FORTY-NINTH ORDINARY SESSION

In re ALONSO (No. 3)

Judgment No. 514

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Miss Mercedes Alonso on 27 July 1981 and brought into conformity with the Rules of Court on 11 August, the PAHO's reply of 1 November, the complainant's rejoinder of 4 December 1981 and the PAHO's surrejoinder of 21 January 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rule 920, WHO Manual section II.13.30 and 60 and PAHO Directives 53-7 of 1953 and 73-13 of 1973;

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 complainant, a United States citizen, joined the staff of the Pan American Sanitary Bureau, the secretariat of the PAHO, in 1950 and retired on 31 October 1980. On 31 December 1980 the United Nations Joint Staff Pension Fund paid her, at her request, a lump sum of 93,000 United States dollars in settlement of one-third of her pension rights. She paid United States tax amounting to $15,446 on that sum and applied to the PAHO on 10 April 1981 for reimbursement of the tax. By a letter of 4 May, which is the decision impugned, the Chief of Administration informed her that the PAHO rejected her claim and that she might appeal directly to the Tribunal.

B. The complainant observes that from 1950 to the end of 1953 the PAHO's practice was to reimburse national tax paid on lump-sum pension payments. From 1 January 1954 until 31 December 1972 a PAHO directive prescribed reimbursement of United States tax paid on PAHO income, defined to include "lump sum payment from the Pension Fund in excess of staff member's contribution". A PAHO staff member, Mr. Besosa, in 1972 and a WHO staff member, Mrs. Norman, in 1969 obtained reimbursement. In the former case it was due under the directive; in the latter, it was granted by way of exception to WHO Manual section II.13, which precluded it. In the pleadings in Settino v. the PAHO (Judgment No. 426) the organization misleadingly assimilated the two cases. In fact the position is not the same in the PAHO as In the WHO, and as a former PAHO employee the complainant claims an acquired right to reimbursement under the PAHO directive in force for some 20 years. She believes, besides, that if Manual section II.13 is to be followed instead of PAHO practice, the staff ought to have been consulted on the matter under Staff Rule 920. The PAHO should follow the example of the United Nations, which, though it discontinued reimbursement in 1980, introduced a transitional measure to protect the acquired rights of serving officials. The complainant seeks reimbursement of the $15,446 and an award of $3,500 for costs.

C. In its reply the PAHO invites the Tribunal to dismiss the complaint as unfounded. The material rule in the WHO, Manual section II.13, applies to PAHO staff. Under II.13.30 income tax shall be refunded on "WHO earnings", the definition of which in 11.13.60 does not include any benefit from the Pension Fund. As was held in Judgment No. 426, earnings do not, in the absence of an express provision to the contrary, include lump-sum payments from the Fund. The complainant's assertion of an acquired right under the PAHO directive is also unfounded, as is clear from the Tribunal's reasoning in paragraph 7 of Judgment No. 426. The Organization did not misrepresent the facts in Settino: it stated, correctly, that the cases of Mrs. Norman and Mr. Besosa were exceptions to a consistent policy of non-reimbursement. It explains the special circumstances warranting the exception in the former case. The case of Mr. Besosa - who received a withdrawal settlement, not a pension benefit - may have created some confusion, but the directive of 1973 clarified existing policy. Moreover, the complainant did not object to the directive at the time. There has been no change in the material Manual provisions: the 1973 directive merely clarified established practice, and Staff Rule 920 requires consultation of the staff only on a proposal to change the Staff Regulations or Staff Rules. Lastly, United Nations practice is irrelevant.

D. In her rejoinder the complainant asks why, if Manual section II.13.60 in 1954 superseded the PAHO directive of 1953, Mr. Besosa was awarded full reimbursement. In fact he received it in accordance with the directive. The 1973 directive did not clarify but changed the practice, since it was stated to take effect from 1 January 1973. The elected representatives of the staff should have been consulted on that change in accordance with Staff Rule 920. Manual provisions are not circulated to the staff, whereas directives are: the staff were therefore right in assuming that the directive of 1953 was still in force. Thus the PAHO did have an "express provision" for reimbursement of the kind declared In Judgment No. 426 to be necessary. As the Tribunal also said, the PAHO has "the obligation not to discriminate", and the complainant has been treated differently from Mr. Besosa. Mrs. Norman's case was obviously regarded as different from Mr. Besosa's since she was not repaid the tax in full.

E. In its surrejoinder the PAHO gives an account of its records on the subject and concludes that there were only two periods in which the WHO or the PAHO or both had provisions for reimbursement: 1953-54 in the WHO and the PAHO, and 1971-72 in the PAHO. By the time the complainant retired the provisions had long expired. Her argument based on an acquired right should fail because there was no provision for reimbursement when she joined the PAHO in 1950 and because, as the Tribunal said in Judgment No. 426, reimbursement is not a benefit of decisive importance to a new staff member. Besides, the complainant's entitlement could not be larger than that provided under the old rules, which prescribed reimbursement in respect of full, not partial, lump-sum withdrawals. The plea of discrimination is also unfounded: both Mrs. Norman and Mr. Besosa received reimbursement, not on a lump-sum pension benefit, but on a full withdrawal settlement. Moreover, they were paid before the PAHO informed the staff that no reimbursement would be made as from 1 January 1973.

CONSIDERATIONS:

1. The complainant, who is a citizen of the United States, on her retirement from the organization in 1980 received from the United Nations Joint Staff Pension Fund (hereinafter referred to as the Fund) retirement benefits including a lump sum for which she commuted a part of her pension. On this lump sum she has had to pay tax to the United States Government. Her claim against the Organization is for reimbursement of the tax. A similar claim against the Organization was put forward in re Settino and rejected by the Tribunal in Judgment No. 426. In her argument the complainant seeks to distinguish Judgment No. 426.

2. In re Settino the facts were that the complainant in that case joined the Organization on 9 march 1953 under a contract of employment which required the Organization to reimburse tax levied on earnings. This requirement arose from the introduction on 9 February 1953 into the Manual section of a provision which specified as covered by "earnings" a number of items including a lump-sum payment from the Fund. This item was dropped in a revision published in June 1954. The Tribunal, apparently accepting that a lump-sum payment was part of the contractual definition of earnings at the time when the contract was made, held that under the principle of acquired rights the complainant did not acquire a right to the preservation of that definition, which accordingly did not survive the revision in 1954.

3. The complainant, who joined the Organization in 1950, does not rely on any term in her contract of employment. She relies on an administration directive on reimbursement of tax coming into force on 1 January 1954 and providing that a lump-sum payment from the Fund should be treated as income on which tax would be reimbursed. This provision remained in force until it was cancelled by a similar administration directive coming into force on 1 January 1973. The complainant claims that since by virtue of the earlier directive she enjoyed for the greater part of her period of employment the right to have tax reimbursement on a lump-sum payment from the Fund, she thereby acquired a right which the later directive of 1973 could not effectively cancel.

4. An administration directive is the instrument by which the Director-General exercises the power of administration inherent in his office within the framework of the Staff Regulations and Rules and subject to them. It is unnecessary here to consider to what extent such a directive can confer on the staff member a contractual right capable of being enforced by the Tribunal. Assuming that it can, and that in this case it does, the reasoning in paragraph 7 of Judgment No. 426 would apply to prevent it from being an acquired right.

5. In Judgment No. 426 the Tribunal decided also that two cases in 1969 and 1972 respectively in which the Organization had reimbursed taxation on a lump-sum payment did not enable the complainant to invoke the principle of equality of treatment, since the lump sums were in repayment of contributions and not in part commutation of a pension. The complainant nevertheless relies on these two cases and seeks to distinguish Judgment No. 426 on the ground that it was induced by an error in the Organization's argument. It was argued by

the Organization and accepted by the Tribunal that the provision for reimbursement of tax on the lump-sum payment was operative only from February 1953 to June 1954. No reference was made to the administration directives specified in paragraph 3 above which show that the provision continued to operate until 1973. The complainant contends that it was by virtue of the directive that the two claims in 1969 and 1972 succeeded and not by virtue of the distinction drawn in paragraph 9 of Judgment No. 426. Even if this be so, it does not assist the complainant in her reliance upon the principle of equality of treatment. A change in a rule or practice. such as admittedly occurred in 1973, is a sufficient ground within the meaning of that principle for distinguishing those who made their claim before from those who made their claim after.

6. Finally, the Tribunal in Judgment No. 426 decided that a practice by the United Nations to reimburse tax on lump-sum commutations was irrelevant. The complainant alleges that when the United Nations discontinued this practice in 1980, it instituted a transitional measure to safeguard the acquired rights of serving officials. She contends that when the PAHO discontinued its practice in 1973 it ought to have done likewise. This does not raise a point within the jurisdiction of the Tribunal.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Héctor Gros Espiell, Deputy 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 18 November 1982.

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

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