

## SIXTY-FOURTH SESSION

### *In re* PALENQUE

#### Judgment 893

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Federico Palenque against the Pan American Health Organization (PAHO) (World Health Organization) on 9 November 1987 and corrected on 20 December, the PAHO's reply of 11 March 1988 and the letter of 13 April 1988 from the complainant's counsel stating that he did not wish to file a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rules 470.3 and 1050.2 and .4 and WHO Manual provisions II.9.260 and 340:

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 complainant, a Bolivian citizen born in 1947, joined the staff of the PAHO at headquarters in Washington in 1978 at grade G.4. He was promoted to G.6 in 1979 and to G.8 in 1983 as an "office technician II". The Pan American Health and Education Foundation (PAHEF), which financed all his appointments, told the PAHO in April 1986 it would no longer do so and by a letter of 5 June the Chief of Personnel warned him that his post would be abolished and that the procedure laid down in Staff Rule 1050.2 for a "reduction in force" would be applied.

According to 1050.2.1 "competition for retention shall be limited to other staff performing similar duties at the same grade level as that of the post to be abolished". A joint body set up by the Administration and the staff committee held a competition in accordance with WHO Manual provision II.9.260. It had to identify other posts carrying duties similar to the complainant's, rank the incumbents by performance and seniority and name the one with the lowest priority for retention. The representatives of the Administration found only one similar post and its incumbent was senior to the complainant, but the staff representatives listed a dozen and named three incumbents with lower priority. The joint body so reported on 15 August 1986 to the Chief of Personnel, who told him on 30 September that he would be terminated on 14 November 1986. That was when he left, and the PAHO paid him end-of-service entitlements and the United Nations Joint Staff Pension Fund some 10,000 United States dollars in benefits. He filed an appeal on 1 October 1986 alleging that he had not been made a reasonable offer of reassignment under Rule 1050.2.5 which reads: "a staff member's appointment shall not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible". In its report of 12 June 1987 the Board of Appeal found that there had been at least seven suitable vacancies at G.7 and G.8 at the material time and held that a reasonable offer could have been made and that the procedure had not been followed. It recommended reinstating the complainant in a G.8 post, or, failing that, a G.7 one, with full pay as from the date of termination. In a letter of 11 August, the decision impugned, the Director offered him a G.7 post but, maintaining that the termination had been valid, refused retroactive reinstatement. On 12 August the complainant accepted the offer and again took up duty on 24 August at much the same salary as before.

In a letter of 13 August the Chief of Personnel told him, among other things, that he was treated as having been on leave without pay up to 23 August 1987, that he must pay back his end-of-service entitlements and that he could join the Pension Fund again from 24 August. A minute of 1 September 1987 from the Organization said he owed it \$14,843 and would have instalments deducted from salary over two years. They later agreed to spread repayment over three years.

He also took up the matter of his pension rights with the Fund. Reckoning that his pension would be cut by some \$7,000 a year if his earlier period of service was discounted, he wrote on 5 October to the Chief of Personnel asking the Organization to "initiate the steps necessary to restore" that period of participation in the Fund. The Chief of Personnel wrote to the WHO in Geneva on 9 October and the Secretary of the WHO Staff Pension Committee answered on 20 October that the case would be put to the Fund.

B. The complainant submits (1) that his termination was unlawful, (2) that he should be reinstated as from the date

of termination, and (3) that the PAHO should declare to the Fund that his termination was unlawful.

(1) According to Manual provision II.9.340.4 the staff member to whom the reduction-in-force procedure applies may be offered a post at any grade up to and including his own. As the Board found, there were several vacancies at such grades "after the decision was taken to abolish the appellant's post and before he was terminated". Yet he was not offered any of them.

Moreover, under II.9.340.5 a staff member who has had promotion is entitled to be put on a post identical to the one he had before promotion if the incumbent has lower "priority for retention". The complainant contends that he was entitled to compete with all those who held his former posts at lower grades and that the Organization held no such competition.

On both counts his termination was in breach of 1050.2.5.

(2) For nine months he was unemployed and had to live off his end-of-service entitlements, consisting of an indemnity under 1050.4 and payment of his accrued annual leave. He is entitled to retroactive reinstatement because his termination was due to the PAHO's failure to respect the rules and he should not suffer for it himself.

(3) The same reasoning applies to the matter of his membership of the Fund. Since his termination was wrongful the PAHO should so declare in order that the Fund may allow a derogation from its Regulations to "restore" the earlier period of his service.

He seeks the quashing of the Director's decision of 11 August 1987 insofar as it refuses to admit to wrongful termination, retroactive reinstatement, full arrears of pay, a declaration by the PAHO to the Fund that his termination was wrongful, costs and any other relief the Tribunal deems fit.

C. The PAHO replies (1) that the complaint is irreceivable because the complainant waived his right to appeal by accepting on 12 August 1987 the Director's offer of 11 August. The offer was an indivisible whole and since he accepted it he may not now object to any part of it. That the PAHO acted on his acceptance of it is clear from the measures the Chief of Personnel informed him of in the letter of 13 August.

(2) In any event the complaint is devoid of merit. The PAHO acted in good faith and duly terminated the complainant's appointment. The Chief of Personnel suggested him to selection committees for appointment to several posts. One of them was "frozen"; for the others the committee picked someone else. Besides, 1050.2.5 requires an offer of reassignment only if "immediately possible". Between 30 June 1986, when PAHEF funds ceased, and 14 November 1986, when his appointment was terminated, no offer proved possible. Every effort was made to find him a suitable position, but in vain. It treated him considerately, even extending the period of repayment of his debts.

(3)(a) The Tribunal is not competent to entertain his claim relating to membership of the Pension Fund. According to Rule 470.3 "Restoration of prior contributory service [in the Fund] is governed by the Regulations [of the Fund]", and it is the United Nations Administrative Tribunal that is competent to hear any complaint arising out of the application of the Fund Regulations. The PAHO has no authority over the Fund in the matter of "restoring" a period of prior service. (b) The claim is in any event devoid of merit. The complainant asked in February 1987 for withdrawal of his entitlements from the Fund and he got them in May 1987. The PAHO neither coerced nor misled him into making the withdrawal. The complainant may not appeal against the consequences of an act he took of his own free will and for which the Organization cannot be held liable.

#### CONSIDERATIONS:

1. The PAHO replies that the complaint is irreceivable because the complainant waived his right of appeal by accepting on 12 August 1987 the Director's offer of 11 August: the offer was an indivisible whole and since he accepted it he may not now object to any part of it.

2. The complainant has indeed waived his right of appeal by accepting the Director's offer of 11 August. That offer must be read as a single package rejecting the Board of Appeal's recommendations and at the same time proposing reinstatement in a newly vacant post. The letter of 11 August is so expressed that the complainant was plainly required to accept all or nothing. A copy was sent at the same time to the complainant's counsel. On the very next day the complainant accepted the Director's offer, and it is fair to assume that he did so with the knowledge and

advice of his counsel.

3. The plea appears in the PAHO's reply and the complainant might have sought to rebut it in the rejoinder he was invited to submit. Yet he informed the Tribunal through his counsel that he did not wish to file such a rejoinder.

In the circumstances the complainant is estopped from pursuing a claim which he must be presumed to have surrendered on accepting the Director's offer.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux  
Mohamed Suffian  
Mella Carroll  
A.B. Gardner