

SEVENTY-FIFTH SESSION

In re MITASTEIN (No. 2)

Judgment 1293

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Monique Mitastein de Karp against the Pan American Health Organization (PAHO) (World Health Organization) on 7 October 1992, the PAHO's reply of 10 December 1992, the complainant's rejoinder of 27 January 1993 and the Organization's surrejoinder of 5 April 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rule 1050 and WHO Manual paragraphs II.9.265, 280, 290, 310, 330, 340, 350 and 360;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Mexican citizen born in 1939, is trained in microbiology. She joined the PAHO in 1976 under a two-year appointment as a research assistant at grade G.7. She was assigned to the Organization's Pan American Center for Human Ecology and Health (ECO), which is at Metepec in Mexico, and had her appointment regularly extended by two years at a time. In 1979 the Organization promoted her to grade P.3 as a scientist at ECO. In 1986 it revised the description of her post and made her University and Higher Education Specialist at the same grade.

By Judgment 1045, which it delivered on 26 June 1990 on her first complaint, the Tribunal set aside a decision of 7 June 1989 to dismiss her for abolition of post and ordered the Organization to apply the reduction-in-force procedure to her in accordance with Rule 1050.2.(*)(* Rule 1050.2 reads: "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director ..."). On 6 August 1990 the Director of the PAHO set up an "Ad Hoc Committee on Reduction in Force" for that purpose.

In a letter dated 27 August 1990 to the Director the members of the Committee recommended informing the complainant of her rights and duties and the nature of the procedure under Manual paragraph II.9.280 and offering her reassignment in keeping with II.9.290.(*)(* Manual paragraph II.9.290 says: "Offers of reassignment are made first, where possible, to those incumbents whose services have been satisfactory. Staff members who refuse any reasonable offer will not be permitted to take part in the competition for retention provided for in Staff Rule 1050.2 ...") so that she could take part in a "competition for retention".

In a letter of 28 September 1990 to the chairman of the Committee the Director described the complainant as a "very reasonable" candidate for a P.3 post as translator and said that there was no other in which the Organization could use her services.

By a personnel action notice dated 22 October 1990 the PAHO reinstated her as from 1 December 1988 and put her on administrative leave with full pay.

In a letter of 5 November 1990 to the Director the Committee referred to possible vacancies for her in the two areas - technical information management and training - in which she had already served. It urged the Director to make her an offer of reassignment so that the reduction-in-force procedure could begin.

The chief of the Translation Unit having found her qualifications and experience unsuitable for the translator's post, the Director informed the Committee in a letter of 27 November that there was no vacant post he could put her on.

The Committee reported to the Director on 14 December 1990 that it had decided to treat her as a "candidate for retention" and recommended reassigning her to one or other of two vacant posts for a "Technical Officer (Manpower - Training)". The Committee concluded by saying that its report marked the end of its "mandate".

In a letter of 26 December 1990 the Chief of Personnel gave the complainant notice of termination at 31 March 1991. She appealed on 17 January 1991. In its report of 22 May the Board of Appeal recommended reconvening the Committee so that it could resume the procedure, reinstating the complainant from the date of termination to 31 December 1992 and paying her costs.

In a letter of 10 July 1992, the decision she challenges, the Director rejected the Board's recommendations on the grounds that the Committee itself believed that it had completed the procedure.

B. The complainant submits that by ending the reduction-in-

force procedure prematurely and terminating her appointment in breach of the rules the Organization has failed to execute Judgment 1045.

It was wrong to stop the procedure at the rejection of the Committee's recommendation. According to Manual paragraph II.9.330.3, when an official is deemed unsuited for retention after a first competition "a new list is drawn up [for competition] but relating to posts that are one grade lower ...". And if the official fails to get an offer after taking part in competitions at two different grade levels he may, under Manual paragraph II.9.360.1, ask the Committee to admit him to a competition in any other "occupational group" for which he may qualify.

The Director should not have taken a remark in a committee report to outweigh the rules on reduction in force. Yet he bases his decision on the Committee's statement that it had completed its "mandate".

The complainant claims reinstatement as from the date of termination, a complete reduction-in-force exercise, moral damages in a "substantial" amount and costs.

C. In its reply the PAHO submits that the reduction-in-force procedure was fully complied with in this case. Both the Administration and the Ad Hoc Committee sought ways of reassigning the complainant within the same occupational group at her own or a lower grade. But reassignment proved impossible in that group because her post was the only one in it.

The "essence" of the procedure is competition for retention, which Staff Rule 1050.2.1 limits to staff holding relevant posts at the same grade or one grade lower and which Manual paragraph II.9.330.1 restricts to the same occupational group. The Committee recognised the complainant as a candidate for retention and put her name on a list with holders of posts in the "Technical Officer (Manpower - Training)" occupational group, where it found two vacancies. But it did not "strictly" conduct a competition for retention. Instead it concentrated on reassigning her. In any event its conclusion was that it had "completed its mandate".

