

FORTY-EIGHTH ORDINARY SESSION

In re GARCIA and MARQUEZ (No. 2)

Judgment No. 496

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the Pan American Health Organization (PAHO) (World Health Organization) by Dr. Juan César García and Dr. Miguel Márquez on 6 May 1981, the PAHO's single reply of 1 July, the complainants' single rejoinder of 24 July and the PAHO's single surrejoinder of 1 September 1981;

Considering that the two complaints relate to the same matters and should be joined to form the subject of a single decision;

Considering the memorandum dated 27 July 1981 provided at the Tribunal's request by the PAHO Staff Association and the Organization's memorandum dated 1 September 1981 making observations on the Staff Association's memorandum;

Considering the answers to a questionnaire of the Tribunal, submitted on 22 October 1981 by the complainants and on 28 October 1981 by the organization, and the observations on those answers made on 25 November 1981 by the organization and on 1 December 1981 by the complainants;

Considering the applications to intervene filed by:

Ms. Mercedes Alonso

Ms. Eleonor Ambler

Mr. Juan Carlos Arietio

Dr. Micheline Beaudry-Darismé

Mr. José Carlos Campagnaro

Ms. Libia Victoria Cerezo

Ms. Berta Chiari

Ms. Né linda Cubile (formerly Subiela)

Dr. Miguel Dicancro

Ms. Sara Espínola

Ms. Josefina García

Dr. George Gillespie

Ms. Olinda Glorioso

Ms. Luz María Gluecksmann

Ms. Sylvia López-Calleja

Mr. Benjamin Mejía

Ms. Maria de los Angeles Muñoz

Ms. Isabel O'Connell

Ms. Violeta Ortega

Ms. Miguela Pérez Esandi

Dr. Julio César Perrone

Ms. Edith Quiñones

Ms. Patricia Rodríguez

Dr. Hector Olivares Silva

Mr. Arnaldo Trenchi

Dr. Maria del Carmen Troncoso

Mr. Terrence Woods

Mr. Francisco Zepeda

and the PAHO's observations on the applications, including its observations of 7 August and 2 September 1981 on Mr. José Campagnaro's application;

Considering Articles II, paragraph 5, VII, VIII and X, paragraph 1(c) of the Statute of the Tribunal, Article 17, paragraph 2, of the Rules of Court, and PAHO Staff Rules 910, 920, 930, 1230 and 1240;

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. The Case dates back to 1978, when Dr. García was Chairman and Dr. Márquez Vice-Chairman of a committee representing the staff of the PAHO, known as the Staff Committee. Both are P.5 officials, Dr. García being stationed in Washington and Dr. Márquez in Nicaragua. The events which led to the filing of the complainants' first complaint, to which the present complaint is the sequel, are summarised in paragraph A of Judgment No. 408. The complainants had lodged an appeal with the PAHO Board of Inquiry and Appeal in October 1978, but they became convinced that the Board would not hear the case and that the dispute had reached an impasse. They therefore withdrew and filed their first complaint with the Tribunal on 17 May 1979. In Judgment No. 408 the Tribunal held that there had been no valid grounds for divesting the Board of an appeal which it was in no way prevented from hearing, that there were no grounds for allowing any derogation from the rule that the internal means of redress must be exhausted and that the complaints should therefore be dismissed. The case was resubmitted to the Board forthwith. There were 38 interveners. The complainants alleged that the Administration had "denied them individually and collectively their right of association" guaranteed under Staff Rule 910⁽¹⁾ and impaired their "ability to represent the staff's views ... to the Organization", which was guaranteed under Staff Rule 920⁽²⁾. In its report dated 8 December 1980 the Board concluded that the appeal should be dismissed, mainly on the grounds that the remedies sought were not practical. In three special recommendations, however, it sought to impress on the Administration the intent of the Staff Rules to confer an "unabridgeable right to associate" and suggested amending them to define clearly the practical and procedural components of representation and jointly establishing a formal grievance procedure. In a letter dated 5 February 1981 and notified to the complainants on 9 February, the Director endorsed the conclusion but not the recommendations, and that is the final decision impugned.

B. The complainants state that they are and were at all material times members of the Staff Association. At the material time both were elected representatives. The interveners are or were members or elected officials of the Staff Association. The complainants trace in detail the recent history of relations between the Administration and the Association, contending that animosity began in 1976, when a staff member disappeared in Argentina and the Association pressed the Director to make inquiries. A summary appears in paragraph A of Judgment No. 408. The

complainants also give details of the treatment they have received, which they believe constitutes victimisation on the grounds of Staff Association activities. The memoranda contain information on the treatment of the interveners, also alleged to constitute victimisation. Such treatment has consisted in non-renewal of appointment, transfer to other duty stations, abolition of post, unfavourable and unfair appraisal of performance, reduction in duties, lowering of status and other forms of harassment. The complainants submit that through such treatment the Administration has denied to them, and to the staff in general, freedom of association, of assembly and of representation in breach of Staff Rules 910 and 920 and the universal principles of law. It is, they believe, clear on the evidence that the Director has sought to discredit the staff leaders, divide the staff by encouraging splinter associations, silence the Staff Association by withholding facilities for communication, and "destroy, demoralise and diminish" the leadership of the Association. Starting in 1978 and throughout 1979 adverse personnel decisions against staff representatives reached an unprecedented number and the circumstances suggest that they were linked to Staff Association activities. The sudden withholding, in 1978, of facilities for communication between staff representatives and staff was an arbitrary and punitive measure. The facilities have not been restored. The complainants accordingly seek what they describe as "individual and collective remedies": (1) that the Administration pay the Staff Association contributions wrongfully withheld since 1978; (2) that it reimburse the Association all expenses incurred in sending telegrams, telexes, etc., through commercial facilities; (3) that it pay 100,000 United States dollars in damages for moral prejudice to the staff and its representatives, the sum to be deposited in the Staff Association Legal Defence Fund; (4) that it pay \$10,000 towards costs; (5) that the Board of Inquiry and Appeal be constituted as a "claims board"; and (6) that the Tribunal award any other remedies it deems fit.

C. In its reply to the complaints the Organization contends that they are irreceivable. The Tribunal having dismissed the original complaints, the complainants and the interveners were not free to return to the internal appeals body whose competence they had chosen to spurn, and they were therefore time-barred. As to whether they could introduce new proceedings alleging recurrent infringements of their rights, the Board observed that the only possible such infringement was the alleged restriction on the use of facilities, but it omitted to determine whether that would constitute infringement of the terms of appointment of staff members. In fact, to alter the nature of the Staff Association's facilities constitutes no breach of any obligation provided that the right of association has been respected and adequate time off granted to staff representatives. There was therefore no continuing breach of an obligation such as to open new time limits for an appeal to the Board. Besides, once an appeal has been brought and dismissed, no new cause of action can arise from the same facts; the allegations relate to events in 1978 and 1979, and any appeal based thereon was therefore time-barred. Furthermore, the contention by Dr. Márquez that his transfer was punitive is irreceivable for failure to exhaust the internal means of redress. As to the applications to intervene, the PAHO submits that they are all inadmissible on the grounds that no applicant can allege identity or similarity of facts such as to create a valid interest in the outcome of the complaints. Moreover, some of them have filed their own complaints with the Tribunal on the same set of facts, and the Organization cannot be put in "double jeopardy". One intervener has an appeal pending before the Board, and on similar grounds that application should be disallowed. Some have resigned from the staff, and voluntarily, and their claims are therefore extinguished. Another intervener settled all differences with the Administration by negotiation on termination of appointment. Others show no grounds whatever to support their applications. In any event there is no evidence to show why the applicants have any right to intervene, and to hear their claims would require detailed evaluation of evidence turning on the facts in each instance. Besides, if the complaints are dismissed, the applications too must fail: the alleged grievance of the interveners cannot constitute a separate cause of action. Turning to the merits, the Organization contends that the disappearance of a staff member in Argentina is being used ex post facto to justify the "aggressive" attitude of the staff representatives towards the Administration; in fact all the steps that were likely to be successful were taken to inquire into the matter, including intercession by the Director-General of the WHO and the Secretary-General of the United Nations. Since 1975 the PAHO Administration has made very real efforts to improve relations with the staff and facilitate the Staff Association's work. It is true that in 1978 relations became strained over the Committee's use of the PAHO communication and document production services, and on that account and because of the cost, the Administration restricted and regulated the use of telephone, telex and other communication facilities. But in 1979 relations improved and on 13 August 1980 the Administration authorised the use of facilities for a trial six-month period. The arrangements were renewed on 17 April 1981 for one year, subject to a limit on the cost of printing and telexes. Members of the Staff Committee were also given time off to carry on their Staff Association activities, and staff representatives have been setting up joint working groups. The PAHO repeats the submission it made in reply to the complainants' first complaint that staff transfers were decided in the Organization's interests; it points out that during the material period the WHO and the PAHO were revising their programmes and structures and that the reorganisation meant progressive decentralisation,

including the strengthening of field offices and cuts in technical staff at headquarters. To the complainants' allegations that, by way of punishment, they were not allowed to attend certain scientific meetings, the PAHO retorts that assignment to duties is a matter of discretion. Nor is there any evidence to support Dr. Márquez's allegation that he was the victim of a punitive transfer. His assignment as country representative in Nicaragua enhanced his responsibilities and reflected changes in the organization's programme. Lastly, as the Board observed, there is no logical connection between the remedies sought and the facts alleged. The arrangements under which the Staff Association operates are an administrative matter and do not fall within the scope of the appeals procedure. In any event, the reasons for the reduction in facilities have been explained. The Statute of the Tribunal does not provide for granting the collective remedies sought: the complainants are not asking for the rescinding of any individual decision or the performance of any obligation relating to them. Nor is there any provision for the award of damages to a staff association. The Organization accordingly asks the Tribunal to dismiss the complaints and the interventions and to refuse the relief sought and costs.

D. In their rejoinder the complainants submit, as to receivability, that the merits of the case were not dealt with in Judgment No. 408. The Tribunal left it to the complainants to remove the procedural defect by lodging the case again with the Board and that defect has thus been removed. Nor was the internal appeal time-barred: it was originally filed within the sixty-day time limit prescribed by the Staff Rules. As to the merits, the complainants contest the Organization's presentation and interpretation of the facts. The staff representatives acted with proper zeal, not aggressively, in pressing inquiries into the fate of the official who had disappeared in Argentina. The Administration is giving a false picture of relations with the staff. Its explanations of Dr. Márquez's transfer are unconvincing; there was no reason for the adverse administrative action, bar a desire to punish staff representatives. The facilities were also withdrawn from the Association for punitive purposes: the financial reasons are false. As to the applications to intervene, they are both receivable and well-founded. There is similarity both in fact and in law with the position of the complainants. The complainants and the interveners all have in common their membership of the Staff Association, and it is on that account that they too have suffered adverse administrative action prompted by personal prejudice within the meaning of Staff Rule 1230. All interveners were staff members and members of the Staff Association at the material time; all alleged injury resulting from the denial of their rights under Staff Rules 910 and 920; all have suffered curtailment of their contractual rights; and all those still on the staff have an identifiable interest in the outcome of the case. The organization's objections to the applications filed by various groups of interveners are not valid, for the reasons which are set out in the rejoinder. The Tribunal is not being asked to examine the individual circumstances of the interveners but to determine whether there has been a breach of the rules on freedom of association. In fact there has been a classic pattern of anti-union conduct along the lines described in the original memoranda and fully corroborated by the written evidence. The Tribunal may therefore award the collective relief set out in (1), (2) and (3) of paragraph B above. As to the remedies sought, under Article VII, paragraph 2, of its Statute the Tribunal may hear complaints "affecting a class of officials", and it may therefore award compensation in accordance with Article VIII. The term "double jeopardy" is inapposite: there are sufficient safeguards to prevent double compensation by the Organization.

E. In its surrejoinder the Organization maintains that the complaints are irreceivable. When the Tribunal dismissed the original complaints on the grounds that the complainants had failed, without adequate excuse, to exhaust the internal procedures, the time limits under Staff Rule 1230.8.3 for following those procedures were not automatically reopened. As to the applications to intervene, since they are based on membership of the Staff Association, the interveners cannot be entitled to relief on the grounds of individual circumstances, which would have to be examined in full. There cannot be a "collective" statement of facts; the facts set out in the complaint relate only to the position of the complainants. As to the merits the Organization rejects any suggestion that it became hostile to the staff representatives because of the case of a staff member who went missing in Argentina. The improvement in staff relations was attested to by the General Secretary of FICSA in a report in December 1980. Facilities were curtailed for the Staff Association because excessive and sometimes inappropriate use was being made of them, and in any case the curtailment did not amount to interference with the right of association. Staff Rule 910 means that the Administration must not hamper staff representatives in performing their functions as such: it does not lay any duty on the Administration to provide facilities, except perhaps reasonable time off. The grant of facilities is discretionary and does not confer rights on individuals. Agreements on facilities are not to be equated with contracts of employment. The Administration again rejects, with full explanations, the allegation that staff representatives had been reassigned or terminated or humiliated on account of their staff activities. As to the relief sought, the Statute of the Tribunal makes no provision for collective remedies, and an award of compensation to the Staff Association would not come within the scope of Article VIII. Nor does the Statute provide for the establishment of a "claims board". The Organization again invites the Tribunal to dismiss the complaints as irreceivable or as utterly devoid of merit.

F. The Tribunal invited the PAHO Staff Association to state whether, in its view, the Administration followed a policy of penalising staff members because of their activities in the Association. In a memorandum dated 27 July 1981 the Association replies that in its view the Administration is indeed following such a policy and has committed serious breaches of the right of association. In support of its contention it cites a comprehensive report on a mission of the Federation of International Civil Servants' Associations to the PAHO in September 1979, as well as many other items of evidence. It alleges that the decline in relations with the staff dates back to the Administration's ineffectual response to the abduction of a staff member in Argentina in 1976. Since then the Administration has taken a combative attitude towards the Staff Association by systematically hampering its operations. The Association gives many examples of the repressive policy it alleges, and under four main heads, namely limitations on consultations between staff and management; administrative interference with internal activities of the Association including encouragement of a splinter union in the Pan American Center of Zoonoses in Argentina (CEPANZO), the packing of the Staff Committee in 1979, and restrictions on meetings; the withholding or restriction of facilities, such as office space and the use of telex and other communication services; and the elimination of staff leaders by taking abusive personnel action such as transfer and non-renewal of appointment on the grounds of a reorganisation of the PAHO. It gives examples of such elimination.

G. In a memorandum dated 1 September 1981, also accompanied by many items of evidence, the PAHO makes observations on the Staff Association's memorandum. It firmly denies the existence of any policy of penalising staff members because of their activities in the Association. The Association used the disappearance of the staff member in Argentina as a pretext for making new demands, despite all the efforts made to improve staff relations. The Administration does consult the staff representatives on a wide range of matters and it gives examples. It has not interfered with the internal activities of the Staff Association. In fact the Staff Association does not necessarily have the monopoly of staff representation, and the staff may join any type of association provided membership is not incompatible with their status as officials. The creation of a professional staff association in CEPANZO was not an unfair labour practice. The Staff Committee in 1979 was duly elected. As to the alleged elimination of staff leaders, the transfer of a staff representative does not rob the staff of the benefits of his leadership: a staff member is not immune from the normal incidents of service just because he is a staff representative, and in any case he may still carry on staff activities in his new duty station. Not all the staff members mentioned by the Staff Association were dismissed, as might be inferred from the Association's memorandum. The reorganisation of programmes and budget constraints have led to staff cuts. There has been no ouster or purge of staff leaders on the grounds alleged by the Association. Since 1973, apart from those who retired or resigned, only one member of the Staff Committee, Dr. Beaudry-Darismé, has had her appointment terminated and many staff representatives have been promoted or have taken part in staff training. For years relations with the staff have been difficult, but there is no evidence of any deliberate attempt to deny the right of association.

H. On 25 September 1981 the Tribunal sent a questionnaire to the complainants and to the defendant organisation inviting observations on the following questions:

1. At the time of the alleged sudden withdrawal what facilities was the Staff Association enjoying? Which of them were withdrawn?
2. State how and when each withdrawn facility was created, producing and identifying all written material - letters, minutes, memoranda, etc. - evidencing such creation.
3. State how and when each such facility was withdrawn, producing and identifying all written materials as above.
4. What in your belief was the reason for the withdrawal? In so far as such reason does not appear from the written material, state the grounds for your belief.

Each of the parties was also invited to comment on the observations filed in reply to the questionnaire by the other. It appears from the memoranda thus submitted that the facilities enjoyed by the Staff Association included the services of a secretary, the allocation of premises, the grant of administrative leave for Staff Association officers, the use of printing and processing services and communication facilities (telephone, telex, etc.) and the payment of an annual contribution by the Organization, amounting at one time to US\$1,500. Facilities have been granted since the foundation of the Association but have since been enlarged, for example under a formal agreement concluded in 1976. Another agreement, concluded in 1978, was apparently never put into effect.

I. The complainants maintain that the use of printing services and communication facilities was withdrawn altogether from the Staff Association. The Organization contends that the functioning of the Association was not hampered even though there was a reduction in certain facilities. Both sides agree that restrictions were imposed at the time of the 20th Session of the PAHO Conference. The Organization contends that the measures then taken were the consequence of the Association's directly addressing governments in disregard of United Nations practice. The complainants explain that what the Association did was to send a cable to the Conference and a letter to the Conference delegates and that the Administration's reaction was disproportionate since it prevented communications with the field staff and their filials.

CONSIDERATIONS:

Receivability

1. The proceedings in this matter originated on 31 October 1978 when the complainants appealed to the Board of Inquiry and Appeal, making substantially the same allegations as those which are now before the Tribunal. The subsequent proceedings before the Board are summarised in paragraph A of the Tribunal's Judgment No. 408. On 17 May 1979, feeling that the dispute had reached an "impasse", the complainants filed a complaint with the Tribunal. On 25 July 1979 the complainants' agent wrote to the Secretary of the Board, notifying her of their action and adding: "We are therefore withdrawing said case" from the Board.

2. When the complaint thus filed reached the Tribunal the Organization objected to it as irreceivable on the ground of non-compliance with Article VII, paragraph 1, of the Statute of the Tribunal, which requires that the internal means of redress shall have been exhausted. The complainants pleaded "that the defendant organisation resorted to tactics to delay the Board's decision". The Tribunal found that, although the Organization's attitude was "open to reproach, the complainants were not on that account entitled to forgo a decision from the Board". Accordingly, by Judgment No. 408 the complaints were dismissed. The complainants then "resubmitted" the case to the Board. The Board allowed the appeal to proceed and found that "the remedy sought by appellants cannot be sustained". The Director on 5 February 1981 decided accordingly and from this decision the complainants now appeal to the Tribunal. The Organization contends that the appeal was irreceivable by the Board and therefore is irreceivable by the Tribunal. It bases this contention on two grounds: first, that the complaint had been dismissed by the Tribunal under Judgment No. 408; second, that the appeal had been withdrawn before the Board and that any new appeal would be out of time.

3. The first ground fails. The appeal was dismissed as irreceivable. Such a dismissal constitutes no barrier to a second presentation if the objection of irreceivability can be overcome. The Organization argues that because the formal decision was simply that the complaints "are dismissed" without any words such as "as irreceivable" being included, the appeal must be taken as having been dismissed on the merits although these were not considered by the Tribunal. This is mistaken. Even if the formal order only is considered, the appeal was dismissed "for the above reasons" and the reasons are clearly confined to receivability.

4. The second ground also fails, though it raises a more difficult point. There are circumstances in which an exception is permissible to the rule that the internal means of redress shall have been exhausted. In its Judgment No. 408 the Tribunal said that there would be an exception "if the Board either by its statements or by its conduct had evinced an intention not to give a decision within a reasonable period". The Tribunal held, however, that while the Board showed the Organization too much forbearance, it did not evince any such intention. Nevertheless, the complainants in applying to the Tribunal were not acting without some grounds and should not in such circumstances be forced to elect between on the one hand submitting to what might be an inordinate and inexcusable delay and on the other hand losing their remedy altogether. When the Board is notified that an application of this sort is being made direct to the Tribunal and does not consider it to be frivolous, it should as a general rule suspend the proceedings until the outcome is known. Such application will be rare and the delay is unlikely to prejudice anyone except the complainants themselves. The complainants in this case obviously had no intention of abandoning their appeal; their wish was to expedite the hearing. As a matter of procedure they made a mistake in asking for the case to be withdrawn, but the situation was unprecedented and it was one to which the inactivity of the organization had contributed. A procedural error should not in this instance be held against the complainants.

Form of the proceedings

5. The complainants are staff members who at the material time were Officers of the Staff Association. The first complainant, Dr. García, was Chairman of the Staff Committee: see paragraph 10 below. It is stated in the dossier that both complainants were victims of the punitive measures which are referred to in paragraph 16 below. They do not however seek any relief on this ground. Their claims are only in respect of alleged breaches by the Administration of Staff Rules 910 and 920 and of the principle of freedom of association.

6. The principle is accepted by the Organization and Article VIII of the Staff Regulations (which is headed "Staff Relations" and requires the Director to make provision for staff participation in the discussion of policies relating staff questions) and Staff Rules made thereunder give effect to the principle. The Rules provide inter alia that staff shall have the right to associate themselves together in a formal organisation for the purpose of developing staff activities and making representations to the Bureau concerning personnel policy and conditions of service; that Staff Associations shall have the right to request their membership for voluntary financial contributions; and that the Bureau may give financial assistance to any such Association in the furtherance of activities beneficial to the staff provided the membership of the Association also contributes substantially to such activity. The rights conferred by these rules must be taken together with those that are derived from the general principle; they are referred to below compendiously as the "right to associate". By each contract of appointment the Organization accepts as part of the contractual terms the obligation not to infringe the right to associate. Consequently any decision by the Organization which involves an infringement may be made the subject of complaint by any persons holding such a contract. The complainants are such persons.

7. Under Article X 1(c) of the Tribunal's Statute and Article 17.2 of its Rules of Court, any person to whom the Tribunal is open under Article II of its Statute may apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given. The Staff Association, being the formal organisation created under Staff Rule 910, seeks to intervene as a "collective personality". It is unnecessary to decide whether or not the Association has such personality. Assuming that it has, it is not a personality which holds a contract of appointment by the Organization so it is not a person to whom the Tribunal is open under Article II. The intervention cannot be received.

8. There are 28 named interveners. In more than half the cases it is alleged in the dossier that punitive measures of the same sort as were taken against the complainants were taken also against these interveners. Since, however, the complainants are not seeking any relief in respect of such measures, this is irrelevant. An intervener must have a right which may be affected "by the judgment to be given"; where no relief is asked for, no judgment will be given; the possibility that in the considerations which lead to the judgment some findings may be expressed which would be of assistance to a person seeking to intervene does not justify intervention. The objections raised by the Organization to certain interveners on the ground that they have filed individual complaints in respect of the punitive measures alleged need not therefore be considered.

9. Since the breach alleged is an infringement of the right to associate and since that right is enjoyed by every staff member, it is manifest that every staff member has a right which may be affected by the judgment to be given. It is unnecessary therefore for any staff member to show any further ground for his intervention. The Organization, however, alleges that a number of the interveners have resigned or otherwise ceased to be staff members at the time of their intervention; such persons must show some special ground for intervention.

Background

10. The Organization has its headquarters in Washington D.C. and branch offices in "the field", e.g. the capitals of the South American countries in which it operates. The Staff Association is centred on Washington with branches, known as filials, in other capitals. The Committee (to be referred to as the Staff Committee) of the Staff Association is elected exclusively by members at headquarters. In 1976 relations between the Director and the Staff Association - or, as the Director would put it, the Staff Committee - began to deteriorate. In that year a member of the staff was kidnapped; the Staff Committee felt that the Director was insufficiently energetic about pressing member governments to intervene. The Director took the view that the Staff Committee, which had been elected by a large majority but only of the headquarters staff, was unrepresentative. In July 1977 and again in July 1978 he addressed a number of meetings in the field at which he criticised the Staff Committee. On 17 July 1978 he severed his formal connection with the Staff Association.

11. According to the complainants he was working for the break-up of the Association by encouraging the formation of separate branch associations and separate associations for the Professional and General Service

categories. The complainants call these activities of the Director divisive and elitist. They represent them as a breach of their right to associate: in this they are mistaken. The Director is entitled to hold views about the form of association which is most useful to the Organization. He may use neither threats nor inducements to impose his views on staff members. But the principle of freedom of association does not require him to keep silent about them any more than the loyalty which he expects from his staff precludes responsible criticism of the Administration. Manifestly, these are areas in which to preserve good relations both sides should move with great circumspection. But it is not an area in which the Tribunal will intervene.

Claims

12. The complainants claim that the Director has infringed the right of association in various ways which they group under four heads. The Tribunal will consider the allegations under each of these heads in order to decide in the first instance to what extent they require examination on the facts.

13. The first allegation is that "the Director publicly discredited Staff Leaders, referring to them as fanatics, incompetents and persons not representative of their constituents". The evidence in the dossier does not go further than to show that at Staff Meetings the Director said that the Staff Committee at headquarters represented only a vocal minority and that he referred to some of them as "bad apples". The Tribunal is not here concerned with whether or not such observations are judicious. Freedom of association does not require that representatives of the association should be free from criticism. There is no need to examine this allegation further.

14. The second allegation is that "the Director vigorously encouraged splintering within the Staff Association itself", e.g. influencing Professional staff to form separate associations. There is evidence that the Director approved of the formation of a separate professional association at CEPANZO and that he encouraged others. There is no evidence that he interfered in any way with the freedom of choice of staff members and therefore no evidence that he interfered with freedom of association. There is no need for this allegation to be examined further.

15. The third allegation is that "the Director withheld the means of communication - operational facilities - which had been provided to the Staff Association since its inception". Similar allegations in other parts of the dossier complain of the withdrawal of other types of facility. All these facilities have been granted under agreements, express or implied, usually made after consultation between the Administration and the Association. It is not disputed that in or about-September 1978 the Director decided to curtail or diminish or alter several important facilities. The Organization contends that these are all privileges which the Administration can withdraw at will and consequently its actions are outside the jurisdiction

of the Tribunal. This raises an important question which requires separate examination.

16. The fourth allegation is that there was "a master scheme, orchestrated from the top of the Organization, aimed at individuals to punish them for the collective activity of exercising freedom of association". The complainants tabulate 22 cases of staff members allegedly punished for staff activities by termination, forced transfer or other similar measures. Such actions, if proved, would certainly establish a breach of the right to associate. But they would establish also a gross abuse of power for which the individuals concerned could obtain redress. The organization objects that it should not be required to meet a general allegation in this form. This objection is upheld.

Withdrawal of facilities: the principle

17. The Tribunal rejects the Organization's contention that the grant of facilities to the Staff Association is a privilege which can be withdrawn at will. The Association exists partly because it is in the interests of the Organization that it should. If it were nothing more than the creation of the staff, the Organization could have no concern with it and there would be no place for it in the Staff Regulations. The Organization does not provide facilities purely out of benevolence but because it is in the interests of the Organization that the functions which the Association discharges should be fully and competently performed. Facilities should be granted only when it is in the interests of the Organization that they should be; likewise, they should be withdrawn, wholly or in part, only when the withdrawal is in the interests of the Organization.

18. The Tribunal cannot concern itself with any and every claim by the Staff Association for breaches of agreements for the supply of facilities. Such agreements take effect within the province of labour relations into

which the Tribunal does not enter. The Tribunal is concerned only with allegations that the Administration is violating the right to associate; breaches of labour relations may, if sufficiently grave, be relied upon in support of such allegations. In the next two paragraphs the Tribunal considers in what sort of circumstances it can concern itself with such breaches.

19. First, a wholesale withdrawal of facilities might amount to a violation of the right to associate. The Organization, having in its own interests allowed and encouraged the Staff Association to believe that it could look to it for the provision of certain facilities, upon which the Association has come to depend for its existence, could not, without an amendment to the regulations, withdraw or diminish them to such an extent as to cripple the Association's work. Likewise, it might be shown to be impossible for contact between the members to be maintained if officers were altogether deprived of administrative leave. The evidence in this case is not sufficient to establish a breach of this character.

20. Secondly, the withdrawal of facilities could violate the right to associate if, irrespective of scale, it was designed to coerce the Association into acting in a way of which the Administration approved or to punish it for having acted in a way of which the Administration disapproved. This would strike at the freedom and independence which is an essential part of the right to associate. The complainants allege that this was the Director's objective in the sudden withdrawal of facilities in 1978 and the Tribunal will accordingly examine the circumstances to see if this allegation is made out.

Withdrawal of facilities: the issue

21. While some of the basic facilities were allowed to the Staff Association from its inception without being formally recorded, a larger number, including most of those with which this case is concerned, were covered by written agreements made after consultation between the Staff Association and the Administration. Two of these agreements, made respectively in June 1976 and March 1978, were made during the Administration of Dr. Acuna and may therefore be taken to embody his view of the needs of the Association at these times. The earlier agreement specified (inter alia) the hours to be allowed for administrative leave and required the Administration to provide a full-time secretary at G.5 level. The later agreement dated 9 March 1978 authorised the Staff Association to use the Organization's communications facilities for telex, cables, and mail with the cost to be borne by the Organization. Long-distance telephone calls were normally to be charged to the Association; it was noted that the Organization's cash contribution, which had in 1976 been increased from \$750 per annum to \$1,500, was intended in part to cover this sort of expense.

22. These agreements were expressed as subject to review. In so far as they are governed by the jurisdiction of the Tribunal, the Director could (subject no doubt to the giving of reasonable notice, a point which it is unnecessary to discuss in this case) decide to cancel or amend any of their provisions, not arbitrarily, but if he considered it in the interests of the Organization so to do. On 26 October 1978 Dr. del Cid, acting on behalf of the Director, sent a letter to the Chairman of the Staff Committee in which he enumerated the privileges that the Administration was prepared to grant to the Committee for the purpose of carrying out their activities. This enumeration represented a very substantial curtailment of the facilities previously agreed. Under it the Organization substituted for the provision of a full-time secretary at G.5 the obligation to pay 50 per cent of the cost of a G.4 post; reduced the cash contribution to \$750 per annum; limited the use of telex and cables to \$250 per annum; limited printing and reproduction, hitherto unlimited, to \$500 per annum; and substantially reduced the extent of administrative leave.

23. The complainants contend that this letter was illegal as an abuse of power in that

(a) it was taken not in the interests of the Organization but as a measure of retaliation against the Staff Association for behaviour by its officers which the Director wished to punish; and

(b) it was taken without proper consultation with the Staff Committee and consequently without a full knowledge and understanding by the Director of the relevant facts.

Withdrawal of facilities: the circumstances

24. By a letter of 11 May 1978 to the Staff Committee the Administration made a notable effort to set up procedures for consultation to ensure constructive and harmonious relationships. There were to be monthly meetings, the first being scheduled for 17 May and thereafter on the first Wednesday of each month. The

complainants, however, contend that these and similar meetings at a lower level were ineffectual because of the failure of the Administration to take the decisions that were called for; they became only repetitive discussions. On this ground on 17 August Dr. García refused a meeting with the Chief of Personnel. On 29 August Mr. Muldoon wrote to Dr. García that his position was most regrettable and suggesting a meeting in order to discuss issues "on which agreement is pending or on which decisions need to be implemented". There is nothing in the dossier to suggest that the pending issues included any revision of the arrangements on facilities. On 30 August Dr. García replied that dialogue at the administrative level was fruitless "since it appears that even the most elementary decisions rest with the Director". He said also "that the Administration cannot on the one hand continue its attacks on the right of association and on staff representatives, and on the other, seek to promote dialogue privately". This is a reference to the Director's addresses which, as noted in paragraph 10 above, had recommenced in July 1978. About this time the staff broke off participation in all joint Administration/staff groups.

25. On 9 August the Staff Association was upset by being told to move from the accommodation allotted to it in the main building, where as well as an office, there was a staff lounge and eating facilities. The accommodation had been planned for it when the building was erected in 1964 and enjoyed by it since then. The move was to a building which was part of the "complex" but which was across a street carrying much traffic. It appears from the records that this relocation had been "carefully studied a number of times", but no indication of this had been given to the Staff Association. It was left to one of Mr. Muldoon's subordinates (Chief ACG) to tell Dr. García that the space was wanted "as soon as possible" and "for other priority purposes". Because of this and because of the Staff Committee's resentment at the attacks made on it by the Director in his addresses in the field during July and August relations between the Administration and the Committee deteriorated rapidly during August. On 11 August Dr. García wrote to the Director expressing the Committee's shock and indignation at the distortions in his statements. The Committee invited the President of FICSA to come to Washington to study the situation; he was allowed by the Administration to address the staff and one hour's administrative leave was given for the occasion. An exchange of telexes took place between the Staff Committee and Dr. Mahler, the Director-General of WHO. In its telex the Staff Committee enumerated several of the grievances already detailed and asked for the Director-General's moral authority in support of freedom of association which the Staff Committee would defend "if necessary through hemisphere-wide work stoppage". The Director-General replied on 24 August that he was deeply shocked by this communication and by the threats contained in it; he deplored any steps involving communications to governments; he had no proof that the right of association had been infringed. It appears that also on 22 August the Staff Committee sent telexes to the Governments of France, Great Britain and the Bahamas which quoted from the telex to Dr. Mahler.

26. At various times during August the staff found that facilities for communications were not being made available as agreed. On 7 September Dr. García wrote to Mr. Muldoon to inquire whether it was by his instructions that mail, telex and printing facilities were being made subject to prior censorship. The letter was not answered.

27. The 20th Pan American Health Conference was due to be held in the last half of September. It was a conference of the delegates of the 32 governments who are members of PAHO. Dr. Acuña was standing for re-election as Director. Another candidate for election was Dr. Dicancro, a Uruguayan member of the PAHO staff who had been nominated by the Government of Uruguay. It seems clear that by the end of August at the latest the Staff Committee had decided to present, if it could, its case on labour relations to the Conference. In his letter of 29 August, referred to in paragraph 24 above, Mr. Muldoon had protested against "recent publications and statements made by the Staff Committee in reference to its differences with the Administration" and said "your communications to member governments on these internal matters are totally inappropriate". On 31 August Dr. Dicancro had joined with the other opposition candidates in a cable to the 32 member governments saying that they were "deeply worried about the consequences of the present confrontation between the authorities and the staff" and proposing a guarantee of "mutual respect between the authorities and the staff based on strict fulfilment of the staff rules and regulations".

28. On 7 September an assembly of the Staff Association was held at which two resolutions were passed. By the first the Staff Committee was instructed to ask the Conference to "investigate administrative actions which appear to violate the staff rules". By the second the Director was requested "to put an end to his interference with the right of association and to his harassment of the Staff Committee" and to re-establish facilities within 24 hours; the Staff Committee was given a list of 14 points to be negotiated through a "mediational commission" to be created by the Administration and itself. This second resolution was further considered at another assembly of the Staff Association on 12 September when it was further resolved that unless the Director replied to it by 15 September, the Staff committee should call a day of protest and ask FICSA to ask all its members to join in. On 15 September

Mr. Muldoon wrote to Dr. García a conciliatory letter in which, while deploring the resolutions as inflammatory, he said that after the Conference was over the Administration would be ready to discuss the Points to Negotiate and to welcome "feedback". If this was intended to appease the staff, it came too late. On 21 September the President of FICSA cabled his members that he could personally testify to unacceptable pressures and violations of Staff Association rights and urging them to send cables in support of the protest. The day of protest was held on 26 September and took the form of holding seminars on freedom of association and like topics. Two telexes were sent about the protest to the President of the Conference, one from the headquarters Staff Committee and the other from the Staff Committee of Filial VI, reporting the protest and the support it had received and urging the Conference to review the charges of irregularity against the Director.

29. By this time the Conference had opened. At the third plenary session on 25 September during the discussion on the adoption of the agenda the Uruguayan delegation moved that an item should be included raising the alleged administrative irregularities imputed to the Director. Dr. Gonzalez of Uruguay said that his delegation had received a document headed "Hechos que Preocupan al Personal", i.e. facts causing concern to the staff. The document bore on the left-hand corner the stamp of PAHO and the words "Official Business SC28" i.e. a reference to the 28th or current Staff Committee. The Director, who had previously referred to the unleashing of a campaign of falsehoods, emphatically denied that the document was official. After discussion it was agreed that the item should not be put on the agenda but should be considered at a private meeting of Heads of Delegations. The private meeting was held at the end of the third plenary session and ended with an expression of full confidence in the Director. On 27 September Dr. Acuña was re-elected as Director by a majority of 18 votes to 14.

30. On 5 October the Director issued a bulletin to the staff announcing his election. He said that a matter requiring immediate attention was the preparation of a clearer definition of the basis for consultation with the staff and the development of effective mechanisms; he would ask Dr. del Cid, the Assistant Director, to meet with the corresponding staff members to review this. On 12 October an invitation was issued by Dr. del Cid and accepted by the Staff Committee and a meeting arranged for 16 October.

31. Also on 12 October the Director appointed an ad hoc committee of four staff members whom he nominated "to examine the facts and circumstances arising out of events preceding and in the course of" the Conference "in relation to non-compliance by staff members" with their duties under the staff rules and regulations. A request that the Committee should be composed also of members of the staff was rejected; likewise a protest against charges of non-compliance with the regulations being dealt with otherwise than in accordance with the regulations. However, the only specific matters with which the Committee appears to have dealt were, first the preparation and despatch of the document, "Hechos que Preocupan al Personal" produced by the Uruguayan delegation (paragraph 29 above), on which it reached no conclusion; and secondly the behaviour of Dr. Dicancro "in contacting governments in an attempt to influence certain official actions to be taken at" the Conference. The "contacting" is presumably the joint cable referred to in paragraph 27 above. On this point the Committee expressed the view that the actions taken by Dr. Dicancro "have, at the very least, brought some discredit as well as loss of prestige to the Organization", but that this may have been counterbalanced by the expression of confidence in the Director. The Tribunal has already in Judgment No. 427 expressed its view of the cable and now sees no reason to alter it. The report was apparently completed in December and a copy given to the Staff Committee, which rejected it.

32. On 16 October the Director, without waiting for the report of the ad hoc committee on the activities of Dr. Dicancro, sent a letter to him in which he purported to dismiss him for misconduct. On this the Tribunal commented in Judgment No. 427, paragraph 12 - "the charge of misconduct is so preposterous and the Director's eagerness, before hearing the defence to the charge, to use it as a ground for dismissal is so manifest that resentment is the only explanation".

33. The meeting between Dr. del Cid and the Staff Committee on 16 October began with a demand by the Committee, which Dr. del Cid agreed to transmit to the Administration, that the facilities which had been withdrawn should "be immediately re-established and immediately thereafter discussions could begin as to the detailed use of these facilities and any agreed upon limitations". The parties met again on 24 October when Dr. del Cid said that this demand was rejected. A discussion began on the different facilities and it was eventually agreed that each side would submit its written proposal by the next day when both would be reviewed with a view to reaching decisions. At the next meeting on 26 October Dr. del Cid produced the letter of that date summarised in paragraph 22 above and said that it was definitive and could not be discussed. There was a good deal of talk about the tone of the letter and the meeting ended on Dr. Garcia's statement that "we are back to zero".

Withdrawal of facilities: conclusion

34. Within the limits indicated in Paragraphs 17 to 20 above the Director has the widest discretion in determining the extent of the facilities which the Organization offers to the Staff Association and in making from time to time such changes in them as he thinks to be desirable. Changes do not have to be negotiated and agreed; and if the implication in the use of these terms in the dossier is that the Director cannot act unilaterally, it is incorrect. He may not, as is the rule in all his decisions, act without taking all the relevant facts into consideration and he can hardly do that without ascertaining the views of the Staff Association. But after these have been considered, the decision is for him alone. When, however, abrupt, drastic and comprehensive changes are made, such as are embodied in the letter of 26 October, the Tribunal will normally expect to be informed of the reasons for them. This is especially so when there is evidence that the change is made by the Director's personal decision and is a change in arrangements approved by the Director himself, some of them only six months before.

35. In the dossier the Organization gives two reasons for the extensive changes that were imposed. The first is the excessive cost which it says was being incurred. The Tribunal does not find this convincing; no figures are given and the topic is not, as is to be expected, one which was ever discussed in the dialogue to which the Staff Committee was invited. The second is the use of the telex facility to communicate grievances to member governments. But it is plain that what is really objectionable here is not the use of the particular facility but the fact of communication. It is unnecessary for the Tribunal to determine whether it is correct or incorrect for the Staff Association to convey its grievances direct to member governments; whether it is or not, it must be legitimate for the Organization to say that it is not providing facilities for that purpose. But although there were a number of communications or attempted communications only one instance is given by the Organization in the dossier of the use of the telex; this is the telex of 22 August mentioned in paragraph 25 above. This can hardly be said to justify a curtailment of facilities over the whole range.

36. It is unnecessary in this case for the Tribunal to determine whether or not the decision of 26 October was taken without consideration of all the relevant facts. It is enough to say that the absence of any evidence supporting the decision creates the suspicion that it was taken with improper motives and that such a suspicion is amply confirmed by consideration of the events leading up to it which have already been narrated. The Director wished to get rid of a committee which he believed to be unrepresentative. He attempted to do so by persuasion. The resolutions of 7 September must finally have satisfied him, if he had not been satisfied before, that he had failed. The decision of 26 October can only be viewed either as an attempt to use coercion where persuasion had failed or as an expression of resentment at the failure.

As such it is an abuse of power.

37. So much for the general decision to curtail. One of the curtailments has been attacked on its own as by itself involving a breach of the right to associate. This was the requirement, rightly described by the Committee as censorship, that all communications to and from the Staff Association should be submitted for inspection by the Administration. This condition, which was still being enforced in June 1981, was justified by Dr. del Cid on the ground that "factual information which the Staff Association conveys needs discussion between the parties when there are doubts on the accuracy of such information". This has from time immemorial been the standard excuse for censorship; the alleged object is never to suppress the truth but just to make sure that only the truth is told. Freedom of association is destroyed if communication between the members is permitted only under supervision. A restriction, which would be unjustified if imposed on speech or letters or any other means of communication which the Association found for itself, does not become justified when the means are provided by the Administration.

Remedies

38. Under Article VIII of its Statute "the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him". If the Tribunal was to order the rescinding of the decision, the result would be that the arrangements existing before August 1978 would be deemed to have continued in force. Subject to two exceptions formulated in paragraph 40 below, the Tribunal considers this to be inadvisable. Some of these arrangements, especially those in which no limit was placed on the use of facilities, could be thought to need tightening up. If after the Conference a reconsideration of the position had been undertaken by the Director in the spirit displayed in Mr. Muldoon's letter of 15 September (see paragraph 28 above), a number of the changes made

in the letter of 26 October might have been properly made. If the defendant allowed his resentment to prevail over the spirit of that letter, the Staff Association cannot escape all responsibility for the conditions which fuelled that resentment. Furthermore, the arrangements on facilities have not stood still since 26 October. Discussions have continued and changes have been made, partly as a result of intervention by FICSA. In a communiqué on the PAHO situation issued on 4 December 1980 FICSA "noted with satisfaction that there has been a positive evolution in staff/management relations through the re-establishment of an open and frank dialogue". It would certainly be undesirable for the Tribunal now to attempt to restore the status quo ante.

39. For similar reasons the Tribunal will not in this case order compensation to be paid in lieu of rescission. The complainants have asked only in general terms that all expenses incurred in sending cables, etc. through commercial facilities outside the Organization should be reimbursed. This as a claim is not acceptable.

40. The exceptions to this conclusion relate, first, to the breach of the right to association formulated in paragraph 37 above; and secondly the Tribunal has noted that the main object of the cash contribution was to pay for expenses not covered by the facilities provided, e.g. the expense of long-distance telephone calls. The amount of the cash contribution had stood for three years at \$1,500. Considering the fact that in October 1978 the facilities were being

substantially curtailed, the Tribunal cannot regard the unexplained cut in the cash contribution otherwise than as an arbitrary cut unrelated to the needs of the Association and the interests of the organization. The Tribunal will order the Organization to pay to the Staff Association \$2,250 as compensation.

41. The other claims of the complainants are rejected. It is unnecessary to say anything about any of them except the claim for \$10,000 for legal costs. Every lawyer must be aware that the jurisdiction of the Tribunal is confined to non-observance of the terms of appointment of officials and of provisions of the Staff Regulations. By far the greater part of the complainants' contributions to the dossier consist of the presentation of what is called a class action and of the complainants' side of a controversy that is manifestly outside the Tribunal's jurisdiction. There is no reason why the Organization should pay for this. The complainants have, however, succeeded in establishing an important principle; they should be allowed \$4,000 towards their costs.

DECISION:

For the above reasons,

1. The Director is ordered to withdraw the requirement that the communications to be despatched through the Organization's facilities should first be submitted to the Administration for discussion and correction.
2. The Organization is ordered to pay to the Staff Association under paragraph 40 above the sum of US\$2,250.
3. The Organization is ordered to pay to the complainants under paragraph 41 above the sum of \$4,000.
4. All the other claims of the complainants are dismissed.
5. The interventions are allowed of those interveners who were staff members at the time of their intervention.

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 3 June 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner

1. Staff Rule 910 reads: "The staff, at any office or location, shall have the right to associate themselves together in a formal organization for the purpose of developing staff activities and making proposals and representation to the Bureau concerning personnel policy and conditions of service."
2. Staff Rule 920 reads: "In any consultations concerning personnel policy or conditions of service, the duly elected representatives of the staff shall be recognized by the Bureau as representing the views of that portion of the staff from which elected."

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