

EIGHTY-FOURTH SESSION

In re Morris (No. 3)

Judgment 1721

The Administrative Tribunal,

Considering the third complaint filed by Mr. Robert Morris against the World Health Organization (WHO) on 19 November 1996 and corrected on 2 January 1997, the WHO's reply of 16 April, the complainant's rejoinder of 21 July and the Organization's surrejoinder of 24 October 1997;

Considering Articles II, paragraph 5, and VIII 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 as a dental officer with the WHO and facts relevant to this case appear under A in Judgment 891 on his first complaint and Judgment 1323 on his second. Judgment 891 ordered the Organization to apply the "reduction-in-force" procedure provided for under Staff Rule 1050.2. The outcome was a decision of 22 December 1988 by the Director-General to pay him the terminal indemnity due under Rule 1050.4 and promise him "priority consideration for re-employment for any vacancies which may occur during the next twelve months in preference to any external candidates". During that period the WHO announced two vacancies for dental officers, one at grade P.4 and one at P.5, and he applied for them both. The process of selection having been delayed, the acting Director of Personnel told him that he would still be given priority until both posts were filled.

In a letter dated 27 February 1990 the acting Director of Personnel informed him that his application for the P.4 post had failed but that he still had priority for the P.5 one. The complainant's challenge to his failure to win the P.4 competition formed the subject of Judgment 1323, in which the Tribunal awarded him 30,000 United States dollars in material and moral damages.

This case is about his application for the other vacancy, which the WHO had announced in notice P89/93 of 16 June 1989. It was for a dental officer in the Organization's Regional Office for Africa (AFRO) at Brazzaville. In a letter of 24 June 1992 in answer to the complainant's request of 5 June for information the head of Manpower Resources told him that he had not been successful. On 11 September 1992 he gave the headquarters Board of Appeal notice of appeal. Having learned that he had first to put the matter to the regional Board of Appeal, he did so by a letter of 23 December 1992. In an undated report the regional Board recommended rejection. By a letter of 13 August 1993 a personnel officer informed him of the Regional Director's decision to endorse the recommendation.

On 25 October 1993 he went to the headquarters Board, applying at the same time for a stay in proceedings pending the outcome of his second complaint. Judgment 1323 was delivered on 31 January 1994. The complainant informed the Board by a letter of 19 April 1994 that he wanted to resume his appeal. He also asked the Director of Personnel for documents pertaining to the selection procedure. Replying on 2 May 1994, the chief of the Administration and Staff Support Service said that the Organization's policy was not to release "selection documentation". But in a letter of 19 September 1994 he attributed a change in policy to Judgment 1372 (*in re* Kashmiri Lal Malhotra): the Administration would release such documents as the headquarters Board might ask for.

By a letter of 8 November 1994 the chairman of the headquarters Board told the complainant that the Board had decided to send his case - like others about "non-selection" - back to the regional Board. The regional Board's second report, dated 25 June 1995, again recommended rejection. The Regional Director rejected his appeal in a letter of 9 August. On 22 September 1995, two days after getting notice of the Regional Director's decision, he appealed to the headquarters Board. It too recommended rejection in a report dated 2 July 1996. In a letter to him of 12 August 1996 the Director-General endorsed the recommendation. That is

the impugned decision.

B. The complainant submits that it was unlawful to reject his candidature. He had priority over external candidates under Manual paragraph II.9.370, which says that someone whose appointment is terminated by reduction in force and whose service has been satisfactory shall for twelve months after separation be considered for vacancies for which he is qualified "in preference to any external candidates". His performance was satisfactory; he still had priority when he applied for the post; and he met all the requirements in the notice. What is more, the successful candidate, Dr. Samuel Thorpe, was an external one, though he had worked as a short-term Professional from 6 November 1988 to 30 September 1989 and from 25 January until 31 July 1990. Following a recommendation of 23 July 1990 by the Selection Committee, Dr. Thorpe became a "regular" staff member on 1 August 1990. But that did not entitle the Organization to treat him as an internal candidate so as to evade the complainant's right of priority. Nor does Manual paragraph II.9.370 limit the grant of priority to posts at the same grade as the abolished post or the grade just below it. Lastly, the shortlist which headquarters submitted to the regional Selection Committee made no mention of the complainant's priority over external candidates.

He seeks retroactive appointment to the post announced in notice P89/93 and an award of moral damages. He claims costs.

C. In its reply the WHO contends that the complaint is devoid of merit. Since priority applies only to posts at the grade the official held when he left the Organization, or one grade lower, the complainant had no right of preference for appointment to the disputed post. In any event he failed to meet the stated requirements. Dr. Thorpe had worked in the Organization as a consultant and short-term Professional and was a staff member when the Selection Committee met. So he "may thus be considered, in many respects, to be an internal candidate". The Organization denies causing the complainant any moral injury.

D. In his rejoinder the complainant rebuts the arguments in the WHO's reply. Priority is, he says, a means of keeping qualified staff on in preference to external candidates, whatever the grade of the vacancy may be. He is not asking the Tribunal to compare the candidates on merit but merely to rule that he met the basic requirements for the post. That the Organization describes Dr. Thorpe as an internal candidate "in many respects" shows that it knew full well he was an external one, as he obviously had been at the time of its offer of a short-term appointment in January 1990. In any event it was wrong to give an external candidate a short-term appointment in order to avoid giving another candidate priority. The complainant presses his claims and seeks compensation for loss of earnings since leaving the WHO in the amount of \$157,520.

E. In its surrejoinder the Organization maintains that giving preference for posts of a higher grade to someone who has been unsuccessful in a reduction-in-force exercise would be unfair to internal candidates applying for promotion. Manual paragraph II.9.370 applies to staff, like the complainant, whose appointments have already been terminated under Rule 1050.2 and for whom retention is no longer at issue. The Organization was diligent in informing the Regional Director of the complainant's suitability and indeed he was one of five candidates on the shortlist submitted to the Selection Committee. He was simply less qualified for the post than the successful candidate. The complainant's claim to compensation for loss of earnings goes beyond the claim in his internal appeal.

CONSIDERATIONS

1. This complaint is a sequel to Judgment 891, by which the Tribunal ordered the WHO to apply to the complainant the reduction-in-force procedure prescribed in Staff Rule 1050.2. The reduction-in-force committee found only one post to which that procedure might be applied but concluded that he did not meet the requirements of that post. It recommended giving him preference in terms of Manual paragraph II.9.370, which provides:

"Staff members whose appointments are terminated by reduction in force whose service has been satisfactory and who wish to be considered for vacancies during the twelve months after their separation, are considered for vacancies for which they are qualified in preference to any external candidates."

2. By a letter of 22 December 1988 the Director-General informed the complainant that he accepted the committee's recommendation. Two vacancy notices were issued within the next twelve months. The first was for a P.4 post at headquarters in Geneva. The second, issued on 16 June 1989, was for a P.5 post at

Brazzaville, the closing date being 28 July 1989. The complainant applied for both posts.

3. There was an unexplained delay in making selections for the posts. However, by a letter of 1 December 1989 the Director of Personnel assured the complainant that the period for which he was entitled to preference would be extended until a selection was made.

4. By a letter dated 27 February 1990 the acting Director of Personnel told the complainant that he had not been selected for the Geneva post, and that the selection for the Brazzaville post "is yet to be finalized" but that he would be informed as soon as a decision was reached.

5. The Tribunal ruled in Judgment 1323 of 31 January 1994 on his second complaint in which he had challenged the decision not to appoint him to the Geneva post. It held that his right to preference over any external candidate had not been respected, and it awarded him \$30,000 in damages for material and moral injury.

6. In the meantime, on 23 July 1990, the Selection Committee had chosen another candidate for the Brazzaville post. Not only did the WHO fail to inform the complainant promptly, but it did so, by a letter of 24 June 1992, only after he had inquired about the outcome. That letter did not suggest that he was not qualified for the post but, on the contrary, informed him that his name would remain on the WHO's records for a period of two years for other "similar assignments".

7. The WHO did not disclose in its letter of 27 February 1990 that the candidate selected for the Brazzaville post had previously been given short-term appointments to perform the duties of that very post. The evidence shows that the first of them began on 6 November 1988 and it was apparently for three months; it was extended from 6 February 1989 to 30 June 1989; and, although no contractual document has been produced, the WHO says that it continued until 30 September 1989. The second appointment was for six months, from 25 January 1990; the contract provided for a possible five-month extension and, although again there is no document, the WHO says that the appointment continued until 24 December 1990. It also says that the second short-term contract was converted to a regular fixed-term appointment as from 1 August 1990.

8. The complainant appealed to the regional Board of Appeal, which concluded that his experience was insufficient for the post and recommended dismissing his appeal. He then appealed to the headquarters Board of Appeal. While that appeal was pending the Tribunal ruled in Judgment 1372 (*in re* Kashmiri Lal Malhotra) of 13 July 1994 that the Administration must make available to boards of appeal the full records of proceedings of selection committees. The headquarters Board accordingly returned the case to the regional Board for reconsideration. In its second report that Board did not conclude that the complainant was unqualified for the post. It observed that the chief of Oral Health at headquarters considered the selected candidate to be qualified for the post and that he was a short-term Professional and therefore had not been an external candidate when the Selection Committee had met. Accordingly, the WHO had committed no breach of the complainant's right to priority.

9. On appeal the headquarters Board disagreed with the Organization's contention that the complainant was unqualified for the post. It did so "in the light of the evaluation made" by the chief of Oral Health that he was an "excellent candidate with WHO field experience" and "qualified for the post". But it held that, since the WHO considered short-term Professionals who were employed against vacant posts to be internal candidates, the complainant's right to preference had not been violated: both of them were internal candidates and the Selection Committee had considered the complainant to be less experienced; and that was a point which the headquarters Board was not competent to question. The Director-General accepted that conclusion and dismissed the appeal.

10. Several questions arise: was the complainant qualified for the post? If so, did his right to preference extend to a post of a grade higher than his former post? Was the selected candidate an internal one and, if he was such only because of the short-term appointments he had been given, was it in circumvention of the complainant's right to preference to give him those appointments?

The complainant's qualifications for the post

11. The WHO has not produced the report of the Selection Committee, and there is no evidence that that Committee found the complainant to lack the required qualifications and, if it did, why it came to that conclusion. In fact the WHO's letter of 24 June 1992 implied that he was qualified; and the chief of Oral Health considered both candidates to be qualified. Further, in its statement to the regional Board of Appeal the Administration said that the original evaluation report of 31 August 1989 from Geneva on the candidates had recommended the complainant and put him on the shortlist of five candidates. The Tribunal holds that the headquarters Board was right in disagreeing with the contention that he was not qualified.

Preference for a post of higher grade

12. The complainant contends that in granting the former staff member preference over external candidates "for vacancies for which [he is] qualified" Manual paragraph II.9.370 means all vacancies, including posts at a higher grade, not just posts at his own former grade. The WHO disputes that on the grounds that the provision must be read, not in isolation, but in the context of the rules about reduction in force because "it is an integral element of the reduction-in-force procedure as a whole". Staff Rule 1050.2.1 provides that in the competition for retention a staff member may compete only for posts at his own grade or one grade lower. That procedure was designed - says the Organization - to ensure that candidates had an equal opportunity of competing with others "for posts at a grade for which they have a demonstrated competence", and "it flies in the face of this procedure to give unsuccessful candidates priority consideration for promotion to posts at a grade above which they have shown they are competent". Manual paragraph II.9.370 must therefore - the WHO concludes - be subject to the same restriction as Rule 1050.2.1.

13. While agreeing that giving preference for re-employment after separation is part of the reduction-in-force procedure, the Tribunal sees a fundamental difference in the nature of the competitions before and after separation. The former is between staff members only and preference is based not just on qualifications but on greater suitability as well. But where competition after separation is between the former staff member and complete outsiders, preference is based on qualifications alone. In such a competition there is good reason for giving preference to the former staff member. As the Tribunal said in Judgment 133 (*in re Hermann*) under 4:

"... it is consonant with the spirit of the rules and regulations that a staff member who has served the Organization in a fully satisfactory manner for a particularly long period, and who might reasonably have expected to finish his career in the same Organization, should be treated in a manner more appropriate to his situation. If he loses his post, he may claim to be appointed to any vacant post which he is capable of filling in a competent manner, whatever may be the qualifications of the other candidates. Not only does this interpretation of the relevant rules take account of the legitimate expectations of staff members, but it is not prejudicial to the Organization itself, which has every interest in employing staff members who have shown themselves deserving of confidence over a long period of employment."

The conclusion is that Manual paragraph II.9.370 grants a preference in respect of all vacancies and that the complainant was entitled to preference for the Brazzaville post even though it was graded P.5.

The effect of the short-term appointments given to the selected candidate

14. The WHO submits, citing Judgment 1383 (*in re Río Rumbaitis*), that the selected candidate was a staff member throughout the periods when he was holding short-term appointments. Thus - it says - he was a staff member at the time of the issue of the vacancy notice (16 June 1989) and at the closing date it set (28 July 1989) and when the Selection Committee met and issued its recommendation (23 July 1990); and accordingly he was not an external candidate within the meaning of paragraph II.9.370.

