

119th Session

Judgment No. 3440

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms E. O. G. against the Pan American Health Organization (PAHO) on 15 May 2012 and corrected on 1 August, PAHO's reply of 27 November 2012, the complainant's rejoinder of 22 February 2013 and PAHO's surrejoinder of 17 May 2013;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

A. The complainant joined PAHO on 7 March 2011 under a two-year fixed-term contract as an Editorial Assistant at grade G5. Her appointment was subject to a one-year probationary period ending 6 March 2012, in accordance with Article 420.7 of the Staff Rules. In mid-December 2011 the complainant initiated her mid-year review process on PAHO's Performance, Planning and Evaluation System (PPES). In this review her first-level supervisor noted various shortcomings and the overall rating of her work was "Below Expectations".

From April 2011 onwards, the complainant received a number of e-mails from her first and her second-level supervisors, drawing attention to errors found in her work and to her lack of punctuality. On 30 January 2012 she was advised by her second-level supervisor that her end-of-year evaluation and comments needed to be completed at the beginning of February. On 3 February 2012 the complainant met with her first and second-level supervisors to discuss her end-of-year

review. She was then told that they would recommend that her appointment not be confirmed, based on her failure to meet her performance objectives. On 6 February her first and second-level supervisors completed the end-of-year review. On 8 February Human Resources Management (HRM) informed her that, due to her unsatisfactory performance, her appointment would not be confirmed and that she would therefore separate from service on 8 March 2012, in accordance with Staff Rule 1060.

On 17 February the complainant appealed against the decision not to confirm her appointment. She requested a six-month extension of her probationary period or reassignment to another unit with the same grade and for the same period, as well as reimbursement of her salary and benefits. By a letter of 16 March 2012 she was informed that the Director of PAHO had decided to maintain the decision not to confirm her appointment. The letter stated that since May 2011 and throughout her probationary period, she had received regular verbal and written feedback from her first and her second-level supervisors about the need to improve the quality and timeliness of her work. Her failure to improve in the identified areas and the impact of her poor performance on the image of PAHO had led to the decision not to confirm her appointment. That is the impugned decision.

B. The complainant contends that she did not receive a job description upon taking up duty, or specific and precise feedback on which aspects of her performance were lacking. Her job was also made more difficult due to a lack of training. PAHO did not give her any warning or reasonable time to improve, in breach of Staff Rule 1070.2 and of the Tribunal's case law concerning probationary periods. Her supervisors rushed to complete the PPES process, in breach of the Staff Rules, which required that a mid-year evaluation be performed six months after her employment started. Moreover, the end-of-year review meeting involved a breach of due process and of good faith, as she was not able to properly reply to the comments made in the report, which was made available to her only a few hours before the meeting. She adds that the decision to terminate her appointment amounts to a hidden disciplinary sanction, as she was unfairly blamed for a mistake in a Resolution of the

Directing Council. The decision is therefore tainted with prejudice and represents an abuse of authority. Lastly, she argues that, pursuant to Staff Rule 1070.2, PAHO ought to have considered reassigning her to a post more suited to her abilities.

The complainant asks the Tribunal to set aside the decision of 16 March 2012 and to order her reinstatement to an equivalent position commensurate with her background, experience and qualifications. She claims material damages equivalent to what she would have earned from the date of separation to the date of reinstatement, with 8 per cent per annum interest. Alternatively, she asks for material damages in the amount of 100,000 United States dollars for loss of enhanced earning capacity, with interest. She seeks moral damages in the amount of 35,000 dollars, as well as 20,000 dollars in costs.

C. In its reply PAHO submits that the decision not to confirm the complainant's appointment at the end of her probationary period was reasonable and based on her unsatisfactory performance. As described in her mid and end-of-year reviews, the quality of her work was inconsistent and unreliable, and she was inordinately slow to complete her tasks and lacked initiative. Both her supervisors agreed that out of eight performance objectives, she had only fully met two. PAHO denies the complainant's assertion that she did not receive specific and precise feedback, and points out that she did participate in a variety of trainings. Her poor performance cannot be attributed to a lack of training. PAHO followed all the applicable rules when it decided not to confirm the complainant's appointment and there was no flaw in the exercise of its discretion. The Staff Rules do not require that a mid-year evaluation be performed exactly six months into the staff member's employment. Moreover, her poor mid-year review should have come as no surprise, given that she had received constant feedback on her performance. She was given the opportunity to improve in the months leading up to the final evaluation, but continued to perform poorly. Her end-of-year review was not rushed either. Staff Rule 540.1 provides that the performance evaluation report for probationers must be made before the end of the probationary period, to allow sufficient time for the Organization to assess a probationer's

performance and, if an appointment is not confirmed, sufficient time to comply with Staff Rule 1060, which requires one month's notice. PAHO denies that the decision was a hidden disciplinary sanction, emphasizing that there is ample evidence of the complainant's poor performance. It observes that Staff Rule 1070.2 does not apply to probationers, but only to staff members who are already confirmed in their posts.

D. In her rejoinder the complainant presses her pleas.

E. In its surrejoinder PAHO maintains its position in full.

CONSIDERATIONS

1. The complainant challenges the decision of 16 March 2012 by which the Director of PAHO rejected her internal appeal against the decision not to confirm her appointment at the end of her one-year probationary period. She had been appointed as an Editorial Assistant on 7 March 2011 in the Governing Bodies Office of PAHO, which is responsible for the coordination, translation, production and publication of official documents. PAHO states that her employment was not confirmed because of unsatisfactory performance during the probationary period. PAHO's case is that she failed to meet her work objectives and consistently made errors in her work which caused her supervisors to return documents to her for further revision, thus slowing the pace of the work in the office and the timely delivery of documents to Member States.

2. A firm line of precedents of the Tribunal have established that a decision not to confirm an appointment at the end of a probationary period is subject to only limited review. Accordingly, the Tribunal will not interfere with that decision unless it was made without authority, or in breach of a rule of procedure, or was based on a mistake of fact or of law, or overlooked some essential fact, or amounted to an abuse of authority, or if mistaken conclusions were drawn from the facts. In short, notwithstanding the nature of the decision, it may be

set aside if the decision was made in breach of the complainant's contract, PAHO's own regulations and rules or applicable general principles of law as enunciated by the Tribunal. The general principles are intended to ensure that an international organization acts in good faith and honours its duty of care towards probationers and to respect their dignity.

3. The complainant contends that the decision to terminate her appointment should be set aside because it was based on various errors of law and mistakes of fact. However, PAHO Staff Rule 1060 permits the Organization to terminate the appointment of a staff member at the end of the probationary period for unsatisfactory performance. This Rule, which is under the heading "Non-Confirmation of Appointment", and which was specifically applicable to the complainant as a probationer, states as follows:

"If, during an initial or extended probationary period, a staff member's performance or conduct is not satisfactory, or if he or she is found unsuited to international service, the appointment shall not be confirmed but terminated. The staff member shall be given one month's notice or, at the discretion of the Director, payment in lieu of notice. No indemnity is payable."

4. The duties which the complainant performed as an Editorial Assistant included the proofreading and editing of documents and preparing the formal "camera-ready" versions of official documents. The duties required the performance of the functions with a high degree of speed, precision and care. These duties also required focus, efficiency and timeliness, particularly in the context of that work within an international organization. They also made it necessary to work under pressure.

5. PAHO has submitted, as exhibits, a number of e-mail correspondences from the complainant's supervisors and the complainant. They reveal that various shortcomings in the complainant's work performance were drawn to her attention during her probationary period. The correspondences, which began from April 2011 and continued throughout her probationary year, speak to her constant editing and

formatting errors; her editing of the wrong texts; the copying of wrong documents; her failure to proof-read material; her failure to edit where previous errors were pointed out or to edit as requested; her failure to inform the office to permit alternative arrangements to have been made when she had a medical appointment; untimely and careless work; lack of initiative and her late arrival at work. This is borne out in the complainant's mid-year performance review and year-end performance evaluation. On the bases of these her supervisors agreed that she had met two out of her eight performance objectives or 25 per cent of expectations. These present unreliable, indifferent, deficient and inefficient work performance, such as would justify the decision to terminate her appointment at the end of her probationary period pursuant to Staff Rule 1060.

6. It is noteworthy that the complainant does not deny that her performance over her probationary period was deficient. However, she seeks to impeach the decision to terminate her appointment on a number of allegations of unlawful acts or omissions. She contends that these acts or omissions breached her contract of employment, PAHO's Staff Regulations and Staff Rules, general principles of law, and, in particular, PAHO's duty of care towards her during her probationary period. In the main, she alleges various deficiencies on the part of PAHO and her supervisors in matters that relate to her probationary supervision and her performance evaluation process.

7. The complainant alleges that she did not receive any job description upon taking up her appointment. This, however, does not appear to be an issue of significance, given that the duties of the post were clearly detailed in the vacancy announcement to which she responded for the post, and can be gleaned from her letter of appointment. Her own evidence is that she knew what her duties entailed.

8. The complainant alleges that her supervisors did not provide her with her work objectives in a timely manner. The Tribunal notes that her letter of appointment directed her supervisors to take all reasonable steps necessary to provide her with clear work objectives.

It further stated that the establishment of those objectives should have been completed within the first month of her appointment in consultation with her first level supervisor. The complainant, who was employed from 7 March 2011, states that her performance objectives were set in late April or early May 2011. This was a time lapse of a few weeks to a month and was not significant in the circumstances. The performance objectives were set to permit the complainant sufficient time to perform her duties. There is nothing that indicates that her deficient and inefficient performance was occasioned by this delay. Accordingly, the complaint is unsustainable on this ground.

9. The complainant alleges that she did not receive specific or precise feedback on which aspects of her work performance were lacking. The available evidence however shows that she received specific feedback from her supervisors consistently throughout her probationary period. This is borne out in a number of e-mails as well as in her performance evaluations. They referred to various aspects of her work that needed to be improved in relation to specific tasks that were assigned to her. The feedback comments suggested, for example, the need for improvement in the timeliness and precision of her work. They also drew her attention to corrections that needed to be done in work that was assigned to her. The evidence also shows the guidance that was given to her on a number of occasions. The evidence does not bear out her further allegation that she did not receive any specific benchmarks or adequate guidance against which her performance could have been measured. She received specific performance objectives in a reasonable time.

10. The complainant alleges that her deficient performance was due to lack of training. The evidence suggests that PAHO provided specific training programs for the complainant in its systems as were relevant for her work. This included training in its translation tracking system; the e-mail system; training related to PAHO's Style Manual, which details the format requirements for all official documents and other training sessions on the Governing Bodies Office Tracking System (GBOTS). The evidence also shows that she attended a training

Workshop for authors of documents for PAHO Governing Bodies in November 2011. There is no indication that other staff members benefitted from more training opportunities than she did.

11. The Tribunal notes that while the complainant highlights PAHO's failure to train her in the use of SharePoint and Elluminate programs, PAHO indicates that it does not schedule these aspects of training because they are available online. Staff members are expected to take advantage of the online resources to improve their knowledge and skills.

12. The complainant states that PAHO failed to train her in the use of computer programs. The Tribunal notes, however, that the Vacancy Notice for the Post of Editorial Assistant required technical expertise in word processing in English and Spanish in accordance with established standards. It also required demonstrable ability to use a computer and to utilize various office software programs. As to her complaint that no training was provided for her after a software upgrade was installed on her computer in December 2011, the Tribunal notes that she was ill on the day when her training was scheduled. The Tribunal further notes PAHO's explanation that it was not possible to reschedule her training in January 2012 and at a later date due to work and budgetary constraints.

13. The Tribunal notes the complainant's allegation that she experienced computer glitches which impeded her ability to carry out her duties. She states that soon after the software upgrade was installed on her computer, in December 2011, she had numerous problems with the editing and formatting of documents. She complains that notwithstanding her entreaties for assistance, addressed to her supervisors and the IT services, the problem was allowed to continue through January 2012 and she was only provided with a new computer on 9 February 2012. This was after the decision was taken to terminate her appointment. The Tribunal does not accept that this period of a month of glitches made an excusable difference that would have pointed to the need for a decision to extend or to confirm the complainant's

appointment. This is in light of the preponderance of the evidence of her work deficiencies over the period of her probation.

14. The complainant alleges that her mid-year performance evaluation was done late, in breach of the PPES process. Her letter of appointment states that the first evaluation for her probationary period coincides with the same dates of her probationary period. The complainant insists that her mid-year review should therefore have been conducted in September 2011, instead of December 2011 when it was done. However, she delayed in commencing the review as the PPES process provided. On the facts of this case, she cannot now complain of a late review.

15. The complainant's allegation that the decision to terminate her appointment was unlawful because she was not provided with a prior warning that the confirmation of her employment was in jeopardy is unfounded. She cites Staff Rule 1070 and general principles of law as authority for her assertion. However, it is clear that Staff Rule 1060, rather than Staff Rule 1070, was applicable to her as a probationer. Staff Rule 1060 did not entitle the complainant to a specific warning that confirmation of her appointment was in jeopardy and expressly denied an entitlement to an indemnity.

16. In any event, by its nature, a probationary period is one of trial in which it is determined whether a person is capable of carrying out the duties of a post. A probationer is quite aware that unsatisfactory performance would occasion the termination of her or his appointment. The complainant's letter of appointment made it clear that a decision whether to confirm her appointment would have been taken at the end of the probationary period, or of any extension thereto. The correspondences and mid-year comments which drew her attention to various aspects of unsatisfactory performance during the course of her probation should have made her aware of the possibility of the non-confirmation of her appointment.

17. There is no written rule or general principle of law that supports the complainant's assertion that the decision to terminate her employment was unlawful because PAHO should first have given thought to transferring her to some other post. As the Tribunal stated in Judgment 2646, under 14, to conclude that a staff member who performs poorly on probation will always be entitled to a transfer prior to being dismissed undermines the whole purpose of probationary terms. The Tribunal sees no circumstance in the present matter that supports a case for a prior transfer.

18. The complainant alleges that the decision to terminate her appointment was tainted by prejudice and constituted a hidden sanction and an abuse of authority. This, she states, was because blame was attributed to her without the due process of a formal investigation for an error in Resolution 11 of the 51st Directing Council. The Director made specific mention of this error in the decision not to confirm the complainant's appointment.

19. The Resolution was of particular importance because it set out the agreed financial contributions that each Member State was to make to PAHO. It was published with a formatting error, which caused the relevant quota for some States to have been incorrectly shown. It had to be revised when a Member State drew the error to PAHO's attention after it was published. Inasmuch as the evidence shows that the complainant was partly responsible for the error, the allegations of prejudice and hidden sanction, in breach of due process, are unsustainable. So too is her further allegation, seemingly of prejudice or bad faith, that her mid-year performance review was scheduled late and soon after this error became an issue. First, she contributed to the delay in the review. Second, the error in the Resolution had become an issue about two months before, in October 2011. The complainant's allegations that her termination was unlawful because her late mid-year review did not afford her sufficient time to improve her performance and her year-end evaluation was rushed are unsustainable for this same reason. PAHO was required to give her a

month's notice of termination, which was a very present possibility given her very deficient performance over the course of her probation.

20. The complainant alleges that the decision to terminate her appointment was unlawful because, in the rush to complete her year-end evaluation, she had only a few hours' notice of the meeting to discuss the evaluation and did not have an opportunity to comment on an adverse observation that a supervisor made in the report. However, she was not thereby prejudiced inasmuch as she presented detailed written comments on the evaluation that the Director had and took into account when the decision not to confirm her appointment was made. In any event, the complainant's performance over the period of her probationary period provided grounds on which the Director, pursuant to Staff Rule 1060, lawfully exercised the power not to confirm her appointment at the end of that period. Her assertions that the decision was unlawful on the grounds raised in the complaint are unfounded. The complaint will accordingly be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