

FORTY-SIXTH ORDINARY SESSION

In re TRONCOSO

Judgment No. 448

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Pan American Health Organization (PAHO) (World Health Organization) by Mrs. Maria del Carmen Troncoso on 7 October 1980, the PAHO's reply of 9 December 1980, the complainant's rejoinder of 28 January 1981 and the PAHO's surrejoinder of 20 February 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rules 530, 910, 920, 940 (now 1040) and 1230 and WHO Manual section II.9.240;

Having examined the written evidence, 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. Having served in the Pan American Sanitary Bureau, the secretariat of the PAHO, as a consultant from time to time over several years, on 23 January 1977 the complainant was given a two-year appointment at grade P.4 on post 3627. She was to be an adviser in human resources, stationed in Guatemala which belonged to PAHO Area III, and for the first year was to be on probation. On 23 January 1978 her appointment was confirmed on the strength of a satisfactory performance report. On 5 May 1978 she was elected to the board of Filial III of the Staff Association. On 30 October she received notice of termination of her appointment with effect from 22 January 1979 in accordance with Staff Rule 940 (now 1040) which reads: "temporary appointments, both fixed-term and short-term, shall terminate automatically on the completion of the agreed period of service ...". The complainant informed the Staff Association at headquarters that the decision was "presumably connected" with her activities in the area Staff Association and asked it to help her and to institute appeal proceedings against the termination of her appointment. The intent to appeal was notified to the Headquarters Board of Inquiry and Appeal on 6 November 1978. On 13 January 1979 the Staff Association concluded an agreement with the Administration for extending the complainant's contract by three months, during which the Administration would explore the possibility of assigning her to another post and duty station. No performance report was made on the complainant for the second year of her appointment. There being no vacancy in any area other than Area III, on 21 March 1979 the complainant was advised that her contract could not be renewed after 22 April. Meanwhile the Government of the Dominican Republic, which the complainant had visited, asked for her services for six months as a consultant, and in May the Administration informed the Staff Association that it would agree to reappoint her as a consultant in the Dominican Republic provided that she withdrew her appeal. The complainant refused, and the PAHO informed the Government, through its representative in the Dominican Republic, that because of her appeal it was reluctant to offer her a consultant appointment but that it could provide other candidates. The Government then itself engaged the complainant. The complainant filed her appeal on 31 October 1979. In its report dated 16 May 1980 the Headquarters Board of Inquiry and Appeal recommended that the Director dismiss the appeal on the grounds that "the application of Staff Rule 1040 was legal and justified". On 23 June 1980 the Director endorsed that recommendation, and that is the decision now impugned.

B. The complainant maintains that the termination of her appointment was due solely to her Staff Association activities. In the negotiations with the Association to find her another appointment the Chief of Personnel declared that she "would not be placed in Costa Rica or any country in Area III because of her activities", and no explanation could be obtained from him about the nature of those activities. The complainant challenges the decision on two grounds: first, it is tainted with prejudice, and secondly, the procedure which preceded it was improper. As to the first point, she cites Staff Rule 1230.1.1, which allows appeals on the grounds of personal prejudice, Staff Rule 910, which lays down the right of association, and Staff Rule 920, which requires recognition of the duly elected staff representatives. She states that at the very time when she was actively involved in setting up a filial of the Staff Association in Area III the Association was suffering repeated attacks from the

Administration, and the Director was encouraging area associations to separate from the headquarters Association. No grounds were given for the decision at the time when it was taken and there is no doubt that the real grounds were her Staff Association activities.

Not until later, when the case came before the Board of Inquiry and Appeal, did the Administration start alleging that her services had been unsatisfactory. If that was the real reason, it is all the more astonishing that no report was made on her performance in the second year. If the reason was the "activities" - which the Administration does not explain and on which the Board shed no light - and if the activities were political, then the reason is quite unfounded and the decision should on that account be set aside. As for the procedure followed, the PAHO was formally bound under Staff Rule 530 to make a second performance report. One of the purposes of such reports is to enable the staff member to attach a statement. The complainant was therefore denied her right to a hearing. Moreover, Staff Rule 530.4 states that evaluation of performance shall be the basis for, among other things, decisions concerning the staff member's status and retention in the Bureau. Manual section II.9.240 requires the supervisor to explain to the staff member the reasons for the decision not to renew his appointment if the staff member so requests. Time and again, and particularly during the appeal proceedings, she asked for explanations, but to no avail.

C. The complainant asks the Tribunal to quash the decision and order her reinstatement in a P.4 post with a two-year appointment or, if the Tribunal feels that reinstatement would be inadvisable, the payment of compensation equivalent to two years' salary plus adjustments. She also claims compensation for the moral prejudice she has suffered as a result of the malicious and unfounded accusations by the Administration, the withdrawal of all offensive correspondence containing accusations regarding her competence which are harmful to her reputation, and costs.

D. In its reply the PAHO contends that the decision not to renew the complainant's appointment fully complied with the material rules and is therefore lawful and justified. There was no connection whatever between the decision and the complainant's Staff Association activities. She is mistaken in relying on Staff Rules 910 and 920, relating to the right of association, since that right has never been denied. But participation in Staff Association activities does not preclude the application of the ordinary staff rules on the normal expiry of appointments. The Board of Inquiry and Appeal did not find that she had been involved in any serious dispute between the Administration and the Staff Association. The Board was unanimous in finding that there was no personal prejudice against her. As for her allegations that the procedure was improper, in any event she had every opportunity to express her views to the Board. She could have appeared in person before the Board had she wished. The Board carried out a thorough review of the case and heard witnesses. In particular it was the Board itself which analysed her performance during her second year of service, thus remedying the absence of a report for that period. Manual section II.9.240, on which the complainant relies, states that the Organization is not required to show cause for not offering an extension of appointment: it merely requires that the supervisor, and not the Chief of Personnel, should explain the reasons to the staff member. The complainant's immediate supervisor testified to the Board that during the week from 10 to 16 November 1979 he explained to her that the reasons were (a) her unsatisfactory performance and (b) the protests about her political activities from three governments in the area (El Salvador, Guatemala and Nicaragua). The PAHO therefore invites the Tribunal to dismiss the complaint.

E. In her rejoinder the complainant points out that the Organization is relying mainly on the Board's findings of fact and conclusions, neither of which are in any way binding on the Tribunal. There was a real dispute between the Staff Association and the PAHO Administration over the facilities provided for the exercise of Staff Association activities and other staff members had also been harassed. As to the relevance of Staff Rules 910 and 920, it is clear from those provisions that Staff Association activities cannot afford valid grounds for terminating an appointment. It is not true to say that the hearing of the case by the Board remedied the earlier flaws in the procedure since the Board, while recognising that there had been such flaws, tamely excused the Administration. Not only did the Board refuse to hear the complainant - being in sore financial straits she was unable to come at her own expense from the Dominican Republic, where she was at the time - but it gave credit only to erroneous statements by witnesses who supported the Organization's case and itself made no exhaustive study of the facts. The grounds for the decision were not given to her at the time when it was taken. It was only later that the vaguest reference was made to her alleged "activities". There was therefore an obvious breach of Manual section II.9.240. In reply to the PAHO's objections to evidence appended to her complaint she points out that in contentious administrative proceedings any evidence is admissible, even excerpts taken out of context from evidence given, particularly since the defendant organisation has the full text in its possession and may refer to other passages if it so wishes. It is therefore for the Tribunal to determine what weight to give to evidence of that kind. The

complainant accordingly presses all her claims for relief.

F. In its surrejoinder the PAHO observes that, though taking exception to the findings of the Board of Inquiry and Appeal, the complainant has not alleged that the Board violated its procedural rules. The Board was thorough in its investigation into the facts and in particular evaluated her duties only with her representative's consent and after hearing her supervisors. Thus it found that her first-level supervisor had had several conversations with her about her performance over the year. Her supervisors were discerning and honest in expressing their views, and there is no substance whatever to her allegation that she was being harassed because of her Staff Association activities. For one thing, she was not really an elected representative, since the local staff association was never formally established, and for another, she has failed to show that she was ever involved in the slightest dispute between the Association and the Administration. The decision is therefore tainted with no error of form, duly substantiated and free from the flaws which would entitle the Tribunal to set it aside.

CONSIDERATIONS:

The production of evidence

1. The complainant appends to her complaint excerpts from tape recordings of evidence given to the Board of Inquiry and Appeal. The PAHO invites the Tribunal to disregard the excerpts on the grounds that they are incomplete or else to ask the Board to produce the complete recordings.

The Tribunal has no reason to disregard the excerpts. The PAHO does not deny their accuracy and was free, if it wished, to supplement them itself. Besides, in hearing the complaint the Tribunal need take account of the evidence in question only in so far as the Board itself mentioned it. The PAHO may not properly object to the Tribunal's passing judgment on findings of the internal appeals body.

The Tribunal's power of review

2. Staff Rule 1040 (formerly 940) provides that a fixed-term or short-term appointment shall terminate automatically on the completion of the agreed period of service unless it is extended. Construed literally, the rule means that all that is needed for such an appointment to terminate is that the period of the contract should expire. It does not mean, however, that on the expiry of that period the Organization is wholly free to continue to employ the staff member or to let him go. PAHO bodies enjoy wide discretion in the matter, but they are not free to decide entirely as they please. Their decision is subject to review within the limits set by the case law; in other words, it will be set aside if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

3. On 23 January 1977 the PAHO gave the complainant a two-year appointment. On 30 October 1978 it informed her that her appointment would terminate on 22 January 1979 in accordance with former Staff Rule 940. It is true that under an agreement concluded on 15 January 1979 the complainant's appointment was extended by three months, to 22 April, but it came to an end once and for all on that date.

Thus the full period for which the complainant had been appointed had expired by the time the PAHO terminated her contract. The decision is therefore in accordance with former Staff Rule 940 (now 1040). The Tribunal will nevertheless consider the complainant's plea that the decision suffers from a flaw which entitles the Tribunal to set it aside.

The grounds for the impugned decision

4. The rule cited above does not expressly require the PAHO to give reasons for its decision not to extend an appointment. Only Manual section II.9.240 requires that a staff member who is not offered an extension of appointment shall, if he so requests, be given an explanation by his supervisor of the reasons for the decision. The Tribunal may however, exercise the power of review which it assumes in such cases only in the light of the grounds given for the decision to terminate the appointment, and if those grounds are not clear from the actual decision will seek to determine them from the other written evidence.

No grounds are given for the decision, which is dated 23 June 1980, nor for the PAHO's letter of 30 October 1978 informing the complainant that her appointment was terminated. A report on her performance was made for 1977

but, with some reservations, it was favourable, and she had her contract extended and her salary increased. That was not the reason therefore, for the impugned decision. There was no report on her performance for 1978. Her supervisors may have made criticisms, but there are no details of the conversations which took place. In short, it is the evidence submitted to the Board of Inquiry and Appeal that contains the criticisms made against her, and the Tribunal will now consider the significance of that evidence.

5. On the strength of evidence given by two of her supervisors, the Board made the following comments on the complainant's professional abilities. First, it acknowledged her remarkable and indeed outstanding technical competence. As to her ability to perform her duties, it drew a distinction: in her relations with university circles she was beyond reproach but she was criticised for the quality and quantity of her work in 1978 related to the training of medium-level and auxiliary staff duties, to which countries were giving growing importance.

6. As to her alleged political activities, the Board accepted the statements by her first-level supervisor. It observed that he had received protests from the Governments of El Salvador, Guatemala and Nicaragua either directly or through PAHO representatives. The protests were made orally, and her first-level supervisor had refrained from seeking written confirmation which might have been harmful not only to governments of member States and to the PAHO but also to the complainant herself. The dossier contains no information on the nature of the political activities in which she is said to have engaged.

The flaws in the impugned decision

7. In accordance with Staff Rule 530.2 supervisors shall periodically, and at least once a year, make a formal evaluation of the performance, conduct and potentialities for greater usefulness for staff at D.2 level and below. There was no report on the complainant's performance in 1978. Staff Rule 530.2 was therefore not complied with, and there was a flaw in the procedure.

The decision not to extend her appointment, which the PAHO took as early as 30 October 1978, did not relieve her supervisors of the duty of appraising her performance. Staff Rule 530.4 states that evaluation of performance shall be the basis for decisions concerning the staff member's status and his retention in the Bureau. The Organization should therefore have obtained the required report for 1978 before taking the final decision on the extension of the complainant's appointment.

That was no empty formality. According to Staff Rule 530.3 the staff member may attach to the performance report a statement challenging the appraisal. His position will differ according to whether or not there is such a report. Where there is a report the PAHO must take account of any comments by the staff member; where there is not it is unaware of his response to criticism.

The PAHO is mistaken in contending that the flaw was removed by the appeal proceedings in which the Board heard the witnesses it had summoned proprio motu or at the complainant's request. It is of course possible that in certain circumstances proceedings following a decision not to extend an appointment may remedy the absence of a report. But they did not do so in the present instance, the criticisms of the complainant being not only challenged but open to various evaluations.

There is no merit in the PAHO's plea that the complainant agreed to discuss the grounds for terminating her appointment in the Board of Inquiry and Appeal provided that she was allowed to call witnesses of her own choosing. But she was not on that account condoning the flaw in the procedure.

Lastly, it is immaterial that her supervisors informed her orally of the shortcomings of which they accused her. Their conversations with her - on what subject has not been stated - did not make good the absence of the report required by Staff Rule 530.2. The rule requires a report "in addition to the normal work review and discussion".

8. In so far as the decision not to extend her appointment was based on the complainant's professional shortcomings and political activities it failed to take account of essential facts.

(a) In assessing the complainant's professional abilities the Director was no doubt obliged to take account of the appraisals by the supervisors, whom the Board of Inquiry and Appeal was therefore right to summon. But he overlooked many facts which emerge from the written evidence.

First, several witnesses heard by the Board expressed unqualified praise of the complainant. They were, it is true

not supervisors but close colleagues, but even though their opinion does not carry the same weight as that of her supervisors it cannot be ignored.

Secondly, the governments of countries where the complainant was stationed often sought her services, and in particular in the second half of 1978. Such requests were made, for example, by Nicaragua and El Salvador, countries which the PAHO alleges had taken exception to her political activities. Presumably, had her services been open to serious reproach, they would not have been sought by governments, even for the performance of duties scheduled long in advance.

The complainant received favourable appraisals in 1977, with only a few qualifications. Notwithstanding the unproven criticisms levelled against her in 1978 the praise she received earlier ought to have been taken into account.

In view of the variety and range of her duties she could very probably have continued to be assigned to duties which suited her, while being relieved of those for which she was less well suited.

On 15 January 1979 the PAHO agreed to extend her appointment by three months and later considered even offering her a six-month appointment: the inference is that it did not consider her unfit to continue to serve on its staff. The reasons for finally deciding not to give her a new appointment are immaterial.

In short, for the many reasons given above the Director exceeded the limits of his discretionary authority in relying exclusively on the opinion of her two supervisors.

(b) The political activities she is said to have engaged in were never investigated and cannot therefore serve to excuse the inadequacy of the grounds for the decision. Even though the protests came from governments of PAHO member States they are not decisive. The Organization cannot bow to a government's wishes before making sure that they are compatible with its own interests. It is not established that the Director inquired into the substance and validity of the protests.

9. Since the impugned decision is tainted with a procedural flaw and failed to take account of essential facts the Tribunal will allow the complaint. It need not therefore consider whether the decision is tainted with any other flaws for example whether it constituted a misuse of authority or whether clearly mistaken conclusions were drawn from the facts.

The complainant's claims for relief

10. Because of the flaws in the decision the Tribunal may either set it aside or award the complainant compensation. The former would mean reinstating her. From the written evidence it is clear that mutual trust between the complainant and the PAHO has diminished to the point where it is unlikely that she can again be usefully employed. Her reinstatement is therefore inadvisable and the Tribunal will accordingly award compensation, determined *ex aequo et bono* at 12,000 United States dollars. The amount takes account in the fact that since 1 July 1979 the complainant has been employed by the Government of the Dominican Republic, and it compensates the moral and all other prejudice she has suffered.

The complainant is also awarded costs amounting to 3,000 dollars.

Her application for the removal of the documents which cast doubt on her professional abilities is dismissed. Any prejudice which may have been caused by such documents may be treated as made good by the present judgment.

DECISION:

For the above reasons,

1. The PAHO shall pay the complainant compensation amounting to \$12,000.
2. She is awarded costs amounting to \$3,000.
3. The other claims for relief are dismissed.

In witness of this judgment by Mr. André Grisel, 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, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1981.

(Signed)

André Grisel
Devlin
H. Armbruster

A.B. Gardner