The Administrative Tribunal,

Considering the complaints filed by Mrs M.M. A. (her fourth), Mr R. H., Mrs S. R.-C. (her third) and Mrs B. S. G. against the Pan American Health Organization (PAHO) on 12 July 2006 and corrected on 25 August, PAHO's reply of 11 December 2006, the complainants' rejoinder of 22 January 2007 and the Organization's surrejoinder of 8 May 2007;

Considering the applications to intervene filed, respectively, by Mr M.E. D. O., Ms M. S. K. and Mr M. K. S. on 23 March 2007, by Mr G.A. S. on 11 April and by the following 240 interveners on 22 October 2007:

A. R., M.

A., G.

A. B., A.L.

A., P.

A., R.

A. C., G.

A. S., R.M.

A., H.

A., E.

A., F.

A., P.E.

A., M.C.

A., C.

A., L.E.

A., V.

A., A.

A. M., M.

A., F.R.

A., J.

B., D.

B., D.B.

B., O.

B., A.

B., O.C.

B., E.

B. G., E.J.

B., I.E.

B., L.H.C.

B., P.A.

B., J.

B., P.

B. d. A., A.E.

B., N.

B., L.

C., N.

C., A.

C., X.

C.-S., C.

C., M.

C. C., E.

C.- O., S.O.

C., E.

C., C.

C., M.

C., J.

C. L., M.

C., J.

C., M.L.

C., M.

C., M.

C., H.

C. P., P.

C., F.

C. C., M.A.

C., M.

C., G.

C., J.G.

C. O., M.

C., Z.

D’E., M.

D. S., C.

D. S., J.

D., G.

D. C., A.C.

d. F., D.

d. G., M.

D. l. B., C.

d. l. R., R.

d. M., R.

d. O., M.d.F.

d. O. Y. M., E.

d. O., M.

d. R., S.

D., C.E.

d. R., J.L.

d. S., D.V.

d. S., J.S.

d. S. R., M.

E. V., N.V.

E., C.

E.D.

E., Y.G.

F., P.

F., M.E.

F., S.

F., G.

F. T., A.

F., L.

F. d. S., M.H.

F., C.L.

F., L.E.

G., M.C.

G., M.C.

G., S.C.

G. G., M.

G., W.

G. B., E.

G., G.

G., M.A.

G. d. l. T., G.

G. d. G., V.

G., R.

G., S.

G. G., S.

G., A.

G., G.

G., M.E.

G., R.

G., M.E.

G. d. l. C., O.

H., F.J.

H., A.

H., H.

H., M.T.

H., J.

I., M.I.

I., J.J.

I., M.d.R.

I., B.

J., L.M.

J., L.

J., E.

J., E.

K., J.

K., B.

K., M.

L. C., M.

L., N.

L., R.

L., J.

L. S., L.

L., M.

L., A.

L., J.W.

M., M.

M., M.

M., J.C.

M., G.

M., J.

M., S.

M. G., V.

M., I.C.

M., N.

M. d. S., A.J.

M., V.I.

M., S.

M.-S., S.

M., R.

M., C.

M.-L., G.

M., L.

M., M.

N.-L., O.

N., A.

N., E.

O. P., R.

O., P.

O., E.

O., R.

P., M.

P., M.-I.

P., A.

P., A.M.

P., D.

P., A.M.

P., M.C.

P., C.

P., N.

P., G.

P., P.J.V.

P., L.

P., R.

P. G., E.

P., M.T.

P., O.

P., B.

P., H.

P., M.

P., A.R.

P., D.

P., F.

P., M.A.

P., A.

P., C.A.

P., L.F.

Q., S.

Q., E.C.

R., C.

R. d. P., Z.

R., M.

R., C.

R. M., J.

R. V., A.A.

R., N.M.

R., F.

R. S., N.

R., J.

R., M.M.

R., H.

R., I.

R., L.M.

R., C.

R., K.

S., C.

S., R.

S., A.

S., V.E.V.

S., T.

S., A.R.

S., J.

S. v. E., F.

S., J.C.

S., M.M.

S., S.A.

S., R.

S.-B., A.A.

S., F.M.

S., C.

T., H.

T.-L., M.

T., C.

T., S.

T., J.E.

U., C.R.

U., J.

V.-K., J.

V. L.n, O.

V., A.M.

V., S.

V., P.

V., M.T.

V., F.

V., A.A.

W., J.

W., J.A.

W., W.A.

X., G.C.

Y., O.E.

Z., F.

Z. d. S., R.C.

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. The complainants joined PAHO more than 20 years ago. One of them, Mrs S.G., retired in June 2006. At the material time, two of them held fixed-term contracts and the two others career-service appointments.

In 2000 the World Health Organization (WHO) initiated an extensive human resource management reform affecting all WHO regional offices. In that context PAHO amended in July 2002 its Staff Rule 1050 concerning abolition of posts. Prior to its amendment, Staff Rule 1050 provided for a reduction-in-force procedure when a post of indefinite duration, or any post held by a staff member with a career-service appointment, came to an end. Under that procedure a competition for retention was held between the incumbent of an abolished post and all staff members holding similar posts at the same grade or one grade lower. "Candidates for retention" were placed into different priority groups according to their type of contract and the number of years of service they had accumulated. Retention under that procedure was based first on performance and, in the event that performance was not decisive, on seniority of service. Under this system the staff member whose post was abolished was not necessarily the person whose employment was terminated if reassignment was not possible.

The reduction-in-force procedure was replaced, as from 1 July 2002, by a procedure of reassignment which would give due regard to performance, qualifications and experience. The amended Staff Rule 1050 provides in part that "[w]hen a post of indefinite duration – or any post held by a staff member with a service appointment – is abolished or comes to an end, reasonable efforts shall be made to reassign the staff member occupying that post, in accordance with procedures established by the Director". Under the new procedure the incumbent of the abolished post enters a six-month reassignment period (which can be extended up to one year) during which the Organization seeks an appropriate vacant post for him or her at the same grade or a grade lower. In addition, training is provided to staff members facing post abolition and an increased termination indemnity is granted to those whose reassignment proves impossible.

By letter of 5 July 2002 the President of the PAHO/WHO Staff Association informed the Director of PAHO that a large number of staff members intended to challenge the amended Staff Rule 1050 pursuant to which the reduction-in-force procedure was abolished. She asked the Director to grant them leave to appeal directly to the Tribunal and to allow the Tribunal's decision, if favourable, to apply to all persons who were staff members as of 1 July 2002. The new Director replied on 25 February 2003 that she had decided not to authorise the direct referral of the matter to the Tribunal and stated that staff members who wished to contest the amendment of the Staff Rule in question should each file a separate statement of intention to appeal.

Three of the complainants filed their appeal with the Board of Appeal on 23 July 2002; the fourth complainant did so on 22 August 2002. They asked that the Organization continue to apply the reduction-in-force procedure to staff "who were working as of 30 June 2002" on the ground that they were adversely affected by the abolition of that procedure, which was the only measure providing them with job security. The Board considered the four appeals together. In its report of 7 February 2006 it held that the reduction-in-force procedure provided some degree of job security for staff members with seniority based on length of service and that, consequently, the complainants had lost security of employment following the abolition of that procedure. However, it concluded that the issue of whether they had an acquired right to benefit from the reduction-in-force procedure should have been referred directly to the Tribunal. It rejected the claim for costs.

By letters of 14 April 2006, which are the impugned decisions, the Director of PAHO informed each complainant individually that she had decided to dismiss their appeal on the ground that the elimination of the reduction-in-

force procedure did not breach their acquired rights as it could not be considered as a fundamental or essential term of employment that induced them to join the Organization. She also noted that revised procedural safeguards had been promulgated under Staff Rule 1050 to protect the interests of staff members and that an increased indemnity would be available to those whose posts were abolished. She pointed out that the reduction-in-force procedure had not been resorted to since 1994 and that none of the complainants had lost his or her job due to the abolition of their posts.

B. The complainants claim that they have an acquired right to benefit from the abandoned reduction-in-force procedure. Citing the Tribunal's case law, they submit that the Organization may not unilaterally change a fundamental condition of employment to the detriment of staff members. They contend that the Administration acted unilaterally and that the Staff Association and they themselves were against amending the reduction- in-force procedure on the ground that they had an acquired right to that procedure. They explain that under that procedure seniority was usually the determining factor since the majority of staff members had satisfactory appraisals rather than poor or outstanding appraisals. Consequently, before 1 July 2002 staff members could look forward to gradually acquiring greater security of employment. They argue that the abolition of the reduction-in-force procedure in July 2002 had a negative impact on them and on other staff members to whom that procedure previously applied. In their view, the amendment of Staff Rule 1050 was made to their detriment.

Referring to the case law, they explain that a staff member may derive an acquired right either from a clause of his or her contract of appointment or from a provision of the Staff Regulations or the Staff Rules which was important enough to affect "the mind of the ordinary applicant" when he or she was considering joining the Organization. In their opinion, there is little doubt that job security is very important to the "ordinary applicant", as it is to protect the Organization from the influence of Member States.

The complainants ask the Tribunal to rule that they have an acquired right to the continued application of the reduction-in-force procedure. They also claim costs.

C. In its reply PAHO submits that the criteria for the existence of an acquired right as defined by the case law are not satisfied and consequently denies that the abandoning of the old reduction-in-force procedure breaches acquired rights.

Referring to the case law, PAHO contends that amendments to a Staff Rule amount to a breach of an acquired right whenthe structure of the contract of appointment is disturbed or if there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment. It contends that the reduction-in-force procedure is neither a fundamental nor an essential condition of service. Indeed, it is unlikely that the reduction-in-force procedure would have swayed a prospective candidate to join the Organization; it is more likely that an applicant would have viewed that procedure as a threat to the longevity of his or her career given that the determining factor for the application of the procedure was seniority. The possible benefit derived from that procedure is consequently too remote to constitute an essential or fundamental factor which would have induced an "ordinary prospective applicant" to accept an offer of employment at PAHO.

The defendant asserts that the decision to amend Staff Rule 1050 was based on objective criteria. The Rule was modified to maintain conformity with the WHO's separation policy, which was adopted in January 2002 and entered into force on 1 July 2002. It explains that the modifications to the Staff Rules resulted in a separation process that put all staff members on an equal footing, maintained a degree of job security through a reassignment process and provided staff with an increased indemnity in the event that their contracts were terminated. The decision to amend Staff Rule 1050 was also based on the desire to simplify a separation procedure which was extremely cumbersome and time-consuming and to ensure that, in case of organisational changes, the workforce would have the skills, experience and commitment needed to carry out the Organization's work.

PAHO points out that, according to the case law, the fact that those pleading an acquired right were prejudiced by a change in a staff rule is not in itself sufficient to support a claim of breach of an acquired right, particularly where the effect of the change is to put all staff members on an equal footing. It asserts that the amendment to Staff Rule 1050 did not change the overall likelihood of retention in the event that a post was abolished. Indeed, a contract will be terminated under either procedure unless the staff member occupying the abolished post is reassigned to a vacant post. The main difference is that under the reduction-in-force procedure staff with more seniority had the best chance of being retained. Under the amended Staff Rule 1050 the complainants and other staff members holding career-service appointments or occupying posts of indefinite duration are treated equally.

Thus, the new procedure guarantees a “measure of job security” for all staff members and places them all on an equal footing with regard to retention possibilities.

D. In their rejoinder the complainants reiterate their pleas. They point out that, under the reduction-in- force procedure, merit was a central issue since seniority was taken into consideration only in the absence of a decisive difference in the performance of two staff members. They deny that the possibility of posts being abolished is too remote since the budget of the Organization fluctuates over time. They also reject the allegation that the reduction-in-force procedure was a cumbersome process.

E. In its surrejoinder the Organization maintains its position. It reiterates that the revised Staff Rule continues to provide job security based on fairness and equality.

CONSIDERATIONS

1. The first three complainants are staff members of PAHO and the fourth is a former staff member. The first complainant holds a career-service appointment, as did the fourth. The second and third complainants are employed under fixed-term contracts. Each of the complainants who is presently a staff member has in excess of 20 years of service within the Organization. The complainants challenge a decision dismissing their appeals with respect to a claim for recognition of an acquired right to the reduction-in-force procedure that obtained pursuant to Staff Rule 1050 prior to its amendment with effect from 1 July 2002.

2. Prior to its amendment, Staff Rule 1050 provided for a reduction-in-force procedure in the event of the abolition of a post of indefinite duration or the coming to an end of a post held by a staff member with a career-service appointment. It appears that Staff Rule 1050 may have been amended from time to time prior to the amendment that took effect from 1 July 2002. Even so, its main features remained unchanged until that date. In essence, the Rule provided that in the event of abolition or the coming to an end of a post, a competition should be held between staff holding a post at the same grade or one grade lower to determine which staff members would be retained. In that competition, priority was given to the retention of persons holding career- service appointments or those temporary staff members who were determined to have priority by the Director. Within each priority group, preference was based on performance and, if that was not decisive, upon seniority. The person who lost the competition was to be offered reassignment if that was immediately possible and, if not, was to be paid an indemnity calculated according to length of service. Thus, under this system, the person whose post was abolished or came to an end was not necessarily the person whose employment was terminated if reassignment was not possible.

3. The amendments to Staff Rule 1050 resulted in the situation that, if a post is abolished or comes to an end, attempts are made to reassign the incumbent to a post at the same grade or one grade lower over a period of six months or, exceptionally, 12 months. Preference is given to that person for vacancies occurring within that period. If reassignment is not possible, the incumbent is to be paid an indemnity calculated in the same manner as before but increased by 50 per cent. Under this system, the person whose post is abolished or comes to an end is the person whose employment is terminated if reassignment is not possible.

4. It is not disputed that the complaints are receivable. However, the position of the fourth complainant who is no longer a staff member requires examination. It is not suggested that her post was abolished or came to an end in circumstances calling for the application of Staff Rule 1050. That being so, any right she may have had under that Rule came to an end when her employment ended. Accordingly, her complaint is without object and must be dismissed as disclosing no cause of action.

5. It was said in Judgment 832 that an acquired right is one that a staff member may expect to survive alteration of the staff rules (see also Judgment 1226). The right may derive from the terms of appointment, the staff rules or from a decision. In Judgment 61 it was said that the amendment of a rule to an official’s detriment and without his consent amounts to a breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment. That statement was elaborated in Judgments 832 and 1330 with the consequence that the question is whether there has been an impairment of a fundamental or essential term of the official’s contract of employment, that being a term of a kind calculated to induce him or her to accept appointment or to stay with the organisation in question.

6. It is clear that none of the complainants consented to the amendment of Staff Rule 1050. And although it is not self-evident, it may be accepted that the alteration was to their detriment or, more precisely, impaired their rights under the term embodied in Staff Rule 1050 before its amendment. Thus, the only question to be considered is whether Staff Rule 1050 constituted a fundamental or essential term. That is to be decided having regard to the nature of the term, the reason for and the consequences of its alteration (see Judgment 832).

7. A term deriving from staff rules does not necessarily give rise to a right that survives their amendment (see Judgments 429 and 832). The term now in question not only derives from the PAHO Staff Rules but is one that does not have direct and immediate application. It applies only in the event that a post is abolished or comes to an end – a contingency that occurs with some frequency but neither routinely nor regularly. A right that is remote or contingent is less likely to survive amendment of the rules than one that is direct and immediate (see Judgments 429 and 1446).

8. It appears that the primary reason for the alteration of Staff Rule 1050 was to bring it into line with the separation policy adopted by WHO for which PAHO acts as regional office. Additionally, PAHO states that it was intended to introduce a less cumbersome procedure, to ensure a workforce with appropriate skills and experience and to treat all staff members equally. None of these considerations is conclusive. PAHO and WHO are separate organisations and their Rules do not coincide in every particular. The amended Rule is no doubt easier of application but there is nothing to indicate that the old procedure gave rise to significant practical difficulties; as retention under the old system was based on performance with preference given to seniority only when performance was not decisive, it is not clear that the amendment to Staff Rule 1050 will have any significant impact on the skills of the PAHO workforce. Similarly, and so long as all staff members are subject to the same rule, it is difficult to see that one system rather than another better ensures the equal treatment of staff members.

9. So far as concerns the consequences of the alteration of Staff Rule 1050, the complainants contend that in its unaltered form it provided them with a degree of job security and that, in its amended form, it provides none. The first proposition may be accepted. However, it needs to be noted that, even before its alteration, it fell far short of a guarantee. Under the former system, someone was bound to lose his or her employment unless immediate reassignment was possible. Moreover, unless his or her performance and seniority resulted in preference over at least one other person, it would be the incumbent whose employment was terminated. Although Staff Rule 1050 now targets the incumbent of the post that is abolished or comes to an end, that person has a greater degree of protection than the unsuccessful candidate for retention under the old system. The Rule now makes reassignment more likely, provides preference in relation to vacancies and increased indemnity if reassignment is not possible.

10. One other matter should be noted, namely, that the right asserted by the complainants cannot be given practical effect considering that it is impossible to apply the unamended Rule to some staff and at the same time to apply the new Staff Rule to others. This is because there is now no obligation on other staff members to participate in a retention competition and, even if they did, there is no longer a legal basis for terminating the employment of a candidate because of his or her lack of success in a competition of that kind.

11. Given the remote and contingent nature of the right in question, the benefits which flow from the amendment of Staff Rule 1050 and the practical impossibility of implementing the right asserted, it must be held that the complainants do not have an acquired right to the reduction-in- force procedure that obtained prior to 1 July 2002.

12. The Tribunal notes that, of the applications to intervene, a number have been filed by former staff members whose rights with respect to the application of Staff Rule 1050 came to an end when their employment ended. Their applications must be dismissed as without object. As the complaints must be dismissed, the applications to intervene must similarly be dismissed.

DECISION

For the above reasons,

The complaints are dismissed as are the applications to intervene.

In witness of this judgment, adopted on 9 November 2007, Ms Mary G. Gaudron, Vice-President of the Tribunal,

Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Mary G. Gaudron

Dolores M. Hansen

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.