15. The complainant contends that, even if the selected candidate was not external, his own right to preference required the WHO to offer him the short-term appointments and that in any event giving the selected candidate those appointments was an impermissible manoeuvre to circumvent his right to preference.

16. There are several matters which have a bearing on that contention. The WHO failed to disclose to the complainant that after issuing the vacancy notice it had extended the short-term appointment it had given to one of the candidates and had later given him a second appointment. Even in its letter of 27 February 1990 it told the complainant nothing on that score. It thus denied him the opportunity of pressing his claims to the

temporary appointments and thereby keeping alive his right to preference. Further, despite the undertaking in that letter to inform him as soon as a decision was reached, it inexplicably failed for nearly two years to tell him about the selection. Such secrecy creates a doubt as to why it granted those appointments.

17. The Tribunal must consider whether there was any objective need to appoint a short-term consultant and, if so, when that need actually arose. The WHO has given conflicting explanations for its decision. In its reply to the complaint it says:

"Meanwhile the AFRO Post was established, and the selection process initiated, but the need to appoint urgently a person for a short-term assignment as a Dental Officer in order to perform the duties of the vacant AFRO Post arose."

Yet in its statement to the regional Board it said:

Due to financial constraints it was recommended that the post be filled initially on a temporary basis. The Regional Director therefore approved the appointment of [the selected candidate] as a short-term staff for 6 months from January 1990."

Those statements confirm that a temporary appointment became necessary only in January 1990 but they are contradictory as to why it was necessary.

18. In its statement to the headquarters Board the Administration referred to the first appointment given to the selected candidate in November 1988 and went on to say that he had been "re-appointed in the same capacity from 25 January 1990". That suggests that there was a need for someone to perform the duties of the vacant post even before January 1990, and in that respect contradicts the WHO's reply.

19. The Tribunal notes that an extension of the first appointment was given after 30 June 1989 and up to 30 September 1989. That decision came after the issue of the vacancy notice and before the closing date, and the WHO has not explained why it became necessary.

20. If the Tribunal is to accept the passage in 17 above from the WHO's reply to the complaint, the resulting position is that the post was advertised in June 1989; there was no financial obstacle to the immediate grant of an appointment; and there was a need to have someone perform the duties of the post in January 1990. If so, there was no need to give the selected candidate an extension after 30 June 1989 and the selection process should have been expedited.

21. It may be that the preference given by Manual paragraph II.9.370 extends even to the holders of short-term appointments *inter se*, but in a case where the holder of a short-term appointment is chosen in preference to a candidate entitled to the reduction-in-force procedure, that offends against the purpose and the spirit of the provision. To give a short-term appointment to an outside candidate after the vacancy notice had been issued deprived the complainant of his right to preference. If that were permitted the preference granted by paragraph II.9.370 could always be negated.

22. Dealing with the analogous provision in Regulation 4.4, which gives staff members preference over outside candidates, the Tribunal observed in Judgment 1077 (*in re* Janice Barahona) under 11 that when an outsider is given a temporary appointment financed from funds earmarked for a post and is then appointed to that post in preference to an inside candidate:

"... that sort of approach is bound, whether rightly or wrongly, to give inside candidates the impression of subterfuge ..."

23. The Tribunal holds that the grant to the selected candidate of two extensions in February 1989 and thereafter and of the second short-term appointment in January 1990 not only offended against the purpose and spirit of Manual paragraph II.9.370 but amounted to subterfuge calculated to circumvent it.

Relief

24. The complainant asks for retroactive appointment to the Brazzaville post. Because of the lapse of time, however, the Tribunal will not quash the appointment made. As for damages, it appears that he was employed from 1987 as a consultant by the Ministry of Health of Kuwait but suffered the loss of thirteen months' income - amounting to 78,000 United States dollars - on account of the state of war in that country. Judgment 1323 also awarded him \$30,000 in damages. Taking those sums into account, the Tribunal decides

in accordance with Article VIII of its Statute to award him damages, under all heads of injury, in the sum of US\$60,000. It also awards him \$5,000 in costs.

DECISION

For the above reasons,

- 1. The WHO shall pay the complainant damages under all heads of injury in the sum of 60,000 United States dollars.**
- 2. It shall pay him \$5,000 in costs.**
- 3. All his other claims are 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