

EIGHTY-FOURTH SESSION

In re Mitastein (No. 3)

Judgment 1698

The Administrative Tribunal,

Considering the third complaint filed by Mrs. Monique Mitastein against the Pan American Health Organization (PAHO) on 19 September 1996 and corrected on 2 December, the PAHO's reply of 28 March 1997, the complainant's rejoinder of 11 June and the Organization's surrejoinder of 17 September 1997;

Considering Article II, paragraph 5, 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. Details of the complainant's career in the PAHO are set out under A in Judgments 1045 and 1293, on her first two complaints. Like them, this complaint is about the application to her of the Organization's "reduction-in-force" procedure.

By Judgment 1045, of 26 June 1990, the Tribunal quashed a decision to terminate her appointment and ordered the PAHO to apply the procedure in accordance with Rule 1050.2, which reads:

"When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director ..."

On 6 August 1990 the Director of the PAHO set up an "Ad Hoc Committee on Reduction in Force" and in a report of 14 December 1990 the Committee recommended putting her on one of two posts it identified as suitable. But on 26 December the chief of Personnel gave her notice of termination at 31 March 1991. By Judgment 1293, of 14 July 1993, the Tribunal set aside the notice of termination and ordered the PAHO to reconvene the Committee or, failing that, carry out a new reduction-in-force procedure.

On 28 January 1994 the Committee submitted a report on her suitability for retention in the "occupational group" of her former post, that of "training specialist/fellowship administrator". The majority concluded that, failing to meet the "minimum qualifications", she "could not compete" for any of the four positions of technical officer in the group. Two of the five members took the view that she did have the minimum qualifications for two of them and should be put on post 3488. By a letter of 16 February the chief of Personnel, having endorsed the recommendation of the majority, invited her to say whether she wished to compete for posts in a different occupational group under Manual paragraph II.9.360. By a letter dated 28 February she announced her wish to compete for posts in other groups, namely translators, social scientists and information experts.

Though the Committee accordingly examined her suitability for posts in those groups, it reported on 4 April 1994 that she was not eligible for any of them. By a letter of 4 May the chief of Personnel told her that the Director had decided to endorse the Committee's recommendation and gave her notice of termination at 11 August 1994.

On 3 October 1994 the Administration got notice of her intent to appeal. In light of the Tribunal's reasoning in Judgment 1371 (*in re Ortiz*), of 13 July 1994, the chief of Personnel told her by a letter of 8 November 1994 that the PAHO was reinstating her as at 12 August 1994 and that the Committee would examine her position anew. Having done so, it recommended termination in a report dated 11 November 1994 on the grounds that she was ineligible for a post of translator or social scientist. By a letter of 23 November 1994 the chief of Personnel told her that the Director had endorsed the Committee's recommendation and gave her notice of separation as at 28 February 1995.

In a report dated 16 April 1996 the headquarters Board of Appeal recommended rejection by 4 to 1. By a letter of 20 June 1996 the Director endorsed the Board's recommendation. That is the decision she impugns.

B. The complainant submits that the reduction-in-force procedure is tainted with a fatal flaw in that the Committee made an "error of fact" by extending the minimum requirements that appeared in the notice of vacancy for post 3488. Although, as the minority report concluded, she met the minimum requirements in that notice, the majority mistakenly treated as minimum requirements further qualifications set out in the post description.

Vacancy notices are drawn up by the Personnel Department with the approval of the chief of Personnel after the classification unit has reviewed the post description. There being no evidence that the Department erred in drawing up the vacancy notice, she observes that it does not describe as incomplete the list of minimum requirements though it did say the list of duties was a "sample". There would have been no point, she contends, in publishing an incomplete or expandable list of "minimum" requirements. As the minority report stated, the published list is the official interpretation of the required qualifications. What is more, the majority were demanding the sort of knowledge that was found only in reference books. In any event the guidelines for the reduction-in-force procedure require the Committee to take account of the candidate's potential as well as actual ability to do the job. Why, she asks, should a vacancy notice, which states the requirements that apply under the normal selection procedure, be swept aside in a reduction-in-force procedure, the purpose of both procedures being the same?

She wants the Tribunal to order her reinstatement as from the date of dismissal and to have the reduction-in-force procedure "repeated". She also claims costs.

C. In its reply the Organization refutes her pleas and argues that she was not qualified for the material post. It says that a post description is the only authoritative statement of the minimum requirements and that the reduction-in-force committee had no reason to take account of the vacancy notice. Though a notice may be lacking, a post still requires qualifications. The "purpose, content, duration and applicability" of a vacancy notice are limited, whereas the post description applies in full. Though the complainant lacked the special knowledge required in the description of post 3488, the Tribunal does not rule on the relevance of particular job requirements. Whatever her potential for a job may be, she must first meet the minimum requirements. But even if she had met them, it is not a foregone conclusion that she would have won the competition. Her record for the years 1981-82 and 1983-84, the last on which she got performance appraisals, was not so good as the incumbent's for 1992-93 and 1993-94.

D. In her rejoinder the complainant seeks to rebut the Organization's reply. She is not asking the Tribunal to set aside the post description; she merely wants it to declare unlawful the PAHO's treating certain qualities described as merely "desirable" in the post description as "minimum requirements" and order the Organization to abide by the minimum requirements announced in the notice. Were the post description the only authoritative source of the minimum requirements for a post, the Tribunal would not have ruled in Judgment 1497 (*in re Flores*) that the "basic rule" of selection is that the chosen candidate must have all the minimum qualifications "in the notice of vacancy". Ignoring the complainant's progress in the Organization from grade G.7 to P.3, the PAHO relies on two performance appraisals to show that she should not have won the competition for "retention" But the material issue is whether she might compete, not whether she would win. She presses her claims.

E. In its surrejoinder the Organization says that the rejoinder does not raise any new substantive issues. It points out that she produces no evidence to show that the minimum requirements are "exclusively" set in the vacancy notice. Indeed the majority of the Committee properly assessed her qualifications against the applicable requirements and found her unsuitable.

CONSIDERATIONS

1. This complaint arises out of a reduction-in-force procedure carried out by the complainant's employer, the Pan-American Health Organization (PAHO). The most important questions raised concern the qualifications required for two posts 3488 and 3598. The reduction-in-force committee held by a majority that the complainant did not meet the minimum qualifications for the posts, which were accordingly removed from the list of those for which she was being considered. That decision was confirmed by the

Director of the Organization on the recommendation of the headquarters Board of Appeal, and the complainant is appealing against it to the Tribunal.

2. The first question is to identify the proper source document or documents from which the essential or "minimum" qualifications or requirements are to be drawn. The descriptions of posts 3488 and 3598 are identical. The complainant argues that the minimum requirements should be determined not from the post description but rather from a vacancy notice which lists them under that rubric. The Organization, on the other hand, takes the position that the reduction-in-force committee was correct in looking beyond the vacancy notice and referring to the official post description in determining that the complainant did not have all the essential qualifications for the job.

3. A comparison of the two documents reveals as follows.

4. In the post description box 5 contains the heading "What are the minimum knowledge requirements of the post?". It goes on to list certain educational, work experience, and language requirements, all of which are susceptible of relatively objective measurement. The same qualifications also appear, although in slightly different form, in the vacancy notice under the heading "Minimum requirements".

5. Box 6 of the post description is headed "Work role and skills required". It sets out rather "softer" qualifications which lend themselves somewhat less to objective measurement. Its content is also echoed in the "Minimum requirements" section of the vacancy notice as follows:

"Skills:

post requires the exercise of independent judgment in analyzing educational and training needs of professionals in the medical, health and related fields in the context of the health programs of Member Countries. The incumbent is responsible for directing the technical, logistical, budgetary and financial aspects of individual and group fellowships. Good interpersonal skills are needed to counsel Fellows in cross-cultural exchange programs on educational and cultural matters."

6. Finally, box 7 of the post description is headed "What subject areas or fields of work does the post cover and to what degree is specialization in them required?". The text reads as follows:

"Detailed knowledge of educational systems and admissions requirements of institutions in the United States and Canada and of academic requirements worldwide and their educational equivalencies. Detailed knowledge of health agencies and training facilities in the USA and Canada and ability to evaluate relevance of their activities in cross-cultural training. Management and multiple activities involving individuals and groups from various cultures and political systems. General knowledge of a wide range of subject areas related to human and animal health."

7. The contents of box 7 have no counterpart in the vacancy notice. The majority of the committee found that these qualifications constituted "minimum" requirements for the post and that the complainant did not have them.

8. In the Tribunal's opinion the concept of "minimum" requirements or qualifications is not helpful. A particular qualification is either required or it is not. Certain qualifications or skills may be essential for a given post while others may be merely desirable. Presumably it is the former which are intended to be designated by the use of the terms "minimum" requirements or qualifications.

9. Moreover, there can be no doubt that the only official source of information about the qualifications required for any particular post must be the post description relating to it. A vacancy notice is only a secondary or derivative source and represents a synopsis of the post description. While it must not include any qualifications which are not required, since to do so might exclude eligible candidates, it may leave out certain qualifications which are in fact required. There need not even be a vacancy notice for every post and the purpose of the notice is to attract suitable candidates rather than to provide a checklist of the qualifications required. As the Tribunal said in Judgment 1386 (*in re Bréban*) under 19, albeit in a different context:

"... since the notice had to be in general enough terms to attract a wide variety of applicants it cannot be regarded as a specific enough job description to be of use to the official."

10. The Tribunal also notes that a vacancy notice, even where one exists, is necessarily a document whose

validity is limited in time by the closing date of the particular competition which it announces. Thus the vacancy notice relied on by the complainant in the present case is dated 28 August 1990 and sets the closing date at 25 September; the committee's finding that the complainant was unqualified was dated 28 January 1994, almost three and a half years later. The requirements of any post may of course change over time. Even though the qualifications at issue here did not actually change, the fact that they might have done so is an indication that a vacancy notice is not a proper source document to establish all the required qualifications for a job. Furthermore, since the appraisal of performance is based on the post description, that document is authoritative.

11. Once it is determined that the proper document to refer to is the post description and nothing else, the second question raised in this case is the proper means of deciding which of the qualifications listed are essential and which are not. In this connection, the use of words such as "requirement", "required" or "minimum" furnishes some indication but is not an infallible guide. The proper approach is to examine the post description in its entirety and to determine from the words used and their context which of the qualifications are essential and which are not. This was substantially the approach taken by the majority of the committee, and it was correct. Box 7 refers to the degree of specialisation required, including detailed knowledge of education systems and health agencies and general knowledge of health and health-related subjects. From the language employed such knowledge is clearly required for the post. The qualifications listed are essential and not merely desirable. The committee was correct to ask itself if the complainant met them.

12. Before closing, two subsidiary arguments raised by the complainant should be mentioned:

(a) it is suggested that the contents of box 7 of the post description are not in fact required for the post in question;

(b) it is suggested that the complainant actually meets the requirements and has the qualifications mentioned in box 7.

13. Neither of these two questions is a matter upon which the Tribunal is competent to rule. In the absence of some procedural flaw or an allegation of abuse of authority -- and there is none -- the Tribunal will not substitute its judgment on these matters.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll
Mark fernando
James K. Hugessen

A.B. Gardner