference in salary between the D.2 grade and his current grade is not sustainable. He has not proved he would have been selected for the position had the competition not been flawed. He is at liberty to apply for the post again in the new competition.

He is entitled, however, to moral damages which the Tribunal assesses at 5,000 United States dollars.

## DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The appointment of Ms W. is set aside.
3. The case is sent back to the Organization.
4. The WHO shall pay the complainant 5,000 United States dollars in moral damages.
5. The WHO shall pay the complainant 1,000 dollars in costs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet