

FORTY-NINTH ORDINARY SESSION

In re GLUECKSMANN

Judgment No. 520

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health organization) by Mrs. Luz Maria Gluecksmann on 26 February 1982 and brought into conformity with the Rules of Court on 1 April, the PAHO's reply of 21 May, the complainant's rejoinder of 9 July and the PAHO's surrejoinder of 18 August 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Regulations 4.2, 4.3 and 4.4, PAHO Staff Rules 310.4, 920 and 1230.1 and WHO Manual section II.1, Annex A;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. On 30 May 1980 the PAHO issued a notice, No. 80/63, inviting applications for a grade P.2 post, No. 2052, for a finance officer in the Budget and Finance Department of the Pan American Sanitary Bureau, the secretariat of the PAHO. The minimum qualifications included "Graduation from a four-year college or university with a major in Accounting or Business Administration. A recognized certification in accounting as a Certified Public Accountant or a Chartered Accountant." The complainant applied for the post. A citizen of Mexico, she joined the Bureau in 1969, obtained grade G.7 in 1976 and has performed supervisory functions for the accounts section since 1977. On 18 November 1980 the Office of Personnel told her that she had not been chosen. The successful candidate was Ms. Mora Reynoso, a G.6 clerk under temporary contract, who has a degree in accountancy from the University of Guadalajara, in Mexico. On 16 January 1981 the complainant appealed to the Board of Inquiry and Appeal against the decision not to appoint her. In its report of 30 September the Board recommended rejecting the appeal, and the Director informed the complainant of his acceptance of the recommendation in a letter of 24 November 1981, which is the decision impugned.

B. The complainant has three main pleas. (1) The decision not to appoint her to post 2052 is just the most recent occurrence of a pattern of vindictive measures taken against her because she has been an active member of the PAHO Staff Association since 1974. Although her appraisal reports are excellent, her career has been blocked and the burden of proof is on the PAHO to show that she has not been penalised because of her staff activities. Many of her former duties have actually been taken away from her and assigned to post 2052. She has therefore been performing recognised P.2 duties and is entitled to compensation under PAHO Staff Rule 310.4. (2) Regulation 4.4 ("... vacancies shall be filled by promotion of persons already in the service of the [Bureau] in preference to persons from outside") implies that officials with a long record of service should be preferred to recent recruits, career opportunities should reward satisfactory performance and loyalty. Yet here the PAHO preferred a temporary employee holding a lower grade. The educational qualifications for the post were added to suit someone chosen in advance. (3) Manual section II.1, Annex A, requires a university degree for posts at grades P.1 to P.3. This discriminates against serving staff and especially - in breach of Regulation 4.3 - against women, who make up four-fifths of the General Service category. The provision is also invalid because the staff representatives were not consulted before it was adopted: Rule 920 requires such consultation on any proposal to change the Regulations or Rules, which should include Manual sections, since they may be used, as they were in this instance, to curtail or deny rights embodied in the Rules. The complainant seeks reclassification of her post to P.2, financial compensation retroactive to the date on which she would have been appointed to post 2052 had she been selected, such other relief as the Tribunal thinks fit, and costs.

C. In its reply the PAHO invites the Tribunal to consider the complaint together with those of Mr. Carbo and Mr. Mejía, which are also before the Tribunal, because the rights of one exclude the rights of the others. The PAHO rejects the allegations of victimisation. For reasons it explains, a university degree was required for the post, and

the complainant does not have the degree required. There was therefore no question of discrimination on the grounds of her staff activities. Nor was there breach of Regulation 4.4: Ms. Mora Reynoso was not a person "from outside" since she held a temporary contract, and the complainant can scarcely be claiming priority for permanent over other staff. Besides, Regulation 4.2 states that the paramount consideration in appointing staff shall be "the necessity of securing the highest standards of efficiency, competence and integrity". The successful candidate is well qualified for the post. There is no merit in the allegations, based on Manual section II.1, Annex A, of discrimination against serving staff, especially women, since the person appointed was a member of the staff and a woman. There was no flaw in the Selection Committee procedure. The claims for relief are in any case unfounded. The complainant has suffered no wrong since she was not qualified for the post anyway, and her claim to reclassification is irreceivable since for that there is a special procedure which she has not followed.

D. The complainant argues in her rejoinder that it would be contrary to due process and the Tribunal's practice to join her own complaint with those of Mr. Carbo and Mr. Mejía. What each of them contends is that the selection procedure was unfair and in breach of the rules, and the remedies each is claiming are not mutually incompatible. The PAHO gave Ms. Mora Reynoso a temporary contract so as to make her an "insider" and get round Regulation 4.4. "Efficiency" and "competence" do not depend on holding a degree, and there must be some connection between the educational requirements and the duties of post 2052. The failure of an official of proven fitness like the complainant to obtain the post reflects personal prejudice against her which she again attributes to her staff activities. Charges of discrimination against women are not rebutted by pointing out that one woman was successful. The claims are valid, the remedy sought being, not appointment to post 2052, but compensation for the wrongful selection procedure.

E. The PAHO observes in its surrejoinder that it is inviting the Tribunal, not to join the three complaints, but merely to consider them together, since they are similar and the relief sought in one may exclude that sought in the others. The determination of the educational requirements for a post is a matter of administrative discretion and was in this instance correct. Regulation 4.4 does not, as the complainant suggests, prescribe promotion by seniority. Ms. Mora Reynoso is far better qualified for post 2052 than the complainant and there was no abuse of discretion in appointing her. The complainant has not suffered the violation of any right, and her claims are, in the PAHO's view, devoid of merit.

CONSIDERATIONS:

The complainant has been in the service of the Organization since May 1969 and has received very good appraisal reports. She served on the committee of the Staff Association from 1974 to 1976 and from 1979 to 1980. She was, she says, "in the forefront of this activism, which manifested in petitions, meetings, open letters and other public activities, challenging the Administration's anti-GS Staff practices". She was an intervener in the case of García and Márquez (No. 2) (Judgment No. 496). She complains that as a result of her staff activities, she has been "denied all opportunities for advancement". She cites as "the most recent occurrence" her unsuccessful application in 1980 for post 2052; the facts relating to this vacancy have already been considered by the Tribunal in the case of Carbo (Judgment No. 519). She contends that the burden of proof is upon the Organization to show that her lack of success is not due to her staff activities.

The decision impugned is the decision of the Director of PAHO given on 24 November 1981 to accept the first recommendation of the headquarters Board of Inquiry and Appeal. She had appealed to this Board on 16 January 1981, limiting her appeal to "non-selection for post 2052". The Board's first recommendation was that "the remedies requested by the appellant be denied". The Board made the same recommendation in the same terms in respect of the appeal of Mr. Carbo, also filed on 16 January 1981. Like Mr. Carbo, the complainant had been eliminated by the Selection Committee because of her lack of the minimum requirements. In so far as the complainant's argument before the Tribunal relates to non-selection for post 2052, it fails for the reasons given in Judgment No. 519.

The Tribunal will not consider whether it is now open to the complainant to complain directly to the Tribunal of prejudice resulting from her staff activities. Assuming that it is open and assuming also that the complainant is right in her contention that the burden of proof is upon the Organization to show that her non-selection was not due to her staff activities, that burden has been discharged. She was not selected because she was not qualified.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner