

## EIGHTY-SIXTH SESSION

### *In re* Lamarche

#### Judgment 1809

The Administrative Tribunal,

Considering the complaint filed by Mr. Leo Lamarche against the Pan American Health Organization (PAHO) on 26 September 1997 and corrected on 27 October 1997, the PAHO's reply of 9 February 1998, the complainant's rejoinder of 20 May and the Organization's surrejoinder of 2 September 1998;

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. The complainant, a citizen of the Dominican Republic who was born in 1944, joined the staff of the PAHO on 3 February 1969. At the material time he held a permanent appointment as a budget officer at grade P.4.

By notice 28 of 25 September 1995 the Organization announced a competition to fill a grade P.5 post, No. 160, for the chief of the Department of Budget. The notice called for a sound knowledge of English or Spanish and a "working knowledge" of the other language. The complainant applied.

He was made acting chief of the Department on 1 October 1995 and as such earned under Staff Rule 320.4 the "extra pay" pertaining to grade P.5.

By a directive, HQ/FO-95-19, of 20 December 1995 the Organization told the staff that as from 1 January 1996 the Departments of Budget and Finance were to merge to form a new one known as Budget and Finance. In the reform the holder of post 160 was to head the Budget Section. The complainant became the acting chief of it on 1 January 1996, and the news went out in a general information bulletin of 27 December 1995.

On 12 March 1996 the Senior Staff Selection Committee met to consider the applicants for the post. It chose Mr. Michael Usnick, a citizen of the United States who was an outside candidate. The next day the Director of the Organization saw Mr. Usnick, the complainant and a third applicant. By a letter of 5 April the chief of Personnel told the complainant that the Committee had recommended someone else. By a general information bulletin of 30 April the Organization announced the appointment of Mr. Usnick to post 160 at 1 May 1996. A letter also of 30 April from the Director thanked the complainant for acting as chief of Budget. On 4 June he gave the headquarters Board of Appeal notice of appeal against the appointment of Mr. Usnick. He later filed a full appeal.

On 1 June 1997 he was transferred from Budget to Internal Audit.

In its report of 24 June 1997 the headquarters Board held that Mr. Usnick, whose mother tongue was English, lacked "working knowledge" of the other language, Spanish. It nevertheless held that for the Organization's sake the Director might pick the candidate he put top. Not sharing the complainant's view that selection should have been left to an ad hoc Committee, the Board recommended rejecting his appeal. By a letter of 27 June 1997, the impugned decision, the Director told the complainant that he did so.

B. The complainant argues that Mr. Usnick had no "working knowledge" of Spanish. After he had got the post the Organization paid to let him have eight weeks' intensive coaching. The form giving him leave to take the course described him as a "beginner" and his purpose as to "learn Spanish". He himself had said in his application that he did not know the language. So too held the Board. Citing Judgment 1497 (*in re* Flores), the complainant pleads that "the Organization broke the basic rule of any process of selection that the successful applicant must have all the minimum qualifications required in the notice of vacancy".

Secondly, the Organization acted in breach of Manual paragraph II.3.330 by putting the applications for post 160 to the Senior Staff Selection Committee, which can recommend for chief of department but not of section. By April 1996 the post was chief of section, not of department. The right body would have been an ad hoc selection committee, no other sort offering the safeguard of membership of a staff representative.

The complainant asks the Tribunal to set aside the appointment of Mr. Usnick to post 160 and order resumption of the competition. He claims damages and costs.

C. In its reply the PAHO contends that Mr. Usnick did fully qualify for the post, was the best candidate by a long chalk, and did have "working" Spanish. Though in his application he professed no knowledge of it, he thereby misrepresented his own attainments. A Spanish-speaking member of the Senior Staff Selection Committee tackled him on the point, and so did the Director, and both felt that his grasp of Spanish and ability to speak it were up to scratch. As for the thorough coaching he had after appointment, his own wish was to become more fluent. The form that branded him a "beginner" was just a run-of-the-mill document of no weight as evidence, made out by a clerk in the Staff Development Office with no inkling of his true grasp of the language.

In subsidiary argument the Organization pleads that, even if the Tribunal held that on appointment he had lacked "working knowledge" of Spanish, his grasp of it had been sure enough for the Director to exercise his discretion, as precedent allows, and so put greater stock in his qualifications and experience. Citing Judgment 1698 (*in re* Mitastein No. 3), the defendant contends that "minimum requirements" are not the right test: the cardinal distinction is between the qualifications that are essential and those that are not. Here knowledge of languages was the least essential criterion.

The PAHO further observes that apart from languages the complainant met none of the requirements of the post.

The selection was in line with the rules. It started three months before the merger of Budget and Finance: indeed the notice referred to the chief of the Budget Department. Moreover, the chief of Budget had always been appointed on the recommendation of the Senior Staff Selection Committee. Manual paragraph II.3.330, since amended, now says that recommending a chief of section falls to that Committee.

In comments appended to the defendant's reply Mr. Usnick avers that his knowledge of Spanish at the time of appointment met what was required of a chief of Budget. He had taken courses in Spanish and when in the United States federal administration often went on mission to Latin America, where he would speak the language.

D. In his rejoinder the complainant contends that the posts of chief of Budget, Finance and Administration at the PAHO are "reserved" to citizens of the United States who have backing from the State Department of that country. He pleads breach of the independence of international organisations and of his right to a career.

To his mind Mr. Usnick did lack "working" Spanish. A long line of precedent has it that, though an executive head may let one criterion prevail over others in ranking applicants, the winner must have all the minimum qualifications in the notice.

He presses his other pleas and his claims.

E. In its surrejoinder the defendant rebuts the complainant's pleas. It says that for reasons that have no bearing on the case Mr. Usnick has gone. So the post he held is again vacant and a new process of selection began on 22 July 1998.

## CONSIDERATIONS

1. A vacancy notice that the PAHO issued on 25 September 1995 opened a competition to fill the P.5 post of chief of its Department of Budget. In line with the description of the post the notice required a "very good knowledge of English or Spanish with a working knowledge of the other". The complainant applied. By a general information bulletin of 30 April 1996 the Organization declared the winner to be Mr. Michael Usnick, who would be taking up duty on 1 May.

2. On 4 June 1996 the complainant lodged an appeal against the outcome on the grounds that Mr. Usnick did not have the "working knowledge" of Spanish the notice had demanded. The headquarters Board of Appeal reported on 24 June 1997. It held that, though at the time of his appointment Mr. Usnick's Spanish had fallen short of the

minimum standard required in the notice, the Director of PAHO had had discretion to pick the candidate he had liked best. By a letter of 27 June 1997 the Director rejected his appeal. That is the decision he is impugning, and he is asking the Tribunal to declare that Mr. Usnick lacked the required working knowledge of Spanish and that the selection went through the wrong body, to quash the appointment, to order resumption of the competition and to award him damages and costs.

3. In its surrejoinder of 2 September 1998 the PAHO says that Mr. Usnick is no longer on its staff. Since the post is again vacant and there is a new competition to fill it, the complainant's claim to resumption of the competition shows no cause of action.

4. But his claim to a ruling that the appointment of Mr. Usnick was unlawful holds good: if he were right on that score he would be entitled to damages for any moral injury.

5. His claim fails. For one thing, the evidence counters what he makes out and what is suggested by a document that Mr. Usnick did not himself write and that gave him leave to take courses in Spanish. Mr. Usnick did know enough of the language for the Organization not to have ignored the requirements of the notice in appointing him. Secondly, the Senior Staff Selection Committee was empowered in law to recommend someone for the senior post, whatever the budget service was called after the merger. And thirdly, the complainant adduces no evidence of the misuse of authority he alleges.

6. The conclusion is that he has no grounds for challenging the lawfulness of the appointment of Mr. Usnick. So his claims to moral damages and to costs must fail as well.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

*(Signed)*

Michel Gentot

Julio Barberis

James K. Hugessen

A.B. Gardner