SEVENTY-THIRD SESSION

In re DE ANDA

Judgment 1193

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought by Mr. Arturo Ramirez de Anda against the Pan American Health Organization (PAHO) (World Health Organization) on 25 June 1991, the PAHO's reply of 4 September, the complainant's rejoinder of 2 October and the Organization's surrejoinder of 5 December 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article VIII of the PAHO Staff Regulations, PAHO Staff Rules 510, 910, 920, 1040 and 1050 and PAHO/WHO Manual provisions 250 to 375;

Having examined the written evidence;

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

A. PAHO Staff Rules 1040, 1050.2 and 1050.4 read up to 31 December 1988 as follows:

"1040. ... a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof not later than three months before the date of expiry of the contract. ...

1050.2 When a post of indefinite duration, which is filled, is abolished, a reduction in force shall take place, in accordance with procedures established by the Director, based upon the following principles:

1050.2.1 competition for retention shall be limited to other staff performing similar duties at the same grade level as that of the post to be abolished;

1050.2.2 if the post is in the professional category and above, competition shall extend to all offices; if the post is subject to local recruitment, competition shall be limited to the locality in which the post is to be abolished;

1050.2.3 staff members holding career-service appointments shall be given priority for retention. The Director may establish priorities among the several categories of temporary staff;

1050.2.4 within any priority group, preference for retention shall be based first upon performance, and, when this is not decisive, upon seniority of service;

1050.2.5 a staff member's appointment shall not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible.

1050.4 A staff member whose appointment is terminated under this Rule shall be paid an indemnity ..."

The complainant, a Mexican citizen who was born in 1935, joined the staff of the PAHO in 1972 and was stationed at its United States-Mexico Border Office at El Paso, in Texas. He held a G.3 post, No. 3623, as a clerk. His post was upgraded, and he was promoted, to G.4 in 1976 and to G.5 in 1977. According to the post description his duties consisted mainly in using and maintaining office machines and equipment, keeping inventories of vaccines and office supplies, handling mail, serving as messenger, and driving and looking after official cars. He was granted fixed-term appointments.

In May 1987 the Organization approved its budget for 1988-89. The budget made provision for only ten months' funding of post 3623 as from 1 January 1988.

By a letter of 25 July 1988 the Chief of Personnel at PAHO headquarters in Washington D.C. told the complainant that his post was "no longer budgeted" after 31 October 1988, when his appointment was to expire; gave him notice of termination under Rules 1040 and 1050; and said he would be paid the maximum indemnity that Rule 1050.4 allowed, the equivalent of twelve months' salary.

On 25 September the complainant appealed to the Board of Appeal at headquarters.

On 21 October the chairman of the Staff Association wrote asking the Director to find another job for the complainant.

By a telex of 31 October the Chief of Personnel extended his appointment to 31 December 1988 on "administrative leave". That was the date at which his appointment was terminated.

The Staff Association continued to make efforts, to no avail, to have him reinstated.

In its report of 20 February 1991 the Board of Appeal held that the reduction-in-force procedure had been properly observed and that there was no reason to believe that the post had been abolished for any but sound objective reasons. It declined to entertain the complainant's allegations of personal prejudice. It recommended rejecting his appeal. By a letter of 16 April 1991 the Director of the PAHO informed him of the rejection of his appeal, and that is the decision he is impugning.

B. The complainant gives his own account of the facts of the dispute, which he says has to be seen against the background of poor relations between staff and management at the El Paso Office.

He observes that until Mr. Herbert Ortega took over as Chief of the office in 1984 such relations had always been good. As the Tribunal knows from earlier cases against the PAHO, the staff suffered constant anxiety and persecution when Mr. Ortega was Chief of Personnel at headquarters. That was why in 1984 the Director had to banish him from Washington. But the same pattern of staff harassment began in El Paso as soon as he took over. He turned the office into a fiefdom, using the staff to do chores in his own home, visiting the office but seldom and delegating most of his authority to a Mrs. Valdes. The staff started complaining to the Staff Association at headquarters of harassment by Mr. Ortega and Mrs. Valdes. On 29 September 1988 the general assembly of the Association passed a resolution asking the Director not to allow any further infringement of staff rights in El Paso.

The complainant and two other El Paso staff members went to Washington to explain matters to the Association and seek advice. Things reached such a pitch that the Director had to send the Chief of Personnel to El Paso in mid-October 1988 to investigate. In his report of 20 October the Chief of Personnel said that Mr. Ortega "must change or improve his ways and means of dealing with people" and admonished him for cavalier disregard of the rules and the staff's rights.

The complainant alleges that Mr. Ortega and Mrs. Valdes singled him out for harassment and submits written testimony by several former colleagues in support of his contention. He believes that the true reason for his termination was not his alleged redundancy but Mr. Ortega's desire to get rid of someone who stood up for the rights of staff at El Paso. His termination was intended to scare off anyone else who might want to defend those rights.

In fact his former duties have not been done away with but are being performed by three new Mexican employees under local contracts. So what savings can abolishing his post have achieved? Mr. Ortega and Mrs. Valdes trumped up the case for redundancy with the connivance of representatives of the Mexican and United States Governments.

On 20 December 1988 the Director told a staff representative that the complainant could have his job back if he promised "to abstain from further El Paso staff activities". He cites a letter which the staff representative wrote to the Director about his case on 9 February 1989 and which uses those words. That was another breach of freedom of association.

The Chief of Personnel's letter of 25 July 1988 giving the complainant notice did not state that the reduction-in-force procedure prescribed in Rule 1050 had been followed. Time and again staff representatives asked the Administration to follow it, only to be told that it would serve no purpose because the abolished post had been unique. So it was odd to find among the PAHO's submissions of 7 November 1990 to the Board of Appeal a one-page document, bearing illegible initials, that purported to be a record of a meeting held at headquarters on 18 July 1988 to consider the consequences of abolishing the post. The meeting had - or so the Organization said - been attended by the Chief of Personnel and four other officials of his department. The date of disclosure of the document is suspect in that only a few months before - on 26 June 1990 - the Tribunal had ruled in Judgment 1045 (in re Mitastein) that the reduction-in-force procedure must precede termination on grounds of abolition of post. Not since 1978 has there been such a procedure without participation by staff representatives. Why was there a

meeting at all when the Chief of Personnel kept saying that the procedure was unnecessary? Why did he not speak of it in his letter of 25 July 1988? And why did the Personnel Department let staff representatives look for suitable posts for the complainant when the meeting had supposedly found that there was none?

The complainant concludes that there was breach of Article VIII of the Staff Regulations and Staff Rules 910 and 920, which safeguard freedom of association; of an agreement which the Staff Association concluded with the Organization in 1978, and of consistent PAHO practice, whereby there should be staff participation in any reduction-in-force procedure; and of Staff Rule 1050.2 and Manual provisions 250 to 375, which set guidelines and prescribe arrangements for it; of the PAHO's approved policy of not replacing established staff like the complainant with local employees; and of the provision for reassignment by mutual consent in Staff Rule 510.1.

The complainant applies for oral proceedings. He asks the Tribunal to set aside the decision to abolish post 3623, to order the Organization to follow the reduction-in-force procedure, to order his retroactive reinstatement, and to award him damages for injury to his reputation and for cruel humiliation, and costs.

C. In its reply the PAHO points out what it sees as misrepresentations in the complainant's version of the facts and dismisses as gratuitous his comments on Mr. Ortega's behaviour and disputes with the Staff Association. In its submission those comments have no bearing on the material issues, which are the abolition of his post and his termination. Contrary to what he suggests and despite the description of his post, he was employed mainly as a driver and general handyman. Talk of abolishing his post began in 1986, before he became spokesman for the Staff Association in El Paso. So it is quite wrong to make out that there was a plot hatched just to get rid of an irksome staff militant.

The Organization describes the various stages in the procedure it followed for deciding on the abolition and submits that the decision was taken by the competent authorities, including the Executive Committee of its Directing Council and the Council itself. It was taken for objective reasons and in line with the procedure for review of the budget.

The Chief of Personnel's letter of 25 July 1988 made it plain that termination of the complainant's appointment was the outcome of the reduction-in-force procedure. Thus it read: "We, therefore, confirm the notice of termination under Staff Rules 1040 and 1050, as these rules relate to completion of contract and reduction in force respectively". A group had met in the Personnel Department a week earlier in accordance with the prescribed procedure. It found only one post in the El Paso Office on which the complainant might have been put - a G.5 post for an office assistant - but he was not qualified for it. Nor was there any suitable opening at headquarters, the trouble being that his qualifications were limited. The absence of staff representation at the meeting does not invalidate the procedure since at the time there was no rule requiring it. It would have made no difference anyway.

The Organization denies the complainant's charges of breach of freedom of association. He was free to perform his duties as staff spokesman. He affords not a shred of evidence in support of his allegation that Mr. Ortega was trying to get rid of him because he was representing the staff.

Remarks the Director may have made at a meeting with a staff representative on 20 December 1988 are hearsay and again he offers no evidence.

There was no breach of any of the texts he is relying on. His views about the running of the El Paso Office were not shared by the staff: the Organization appends to its reply a written statement to that effect bearing a score of signatures and dated 11 October 1988. Mrs. Valdes has had the status of national employee since 1984 and her duties include co-ordination of administrative work and the supervision of support staff at El Paso.

The Organization invites the Tribunal to dismiss the complainant's claims as devoid of merit.

D. In his rejoinder the complainant maintains that the whole background to his case casts doubt on the Organization's good faith in abolishing his post. The behaviour of Mr. Ortega and the constant disregard of the rules are material issues because they shed light on the circumstances in which he lost his livelihood after seventeen years' loyal service. Like Mr. Ortega, the Organization seems to think it can break its own rules at will.

It is unfair and improper to disparage his usefulness to the Organization by arguing that the description of his post misrepresented his duties. The PAHO's avowed distortion of the description to get the post upgraded was in breach of its own standards on the classification of posts. In any event it is estopped from contending that the

complainant's actual work was not reflected in that post description. He provides written testimony by several witnesses as to the quality of his services over the years.

The idea of abolishing his post was not mooted before he took up the defence of the staff: he produces evidence which in his submission shows that he was acting as a spokesman for the staff as early as November 1983 and continued to do so until he left.

It is misleading to say that the Directing Council knowingly approved the abolition of his post. The budget submitted by the Director to the Council ran to hundreds of pages in which the abolition was just a one-line proposal. In practice the governing bodies of the Organization expect the Director to deal with staff matters of that kind in the exercise of his executive prerogative and their members cannot have been alert to the matter of the complainant's post in approving the budget.

Staff representation in the reduction-in-force procedure has been the policy and custom of the PAHO and the World Health Organization for many years and indeed is in line with Article VIII of the Regulations. The complainant cites examples of such representation.

He develops his pleas about the absence of a proper reduction-in-force procedure, which he says the Board of Appeal simply ignored.

He describes the attempts the Staff Association made to have him reinstated and submits that it was especially harsh to let him go merely on Mr. Ortega's "say-so".

E. In its surrejoinder the Organization develops its reply and seeks to refute the argument in the rejoinder. It submits in particular that the complainant has by implication acknowledged the lawfulness of the abolition of his post and is trying to get round that by dragging in irrelevant issues.

There are bound to be grievances from staff in any organisation and the fact that a few cases reached the Tribunal when Mr. Ortega was Chief of Personnel does not mean that he is hostile to staff representatives.

Upgrading the complainant's post in 1976 and in 1977 was not in breach of the PAHO's classification standards, which did not come in until 1979. As for the quality of his services, all he adduces is routine letters of appreciation from a few people who had come to know him: in fact his education and skills are limited and though he was a good driver and odd-job man, he could not serve as secretary, clerk or accountant.

In 1988 staff representation in the reduction-in-force procedure was neither the custom nor the policy of the Organization; it was only a "practice under development" and did not become policy until 1989. So it is mistaken to allege that the group that met on 18 July 1988 to apply the procedure in the complainant's case was improperly constituted.