Since there was no other position in the Organization like the one the complainant had held there were no holders of comparable posts she could compete with. Her former post was "very different" from the two the Committee recommended. Though the Administration was unable to offer her either of them it abided by the purpose and logic of the reduction-in-

force procedure.

D. In her rejoinder the complainant cites two steps in the procedure which the Organization ignored. It offended against Manual paragraph II.9.330.3 by denying her the chance to compete one grade below her last post in the same occupational group and against Manual paragraph II.9.360.1 by denying her the chance to compete in a different group.

She observes that the PAHO never classified her former post or the two posts the Committee recommended according to the rules approved by the International Civil Service Commission and known as the Common Classification of Occupational Groups (CCOG). Those rules would have given the Committee a yardstick to determine which posts fell in the same group as hers, but it was left to seek a "reasonable" solution as best it could. Under the circumstances it was easy for the Administration to maintain that her post was on its own when the occupational group of her post had never even had a name.

If the Administration fails to offer reassignment it has a duty under II.9.360.1 to let a candidate for retention compete in another occupational group. It should therefore have asked her whether she wanted to do so and in what group.

E. In its surrejoinder the PAHO seeks to refute the pleas in the complainant's rejoinder. The CCOG rules are, it says, immaterial because her post was unique and would not have fitted into any of the broad occupational groups presented in those rules. Nor was the Organization under any duty to ask the complainant whether she wanted to compete in another group. That was up to her, and since she had not said so the Director had no reason to assume that she wanted to.

CONSIDERATIONS:

The material facts

1. In Judgment 1045 the Tribunal set aside a decision of 7 June 1989 to terminate the complainant's appointment and ordered the PAHO to apply the reduction-in-force procedure to her in accordance with Rule 1050.2. That procedure is set out in provisions of the WHO Manual.

2. On 6 August 1990 the Director of the PAHO ordered the convening of an Ad Hoc Committee on Reduction in Force to look into the case. In a report of 27 August to the Director the Ad Hoc Committee recommended that the complainant "be informed of her rights and obligations and of the procedures that will be followed" and that the Director make her an offer of reassignment. It drew the Director's attention to Manual paragraph II.9.265.2, about the suspension of external recruitment.

3. In a letter of 28 September to the chairman of the Ad Hoc Committee the Director said that he would be in favour of reassigning the complainant to a post in the Translation Unit. "Unfortunately", he added, "there is no other post for which we could possibly use her services". In a reply of 5 November to the Director the Ad Hoc Committee said, among other things:

"According to the Committee's analysis of Ms Mitastein's resumé, although her educational background lies in biology, she has never actually worked with PAHO/WHO in this capacity. Her activities in this Organization have always been related to technical information management and in the area of education and training. There are at present several vacancies at P.2 and P.3 levels which fall into these categories. Her resumé also indicates that there are other areas in which she has professional expertise

The [reduction-in-force] procedures can only start after the staff member becomes a 'candidate for retention', which is conditioned to the application of Manual Provision II.9.290."

The Committee again drew the Director's attention to the Manual provision about the suspension of external recruitment. The Director's reply of 27 November to the chairman of the Committee was that the question of the complainant's "suitability ... for any post of translator" had been referred to the competent unit; in a memorandum of 20 November to the Chief of Personnel the chief of that unit had concluded that the complainant would not be "well placed" in the Translation Unit; there were no "vacant posts to which she could be reassigned"; and the Committee should therefore go ahead with the reduction-in-force exercise.

4. The Ad Hoc Committee wrote the Director a letter on 14 December 1990. It stated that it "recognised [the complainant] as a 'candidate for retention' entitled to participate in the competition provided for under Staff Rule 1050.2". It went on:

"After careful analysis of Ms Mitastein's personal file and taking into consideration her experience and qualifications, the Committee concluded that 'Technical Officer (Manpower - Training)' is the most appropriate occupation group within which she should compete. A [reduction-in-force] Register was established ... in accordance with the principles set forth in Manual Provision II.9.340.

Following the principles and guidelines established in Staff Rules 1050.2 and 1050.2.5 and Manual Provisions II.9.250-375, this Ad hoc Committee on Reduction in Force finds Ms Monique Mitastein, in view of her qualifications, experience, and performance, suited for vacant posts .3488 and .3598 in [the Health Manpower Development Program], Washington D.C., and recommends her reassignment to one of these posts.

In accordance with Manual Provision II.9.340.5 this Ad Hoc Committee understands that with this report it has completed its mandate."

5. Without further communication with the Ad Hoc Committee the Chief of Personnel wrote the complainant a letter on 26 December 1990. He said that "after reviewing the content of the [reduction-in-force] report" the Organization had concluded that "there is no post to which you could possibly be reassigned if one takes into account the vacancies available in relation to your background". He added:

"the post of University and Higher Education Specialist you were holding in Mexico was unique and we wish to confirm that we have no such or similar post available elsewhere in the Organization."

He gave her notice of termination under Rule 1050 at the end of March 1991.

The material rules

6. The detailed provisions of the WHO Manual on the reduction-in-force procedure lays responsibility for following it on the Director, who, according to II.9.265, shall consult staff representatives before initiating it. The purpose is, according to the same provision, to reduce staff yet keep terminations to the minimum. According to II.9.265.1 there is to be priority for early retirement, retraining, redeployment of staff and measures to encourage staff to leave the Organization. And 265.2 provides:

"in order that reduction in force can be applied to the maximum number of posts, external recruitment is as far as possible suspended."

In accordance with 280 the incumbents of abolished posts must be informed of their rights and obligations and of the procedures to be followed, and 290 states that a staff member who refuses "any reasonable offer" of reassignment may not ordinarily take part in the "competition for retention".

7. The terms of reference of the reduction-in-force committee are set out as follows in II.9.310:

"1. to determine, in accordance with the procedure described in paragraph 330 below, for which posts each candidate for retention may compete;

2. to make a recommendation, in accordance with the criteria set out in paragraph 340, on whether a candidate shall or shall not be retained."

In accordance with "principles" set out in 340 all posts of indefinite duration which are of the same grade and in the same occupational group as the post of the candidate for retention shall be placed in the "priority groups" A to F set out in 340.1. The competition starts with staff in the listed posts in the group with the lowest priority, who, according to 340.2, are put in order of "suitability for retention". It ends when either the candidate for retention has been found more suitable than another staff member or when all priority groups up to and including the candidate's own group have been considered. By virtue of 350 the reduction-in-force committee then submits a report to the Director for an appropriate decision. Lastly, 360.1 and .2 provide that a candidate for retention who has received no offer of another post or who declines an offer of a post at a grade lower than that of the abolished post may ask the committee to let him compete for posts in a different occupational group.

The merits

8. The complainant contends that the PAHO did not, as Judgment 1045 required, conduct a proper and complete reduction-in-force procedure in accordance with the detailed provisions that are summed up in 6 and 7 above. The PAHO maintains that the procedure was conducted in "strict compliance with the rules and regulations" and was completed. It argues that, although the Ad Hoc Committee "did not strictly concentrate in the essence of the procedure, which is to conduct a competition for retention", the procedure ended with a recommendation to the Director and with the statement by the Committee that it had "completed its mandate".

9. In its letter of 14 December 1990 to the Director the Committee recognised the complainant as a "candidate for retention" who was entitled to take part in the competition provided for in Rule 1050.2 and it identified the most suitable occupational group for her to compete in. But it made no recommendation, in accordance with the principles in II.9.340, as to whether the complainant was to be retained in service. The concluding comment by the Committee in its letter that it had completed its mandate was made only on the understanding that it had found two vacant posts in the complainant's occupational group that she was qualified for and because it had recommended putting her on one of them. But that was not a proper recommendation within the meaning of 310.2, cited in 7

above, since the Committee did not specifically state whether or not the complainant should be retained.

10. Had the Director's reaction to the Committee's recommendation for reassigning the complainant been affirmative there would have been no need for a competition; but if it had been negative the Committee would have had to carry on with the reduction-in-force procedure to the conclusion provided for in the rules. From what is said in 8 above it is clear that the Organization itself acknowledges the Committee's failure to identify properly the "candidate for retention".

11. The PAHO puts forward the subsidiary plea that the complainant failed to ask, as she might have done in accordance with II.9.360, to be considered for a post in a different occupational group. The short answer is that the complainant was not afforded an opportunity to make such a request because, the Committee having reported to the Director on 14 December 1990, the Chief of Personnel without further reference to it or to the complainant, gave her notice of termination on 26 December.

12. Since the Organization failed, for the reasons set out above, to complete the reduction-in-force procedure in accordance with the provisions of the Manual the Director's decision confirming the termination of the complainant's appointment cannot stand, her appointment is by implication extended, and she must be given proper redress.

DECISION

For the above reasons.

1. The Director's decision of 10 July 1992 and the notice dated 26 December 1990 of termination of the complainant's appointment are set aside.
2. Her appointment being still in force, the PAHO shall pay her the amounts due under her contract by way of salary and allowances less the termination indemnity and any occupational earnings she may have had since the date of termination.
3. The Organization shall reconvene the Ad Hoc Committee on Reduction in Force to resume examination of her case or, should that prove impossible, shall carry out a new reduction-in-force procedure.
4. It shall pay her 3,000 United States dollars in costs.
6. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

William Douglas
E. Razafindralambo
Michel Gentot
A.B. Gardner