

**SIXTY-FIRST ORDINARY SESSION**

***In re* BAMBINELLI (No. 4)**

**Judgment 812**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Vincent Babinelli against the Pan American Health Organization (PAHO) (World Health Organization) on 16 December 1985 and corrected on 14 January 1986, the PAHO's reply of 28 March, the complainant's rejoinder of 6 May, the PAHO's surrejoinder of 19 June, the complainant's further brief of 25 August and the PAHO's observations thereon of 16 October 1986;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a United States citizen, joined the PAHO in Washington in 1974 as a clerk at grade G.6. He has since been promoted to P.2 as a Finance Officer but at the time of filing held grade G.8. This complaint is the sequel to his second one, on which the Tribunal ruled in Judgment 670 on 19 June 1985. As it recounted in that judgment, under A, he applied for a P.3 post in the Budget and Finance Department (ABF). On 5 October 1983 the selection committee recommended him, but on 27 November 1983 the Director declared the competition void. He appealed. On 7 May 1984 the Board of Inquiry and Appeal held that he had been unfairly treated and recommended redress, but on 8 June the Director rejected his appeal. In Judgment 670 the Tribunal quashed that decision on the grounds of an error of law and awarded him compensation for loss of increase in salary, moral damages and costs.

Meanwhile a second selection committee, including Mr. McMoil, the chief of ABF, had met on 16 February 1984 to consider the complainant and 56 other candidates for the post. Four of the five members, including Mr. McMoil, recommended a Mr. Ho; the Director appointed Mr. Ho; and the complainant challenged the appointment in another appeal. In its report of 26 July 1985 the Board recommended that the Director negotiate with the complainant "to find an equitable solution consistent with" Judgment 670, "reconsider the spirit" of the Board's recommendations of 7 May 1984 and pay his costs. In a letter of 17 September 1985, the decision impugned, the Director told the complainant he believed he had already given full effect to Judgment 670; he rejected the appeal.

B. The complainant alleges that in appointing Mr. Ho the Director acted on the recommendation of an improperly constituted committee. Since, as the Tribunal held in Judgment 670, the first committee's findings were valid, the second selection process was void. The Director has failed both to give valid reasons for his discretionary decision and, as required by the rules, to take advice from a valid committee. One member of the second committee, Mr. McMoil, had stoutly opposed the first committee's findings and was prejudiced. Being stirred by personal prejudice against the complainant, the decision was tainted with abuse of authority. Though he works well, the PAHO has been victimising him for years. Time and again he has been vindicated, but the injustice goes on. He asks the Tribunal to quash the impugned decision; to award him as from 1 June 1985 the difference between the pay of a P.3 official and that of a G.8 one; to rule that to stop payment before he is promoted to P.3 would be challengeable under the doctrine of continuing breach; and to award him 50,000 United States dollars in moral damages, costs and any other relief the Tribunal deems fit.

C. In its reply the PAHO submits that the complaint is irreceivable as *res judicata*: the Tribunal ruled in Judgment 670 on all the material issues and on the substance of the claims. Having already given full effect to Judgment 670, the Director could not accept the Board's recommendation for negotiations the Tribunal had not ordered.

As to the merits, the PAHO submits that the complainant has misread Judgment 670. The Tribunal expressly

refrained from imposing upon the second committee or the Director "an obligation which might conflict with the judgment in a particular case in the future", and it is therefore mistaken to argue that the second selection process was void. The decision the Tribunal quashed in Judgment 670 was not that of 27 November 1983 declaring the first competition void but that of 8 June 1984. The PAHO denies abuse of authority. Not a single member of the second committee recommended the complainant. As for Mr. McMoil's membership of the committee, there is no evidence to support the serious charge of animosity he has made against that respected senior official. Besides, he fails to show how the alleged animosity tainted the recommendation. The committee recommended Mr. Ho, the Director appointed him, and the complainant offers no valid objection. He would have to show that he was a better candidate; yet he has not even tried to do so. There can be no "continuing" breach of the rules because there was none in the first place. In any event he has failed to show moral injury.