The Organization again invites the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS:

1. The complainant joined the PAHO on 18 October 1972 and was appointed to a grade G.3 post, No. 3623, as a clerk in the United States-Mexico Border Office at El Paso, in Texas. His post was upgraded on 1 January 1976 to G.4 and on 1 June 1977 to G.5. He continued to serve in the post under a series of two-year appointments.

On 22 September 1987 the Directing Council of the Organization approved by resolution its programme and budget for 1988-89, which provided for the abolition of post 3623. By a letter of 25 July 1988 the Chief of Personnel gave the complainant notice of separation from the service of the Organization at 31 October 1988 under PAHO Staff Rules 1040 and 1050. The date of termination was later postponed to 31 December 1988 and that was when he actually left. The decision under challenge is the one the Director of the Organization notified in a letter to him of 16 April 1991 to reject his appeal against termination.

2. A decision to terminate an official's appointment is at the Director's discretion. It is therefore subject to review by the Tribunal only on limited grounds: it will be set aside only if there was a mistake of law or of fact, or a formal or procedural flaw, or abuse of authority, or if some mistaken conclusion was drawn from the evidence, or if some essential fact was overlooked. The flaws which the complainant is alleging come under one or other of those

heads, and they are taken up below.

The complainant's application for oral proceedings

3. The complainant has applied for oral proceedings so that he may "explain facts that are not included in the documents". He does not say what those facts are or why they may not be set out in his written submissions or what relevance they may have to the material issues. His application is therefore disallowed.

The abolition of the complainant's post

4. The complainant submits that the abolition of post 3623 was unlawful in that it was an abuse of authority: the whole exercise was just a trick to get rid of him as a punishment for his defence of the staff's rights and was therefore in breach of his right of association.

The Organization denies the charge in its reply and the complainant does not seriously pursue it in his rejoinder. It therefore fails for want of proof.

5. The complainant further submits that the decision was taken in disregard of essential facts: since the duties of post 3623 continue to be performed there was no need to abolish it.

The Organization's answer is that the decision on what posts are to be abolished is an administrative one that takes into account such issues as budget factors and material needs. It points out that the proposal to abolish post 3623 originated with the United States-Mexico Border Health Association, which is responsible for the El Paso Office. It was then concurred in by the Director's Advisory Committee, endorsed by the Executive Committee of the Directing Council as part of the Organization's draft programme and budget for 1988-89, and finally approved by the Directing Council itself at its 32nd Session, on 22 September 1987.

The complainant fails to show that the impugned decision, insofar as it rests on a decision by the Directing Council, was ultra vires or otherwise unlawful. His challenge on this score is rejected.

The complainant's objections to the application of the reduction-in-force procedure

6. The complainant contends that the notice of termination the Chief of Personnel gave him by letter of 25 July 1988 was premature: the Organization had not yet carried out a proper reduction-in-force procedure and, more particularly, considered the possible options for keeping him.

7. The first argument - that the procedure prescribed in the Staff Rules had not been followed - rests on Judgment 1045 (in re Mitastein) of 26 June 1990, which says that no appointment may be terminated under Rule 1040 until the reduction-in-force procedure has been completed.

The complainant appends to his complaint a one-page text dated 18 July 1988 and headed "Note to the files". He says that the PAHO produced the text in the course of the internal appeal proceedings, and the Organization does not deny that.

The first paragraph of the note reads:

"On 18 July 1988, as a result of the abolition of Post .3623, G-5, Clerk of the El Paso Office, occupied by Mr. Arturo de Anda, a meeting was held to carry out a reduction in force according to the procedures specified under Staff Rule 1050..."

It appears from the note that only members of the Personnel Department at headquarters in Washington D.C. attended the meeting. The Organization explains that "the reduction in force situation was simple and clear and within the attributions of the Personnel Department".

8. At the material time Rule 1050.2 read in part:

"When a post of indefinite duration, which is filled, is abolished, a reduction in force shall take place, in accordance with procedures established by the Director, based upon the following principles:

1050.2.1 competition for retention shall be limited to other staff performing similar duties at the same grade level as that of the post to be abolished."

The procedures are set out in detail in the Manual of the WHO/PAHO. They are not as "simple and clear" as the Organization makes out. On the contrary they are complex and time-consuming. What is required is careful and objective review of the problem of keeping on the staff someone whose post has been abolished. Those who are in charge of applying the procedure must determine which staff are "performing similar duties at the same grade", assess their performance record, compare their seniority and see whether a reasonable offer of reassignment may be made to the staff member who is under threat of dismissal.

9. The note dated 18 July 1988 contains five short paragraphs. In the first paragraph four of the five members identify themselves. In the second the group concludes that competition for retention should be limited to the El Paso Office. In the third it reviews certain posts and finds them not to be comparable. In the fourth it says:

"The group also has found that Post .3623 is not similar to Post .0907, G-5 Office Assistant II. Post .3623 is the only one with the duties and responsibilities related to driving the Organization vehicles. The incumbent must be a licensed experienced driver. Post .3623 is in no way similar to Post .0907."

And in the fifth paragraph the group concludes that the complainant's appointment must be terminated.

10. As to the construction to be put on the phrase "similar duties at the same grade" in Rule 1050.2.1, the Organization states in its reply:

"Post .3623 was established to serve the needs of a chauffeur and office clerk ... On two occasions, in 1977 and in 1978, the post description was modified by the inclusion of other duties in order to facilitate the up-grading of the post. With all due respect, the fact is, however, that Complainant continued to perform the same duties as before his post was upgraded; mainly as chauffeur, office clerk and as a general helper ..."

The Organization's argument is mistaken. It is not entitled to derogate from the description of the post the complainant held but, in considering whether other staff were performing "similar duties", was required to take account of every single duty set out in that description.

In treating the duties of post 3623 as being confined to driving the Organization's vehicles the group failed to pay proper heed to the description. The duties of the post included operating and maintaining mimeograph, photocopy and "addressograph" machines and other electronic equipment; assembling simultaneous interpretation equipment, receiving, shipping and maintaining an inventory of vaccines, mailing publications, keeping an inventory of office supplies, receiving and despatching mail, serving as office messenger, serving as driver and maintaining cars in good working order, travelling with the consultants in the field and assisting in the Mexico-3301 project.

The conclusion to be drawn from paragraph 4 of the group's note is that it failed to take into consideration that full list of duties.

11. The decision to abolish the post was actually taken on 22 September 1987 and before that date the Director must have been aware that abolition was possible or even probable. Yet nothing was apparently done until 18 July 1988, a date under two weeks before the deadline for giving the required three months' notice of termination to the complainant, whose appointment was to expire at 31 October 1988. On the Organization's own admission it let almost ten months go by after the decision on abolition before even purporting to carry out the prescribed reduction-in-force procedure. The truth of the matter is that the exercise recorded in the note was nothing but a sham contrived to lend a semblance of propriety to the notice of termination given on 25 July 1988. That is borne out by the fact that the letter of notice did not make it clear that the reduction-in-force procedure had been followed.

The Organization made no genuine effort to carry out the procedure properly and thereby to give the complainant the protection of the Staff Rules he was entitled to under the provisions on abolition of post. The purported procedure - whatever it may have been - was devoid of effect in law.

12. Where a post is abolished compliance with the reduction-in-force procedure is a condition precedent to termination of the holder's appointment. Not being the outcome of a valid procedure, the notice of termination given to the complainant in the letter of 25 July was also invalid.

The Tribunal's ruling

13. The complaint being allowed because of the procedural flaw, the complainant is reinstated as from the date of termination of his appointment and he must be given the benefit of proper compliance with the reduction-in-force procedure. The circumstances of his unlawful termination warrant an award of damages for the moral injury he has sustained. He is also entitled to costs.

DECISION:

For the above reasons,

1. The Director's decision dated 16 April 1991 is quashed.

2. The complainant is reinstated as from the date of termination of his appointment.

3. The Organization shall apply the reduction-in-force procedure to the complainant in accordance with Rule 1050.2.

4. It shall pay him in full any salary, allowances and other benefits due to him under his appointment, less any indemnity or other sums it may have paid him on account of the purported termination.

5. It shall pay him 1,000 United States dollars in damages for moral injury.

6. It shall pay him $5,000 in costs.

7. His other claims are dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.