THIRTY-SIXTH ORDINARY SESSION

In re CARRILLO

Judgment No. 272

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the Pan-American Health Organization (PAHO) (World Health Organization) drawn up by Miss Maria Teresa Carrillo Fuller on 12 May 1975, the Organization's reply of 29 September 1975, the complainant's rejoinder of 13 October 1975 and the Organization's surrejoinder of 25 November 1975;

Considering the applications to intervene lodged by

Mrs. Luisa Ana Patricia Rodriguez,
Miss Dora Ordoñez,
Mrs. Norma Gandolfo,
Mrs. Julieta Conrad, Mrs. Circé Blaise,
Miss Sheila Argote,
Miss Nancy Rodriguez,
Miss Linda Alcalde,
Mrs. Eugenia Biknevicius,
Miss Marjorie McCallum;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Staff Regulations 3.2, 11.1 and 12.1, Staff Rules 270, 360, 640.1, 640.2, 640.3, 640.4, 640.9, 810, 820, 1030.1, 1030.4, 1030.8 and 1110.4 and WHO Manual provisions II.10.150 and II.10.350;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. In 1972 the complainant had an interview with a PAHO official in Lima (Peru) concerning her recruitment for employment with PAHO in Washington. After undergoing tests relating to her professional qualifications and a medical check-up she was invited to go to Washington at her own expense and report to the personnel office. She did so on 19 June 1972. On receiving an appointment at grade G.4 on that date the complainant was asked to sign a form stating that Washington was her place of residence. The PAHO Staff Association made lengthy protests, but to no avail. The complainant took the view that it ran counter to the spirit and letter of the Staff Regulations and Staff Rules in force that a non-local staff member recruited abroad should be compelled to mis-state that Washington was her place of residence and to accept conditions of employment applicable to locally recruited staff. Accordingly on 1 July 1974 she lodged a complaint with the Administration and asked that the Board of Inquiry and Appeal should be convened. Having received a reply neither from the Administration nor from the Board, she appeals to the Tribunal, her complaint being in her view receivable in the absence of a response by the competent authorities.

B. In her complaint she relies on Staff Rule 360, which provides that the place of residence should be determined at the time of appointment in consultation with the staff member and that the place of residence should be determined to be the place in the country of the staff member's nationality where he was residing at the time of the appointment. Basing her complaint mainly on the alleged breach of that provision, the complainant asks the Tribunal: (a) to rule that the complainant (and the interveners) was internationally recruited and is entitled to all the benefits guaranteed by the relevant provisions of the Staff Regulations and Staff Rules and Manual; (b) to rule that such benefits are a matter of acquired rights, that all benefits are compulsory and should be recognised and granted to the complainant with effect from the date of her appointment; (c) to rule that the interveners shall have the right to rely on the rights recognised to the complainant under the Tribunal's judgment; and (d) to award costs.

C. In June 1975, i.e. after the complaint had been lodged, the Executive Committee of the PAHO had before it a proposal by the Director that from 1 January 1975 staff members in the General Service category recruited outside

the country of the duty station should enjoy all the benefits granted to staff internationally recruited in accordance with the PAHO Staff Rules. That proposal was adopted, and it was decided not only that the staff members concerned should be granted the benefits in question with effect from 1 January 1975 but also that account would be taken of the date of their appointment to the duty station outside the country of residence in determining the home leave and repatriation entitlements of non-local staff members recruited before 1 January 1975.

D. In its reply the Organization observes that under its rules and practices once an appeal has been made to the Board of Inquiry and Appeal the prescribed procedures should be put in motion and arrangements made for a hearing and the submission of a recommendation. The Organization admits that those procedures were not observed and that under the terms of the Tribunal's Statute a situation has therefore arise in which recourse may be had to the provisions of Article VII. The Organization therefore does not contest the receivability of the complaint.

E. The Organization then states that in view of what is said in paragraph C above the complainant's claims for relief in point (a) (see paragraph B above) have been fully met. Insofar as the relief sought under point (b) of her claims entails the grant of benefits with retroactive effect from her date of appointment, the Executive Committee expressly provided that benefits to be granted on account of non-residence would be granted as from 1 January 1975. That decision having been taken by a governing body, there can be no grounds for providing benefits on any other basis. As regards the "acquired rights" claimed by the complainant, the Organization points out that according to Staff Regulation 12.1 the Staff Regulations may be amended or supplemented without prejudice to the staff's acquired rights. That means that acquired rights cannot be adversely affected by subsequent amendments of the texts. In the present case, however, there is the converse situation, namely a decision to grant a benefit previously withheld with the consent of the legislative body. The Organization therefore considers that the complainant has no grounds for obtaining benefits over and above those already granted under the resolution of the Executive Committee and asks the Tribunal to dismiss the complaint. It adds that the above facts and arguments apply equally to the interveners.

F. In her rejoinder the complainant again asks the Tribunal to decide that she is entitled to the benefits prescribed by the relevant texts with effect from the date of her appointment. In its surrejoinder the Organization repeats its original arguments.

CONSIDERATIONS:

1. On 1 July 1974 the complainant together with six of the interveners wrote to the Chief of the Department of Management and Personnel requesting recognition of the status of "internationally recruited staff" (the quotation marks are in the letter) with attendant benefits which they did not specify. This request has never been either accepted or rejected. On 12 May 1975 the complainant filed a complaint before the Tribunal. She based it on the silence of the Organization and on Article VII, paragraph 3, of the Tribunal's Statute. The Organization does not dispute that the complaint falls with Article VII and accordingly, so far as that Article is concerned, the complaint is receivable. Nevertheless, the authority given to the Tribunal by Article II of its Statute is limited to complaints alleging non-observance of the terms of appointment of officials and of provisions of the Staff Regulations. The authority does not extend to the giving of advisory rulings nor to resolving differences in which there is no question of a breach of the terms of appointment or of the Staff Regulations.

2. The remedies sought by the complainant, as modified in the statement of the claim, are

(I) a ruling that complainant and interveners were internationally recruited and therefore subject to all the benefits guaranteed by Staff Rules 360, 810, 820, 640.1, 2, 3, 4 and 9, Staff Rule 1110.4 and Manual provisions II.10.150 and 350; and

(ii) that such benefits are a matter of acquired rights and therefore binding from the moment of recruitment.

The classification of "internationally recruited staff" does not appear in any of the Staff Rules cited above and no definition of the term is to be found in the dossier. The Tribunal takes it to mean staff whose nationality and/or residence at the time of recruitment was not that of the country in which the duty station for which they were recruited is situated.

3. The statement of claim alleges a violation of each of the eleven rules above cited, but it is only in relation to the first of them, Staff Rule 360, that any facts capable of "Determination of place of residence" and reads:

"At the time of appointment of a staff member, the Bureau shall determine in consultation with him, that place which is to be recognised throughout his service as his residence prior to appointment, for purposes of establishing entitlements under these Rules. Unless there are reasons to the contrary, the residence shall be determined to be the place in the country of the staff member's nationality where he was residing at the time of appointment."

The complainant is a national of Peru and was resident there when in 1972 she answered an advertisement in a Lima newspaper inviting applications for posts in the Washington Office of the Organization. She was interviewed in Lima by an officer of the Organization and after various tests told that she qualified for a post. On 24 May 1972 in Lima she completed a form headed "Determination of place of residence" in which she gave her place of residence as "Lima, Peru - Washington, D.C." On her arrival in Washington in June 1972 she was given the same form, WHO Form 386, and instructed to state her place of residence at the time of her appointment as Washington, D.C., which she did.

4. The Tribunal finds that Staff Rule 360 was not complied with. The Rule is not to be interpreted as drawing any distinction between "residence prior to appointment" in the first sentence and where he was residing at the time of appointment" in the second sentence. The Rule is framed so that one place of residence only falls to be determined and that is the place of residence immediately prior to appointment. This place in the case of the claimant was Lima and not Washington, D.C. Moreover, the facts in the dossier establish that the error in the WHO Form 386 was not due to inadvertence but was required by the Organization so that the complainant should be deemed not to qualify for some or all of the entitlements mentioned in the Rule.

5. The breach of the Rule is neither admitted nor denied by the Organization, whose argument is devoted entirely to the two heads of relief as set out in paragraph 2 above. The Organization contends that relief under the first head has already been guaranteed by means of the resolution of the Executive Committee of PAHO referred to in the next paragraph. On the second head, the Organization submits that the relief sought is not clear, and that if and insofar as it relates to the period of the complainant's employment before 1 January 1975, it ought not to be granted.

6. The resolution referred to above was passed by the Executive Committee on 1 July 1975, i.e. after the complaint was filed. The Committee resolved that beginning on 1 January 1975 staff members in the General Service category recruited previously or in the future from outside of the country duty station should be provided with all the entitlements of internationally recruited staff. The resolution is a declaration of policy and not an amendment of the Staff Rules. In view of the uncertainty created by the breach of Staff Rule 360 the claimant is entitled to have her position under the rules clarified. She is entitled to have it declared that, notwithstanding the contests of WHO Form 386, she was at the time of her appointment resident at Lima in Peru.

7. But the Tribunal will not decide that she was entitled to "attendant benefits", whether the entitlement arose before or after 1 January 1975. This is a question which may be answered differently in the case of different benefits under different rules; the answer may be dependent also upon the relevant facts and circumstances at the time when the benefit becomes due. If and when an allegation is made that any particular benefit has been wrongfully withheld, the Tribunal will decide it upon the facts then presented. To make a declaration that the complainant is entitled to all the benefits which flow from her international recruitment provided she shows herself qualified in all other respects to receive them would be vague and meaningless. On the other hand, to make a declaration that she is qualified to receive all the benefits provided by the eleven Rules cited in the complaint, would mean the examination by the Tribunal in hypothetical circumstances of eleven Rules which are no more than mentioned in the dossier. This is not a task which, even if it is within its competence, it is the function of the Tribunal to undertake.

8. As to the interveners, none of them has provided a clear and positive statement of her residence at the time of recruitment. The Tribunal considers that, rather than that it should attempt to draw inferences from such facts as are provided, the cases of the interveners should be remitted to the Director-General so that, in the light of this judgment and of such further inquires as he may make, he may amend the WHO Form 386 so as to show in each case the correct and agreed residence immediately prior to appointment with liberty to each intervener to apply to the Tribunal if agreement is not reached.

9. There is attached to the complaint a request that the complainant's advocate be paid by the Organization his legal costs amounting to $10,460. In considering this request the Tribunal has to bear in mind that the relief granted to the complainant has been much narrower than that which she sought. Moreover, the point which the Tribunal has decided is short and simple. The dossier is far more voluminous than is necessary to give the Tribunal the

background to the legal point. It is almost entirely taken up with the history and merits of along-standing dispute dating from 1960 between the Staff Association and the governing authorities of the Organization about the rights of non-resident staff members in the General Service category; and with resolutions and statements showing the attitudes of various bodies towards this question. Since the cases of the interveners are to be remitted to the Director-General because of the insufficiency of the evidence that is supplied with them the Tribunal can award no costs in respect of them. The Tribunal considers that the sum of 1,000 dollars should meet all the costs reasonably incurred.

DECISION:

For the above reasons,

1. For the purpose of establishing entitlements under the Staff Regulations and Rules in accordance with Staff Rule 360, the place of residence of the complainant shall, notwithstanding the contents of WHO Form 386 signed by her in June 1972, be determined as having been at Lima in Peru.

2. The cases of the interveners Mrs. Rodriguez, Miss Ordoñez, Mrs. Gandolfo, Mrs. Conrad, Mrs. Blaise, Miss Argote, Miss Rodriguez, Miss Alcalde, Mrs. Biknevicius and Miss McCallum shall be remitted to the Director-General for the purpose set out in paragraph 8 of the considerations above.

3. The defendant Organization shall pay the sum of 1,000 dollars as costs.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 12 April 1976.

M. Letourneur
André Grisel
Devlin

Roland Morellet

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