

Registry's translation, the French text alone being authoritative

FIFTY-NINTH ORDINARY SESSION

In re SOARES NOGUEIRA

Judgment No. 756

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Umbelina Soares Nogueira against the Pan American Health Organization (PAHO) (World Health Organization) on 25 October 1985, the PAHO's reply of 13 January 1986, the complainant's rejoinder of 5 March and the PAHO's surrejoinder of 16 April 1986;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Regulations 1.3 and 1.10, PAHO Staff Rule 1050 and WHO Manual provision II.9.270;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The PAHO and the Brazilian Government concluded an Agreement in 1973 to establish a general programme for "the development of human resources in health care" in Brazil. The PAHO was to provide technical assistance, but the Government bore general responsibility and provided the funds. There was a supplementary Agreement in 1975, and Part VI of this stipulated that the PAHO would recruit the staff in Brazil and abroad and finance them with the funds from the Government. A project was launched under the programme, and the PAHO recruited the complainant, who is a Brazilian citizen, to work on the project. She was appointed on 1 August 1980 as a temporary secretary at grade G.3 and stationed in Brasilia. A G.3 post for an office clerk, No. 4574 was created on 1 October 1981 and she was put on it. Her appointment was renewed from time to time, and the last extension was to expire on 30 September 1985. On 10 July 1984, however, the Secretary-General of the Brazilian Department of Health wrote to the PAHO's acting Country Representative in Brazil asking that her contract be terminated because the work she did was no longer needed. The Representative sent a telex on 15 August seeking instructions from the Director of the PAHO in Washington D.C. On the same day the Director instructed Personnel to abolish her post. By a telex of 21 August Personnel informed her that her appointment would end on 30 December 1984 under Staff Rule 1050, which relates to abolition of post; if any G.3 vacancy arose elsewhere she would be told. On 19 and 20 September the Brazilian Government wrote to ask the PAHO to engage two typists for seven months, from 1 October 1984 to 30 April 1985, to work on the project. The PAHO did so. The complainant left on 30 September and was paid a termination indemnity. She appealed to the headquarters Board of Appeal. In its report of 19 June 1985 the Board held that her appointment had been wrongfully terminated, and it recommended giving her preference for any suitable vacancy in Brasilia and paying her full salary up to reinstatement or 30 September 1985, whichever was the earlier, and costs. By a letter of 31 July 1985, the decision now impugned, the Director undertook to inform her of any suitable vacancy that occurred by 30 September 1986 and to pay her the full amount due up to 30 September 1985, less the indemnity she had already received, and 1,500 United States dollars in costs.

B. The complainant submits (1) that her post was not abolished, and it was a mistake of law to terminate her appointment on such grounds under Rule 1050. Manual provision II.9.270 reads: "A post is considered to be abolished either when the work allotted to it ceases or when the work is so changed that the post becomes one of a different type calling for materially different qualifications". As the Board held, neither condition was fulfilled: the complainant was at once replaced by two typists at salaries less than half her own, and the work continued to require typing skills. (2) There was breach of the PAHO's independence: the only reason to terminate the complainant's appointment was the Government's wish to replace her with cheaper employees. (3) The Director acted in breach of Regulation 1.3: "In the performance of their duties staff members shall neither seek nor accept instructions from any government", and of the oath to that effect in Regulation 1.10. she seeks reinstatement either by assignment to a suitable post or else by being put on paid leave until one falls vacant. She claims compensation, any other relief the Tribunal deems fit, and costs.

C. In its reply the PAHO observes that the complainant held a contract for services from 13 November to 13

December 1984 and was offered another on 21 November 1985, but refused it. It submits that she misrepresents the legal context in which she was employed. Her charges of breach of the PAHO's independence and of the Director's oath of office are absurd. She was not terminated on instructions from a member State: Brazil was acting as a party to the Agreement. The PAHO's independence of its membership does not preclude contractual arrangements with a member State, and Brazil was simply acting under the Agreement as the provider of funds. Her post depended on the supply of those funds and on its being needed to carry out the project. It was not properly a PAHO post, nor its incumbent an established staff member. Once the Government would no longer finance it there was no choice but to abolish it. The recruitment of two typists was a separate arrangement based on the Government's own assessment of its requirements. The complainant's claims are devoid of merit. Besides, the PAHO has already agreed to pay her ex gratia up to 30 September 1985.

D. In her rejoinder the complainant seeks to refute the PAHO's pleas. She contends, in sum, that the PAHO ought to have told the Government that meeting its wishes would mean breaking the rules. As a member of the PAHO staff she was protected by the Staff Regulations and Staff Rules. Since they were not respected her claims are sound. The PAHO may not conclude arrangements with governments to evade the rules. The rights of the staff do not depend on the nature of the project they are employed on or the source of funds. To put it bluntly, Brazil wanted more for its money; since it could not just cut the complainant's salary, it got the PAHO to feign abolition of her post and recruit two cheaper workers to do the very same work.

E. In its surrejoinder the PAHO points out what it sees as misstatements of fact and answers various points raised in the rejoinder. It develops its submissions, in particular rejecting any suggestion that the intention of the Brazilian Government and the Organization was to break or get round the law. It again submits that the termination of the complainant's appointment was in compliance with the rules and that it did try, albeit in vain, to find her another assignment.

CONSIDERATIONS:

1. In its report of 19 June 1985 the PAHO Board of Appeal held the Director's decision of 15 August 1984 to be unlawful and recommended remedies. In his decision of 31 July 1985, the one now impugned, the Director accepted the recommendations only in part. The complainant was granted a service contract from 13 November to 13 December 1984. Another was offered to her on 21 November 1985, but she refused it.
2. The Director's decision of 15 August 1984 to abolish the complainant's post was unlawful.

It is therefore immaterial whether the request of 10 July 1984 for her termination from the Secretary-General of the Brazilian Department of Health -- which led to the abolition was in breach of the Agreement concluded in 1975 between the Brazilian Government and the PAHO or of the principle that in its personnel policy an international organisation should be independent of member States.

Also immaterial is the question whether the Brazilian Government made its request as the source of financing of a project and not as a member State. As a matter of fact the distinction is a dubious one since it is difficult to see how there can be such separate entity in law of a member State on the grounds of its financing an agreed programme.

Be that as it may, the Tribunal upholds the Board's view that the complainant's post was abolished in breach of WHO Manual provision II.9.270.

The abolition was in fact just an expedient hurriedly found to put an end to the complainant's employment. That that is so is plain from evidence that shows the secretarial duties she had been performing were assigned to two others immediately after she left. Contrary to the telex sent to her on 21 August 1984 and informing her of the decision of 15 August, which said that her post was no longer considered necessary, in fact it was. The Tribunal accordingly holds that a mistaken and wrongful procedure was followed to end her contract and that the measure was therefore unlawful.

3. Although the consequences of it were in part remedied by the Director's decision of 31 July 1985 the main issue, namely her claim to reinstatement in a post equivalent to the one she formerly held, has not been resolved.

Her last appointment having been for a period of two years, from 1 October 1983 to 30 September 1985, she is entitled to be reinstated for two years as from 1 July 1986.

At the end of the two years her appointment may be renewed in keeping with the ordinary rules on fixed-term appointments.

4. Failing such reinstatement the complainant is entitled to be paid for the period during which she has not worked compensation equivalent to the sums she would have been paid if reinstated, the purpose being to safeguard the right to reinstatement.

5. The Tribunal will also make her an award of compensation for the injury caused by the unlawful decision, and the amount will take account of her former pay, the period that remained of her unlawfully terminated appointment and all the their circumstances of fact and law set out above.

DECISION:

For the above reasons,

1. The impugned decision is set aside insofar as it is contrary to this judgment.

2. The complainant shall be reinstated in a post equivalent to the one that was abolished for a period of two years as from 1 July 1986, her appointment to be renewable under the ordinary conditions governing fixed-term appointments.

3. If not reinstated as ordered in 2 she shall be paid, for the period during which she has not worked, compensation equivalent to the sums she would have been entitled to.

4. The PAHO shall pay her 5,000 United states dollars as compensation for injury.

5. She is awarded \$2,500 in costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 June 1986.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner