

## FIFTY-SIXTH ORDINARY SESSION

In re BAMBINELLI (No. 2)

Judgment No. 670

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Vincent Babinelli on 6 September 1984 and corrected on 1 October, the PAHO's reply of 21 December 1984, the complainant's rejoinder received at the Registry on 19 February 1985 and the PAHO's surrejoinder of 11 April 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Regulations 4.1 and 4.2 and WHO Manual sections 280, 310 and 380;

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. The complainant joined the PAHO in Washington in 1974 as a clerk at grade G.6 and has since been promoted to G.8. On 1 February 1980 he was transferred to his present post as an accounting technician. He was one of 48 candidates for a P.3 post, No. 4.3102, for a Finance Officer. On 5 October 1983 the selection committee set up to assess the candidates recommended the complainant. Several minutes were addressed to the Director of the PAHO and several officials got in touch with him about the committee's recommendation. On 8 November the Chief of Personnel wrote on the committee's report, before passing it to the Director, that because of irregularities he could not endorse the recommendation. On 27 November the Director signed a minute saying that the procedure had been abnormal, the competition must be declared void and the vacancy advertised again. The complainant was so informed by a minute of 1 December from Personnel. On 5 December a new notice of vacancy was issued. Having, at his request, been given confirmation on 20 December that the decision of 1 December was final, the complainant submitted an appeal on 24 January 1984. In its report of 7 May 1984 the Board of Inquiry and Appeal found that procedural irregularities had occurred and that the complainant, a highly deserving candidate, had been unfairly treated. It recommended that he be granted grade P.3 and paid the corresponding salary as from 1 January 1984, "a reasonable date of appointment had the selection been honoured"; that he be offered transfer to the first suitable P.3 vacancy; and that he be awarded costs. But by a letter of 8 June, which was notified on 11 June and is the impugned decision, the Director informed the complainant that he rejected his appeal.

B. The complainant observes that in his minute of 27 November 1983 the Director gave as reasons for his decision breach of confidentiality, lobbying, the priority given by the selection committee to subjective considerations, and lack of consensus in the committee. The complainant submits that such flaws did not warrant disregarding the committee's recommendation. The first occurred after the committee had reported, and the complainant was not to blame anyway. The second, though improper, did not reflect on the committee's competence; besides, the Director himself allowed the lobbying to go on. The fourth is irrelevant: the committee need not be unanimous, and its recommendation was valid. As to the third flaw, objective considerations prevailed in the committee, as a fair reading of its report shows. The difficulty was that it found three candidates suitable and in order to make its choice had to take account of factors it would not usually consider. The Director's decision was therefore an abuse of his discretion. Furthermore, the complainant believes that he is the victim of prejudice. He has an outstanding record of service and has done his utmost to advance his career, having even taken a college degree in his spare time. Yet the Organization's disparaging attitude was already evident from its treatment of him in an earlier competition, as described in Judgment 636, under A. He has twice been recommended by selection committees, and twice a Board of Inquiry and Appeal has found in his favour: yet twice the Director has rejected his claims. He asks the Tribunal to order that he be granted P.3 and the P.3 salary as from 1 January 1984, priority for the first suitable P.3 post to become available, 30,000 United States dollars as damages for moral injury, costs and any further relief the Tribunal thinks fit.

C. In its reply the PAHO submits that the complainant has supplied no admissible evidence in support of his charges of prejudice. What prompts them is disappointment at his failure to get promotion. The Tribunal dismissed

his complaint with regard to his earlier failure in Judgment 636, and his latest failure was just the outcome of the Director's legitimate exercise of his discretion, in which the complainant has shown no flaw that would warrant setting the decision aside. PAHO staff Regulation 4.2 says: "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..."; and 4.1: "The Director shall appoint staff members as required." Thus it is the Director who makes appointments, and at his own discretion: according to WHO Manual section 280 the selection committees make mere recommendations. In this case the selection committee had difficulty in making a recommendation, took months to do so, and even then was not unanimous. The recommendation, by the majority, seemed to rest in the last resort on the complainant's alleged "ability to please the customer". It was open to the Director to approve the recommendation, pick someone else, or else order a new competition. His preference for the last option was beyond reproach and the fairest to everyone being based on his conclusion that the recommendation did not give him "sufficient elements for any assurance of what is best for the Organization".

D. In his rejoinder the complainant seeks to refute the arguments and correct what he sees as factual errors in the reply. He observes that he has won twice in fair competition, only to see the post go to someone already dropped in the process of selection. In his view the PAHO has shown no sound reason for disregarding the selection committee's recommendation. As the Board said, there was no irregularity in the committee's proceedings, he was a worthy choice, he has been discriminated against by the Administration, and he should have been appointed. He presses his claims for relief.

E. In its surrejoinder the PAHO develops the arguments in its reply, contending that the complainant has failed to show that the Director's decision to readvertise the post was wrong or that there was any abuse of discretionary authority or prejudice against him. The PAHO again invites the Tribunal to dismiss the complaint on the merits.

## CONSIDERATIONS:

### THE LAW

1. Article IV of the Staff Regulations of the Organization provides that the Director shall appoint staff members as required and lays down the general principles to be followed in the appointment, transfer and promotion of staff. Subject to these principles, the appointment, transfer and promotion of staff is left to the Director's discretion. But the administrative policies and procedures required to implement Article IV have been formulated and are expressed in the Staff Manual. It is not disputed that so long as they remain in force the Director must adhere to them. MS 280 provides that authority for the recommendation of candidates for a post is delegated to an ad hoc selection committee. MS 310 provides that all members of the selection committee shall be bound to respect the confidentiality of the process. MS 380 provides that the recommendations of the selection committee are to be submitted through the Chief of Personnel to the approving officer; for Professional posts this officer is the Director himself.

2. If there were no administrative policies and procedures, the Director who, as he says in this case, "does not personally know the candidates and their merits", would have to make informal inquiries. The selection committee relieves the Director of this burden and at the same time serves as a guarantee to the staff that applications from all quarters for promotion are fully and impartially considered. So, while it is not suggested that the Director is bound by a recommendation of the committee, which he may for good reason reject, it is agreed that a decision to reject is subject to review by the Tribunal. The principles upon which the Tribunal interferes with discretionary decisions are now generally familiar. The two that are material in this case are that the Director must not fall into an error of law and that he must not be motivated by prejudice.

### THE FACTS

3. In August 1983 a selection committee was convened to make a recommendation for the post 4.3102 of Finance Officer P.3 in ABF, the Budget and Finance Department. There were 48 candidates, seven of them from within the Organization and five of these from ABF itself. The selection committee was composed of Mr. Hunter, the chief of accounts in ABF, and two other staff members unconnected with finance. In order to assist the committee, Mr. McMoil, chief of ABF, together with Mr. Hunter ranked the seven internal candidates according to their own preferences. The two candidates from outside ABF were put at the bottom of their list as lacking accounting experience. The list was topped by three P.2s, Mr. Ho from the grants unit, Ms Mora-Reynoso from the accounts unit and Mr. Hasan from the grants unit, placed in this order. The complainant, a G.8 in the staff benefits unit, and

another candidate, a G.6 in the imprest unit, were coupled fourth and fifth.

4. The selection committee began by reducing the candidates to a short list of three. Both Mr. Ho and Ms Mora-Reynoso were put on this list. The third on the list was the complainant. Although much lower in rank than the other two, he was manifestly an officer of exceptional quality. The headquarters Appeal Board in this case were unanimous in regarding his personal file as revealing "a consistent record of dedication, reliability and excellence" and himself "as an outstanding staff member who could well serve as an example to others" and who ought to be promoted. He had studied in his own time for a university degree in accountancy which he obtained in 1981. In June 1982 he was unanimously recommended by a selection committee for a P.2 post in the Organization, but the Director decided to fill the post by the transfer of a P.3 whose post was being abolished. The complainant appealed and the headquarters Board unanimously recommended that the appeal should be allowed, but the Director adhered to his decision. This was the situation in the autumn of 1983. On 5 December 1984 in Judgment 636 this Tribunal refused to interfere with the discretionary decision of the Director.

5. At its August meeting the selection committee reached no agreement upon a recommendation and adjourned until 5 October. The committee then, after discussing the case for four hours, by a majority of two to one, Mr. Hunter being the dissident, recommended the complainant. In a brief report, dated 11 October, the committee said that all three candidates were particularly well-suited to carry out the duties of the position. It summarised the qualifications of each candidate before stating its conclusion. The complainant had the least experience and his accounting skills might be the weakest. But he was clearly capable of learning quickly. His advantage in the opinion of the majority lay in the reputation he had gained for providing prompt, efficient and friendly assistance to all who dealt with him. Mr. Ho was the most experienced. His ability to manage the full range of accounting services had been well demonstrated. His advantage in the opinion of Mr. Hunter lay in the strength of his accounting skills and the level of responsibility he had proved he could carry. Ms Mora-Reynoso was a strong alternate but not the first choice of any of the selectors.

6. For reasons which do not appear in the dossier this report and recommendation did not reach the Director until November. Meanwhile confidentiality was not observed. On 7 October, even before the report was issued, Mr. McMoil wrote to the Director of Administration to say that he would shortly be receiving the report for review and to request that a new selection committee should be convened. "I find it incredible", he wrote, "that a selection committee would overrule the judgment of the direct supervisor of the position to be filled ... the staff relations problems which this precedent will create, if accepted, will make it almost impossible for the senior ABF supervisors to retain the support and confidence of the staff".

7. On 24 October Mr. Ho, the candidate favoured by Mr. McMoil, wrote personally to the Director, after he had had, as he says, an opportunity to review the minutes of the committee. The committee, he thought, did not make a careful comparison to determine which candidate had the best qualifications; an objective analysis would show his qualifications to be the highest and he requested that such an analysis should be made before deciding on the selection. He would "look forward to your fair decision". Copies were sent to Mr. McMoil and to the chiefs of Administration and Personnel and the Chairman of the Staff Association.

8. The report seems to have reached the Director on 10 November with an annotation by Mr. Barahona, the chief of Personnel, dated 8 November. He wrote that he could not concur with the recommendation. He appears to have misread the reference to Mr. Ho as amounting to a statement that he was the most suitable candidate, consequently he incorrectly regarded the finding in favour of the complainant as "at variance" with the contents of the report.

9. On 27 November the Director declared the selection procedure void and ordered that a new selection procedure should be initiated. He made a memorandum of his reasons in which he noted that he had received three written statements -- presumably those referred to in paragraphs 6, 7 and 8 above -- and that four people had come to his office to support one decision or another. He concluded upon the two grounds which are examined below that the procedure was irregular.

10. A second selection committee was appointed, consisting of five staff members including Mr. McMoil. This committee met on 16 February 1984, there were 57 candidates including Mr. Ho and the complainant. The committee reviewed the documentation of the first committee and also the "comments and instructions of the Director". Its report was briefer than that of the first committee and gives the Director rather less information. It appears that Mr. Ho was favoured by four out of the five members and the complainant by none. The Director decided to appoint Mr. Ho and the complainant has challenged this decision in proceedings which have not yet

been finally resolved.

11. Meanwhile the complainant had on 24 January 1984 appealed against the Director's decision of 27 November 1983 which declared void the first selection committee's report. On 7 May 1984 the headquarters Board dealt with this appeal by unanimously recommending that the Administration provide for the appellant the grade of P.3 (for the incumbent only) and concomitant salary differential retroactive to 1 January 1984 and that it offer to the complainant a lateral transfer to the first available P.3 post for which he was qualified. On 8 June 1984 the Director decided to reject this recommendation and this is the decision now impugned before the Tribunal. The complainant asks the Tribunal to grant him the relief recommended by the headquarters Board.

## ERROR OF LAW

12. The complainant challenges the decision impugned on the ground that the Director erred in law in declaring the selection procedure void and on the further ground that in so doing he was motivated by prejudice. The Tribunal will consider first the error of law. It is not disputed that the Director may in his discretion ignore the recommendation by the committee. But he has not in the procedure formulated in the Staff Manual reserved for himself a power of annulment such as would enable him to discharge the first committee and appoint another one. The Tribunal will not here determine whether or not such a power is inherent in his office nor, if it is, in what circumstances it may be exercised. It is sufficient to say that there is no evidence whatsoever of any irregularity in the first committee's procedure.

13. The Director concluded that there were two irregularities. The first of them was that the recommendation was made known before his evaluation; of its nature this is not a procedural irregularity affecting the validity of the recommendation. The second irregularity was that "the recommendation does not provide me with sufficient elements for my assurance of what is best for the Organization". This is not an irregularity nor even a defect. The form used by the first selection committee seems to be customary. The report of the second selection committee was in the same form and contained rather less information about the candidates; yet the Director found no difficulty in accepting the recommendation of Mr. Ho. The committee's duty is to recommend a name. It is obviously helpful if, as in this case they

did, they compare their choice with other possibles and elaborate a little on the qualifications of each. But they cannot, especially in a difficult case, be expected to anticipate all the questions which might trouble the Director and to provide the answers to them in advance. The Tribunal does not see how the committee could have given the Director any further help.

14. Earlier in his memorandum the Director observed that "subjective aspects were allowed to prevail in the committee's analysis". What this appears to mean is that the committee allowed their assessment of the personality and prospects of the successful candidate to prevail over the recorded achievements of the others. This is an approach that will not please everyone, but it is not a defect in the report. Likewise, it is not a defect that, as the Director pointed out, there was no consensus, though the fact that there was a dissenting view is certainly a point for his consideration. In short, the Director has confused points which go to the validity of the report with those which affect the weight he ought to give to it and thereby fallen into an error of law.

## PREJUDICE

15. The error of law means that the decision impugned must be quashed whether or not it was motivated by prejudice. But, if it was an unprejudiced decision, if the injury done to the complainant was caused simply by a procedural error by the Director in setting aside the recommendation instead of reaching the same result by the justifiable exercise of his discretion, the relief given would be substantially less than it would be if, as alleged, it was prejudice which had unfairly barred promotion. The Tribunal must therefore consider this allegation.

16. The Tribunal does not find sufficient evidence of any personal animosity against the complainant such as would taint the Director's decision. There is, however, evidence that the Director or some of his advisers approached the case with an exaggerated belief in the importance of seniority and experience and in the weight to be given to the judgment of supervisors and also with a complete misunderstanding of the functions and duties of a selection committee. It is possible that such an approach may be so misguided as to amount to a factor to which the Tribunal would have to give weight when considering whether the Director had failed to take into account an essential fact or drawn a clearly mistaken conclusion from the evidence. Since in the present case the decision is

being quashed for error of law it is unnecessary to consider whether it might also have been quashed on any other ground.

17. Nevertheless the criticisms which can justly be made of the Director's approach to his decision are relevant to the nature of the relief which the complainant is seeking. This is the second occasion within a short space of time in which the Director has blocked a recommendation by a selection committee favouring the complainant. One would therefore have expected him to exercise a high degree of care and discrimination in his approach to the second recommendation. On the contrary he allowed the trifling objections which he has stated to prevent him from giving proper consideration to the committee's report and thereby did an injustice to the complainant which calls for substantial compensation.

#### RELIEF

18. The complainant asks for an order in the terms proposed by the headquarters Appeal Board; see paragraph 11 above. The course proposed by the Board provides a good basis for the assessment of compensation. But the Tribunal will not make an order that might appear to impose upon the selection committee or the Director himself an obligation which might conflict with their judgment in a particular case in the future. It will therefore award the complainant 20,000 dollars as compensation for loss of increase in salary and for moral damage.

#### DECISION:

For the above reasons,

The appeal is allowed and it is ordered that

1. the decision of 8 June 1984 be quashed;
2. the Organization pay to the complainant as compensation for loss of increase in salary and for moral damage the sum of 20,000 US dollars; and
3. the Organization shall pay the complainant \$4,000 as costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner