

FORTY-SIXTH ORDINARY SESSION

In re QUIÑONES

Judgment No. 447

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Pan American Health Organization (PAHO) (World Health Organization) by Miss Edith Quiñones on 19 August 1980, the PAHO's reply of 30 October, the complainant's rejoinder of 17 January 1981 and the PAHO's surrejoinder of 26 February 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Regulations 4.2 and 8.1 and PAHO Staff Rules 410.1, 440.1.1, 510.1, 550.1, 530.1.1, 550.4, 565.2, 910 and 1230.1.1;

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 joined the staff of the Pan American Sanitary Bureau, the secretariat of the PAHO, in 1950. From that date she served almost continuously as secretary to chiefs of branch and she had a consistently outstanding work record. For fifteen years she was secretary to the Chief of the Office of Administration in G.7 post 0157, and she still held that post on 14 May 1979 when the Chief, Mr. Muldoon, informed her orally without warning that she was being transferred immediately to a clerical post, No. 553D, in the Public Information Office. The reason given was that her transfer formed part of a reorganisation of the office. On 22 May 1979 the Chief of the Public Information Office explained her new duties to her and on 1 June 1979 she was officially informed of her transfer by a personnel action notice, to which a post description was appended. She appealed to the Board of Inquiry and Appeal alleging the following flaws in the decision: prejudice, disregard of the facts, misapplication of the Staff Regulations and Staff Rules, procedural flaws, discrimination against women, denial of freedom of association and failure to perform contractual obligations. The Board rejected all her allegations but held that she had suffered moral prejudice, but not enough to warrant monetary compensation. It recommended dismissing the appeal but carrying out a desk audit within six months to ascertain whether post 5333 had been properly classified. On 19 May 1980 the Director of the PAHO informed the complainant that he endorsed the Board's recommendation and that is the decision she is impugning.

B. On the form instituting her complaint the complainant states that the decision was notified to her on 21 May 1980, whereas on page 1 of her statement of facts and arguments she gives the date as 20 May. She makes seven pleas: Breach of Staff Rule 510.1, which requires that in determining "any subsequent assignment, consideration shall be given, to the extent possible, to the staff member's particular abilities and interests". She was most anxious to keep post 0157 since she was thoroughly familiar with the work. Yet she was suddenly transferred, without any consideration of her wishes, as part of an alleged "reorganisation". The Board of Inquiry and Appeal found that there had been no such reorganisation. The PAHO then invited applications for her former post. There was therefore an obvious abuse of authority. (2) Breach of Staff Regulation 4.2, which reads: "The paramount consideration in the ... transfer ... of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity", and breach of Staff Rule 410.1, which is of similar purport. It was a misuse of authority to transfer the complainant, despite her outstanding work record and on wholly trumped-up grounds, to a vacant post hitherto graded G.4. (3) Breach of Staff Rules 440.1.1, 530.1 and 530.1.1, which entitle the staff member to a post description, and of Staff Rule 530.4, which makes the evaluation of performance "the basis for assisting the staff member to make his most effective contribution to the work of the Bureau". The description of the duties of post 5333 was not given to her until after her transfer. (4) Breach of Staff Regulation 8.1 and Staff Rule 910, which authorise participation in the activities of the Staff Association. The complainant had been a member of the PAHO Staff Association for thirty years. Disputes having arisen between the Association and the Director and relations having become strained, the complainant provided informal liaison between the two sides, but later the Administration became suspicious of her contacts with the Association and put pressure on the Chief of

Administration to banish her to some harmless post. That is the real reason for the impugned decision. (5) Transfer motivated by prejudice on the Administration's part. This is clear from the treatment she received: had Mr. Muldoon not been prejudiced he would surely have behaved quite differently towards a secretary with such an outstanding record. (6) Decision tainted with several procedural flaws: no notice of transfer, no post description given to her before transfer, disregard of her record of service and of her feelings and interests, and transfer misused as a sanction. (7) Failure to perform contractual obligations: the above-mentioned repeated violations of the Staff Regulations and Staff Rules, which form part of her contract of employment, constitute failure to perform the obligations arising under that contract.

C. In brief, the complainant is claiming: (a) assignment to a comparable position (not reinstatement in her former post); (b) compensation for moral prejudice; (c) compensation for loss of expectation of promotion; (d) damages for injury to her reputation; (e) compensation for mental distress and humiliation; and (f) costs.

D. The PAHO contends that the complaint is irreceivable. The complainant states in her memorandum that she was informed of the decision on 20 May 1980. Her complaint is dated 19 August 1980, or ninety-one days later. As to the merits, the PAHO observes in reply to her first plea that a decision to transfer a staff member comes within the scope of the Director's discretion and that her new duties in post 5333 do indeed correspond to grade G.7 since they make use of her thorough knowledge of programmes, experience and drafting ability. In reply to her second plea the PAHO observes that to allow it would mean that only staff members with a poor record could be transferred. The Board of Inquiry and Appeal found that her new duties were no less complex and it concluded: "... there were no grounds on which to substantiate the allegation of grave injury likely to impair the staff member's career". The PAHO also rejects the third plea, which relates to her post description. Her duties were described orally by the Chief of Administration in a conversation with her on 14 May 1979 and supplied in writing on 4 June. In any event any improprieties which may have occurred were corrected in the appeal proceedings. As to the fourth plea, about freedom of association, the Board found that the complainant had failed to show any link between her participation in the Staff Association and her transfer. The PAHO fully recognises freedom of association; indeed several members of the Staff Association, including elected representatives, work in the Office of Administration. The fifth plea is likewise unfounded: there was no prejudice whatever against her, and she was transferred because of a genuine need to strengthen the Public Information Office. The question of providing a post to improve liaison with the public was raised in 1978, the post was established in 1979, and the complainant was assigned to it precisely because of her experience. Her supervisor had no prejudice against her, indeed he recommended her for a meritorious service award. There is no substance to the sixth plea - that there were procedural flaws. The Board of Inquiry and Appeal found no such flaws. Lastly, there was no breach of her contract since the transfer did not bring about any change of grade, reduction in salary, or lowering of dignity and it did not prejudice her career. The PAHO accordingly invites the Tribunal to hold the decision to be lawful and based on the Organization's interests, and to dismiss the complaint.

E. In her rejoinder the complainant explains that the correct date of notification of the decision is the one given on the form, and that "20 May" in the memorandum is a typing error. The complaint was filed on the ninetieth day and is therefore receivable. The PAHO has, she believes, failed to mask the truth: to punish her for her Staff Association activities she was suddenly transferred to an annex building and put on a G.4 post, hastily transformed into a G.7 post to serve the PAHO's own ends. The Board of Inquiry and Appeal found no substance in the reason given by Mr. Muldoon on 14 May 1979 - "organisational needs". The PAHO's attempts to demonstrate the importance of post 5333 are unconvincing. The fact is that this is a classic instance of abuse of authority which entitles the Tribunal to interfere. "Persons in higher positions" compelled Mr. Muldoon to abuse his authority since until then relations with her supervisor had been excellent. It is untrue to say that her career has not suffered from the transfer: a career is not just a matter of remuneration and promotion; account must also be taken of the staff member's dignity. The obvious and pointless humiliation inflicted does injury to her career, which cannot now come to an honourable end. The complainant concedes that the Director has authority to transfer staff members, but in this case it was misused since the real reason for the decision was not the one given. Proof of the fact that the alleged "reorganisation" was just a pretext is to be found in the post description hurriedly drawn up and given to her after transfer: when there is a genuine reorganisation the new posts and new descriptions are defined in advance. The Board of Inquiry and Appeal having found that the reason given was untrue, there is a shift in the burden of proof. It is not for the complainant to establish that there was some other reason - her Staff Association activities - for which in any event she believes she has made out a case. It is for the PAHO to show that she is mistaken in alleging that there was some other reason. Lastly, the treatment of her in general constituted breach of her contract, which guaranteed that she would be treated lawfully and with respect for her rights as a human being.

F. In its surrejoinder the PAHO continues to maintain that the complaint is time-barred. It is not good enough to say that the mention of 20 May 1980 is a typing error; she must prove she received the decision on 21 May. Since it is the date of notification that matters, the fact that the decision was not dated is irrelevant. The PAHO utterly rejects the allegation of misuse of authority, which it believes to be based on pure conjecture and surmise and not supported by the facts. It has supplied conclusive evidence to show that the post to which the complainant was transferred was created to meet organisational needs. It is immaterial that the post was previously graded G.4 since substantial duties were added before it was regraded. The complainant was transferred, not on 14 May - on that day her supervisor merely informed her of her transfer - but on 1 June. The post description was therefore communicated to her in time. There is no evidence whatever to suggest that she suffered any loss of dignity. The interpretation which she is putting on the rules would prevent the Administration from functioning. The sole purpose of the transfer was to serve the PAHO's interests and it did not harm the complainant's. The decision was taken, not by the Director, but by the Chief of Administration who acted of his own accord, and he was not influenced by the complainant's Staff Association activities, which in any case were not considerable.

CONSIDERATIONS

Receivability of the complaint

1. According to Article VII, paragraph 2, of the Statute of the Tribunal a complaint shall not be receivable unless it is filed within ninety days after the notification of the decision impugned or, in the ease of a decision affecting a class of officials, after the decision was published.

In the form instituting her complaint the complainant states that the impugned decision was dated 21 May 1980. In the statement which she appends to the form, however, she writes in brackets that she received the decision on 20 May. If the time limit started on 21 May, it expired ninety days later, on 19 August 1980, the date on which she filed her complaint, and her complaint is therefore receivable. If the time limit started on 20 May, the complaint was filed ninety-one days afterwards and is therefore time-barred.

In its reply the PAHO says that the decision was notified on 20 May and contends that the complaint is therefore irreceivable. In her rejoinder the complainant maintains that the actual date on which the decision was notified was 21 May, that the date given in the statement of facts is wrong and that she therefore respected the ninety-day time limit. In its surrejoinder the PAHO repeats its plea of irreceivability, contending that the complainant is bound to establish the receivability of her complaint and that she has not discharged that obligation.

2. Under the general rules on the burden of proof, it is for the author to establish the date on which a communication was received. If he sends a letter by registered post or an official notice of acknowledgement for completion by the addressee he can easily furnish the proof. If he sends it by the ordinary mail, however, he may be unable to do so, and then, for want of evidence as to the actual day of receipt, the Tribunal will accept what is said by the addressee.

That is what the Tribunal will do in this case. The impugned decision was not sent by registered post or with an official acknowledgment of receipt. It was not even dated. Nor can the date of delivery be determined from the written evidence. The Tribunal will therefore accept the complainant's statement. It is true that she gives two dates: 21 May 1980 on the form instituting her complaint, and 20 May in the statement appended to the form. The Tribunal will, however, take 21 May as the date rather than 20 May. First, there is reason to suppose that the complainant gave greater importance to the date which appears on the form than to the one put in brackets in a sentence in an appended statement. Secondly, it is likely that she was anxious to respect the time limit and that if she had indeed received the impugned decision on 20 May she would have acted one day earlier. The date of 21 May is accepted and the time limit has been respected.

The Tribunal's power of review

3. The impugned decision confirms the complainant's transfer from post 0157, with the Chief of the Office of Administration, to post 5333, which belongs to the Public Information Office. The decision is based, among other things, on Staff Rules 510.1 and 565.2, which the Tribunal will consider below. Here it will merely observe that the rules confer wide discretion on the Director. It will therefore set aside the impugned decision only if it was taken without authority, or violated a rule of form or procedure, or was based on an error of fact or of law, or if essential facts were overlooked, or if there was misuse of authority, or if mistaken conclusions were drawn from the facts.

The Tribunal will allow the complaint if it finds any of these flaws.

The complainant's pleas

4. Staff Rule 565.2 reads: "A staff member may be reassigned whenever it is in the interest of the Bureau to do so". Staff Rule 510.1 adds, however: "In determining the initial and any subsequent assignment, consideration shall be given, to the extent possible, to the staff member's particular abilities and interests". Thus in deciding to transfer a staff member the Director is bound to take account not only of the PAHO's interests but also of the staff member's particular abilities and interests. It is true that if the Organization's interests carry greater weight the Director will act accordingly. However, "to the extent possible", i.e. provided it is not at variance with any of the Organization's main interests, he will take account of the staff member's particular abilities and interests.

The complainant is mistaken in contending that her abilities were disregarded. As is clear from correspondence appended to her surrejoinder, the PAHO had had it in mind since 1977 to enlarge the Public Information Office. It is immaterial whether that was really a reorganisation or not. It is established that the intended action was taken in 1979, that post 5333 in the Public Information Office was upgraded from G.4 to G. 7 and that, as was found by the Board of Inquiry and Appeal and the official who carried out a desk audit, that post may be regarded as equivalent to post 0157 with the Chief of the Office of Administration. In transferring the complainant from post 0157 to post 5333 the Director therefore neither under- nor overestimated her abilities.

The PAHO failed, however, to meet the requirement in Staff Rule 510.1 that it should take account of the complainant's particular interests. It is of course understandable that it tried to give post 5333 to a staff member whose qualifications matched the new duties to be performed. There is nothing to suggest, however, that only the complainant was fit to perform those duties. In any event, before transferring the complainant against her will the PAHO ought to have made sure that there was no other staff member fit and willing to hold the enhanced post. It was bound to take action to find someone on the staff for the post or even to hold a competition. It had all the more reason for enlarging the scope of its inquiry because the complainant was entitled to proper treatment in view of her age, seniority and outstanding work record. Under the circumstances in which the PAHO obliged her to take on a new position, it overlooked her particular interests even though those interests could have been safeguarded. It therefore committed a breach of Staff Rule 510.1.

5. According to Staff Regulation 4.2 and Staff Rule 410.1 considerations to be taken in mind by the Organisation in the selection of staff include competence and integrity.

The complainant maintains that the PAHO failed in its obligations under those rules by transferring her to a post in which her competence and experience cannot be fully used. Her objection would succeed only if her new post required qualifications inferior to those required in her former post. It is clear from 4 above, however, that it does not. Although the duties of the two posts are different, they may be regarded as equivalent in importance. In other words, ability to perform the duties of one post implies ability to perform the duties of the other.

6. According to Staff Rule 440.1, upon selection for a post a candidate shall receive an offer of appointment which according to Staff Rule 440.1.1, shall "state the type of appointment, tenure probation requirement, title and duties of post, salary and allowances". Moreover, Staff Rule 530.1.1 states that supervisors shall be responsible for facilitating the adjustment of the staff member to his work by "providing him with a clear statement of his duties and his official relationship".

Contrary to what the complainant contends, those rules were not disregarded in her case. On 14 May 1979 the Chief of Administration informed her of her transfer and gave her summary information on her future duties. On 22 May the Chief of the Public Information Office gave her further details. On the same day she was invited to take note of the description of her new post, but she refused to do so on the grounds of her state of health. The post description was eventually given to her on 4 June. There is no need to consider at what date the transfer took place in law - whether it was on 14 May, as she contends, or not until 1 June, as the PAHO contends. What is certain is that she actually held post 5333 from 1 June; that she was by then aware of the duties of the post, at least in their broad lines; that it would have been open to her to obtain a post description earlier; and that she received it on 4 June. In the circumstances, since the rules do not prescribe the date by which the post description shall be communicated, the Tribunal does not find that they were violated. It is true that the PAHO could have shown greater diligence and communicated the post description to the complainant as early as 14 May. When she began her new work, however she knew what it entailed. Although she had to wait a few days to obtain a written

explanation, that did not in any way impair the protection of her interests.

7. Under Staff Regulation 8.1 the Director shall make provision for staff participation in the discussion of staff questions Staff Rule 9.10 recognises the right of the staff to associate.

The complainant contends that the sole reason for the action taken against her was the tension which had existed for some years between the Director and the Staff Association, of which she is a member. She therefore alleges that she was victim of a concealed sanction and that it was imposed on her in breach of the right of association. At first sight her contention seems to be supported by the circumstances in which she was transferred, i.e. hastily and over her objections. But there are other matters to be considered. First, the written evidence suggests that the reform of the Public Information Office and the complainant's transfer were measures which formed part of a plan designed as early as 1977. In any event there is nothing to suggest that they were intended to conceal imposition of a sanction on a staff member on whom the Director wished to wreak vengeance. Moreover, although the complainant was a loyal member of the Staff Association, regularly attended its meetings and even discussed matters raised at those meetings with senior officials, up to 1979 she was not particularly active in the Association. She is therefore unlikely to have aroused the Director's ire any more than other staff members. There being uncertainty about the real grounds for the impugned decision, the Tribunal will not regard as proved her allegation of a breach of the right of association.

8. According to Staff Rule 1250.1.1 a staff member may appeal against any measure or decision tainted with personal prejudice against him. For such a plea to succeed there is no need for a staff member to have suffered unequal treatment, i.e. to have been treated less favourably than another. It is enough that he should have suffered treatment which is not warranted on any objective grounds.

This is so in the present instance. Despite her age and work record the complainant was suddenly transferred to a post which did not suit her and no thought was even given to finding a solution which would more closely match her legitimate interests. Only prejudice can account for such lack of consideration, which the complainant is right in treating as grounds for appeal under the rule cited above.

9. The complainant further alleges several procedural flaws such as lack of warning, late communication of her post description, disregard of her particular interests, and so on. Those are not new pleas, but a repetition without any change in form of pleas which she has already put forward. The Tribunal will therefore answer them merely by referring to the foregoing considerations.

10. Lastly, the complainant alleges breach of her contractual rights. She is not, however, alleging breach of terms of her appointment intended to supplement the provisions of that the breach of those rules involves breach of the contract itself. In other words her allegations of breach of contractual rights are indistinguishable from the claims which she bases on the Staff Regulations and Staff Rules and which the Tribunal has already considered.

Conclusions

11. It appears from the foregoing that the complaint must be allowed for two reasons. First, the impugned decision did not take due account of the complainant's particular interests. Secondly, it was tainted with prejudice. Having found two violations of the rules, the Tribunal will now consider what effect to give to the claims for relief.

First, the complainant wishes to be given a post comparable to post 0157, which she held before her transfer. She can hardly claim assignment to a post which has already been filled or to a post which the Organization would have to create for her. She is entitled however to demand that if she applies for a position comparable to the one she held up to 1979 her application should be preferred to others who are equally well qualified.

Secondly, the complainant seeks compensation for moral prejudice. It is true that where the impugned decision is not unlawful such compensation is due only in exceptional circumstances, viz. where the wrong is especially grave. On the other hand where the decision is unlawful, the wrong need not be especially grave for an award of compensation for moral prejudice it is enough for the Tribunal to find a serious wrong. In the present case the impugned decision was tainted and the latter condition is fulfilled. The complainant is therefore entitled to compensation for moral prejudice provided that there was serious injury to her feelings. There was indeed such injury she was certainly affected by the suddenness of the decision, which she regarded as an unfair punishment, and her reputation very probably did suffer since her colleagues must have wondered what the reasons were for

such an unaccountable transfer. The Tribunal will determine the compensation for moral prejudice accordingly ex aequo et bono at 8,000 United States dollars.

The complainant is also entitled to 2,000 dollars in costs.

She is, however, mistaken in claiming compensation for what she alleges is impairment of her prospects of promotion. Her prospects would in fact be reduced only if her transfer involved disqualification, and it appears from the foregoing that it did not.

DECISION:

For the above reasons,

1. The complainant is entitled to be given preference over other equally well-qualified applicants if she seeks a position comparable to post 0157.
2. The Organization shall pay the complainant compensation amounting to \$8,000.
3. The complainant is entitled to \$2,000 in costs.
4. The other claims for relief are dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1981.

(Signed)

André Grisel
Devlin
H. Armbruster

A.B. Gardner