FIFTIETH ORDINARY SESSION

In re DURAN (No. 3)

Judgment No. 543

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Miss Maria Susan Duran on 1 April 1982 and brought into conformity with the Rules of Court on 28 April, the PAHO's reply of 21 June, the complainant's rejoinder of 1 August and the PAHO's surrejoinder of 16 August 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Regulations 1.2 and 4.2, PAHO Staff Rules 510.1, 565.2, 1070.1 and 2 and 1080 (formerly 980), and WHO Manual provision 11.5.195;

Having examined the written evidence and considering oral proceedings to be unnecessary;

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

A. The history of the complainant's previous employment by the Pan American Sanitary Bureau, the secretariat of the PAHO, is recounted in Judgments Nos. 375 and 392. In the latter, delivered on 24 April 1980, the Tribunal quashed the Director's decision of 19 August 1978 to reject her appeal against termination of her appointment. Her counsel sought clarification from the Registrar, who replied, on 2 September 1980, that the effect of the ruling was that she held "an appointment without an assignment". After further discussion with her counsel the Chief of Personnel wrote on 14 October saying that she was reinstated in the post she had earlier been transferred to in Brasilia. She declined to go, and after an exchange of letters the Chief of Personnel warned her on 2 December that if she did not report for duty in Brasilia in a week her appointment would be terminated. Medical clearance was required, and she was seen by Dr. Gatenby, the Medical Director of the United Nations in New York, on 3 December. On 10 December the Chief of Personnel told her counsel that clearance had come through. Notified to counsel on 12 January 1981, it took the form of a telegram dated 9 December 1980 to the PAHO from the Director of the Joint Medical Service of the United Nations in Geneva and it cited findings by Dr. Gatenby. The appointment was terminated on 19 December 1980 under Staff Regulation 1.2 (staff are "subject to the authority of the Director and to assignment by him to any of the activities or offices of the ... Bureau"), Staff Rules 510.1 and 565.2, which also authorise the assignment and reassignment of staff, and Rule 1070 ("a staff member's appointment may be terminated if his performance is unsatisfactory"). The complainant appealed to the Board of Inquiry and Appeal on 5 March 1981. In its report of 17 November the Board recommended rejecting her appeal, and the Director's letter of 4 January 1982 accepting the recommendation is the decision impugned.

B. The complainant has four main pleas. (1) There were procedural flaws. The Board arbitrarily deprived her of her right to an oral hearing, rejected a questionnaire she had proposed sending to witnesses outside Washington, refused an addendum to her original brief, and took account of an item of evidence which neither party had filed and on which neither was invited to comment. (2) Her appointment was not terminated under the right rules. Reliance on Rule 1070 was misplaced since it applies only when an official's performance is unsatisfactory. She had not yet taken up duty in Brasilia and her work had always been found wholly satisfactory. Besides, under 1070.2 she ought first to have had a written warning. (3) She did not have medical clearance. The telegram of 9 December 1980 did not amount to clearance because, though Dr. Gatenby had found her "medically fit", he spoke also of "poor adjustment and possible repatriation for psychological reason". A form signed on 19 December by the Director of the Joint Medical Service in Geneva said that she would be "a bad risk if assigned to the field (Brasilia)", and it cannot have been taken into account in reaching the decision to terminate, which was also dated 19 December and had actually been taken on 2 December. (4) The PAHO continues to deal with her in bad faith, particularly in its response to the Tribunal's ruling and in its disregard of her interests. Regulation 4.2 says that the paramount consideration in the transfer of staff shall be the "highest standards of efficiency", and efficiency will not be served by sending to Brazil someone with an inadequate knowledge of Portuguese. The complainant invites the Tribunal to annul her termination or refer her case back to the Board, to reinstate her with full salary and allowances from the date of termination and to award her 3,500 United States dollars as costs.

C. In its reply the PAHO contends that the complainant's claims are unfounded. She did have medical clearance for Brasilia, and the assignment was therefore valid. Dr. Gatenby finding that she was fit was not invalidated by his allusion to her possible difficulty in adjusting to Brasilia: as the Tribunal held in Judgment No. 375, the criterion is her present fitness to start work there, not her ability to adjust in the longer term. Regulation 1.2 provided grounds for terminating the appointment. So did WHO Manual provision II.5.195, which refers to Regulation 1.2 and says that "refusal to accept a reassignment can be grounds for terminating an appointment". Rule 1070.1 defines performance as unsatisfactory where "the staff member does not or cannot perform the functions of [his] post", and in refusing to take up duty in Brasilia the complainant failed to perform the functions of her post, her previous performance record being irrelevant. Moreover, the termination was in accordance with a ruling by the Tribunal in another case. She meets the linguistic and other requirement of the post. Nor is there any evidence of bad faith. The PAHO has shown her consideration in several ways it describes. On receiving clarification from the Registrar it reinstated her and paid her salary from the date of the judgment to that of reinstatement. Lastly, she has failed to establish any violation of due process of law.

D. The complainant enlarges on her arguments in her rejoinder. In her view the PAHO says nothing to rebut her contention that the Board denied her right to a fair hearing and to have all the material evidence taken into account. The case the PAHO refers to as a precedent may be distinguished on the facts. The PAHO's aim all along has been to get the complainant out of the Washington office, and its bad faith would have been more evident had she been allowed full exercise of her rights in the Board proceedings. For one thing, it has never tried to find her another assignment.

E. In its surrejoinder the PAHO again asks the Tribunal to dismiss the complaint as unfounded. It points out that in accepting a career service appointment in 1970 she consented to work anywhere her services might be required: her refusal to go to Brasilia is a breach of contract. Besides, the Tribunal has already declared her transfer valid and the point is res judicata.

CONSIDERATIONS:

1. This dispute originates in the assignment of the complainant in May 1976 to a post in Brasilia. Before she could take it up she went on prolonged sick leave. In the words of the psychiatrist who examined her she was "suffering from a rather complex psychiatric condition which has produced a good deal of emotional instability, anxiety, and depression". In July 1977 the Administration, acting on the opinion of Dr. Dulac, the Director of the Joint Medical Service in Geneva, terminated her sick leave and instructed her to report for duty in Brasilia. She challenged both decisions and failed to report. Consequently, on 22 August she was given notice of the termination of her appointment under Staff Rule 980.

2. The Tribunal held in Judgment No. 375 delivered on 4 June 1979 that the assignment to Brasilia was valid but in Judgment No. 392 delivered on 24 April 1980 that the notice of termination of her appointment was invalid. Meanwhile the post in Brasilia had been filled. This put the complainant in the position of a person holding an appointment without a post. She was therefore entitled to demand to be assigned to a suitable post and put back on the payroll. This would not exclude a fresh assignment to Brasilia, the Tribunal having in Judgment No. 375 rejected the complainant's objections to that post. Whether or not the incumbent in Brasilia was there on a temporary basis, it was open to the Director to create a vacancy there and assign the complainant to it.

3. However, the complainant did not take the initiative in this respect. Eventually on 14 October 1980 the Organization offered to "reinstate" the complainant in Brasilia. On 17 November Mr. Soschin, the complainant's attorney, replied that "while Ms Duran is most eager to return to work with PAHO, she does not feel that she can accept the post in Brasilia". He referred to her language deficiencies and asked the Chief of Personnel, Mr. Barahona, to explore other possibilities: "given the relatively few women who occupy senior positions, it may well be that Ms Duran's talents and abilities would better serve PAHO by placement elsewhere". On 20 November Mr. Barahona replied that the decision to assign to Brasilia was final and that if a definite reply was not received before 1 December a refusal would be assumed. On 24 November Mr. Soschin wrote that "Ms Duran does not accept her assignment to Brasilia for the reasons previously set forth": he added that she desired to resume her active work with PAHO and that he was ready to meet "in order to explore and discuss alternatives". On 2 December Mr. Barahona replied that the complainant's abilities were in line with the requirements of the post description and that she had no valid reason for refusing the Brasilia assignment. The letter continued: "By virtue of Staff Regulation 1.2, Staff Rules 510.1, 565.2 and 1070, the Organization hereby gives Ms Duran official notice that her appointment will be terminated unless she reports for her assignment one week from the receipt of this letter.

Although there is no alternative to our proposal, we are available to meet with you at your convenience." A meeting in fact took place on 8 December.

4. It is to be observed that nothing was said in this correspondence about the medical grounds which had caused the grant of sick leave in 1976, had led to the complainant's refusal in 1977 to go to Brasilia and had been the subject of the Tribunal's decision in Judgment No. 375. There is no evidence that the complainant had received any fresh medical advice. The Organization had, however, when making the assignment to Brasilia, proposed also a medical examination, presumably for a fresh medical clearance for Brasilia, and Mr. Soschin had said in his letter of 17 November that he did not object to the proposal. The examination was made in Washington on 3 December by Dr. Gatenby, UN Medical Director, who reported to Dr. Dulac in Geneva. On 9 December Dr. Dulac cabled the result to Mr. Barahona in Washington. When therefore Mr. Soschin and Mr. Barahona met in Washington on 8 December the result of the examination was unknown. In the course of the discussion Mr. Soschin said that his client would not accept the appointment regardless of whether or not she was medically cleared. On 10 December Mr. Barahona wrote to Mr. Soschin:

"We now confirm that we have received medical clearance for Ms Duran in relation to the Brasilia assignment; however, inasmuch as you indicated on Monday, 8 December 1980 that your client would not accept the appointment regardless of whether she was medically cleared or not, we are taking steps to terminate her appointment effective 19 December 1980... In the event that Ms Duran would decide to change her mind and accept the Brasilia appointment please let us know before 19 December 1980."

In his reply on 16 December Mr. Soschin dealt with this paragraph by saying that it omitted several important points; he did not however deny what he was said in the paragraph to have indicated. He continued:

"Miss Duran is most willing and eager to accept an offer made in good faith. Such an offer, unlike the current one, would be for a post for which she is well suited, best able to serve PAHO, and for which PAHO could derive maximum benefit. As you are well aware the Brasilia post does not meet these criteria, and is simply part of the continuing effort to run my client out of the organization."

Consequently the termination took effect on 19 December and the issue in this case is as to whether or not it was lawful.

5. Article 1.2 of the Staff Regulations provides that all staff members are subject to the authority of the Director and to assignment by him to any of the activities or offices of the PAHO. Upon receiving her career service appointment in April 1970 the complainant signed an acknowledgement of her "readiness to accept assignment to any part of the world where my service may be required". There are, however, some well established limits to this obligation. Whatever the place of assignment, the post must be one as to which the duties of the post are set out in a post description, are within the capacity of the staff member and are not degrading. A staff member is not obliged to go to a place where she might have to run unacceptable risks of injury or ill health. In certain circumstances it may be the duty of the Organization to consult with the staff member and take her views into account. Subject to limitations of this character, a decision taken by the Director or with his authority under this regulation will not be reviewed by the Tribunal unless it is tainted by some procedural vice or based on an error of law or mistake of fact, or tainted with abuse of power, or unless essential facts have not been taken into consideration or a clearly mistaken conclusion drawn from the facts.

6. The only specific objection which the complainant offered to the assignment to Brasilia is that expressed in paragraph 3 above. The post description listed a good knowledge of Portuguese or Spanish as desirable. The complainant says that she had no Portuguese and limited Spanish. It is to be noted that neither language is a requirement, only a desideratum, and as such the complainant took no objection on this ground to the first assignment to Brasilia in 1977. The evidence is that she had an excellent knowledge of Spanish, which was a requirement of the post she had held as personnel officer P.4. The point fails.

7. The Organization says that it had no suitable post other than at Brasilia to offer to the complainant and there is no evidence to the contrary. Nevertheless, if an approach had been made to the Organization suggesting consultation about alternatives and a request for sympathetic consideration to be given to any that might emerge, the organization might have been wrong to reject it. But the correspondence summarised in paragraph 3 shows that Mr. Soschin from 24 November onwards repeatedly made it clear that the complainant would not in any circumstances go to Brasilia. When he suggested a meeting for discussion, he was not asking for consultation prior

to a decision, but claiming the right to veto the Organization's decision and to negotiate an alternative. The Tribunal also accepts as true, notwithstanding that Mr. Soschin characterises it in his argument as "simplistic, misleading and basically untrue", Mr. Barahona's assertion in his letter of 10 December that at the meeting on the previous Monday Mr. Soschin did indicate that the complainant would not accept the appointment to Brasilia regardless of whether she was medically cleared or not. Consequently, subject to the two matters considered below, the Tribunal holds that the complainant's appointment was lawfully terminated on 19 December 1980. The Tribunal will not enter into the arguments as to which, if any, of the staff rules enumerated in the Organization's letter of 19 December, authorised the termination. It is an elementary principle of the law of contract that if one party clearly and definitely refuses to honour his or her obligations, the other party is entitled to rescind the contract; and it does not matter whether or not any of the rules say so in so many words.

8. Under the head of failure of due process the complainant alleges various irregularities in the proceedings before the Board of Inquiry and Appeal in 1981. However, the issue which the Tribunal has decided as above turns on the correspondence and does not depend on any finding by the Board. There is only one point on which any irregularity, if proved, might be material. The complainant wished to justify ex post facto her refusal to go to Brasilia in any case by the new contention that she was not in truth medically fit to go there. She did not purpose to do this by calling any evidence of her own but by establishing that, contrary to the Organization's assertion, Dr. Gatenby had not in fact given a medical clearance for Brasilia. The hearing before the Board, which had been scheduled for the first half of May 1981, was postponed in order that Mr. Soschin might submit a questionnaire for transmission to Dr. Gatenby. Despite reminders, oral and written, on 4 May and 27 May the questionnaire had not been submitted by 3 June. Mr. Soschin then asked for and was granted an extension of two weeks. A further extension was allowed on 17 August. On 3 September Mr. Soschin indicated that he would send the questionnaire within ten days. The only reason he gave for the delay was the vacation schedules of himself and his client. On 1 October, the questionnaire still not having arrived, he was told that the case had been scheduled for the first week in November and that documentation must be completed by 12 October. The questionnaire was despatched on 3 November when its admission would have meant a further adjournment so that it might be transmitted and answered. The Board met on 9 November, when it refused to admit the questionnaire. The Tribunal finds on this point that there was no irregularity.

9. There is an allegation of bad faith based on the fact that the Organization did nothing to facilitate the complainant's return to it. The allegation fails. In view of the complainant's attitude the only way in which the Organization could have facilitated her return would have been by conceding to her the right to veto the place of work assigned to her. To refuse to make such a concession is not bad faith.

DECISION :

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 30 March 1983.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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