D. The complainant rejoins that his complaint is receivable. Res judicata applies only when the issues of fact and of law are the same in the later as in the earlier case. Judgment 670 related to the first selection process, whereas the present complaint relates to the second, on which the Tribunal made no ruling. Even though the decision quashed was indeed that of 8 June 1984, the substantive ruling was that the Director's decision to put the post up again had been wrong. It follows that the second selection process was void.

As to Mr. McMoil's bias, it is established that he wanted to have another committee convened when the first one chose the complainant: since his mind was not open he could not give all the candidates a fair chance.

Any award of damages should take account of the rise in his pay consequent upon his promotion to P.2 as from 1 May 1986.

E. In its surrejoinder the PAHO presses its plea of res judicata and its submissions on the merits. It argues that the Tribunal neither stated nor implied in Judgment 670 that the Director's error of law avoided the second selection process. The complainant has still failed to show Mr. McMoil's prejudice against him. Mr. McMoil took part in the work of the committee that unanimously recommended him for the P.2 post he has since obtained.

F. With permission from the President of the Tribunal the complainant filed a further brief on that last point in the surrejoinder, and the PAHO replied.

#### CONSIDERATIONS:

The res judicata rule

1. There are three conditions for sustaining an objection that rests on the res judicata rule: the parties, the purpose of the suit and the cause of action must be the same as in the earlier case.

Identity of the parties means that both complainant and defendant were parties to the earlier proceedings. This condition seldom raises any difficulty.

Identity of purpose means that what the complainant is seeking is what he would have obtained had his earlier suit succeeded. Thus a complainant may not eschew the res judicata rule by just prompting a new decision and saying it is not the same as the one he challenged earlier. If in substance the intent remains the same there will be identity of purpose.

Identity in the cause of action relates to the foundation of the claim in law. The cause of action is not the same thing as the pleas, which are submissions on issues of law or of fact put forward in support of the claim.

Application of the rule to this case

2. The PAHO pleads res judicata on the grounds that

the issues are the same as those the Tribunal ruled on in Judgment 670.

Does the rule apply?

There is identity of the parties: both the complainant and defendant were party to the complaint that forms the subject of Judgment 670.

There is identity of purpose too. In the complaint which the Tribunal partly allowed in Judgment 670 the complainant was seeking damages for injury he had allegedly sustained because of the replacement of a selection committee set up to advise on an appointment to post 4.1302. The purpose of this complaint is the same: to seek redress for the injury the complainant says he suffered because the first selection committee was replaced with the second.

There is also identity in the cause of action. In the earlier proceedings the complainant was relying on the invalidity of the new committee. In the present complaint he is again challenging the lawfulness of appointing that committee, and the cause of action is therefore the same as in the suit the Tribunal has already heard. The line of argument he takes now is immaterial since the cause of action is not the same thing as the pleas. Besides, though he develops his earlier arguments, in substance they remain the same: now as then his case rests on allegations of unlawfulness and personal animosity.

The three conditions are fulfilled and the plea of res judicata therefore succeeds.

The execution of Judgment 670

3. The complainant submits that the Organization has failed to take action that the Tribunal ordered by implication in Judgment 670, namely to reject as invalid the second selection committee's recommendation.

He has misread the judgment. What the Tribunal ordered was payment to him of 20,000 United States dollars in damages and \$4,000 in costs. The PAHO paid the amounts promptly and, as it maintains, has given effect to the Tribunal's decision.

The Tribunal did not rule on the appointment the Director had made on the second committee's recommendation. It laid no obligation on the Organization on that score, and the Director was not bound to set the appointment aside. That would have cost the nominee his employment and exposed the Organization to a claim to damages. Although the Tribunal held the setting up of the second committee to be unlawful it did not declare that the action taken on its recommendation before Judgment 670 was delivered might be quashed.

The complainant believes that he is entitled to further damages on the grounds that the sums awarded afford redress for only part of the injury he sustained. What he really wants is review of Judgment 670, and he cannot succeed since he puts forward no admissible plea for review.

Besides, he was promoted to grade P.2 less than a year after Judgment 670. The injury is not as great as he alleges and may be deemed to have been properly made good.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 13 March 1987.

(Signed)

André Grisel  
Jacques Ducoux  
Mohamed Suffian  
A.B. Gardner