

## FORTY-THIRD ORDINARY SESSION

### *In re* DURAN (No. 2)

#### Judgment No. 392

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Pan-American Health Organization (PAHO) (World Health Organization) by Miss Maria Susan Duran on 17 November 1978, the Organization's reply of 17 January 1979, the complainant's rejoinder of 19 March and the Organization's statement of 5 April 1979 that it did not wish to file a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rules 510.1 and 1080 (formerly 980) and WHO Manual provision II.5.190;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. As is described in Judgment No. 375 (Duran v. PAHO), the complainant had appealed against a decision of 8 June 1977 terminating her sick leave and instructing her to report to her duty station in Brasilia. This complaint follows upon the first. On 27 June 1977 the complainant's lawyer informed the Chief of Administration of the Pan-American Sanitary Bureau, the secretariat of the PAHO, that she could not comply with the instructions since she had not been given medical clearance for the post in Brasilia. On 2 August the Chief of Administration informed her that, if she did not report to Brasilia by 22 August, her appointment would be terminated on that date under Staff Rule 980 for abandonment of post. Having failed to comply, on 23 August she was informed that her appointment had been terminated with effect from the day before.

B. The complainant appealed to the Board of Inquiry and Appeal against the decision of 23 August 1977. The Board held that it was not competent to consider the validity of the medical adviser's clearance of the complainant for duty in Brasilia on the grounds that that was the subject of an appeal pending before another Board of Inquiry and Appeal. The Board therefore disregarded the medical testimony submitted to the other Board and to itself. In its report of 20 July 1978 it concluded that since the complainant had not provided any written explanation of her absence from duty Staff Rule 980 relating to abandonment of post had been properly applied.

C. The complainant contends that the Board was mistaken in its view that she had given no explanation of her absence from duty: by the letter of 27 June 1977 her lawyer had informed the Chief of Administration that for the reasons which he gave in another letter of the same date to the medical adviser of the PAHO she could not report to Brasilia. Obviously the medical testimony is as material to her appeal against dismissal as to her appeal against the decision to terminate her sick leave and transfer her to Brasilia. By disregarding such evidence the Board failed to realise that there had been sound reasons for her refusal to report for work. In her view the Board was wrong to conclude that she had offered no satisfactory explanation of that refusal: in his letters of 27 June her lawyer had stated his opinion that the Administration had no proper grounds for terminating her sick leave. Not until later did she discover that on 19 May 1977 Dr. Barnes, head of the psychiatric department of Sibley Memorial Hospital, had informed the medical adviser of his opinion that she was fit to resume work. She made up her mind in the light of what she knew at the time and so did not act unreasonably. Lastly, as regards the legal grounds for the impugned decision, the complainant contends: (a) the Organization was mistaken in basing its decision to dismiss her on the Staff Rule relating to abandonment of post since she never took up her post and so could not abandon it; (b) WHO Manual provision II.5.195 states that non-acceptance of a reassignment can be grounds for "terminating the appointment". That is the provision which was applied, not the one relating to abandonment of post. Besides, even the latter provision does not apply in circumstances like those of the present case, since it states that the appointment may be terminated without compensation only after the Organization has made "every reasonable attempt to locate" the staff member. The complainant's lawyer and the Organization were in constant touch. The Organization therefore committed an error of fact and an error of law.

D. In her claims for relief the complainant asks the Tribunal: (1) to quash the termination of her appointment; (2) to

order the PAHO to provide her with back pay and (3) to award her costs.

E. In its reply the Organization contends that its medical adviser was under no duty to grant her request for review of her medical status and that that request put the Board of Inquiry and Appeal under no duty to review the medical dossier which another Board had already considered. It is immaterial that the complainant did not learn until later of the opinion expressed by Dr. Barnes on 9 May. The decision to terminate her sick leave was taken, not by Dr. Barnes, but by the medical adviser. Moreover, no new medical fact emerged between the date of the Board hearings and the date of its report, 20 July 1978. Hence the only matter in dispute is whether the Organization was right to base its decision on Staff Rule 980. In reply to the complainant's argument in C(a) above, the Organization contends that she is confusing the date on which an administrative decision is taken with that of the "effective date of reporting for duty". A decision to transfer a staff member becomes executory on the date on which it is taken (Staff Rule 510.1). The "effective date" provided for in Manual provision II.5.190 is the date on which the decision produces administrative effects. As for the argument in C(b) above, the purpose of the requirement in Staff Rule 980 that the PAHO must make every reasonable attempt to locate the staff member before terminating his appointment is to make sure that the abandonment of post is wilful. In the present case the Organization was sure that the abandonment was because it kept in touch with the complainant during the period before 22 August 1977, the date on which the termination took effect. The PAHO therefore asks the Tribunal to dismiss the complaint.

F. In her rejoinder the complainant states that the Board's duty was to find out whether her intention had indeed been to abandon her post. Had it considered the medical facts of the case it would have found that that was not her intention and that she sincerely believed that the state of her health precluded her taking up duty. In its arguments about the need to make sure that abandonment of post is wilful the PAHO confuses a situation in which a staff member wilfully and wrongly refuses to take up duty - and that is indeed abandonment of post - with reasonable behaviour like that of the complainant, who was anxious about the effect which work in Brasilia would have on her health. Lastly, the complainant cites Judgments Nos. 361 (Schofield v. WHO) and 367 (Sita Ram v. WHO). She sees little difference between her own position and that of the complainant in each of those cases. Although she had given many years of dedicated and loyal service to the Organization, the Administration failed to show proper concern for her well-being and did not really care whether its treatment of her caused her "unnecessary personal distress".

#### CONSIDERATIONS:

1. In October 1976 the complainant was found to be suffering from "a rather complex psychiatric condition" and was medically advised to "remove herself from her present work situation for at least six months to a year". The circumstances are described in detail in Judgment No. 375. She was granted sick leave which lasted until June 1977. On 8 June Mr. Muldoon, the Chief of Administration, wrote to the complainant to tell her that the Joint Medical Service considered her fit to perform her assigned duties and requiring her to report for briefing and transfer to Brasilia. The complainant failed to report and on 8 July gave notice of intent to appeal against the termination of her sick leave and her assignment to Brasilia. On 2 August 1977 Mr. Muldoon wrote again requiring her to report and calling her attention to Staff Rule 980 which states:

"A staff member absent from duty without satisfactory explanation in excess of fifteen working days shall be considered to have abandoned his post and his appointment shall be terminated without indemnity".

The complainant still failed to report and on 22 August Mr. Muldoon wrote terminating her appointment under the above rule. In due time the complainant appealed against this decision also.

2. The appeal against the earlier decision came before the Board of Inquiry and Appeal in September 1977. Medical evidence was called for the complainant to the effect that she was unfit for duty overseas and that she ought to have a medical re-evaluation. The Board recommended that the complainant should be medically evaluated by "competent professionals" and that in the meantime her sick leave should be continued and her assignment to Brasilia be postponed. On 21 November 1977 the Director gave his decision rejecting these recommendations and confirming as final Mr. Muldoon's decision of 8 June 1977. From this final decision the complainant appealed to this Tribunal on 18 February 1978. On 4 June 1979 the Tribunal delivered Judgment No. 375 upholding the Director's decision.

3. The appeal against the later decision came before the Board in July 1978. The Board found that since the complainant had not produced any written explanation regarding her absence from duty, Staff Rule 980 was

properly applied; it recommended that the appeal should be rejected. On 19 August 1978 the Director gave his decision accepting the recommendation and from this decision the complainant now appeals to the Tribunal.

4. Rule 980 must be interpreted in the light of the ordinary principles of contract law. If one party to a contract fails or refuses to perform his duties under the contract in circumstances which show that he does not intend ever again to resume them, i.e. show in effect that he is abandoning his post, the other party is entitled to treat the contract as at an end; he is not obliged to wait indefinitely in case the first party might change his mind. This is what abandonment means. It contains both a physical and a mental element. A temporary absence from a place does not mean that the place is abandoned; there must be shown also an intention not to return. So to the physical failure to perform a contractual duty there must be added the intention to abandon future performance. Proof of intention is not always easy, and the object of Rule 980 is to allow the intention to be assumed from the fact of absence without reasonable explanation for fifteen days. The explanation has not got to be one that exonerates the staff member from breach of contract or from other disciplinary measures, but it has to be one which negates the intention to abandon.

5. The analysis in the preceding paragraph may be helpful in disposing of two points raised in the argument. The first is the complainant's contention that as she never took up her post in Brasilia she could not abandon it; this is to confuse abandonment of place with abandonment of duties. The second is the requirement in the Board's recommendation, accepted by the Director, of a written explanation. There is no such requirement in the Rule. The explanation may be oral or written or to be implied from the circumstances. When the explanation is obvious and negates the intention to abandon, that is all that is necessary.

6. A bona fide challenge to the validity of an order is a satisfactory explanation for not complying with it. By changing the order in the manner prescribed by the regulations, the complainant was affirming the contract, not abandoning it. She was contending that, having regard to her health, Brasilia was not a safe place for her to work; she was asserting that the order was outside the contract such an assertion contains no implication of disobedience in future to orders that are within the contract. It would have to be a very exceptional case in which the Director could say in effect:

"You may appeal against my decision to send you to Brasilia, but if you do not go immediately, you will be dismissed."

The nature of this case does not bring it within either the letter or the spirit of Rule 980.

7. As stated in the preceding paragraph, the challenge must be bona fide. A frivolous appeal or one entered for the purpose of delay will not do. There may be cases in which the Staff member must say enough by way of satisfactory explanation to show that the appeal is bona fide. It is unnecessary to go into that in the present case. The decision appealed against is that given by the Director on 19 August 1978 and not that given by Mr. Muldoon on 2 August 1977. Whatever the position was as known to Mr. Muldoon, it was quite clear to the Director in August 1978 that the complainant had a bona fide case and one which had indeed been accepted by the Board of Inquiry and Appeal.

8. For these reasons the Director's decision must be quashed. But the claim for back pay is another matter. To succeed under Rule 980 the complainant has had to show no more than that she believed the assignment to Brasilia to be invalid. To succeed in a claim for reinstatement or compensation, she would have to satisfy the Tribunal that the assignment was in fact invalid; the Tribunal in its Judgment No. 375 has decided the contrary.

#### DECISION:

For the above reasons,

1. The decision of the Director given on 19 August 1978 is quashed.
2. The claim for back pay is dismissed.
3. The complainant is awarded 2,000 United States dollars as partial reimbursement of her costs.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as

myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 24 April 1980.

André Grisel  
Devlin  
H. Armbruster

Bernard Spy

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