

EIGHTY-SIXTH SESSION

In re Gramegna

Judgment 1787

The Administrative Tribunal,

Considering the complaint filed by Mr. Marco Antonio Gramegna against the International Organization for Migration (IOM) on 30 March 1998, the IOM's reply of 5 June, the complainant's rejoinder of 17 June and the Organization's surrejoinder of 30 June 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 is a Chilean who was born on 1 July 1943. He has been on the staff of the IOM since 1983. At first he was a chief of division at grade P.5 in the Department of Latin American Programmes. He was later given responsibilities at grades P.4 and P.5. At the material time he was serving at headquarters in Geneva as chief of division in the Department of Planning, Research and Evaluation at grade P.5.

The Organization carried out a comprehensive programme of reform in the second half of 1997 and replaced the complainant's department with a new one called the Department of Programme and Fundraising Support. It reformed or created posts in the Professional category and invited the staff to apply.

By a notice of vacancy, dated 26 August 1997 and numbered 23(O), the Organization put up for competition the P.5 post of chief of the Programme Support Division. The "desirable qualifications" included an advanced university degree, preferably in political or social science or economics, and a thorough knowledge of English and French "and/or" Spanish. The notice also said that a good knowledge of another European language would be a "distinct advantage". The complainant applied for that post and for another five advertised earlier. The post of chief of Programme Support and one other were confined to internal candidates, but the other four were open to outside ones too. By a letter of 16 October 1997 the Deputy Director General told the complainant that the two internal competitions were closed, he had not been successful and the procedure for filling the other posts would take at least another month. The letter told him what his duties were to be in the meantime.

By a general bulletin of 17 October the Organization announced the appointment of Mr. William Hyde as chief of Programme Support. In a letter of 20 October to the Deputy Director General the complainant observed that he had heard of no decision to abolish his post or change his duties and he asked for explanations. In a letter of 22 October the Deputy Director General cited a general bulletin of 1 October 1997 of the Director General's issuing a new organisation chart and announcing the replacement of old posts in the Professional category with new or reformed ones.

By a letter of 24 October the Human Resources Manager informed the complainant that he had not won competition 23(O). By a memorandum of 5 November to the Director of the Department of Management and Finance he asked to have the appointment of Mr. Hyde revoked.

On 6 November the complainant went on sick leave. By a letter of 4 December that Director, whose department had since become Administrative Support, told him that the appointment stood. On 23 December 1997 he appealed against that decision to the Joint Administrative Review Board.

By a letter of 16 January 1998 the Director General informed him that he was to be chief of mission in Bangkok.

In its report of 12 February the Board recommended revoking the appointment of Mr. Hyde, resuming the process

of selection and granting the complainant in compensation for moral injury a sum equivalent to the unrefunded part of the medical expenses he had incurred. By a letter of 12 March 1998 the Director of Administrative Support conveyed to him the Director General's rejection of his appeal. That is the decision he is impugning.

B. The complainant contends that Mr. Hyde did not meet all the requirements in the notice of vacancy: he has no advanced university degree and though English is his mother tongue, he has poor French and no Spanish at all. The complainant professes the required qualifications in full: a doctorate in sociology, command of English, French and Spanish, and some knowledge of Italian. In his view the appointment of Mr. Hyde shows flaws of a kind that in Judgment 1646 (*in re Pinto*) led the Tribunal to set aside like decisions on the grounds that an organisation had "neglected the cardinal rule of any process of selection: the chosen candidate must have at least the qualifications stipulated in the notice".

Though the term "desirable qualifications" confers some discretion, the Organization may not pick anyone who does not have them at all. The notice gives no mere listing of useful attainments.

The complainant submits that, though never told of the abolition of his old post, in fact he was turned out of it. A strong line of precedent was laid on the Organization in the duty of trying to find him some suitable post. It ought to have given serious thought to putting him in charge of Programme Support. Choosing someone who lacked the required qualifications was a grave breach of duty. And sending him out to Bangkok did not put things right. Besides, the impugned decision was not even explained.

The Organization's treatment of him was an affront to his dignity and professional standing. He has been on sick leave since 6 November 1997, and indeed the Organization has acknowledged his ailments as service-incurred.

He claims the quashing of Mr. Hyde's appointment as chief of Programme Support, resumption of the process of selection and awards of moral damages and of 5,000 Swiss francs in costs. He seeks disclosure of the Review Board's reports.

C. In its reply the IOM contends that the rule that the successful candidate should have the qualifications stated in the notice of vacancy applies only when they are essential. Here the qualifications were only "desirable"; so it was free to assess the candidates' experience and attainments.

It describes how on the recommendation of the competent supervisor the Director General came to prefer Mr. Hyde to the complainant. The Personnel Advisory Board was split, and the Director General, having worked with both of them for years, himself assessed them against all the requirements of the notice. There was nothing arbitrary about his choice.

The Organization says that it knew how abolishing the complainant's post would affect him but complied with its duty of doing its utmost to place him. But Mr. Hyde too was stranded, and it owed him the same duty. It did find a suitable post for the complainant as chief of its mission in Bangkok. So it discharged its obligation towards him.

Neither precedent nor the rules of procedure of the Personnel Advisory Board nor the Organization's practice required it to explain to the complainant why he had been unsuccessful.

On 21 April 1998 it sent him a copy of the Review Board's report.

In comments appended to the defendant's reply Mr. Hyde says that he has "many if not all" of the required qualifications. The appraisal of his performance shows that he is performing his duties "competently and efficiently".

D. In his rejoinder the complainant points out that according to the Review Board Mr. Hyde has neither the university degree nor the work experience nor the grasp of languages required, and candidates may be objectively compared only if the listed qualifications are treated as necessary.

Though not a specialised agency of the United Nations, the IOM abides by the standards of the common system. The qualifications set out in its notices of vacancy reflect the criteria that that system applies to the grading of posts. By appointing to the post someone who did not meet the stated requirements it ignored the standards that had warranted the grade.

The complainant doubts that the Organization did its utmost to place him properly. He presses his main claims.

E. In its surrejoinder the defendant observes that although Mr. Hyde did not have the desirable university and language qualifications, he did meet many of the conditions in the notice of vacancy. The Organization maintains that it did do its utmost to reassign the complainant. It presses its other pleas.

CONSIDERATIONS

1. The complainant has held senior posts at the International Organization for Migration (IOM) since 1983. In 1992 he became chief of division in the Department of Planning, Research and Evaluation. An overhaul of the secretariat meant abolishing, altering and creating posts and inviting the staff whom such action might affect to apply for vacancies. That is how the complainant came to apply for several of them, including the post of chief of the Programme Support Division.

2. On 16 October 1997 the Deputy Director General told him that he had not been appointed to any of the posts open to "internal recruitment". The next day he learned from a bulletin that the new chief of Programme Support was Mr. William Hyde. In a letter of 5 November 1997 to the Director of the Department of Management and Finance he asked for the quashing of that appointment and the resumption of the process of selection for the post. His claims were rejected and, though the Joint Advisory Review Board found in his favour, the Director General rejected his appeal on 12 March 1998.

3. He seeks the quashing of that final decision and an award of moral damages. He has three pleas. The first is that the Organization made mistakes of law and of fact in choosing a candidate who did not have the qualifications listed in the notice of vacancy. Secondly, it acted in breach of its duty to find him another assignment after doing away with his post, and did not even tell him of the abolition. Thirdly, it failed to state the reasons for the impugned decision.

4. The complainant's second plea cannot succeed. Although the abolition of his post did demand of the Organization efforts to place him suitably and at the right grade elsewhere, he had no right to preference for any particular post, the less so since others were in the same plight. He may object to the Organization's failure to let him have the transfer he wanted, but such failure does not make it unlawful for the Organization to have appointed another official to the post he had applied for, provided at least that that official was qualified.

5. Nor is there any substance to his third plea, that the Organization failed to explain the impugned decision. When a decision is adverse to a staff member the competent administrative authority does have to reveal the reasons for it. But when the result of a competition is announced and, more broadly, when a choice is made between candidates the reasons for the choice need not be notified at the same time as the decision.

6. Yet in exercising its discretion the competent authority must avoid mistakes of law and fact and keep objectively to the rules it notified when announcing the vacancy. The call of 26 August 1997 for internal applicants for the post of chief of Programme Support put on the list of "desirable" qualifications an advanced university degree, preferably in political or social science or economics, at least 15 years' experience of migration, assistance to refugees, project development and technical cooperation programmes, and a "thorough knowledge" of English and French "and/or" Spanish, a "good knowledge of another European language [being] a distinct advantage".

7. The complainant is a doctor of sociology. Besides Spanish, his mother tongue, he has a sure grasp of English and French and knows some Italian. And he has years of experience in the stated areas. The Joint Advisory Review Board took the view, after looking at the applicants' records, that Mr. Hyde did not have all those qualifications and should not have won.

8. The complainant follows the Board's reasoning. He points out that Mr. Hyde has "only a first-level Bachelor of Arts degree" from the State University of California and that, although his mother tongue is English, he has but slight knowledge of French and none of Spanish or any other European language. The stated qualifications being what they were, he takes exception to the Organization's thinking it reasonable to appoint someone who has no experience of project development and not the grasp of languages required for communicating with the Organization's regional offices.

9. The defendant's answer is that the notice described the qualifications not as "essential" or the "minimum" but merely as "desirable", an adjective intended to allow wider discretion in gauging attainments and experience. The

applications were put to the Personnel Advisory Board, a body that comprises representatives of both management and staff. It was split, the staff representatives recommending the complainant and management Mr. Hyde. What swayed the Director General in exercising his discretion were the views of the supervisor-to-be and Mr. Hyde's having many of the other qualifications listed in the notice.

10. That answer is telling enough, and the precedents that the complainant is praying in aid - Judgments 1158 (*in re Vianney*), 1331 (*in re Roggiero*) and, not least, 1646 (*in re Pinto*) - do concern cases in which an organisation disregarded "essential" qualifications for posts. But the Review Board was right: the criteria for assessing the fitness of candidates for one and the same post must be objective and clear. The qualifications expected may be just "desirable", not requirements binding in law. But the appointing authority is not free on that account, in assessing candidates, to disregard the fact that some do qualify and to plump for the very one who does not, even one who in other respects has the right experience and skills. As Judgment 1595 (*in re De Riemaeker No. 3*) said in 10 -

"... though the qualifications stated in a notice of vacancy are not absolutely binding and the Director General may still exercise some discretion, he may not so utterly discard them as to flout the rules that ensure the proper openness and objectivity of the competition."

11. Here the Organization picked someone wanting in listed qualifications which, though said to be only "desirable", were in fact essential. It thereby fell short of the standards of objectiveness and openness that must govern appointment to a senior post in an international organisation. The process of selection cannot stand, and the IOM must accordingly follow a new procedure to fill the post properly. The Organization may for the time being take steps to ensure that the unit continues to function.

12. The complainant seeks moral damages. Being unlawful, the process of selection for filling the post he had applied for caused him injury, and fair redress is an award of 2,500 Swiss francs.

13. He is entitled to costs, and the amount is set at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The Director General's decision of 12 March 1998 is set aside.
2. The process of selection, advertised in notice 23(O) of 26 August 1997, for the post of chief of the Programme Support Division, is set aside.
3. The Organization shall pay the complainant 2,500 Swiss francs in damages.
4. It shall pay him 5,000 Swiss francs in costs.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner

