FORTY-EIGHTH ORDINARY SESSION

In re OLIVARES SILVA

Judgment No. 495

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Dr. Hector Olivares Silva on 26 February 1981, the Organization's reply of 14 May, the complainant's rejoinder of 15 June, the complainant's further communication of 15 July, the Organization's surrejoinder and additional communication of 21 August, the complainant's statement of 19 March 1982 and the Organization's observations thereon of 15 April 1982;

Considering the memorandum dated 27 July 1981 provided at the Tribunal's request by the PAHO Staff Association and the Organization's memorandum dated 1 September 1981 making observations on the Staff Association's memorandum;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rules 910, 920, 1040, 1050 and 1230 and Manual Sections II.5.260 and II.9.230, 235 and 370;

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 citizen of Chile, joined the staff of the Pan American Sanitary Bureau, the secretariat of the PAHO, as a P.4 dental officer in October 1973 on a fixed-term appointment. He was stationed at first in Ecuador and then, from January 1975, in Mexico on a project for dental health. On 30 August 1977 his appointment was extended to 31 October 1979. In 1977 he was elected, and in 1978 and 1979 re-elected, Vice-Chairman of the Mexican filial, or branch, of the PAHO Staff Association. At a meeting of the Mexico staff in July 1978 the Director of the PAHO made what the complainant took to be derogatory remarks about the Chairman of the headquarters Staff Committee (Dr. Juan García), the Chairman of the Field Staff Subcommittee (Dr. Miguel Márquez), and the headquarters Staff Committee in general. The complainant reported the remarks to the headquarters Staff Association and on 11 August 1978 the headquarters Staff Committee wrote to the Director about the matter. The dental health project having come to an end on 31 December 1978, the complainant's post was transferred to the regular budget of PAHO Area II for the remaining ten months of his appointment. On 19 July 1979 the Area II Representative, Dr. Sotelo, recommended to headquarters extending his appointment to the end of the year and suggested ways of getting over the financial difficulties. On 26 September his appointment was extended to 31 December, but by a telex dated 16 October the Personnel Office informed him that for lack of funds and because there was no possibility of transfer his appointment would then terminate in accordance with Staff Rule 1040, which refers to the completion of temporary appointments. On 20 December he filed an intent of appeal and on 4 February 1980 an appeal with the headquarters Board of Inquiry and Appeal. He alleged that the decision had been taken from personal prejudice and despite the need for his services, that there were in fact funds to finance his post and that he could have been transferred to a post for a dental officer in Brazil. The Board reported on 4 September 1980. While rejecting the charges of personal prejudice, it held that, in view of the continuing demand for his services and his outstanding performance, he had had reasonable expectations of renewal. It recommended that he should be compensated under Staff Rule 1050, which relates to abolition of post and reduction in force, that every effort should be made to reinstate him at the earliest opportunity and that Staff Rules 1040 and 1050 should be redrafted. By a letter dated 20 October 1980 the Director informed the complainant of his view that the termination had been correctly decided under Staff Rule 1040 since the appointment had not ended before the date of its expiry and that no indemnity was payable under Staff Rule 1050. It is the final decision of 20 October 1980 that is now impugned.

B. The complainant contends that the decision was in breach of Staff Rule 910, which guarantees the staff's right of association, and Staff Rule 920, which lays down its right of representation. As the Board recognised, there has

been antagonism between the Director and the Staff Association since 1976. Indeed the Director went so far as to describe some of the staff representatives as "bad apples" and threaten sanctions. The treatment the complainant received is just part of a broad pattern of victimisation of elected staff representatives, often ill-disguised in the form of non-renewal of contract. For his forthrightness in defending the staff's interests, as illustrated by his reporting the Director's remarks in Mexico in July 1978, he was marked out for early elimination. The Administration's attempts to undermine the Staff Association led to an investigation by a mission from the Federation of International Civil Servants' Associations (FICSA), which found systematic harassment and denial of the rights of association and representation. The FICSA Council adopted a resolution on the matter in January 1980. The complainant describes as an "error of law" the Board's finding that there was no convincing evidence of personal prejudice against him. The reasons given for the decision were not the real ones, especially since his record of performance was satisfactory. The decision was in breach of Staff Rule 1050.2, which prescribes compensation when a post of indefinite duration is abolished. Although he held fixed-term appointments, his work was continuous, his post was of indefinite duration and Staff Rule 1050 therefore applied. The Administration also disregarded Manual Section II.5.260, which states that in extending fixed-term appointments due regard should be paid to the need for the official's services, the quality of his work and his own wishes. The complainant points to the Board's difficulty in determining whether Staff Rule 1040 or 1050 is applicable and to its comment that the distinction between appointments of limited and indefinite duration is not clear in PAHO posts nor in the appointment mechanisms. In his claims for relief he asks that the decision be quashed; that he be given normal two-year renewal from 1 January 1980; that he be awarded remuneration from that date to the date of his complaint; and that he be awarded moral, punitive or exemplary damages for the breach of his fundamental rights. He also claims costs and damages for injury to his professional reputation. In its reply the Organization explains in detail the difficulties it had in financing the complainant's post from 1975 and in transferring him at the end of 1979. There was indeed a vacancy in Brazil in October 1979, identified by the complainant's supervisor, Dr. Gillespie, but at the time the Brazilian health authorities were reviewing the PAHO technical co-operation programme and so no appointment was made. In the event the authorities concluded that they would prefer short-term consultant appointments, and that ruled out the complainant. The demand for his services was indeed sporadic. The decision was justified by constraints on the PAHO budget and it was taken in proper exercise of the Director's discretion. The PAHO explains why the Area Representative's suggestions for getting over the financial difficulties could not be followed. Those difficulties began before 1977, when the complainant first became involved in the Staff Association. The PAHO utterly rejects the charges of victimisation. Decisions are not necessarily in breach of Staff Rules 910 and 920 simply because they are taken against officers of the Association. Staff representatives are treated on a par with other staff members. As the Board found, there is no evidence of personal prejudice towards the complainant. The incidents he cites as evidence of such prejudice did not involve him personally and did not relate in any way to his Staff Association activities. He alludes to action taken by the Administration in respect of other staff representatives at various duty stations, but under Staff Rule 1230.1 such action is subject to review only if the officials themselves file individual appeals. The FICSA resolution to which the complainant refers reflects only the Staff Association's views and is of no value as evidence. The PAHO correctly relied on Staff Rule 1040 and also complied with Manual Sections II.9.230 and 235. When an official on a temporary appointment holds a post which is abolished and the expiry of his appointment coincides with the abolition - whether the post is of limited or indefinite duration - the Organization is not bound to apply Staff Rule 1050. Staff Rule 1040 governs termination on completion of a contract, as in the present case; Staff Rule 1050 governs termination of an appointment before expiry of contract due to abolition of post, which is not relevant in this case. The Organization accordingly invites the Tribunal to dismiss the complaint.

D. In his rejoinder and in a further communication dated 15 July 1981 the complainant contends again that the decision he impugns was not taken in proper exercise of administrative discretion. He points out that up to 1979 the PAHO had continually found ways of financing his post and that the decision not to continue to finance it was made in 1978, coincided with attacks on staff representatives and came soon after he had reported the Director's remarks about headquarters staff representatives. It is not true to say that the decision was solely determined by budgetary constraints. The Administration mistakenly believes that it has unlimited discretion under Staff Rule 1040 to renew or not to renew an appointment. It could perfectly well have arranged the financing of the complainant's post. Besides, there were other posts to which he could have been transferred at the time of termination, as his supervisor pointed out. Good faith required the Administration to keep him on as a short-term consultant until the Brazilian Government had decided whether the vacant post was needed. The offer of short-term employment since his termination shows that his competence was not in doubt and that the real objection was his interest in the Staff Association. Short-term employees cannot stand for office in the Staff Association since they do not have the continuity of service that would allow them to work for the staff. Most of the findings of the

FICSA mission were based on documents that had originated with the Administration, and the latter, though invited, declined to comment. Besides, the burden of proof is on the defendant to show that the non-renewal was prompted by the complainant's Staff Association activities. He develops his argument that Staff Rule 1050 ought to have been applied. The Board had understandable difficulty in interpreting the Rules, particularly since the terms "limited" and "indefinite" duration are not defined. The Board was therefore right not to construe the Rules to the complainant's detriment. He presses all his original arguments and claims for relief.

E. In its surrejoinder and in a further communication the Organization submits that the complainant has distorted the facts. It firmly denies that there was any curtailment of the right of association or any pattern of victimisation. Action taken in respect of officials who happened to be staff representatives was taken in the Organization's interests and reflected changes in regional needs for technical co-operation. At the meeting in Mexico City in July 1978 the Director did not criticise the professional competence of any PAHO official. The complainant says that it was he who prompted the Staff Committee's letter of 11 August 1978 to the Director; yet neither the cable sent to the Committee nor the Committee's letter mentions his name. Besides, his appointment was extended for a full year and a half beyond the only events which he alleges aroused personal prejudice against him. The only vacancy identified, the post in Brazil, was abolished two months after his termination. That he has since been offered employment shows the absence of prejudice. The PAHO reaffirms that the reasons for non-renewal were financial. As regards Staff Rules 1040 and 1050, it maintains that the legal position is clear. Staff Rule 1050 cannot apply when a termination is due to completion of a fixed-term appointment. Any other interpretation which disregarded the duration or type of appointment would render almost meaningless the temporary nature of fixed-term appointments. The Organization therefore again invites the Tribunal to dismiss the complaint.

F. The Tribunal invited the PAHO Staff Association to state whether, in its view, the Administration followed a policy of penalising staff members because of their activities in the Association. In a memorandum dated 27 July 1981 the Association replies that in its view the Administration is indeed following such a policy and has committed serious breaches of the right of association. In support of its contention it cites a comprehensive report on a mission of the Federation of International Civil Servants' Associations to the PAHO in September 1979, as well as many other items of evidence it alleges that the decline in relations with the staff dates back to the Administration's ineffectual response to the abduction of a staff member in Argentina in 1976. Since then the Administration has taken a combative attitude towards the Staff Association by systematically hampering its operations. The Association gives many examples of the repressive policy it alleges and under four main heads, namely the limitation of consultations between staff and management; administrative interference with internal activities of the Association, including encouragement of a splinter union in the Pan-American Center of Zoonoses in Argentina (CEPANZO), the packing of the Staff Committee in 1979, and restrictions on meetings; the withholding or restriction of facilities, such as office space, the use of telex and other communication services; and the elimination of staff leaders by taking abusive personnel action such as transfer and non-renewal of appointment on the grounds of a reorganisation of the PAHO. It gives examples of such elimination.

G. In a memorandum dated 1 September 1981, also accompanied by many items of evidence, the PAHO makes observations on the Staff Association's memorandum. It firmly denies the existence of any policy of penalising staff members because of their activities in the Association. The Association used the disappearance of the staff member in Argentina as a pretext for making new demands, despite all the efforts that had been made to improve staff relations. The Administration does consult the staff representatives on a wide range of matters and it gives examples. It has not interfered with the internal activities of the Staff Association. In fact the Staff Association does not necessarily have the monopoly of staff representation, and the staff may join any type of association provided membership is not incompatible with their status as officials. The creation of a professional staff association in CEPANZO was not an unfair labour practice. The Staff Committee in 1979 was duly elected. As to the alleged elimination of staff leaders, the transfer of a staff representative does not rob the staff of the benefits of his leadership: a staff member is not immune from the normal incidents of service just because he is a staff representative, and in any case he may still carry on staff activities in his new duty station. In any case not all the staff members mentioned by the Staff Association were dismissed, as might be inferred from the Association's memorandum. The reorganisation of programmes and budget constraints have led to staff cuts. There has been no ouster or purge of staff leaders on the grounds alleged by the Association. Since 1973, apart from those who retired or resigned, only one member of the Staff Committee (Dr. Beaudry-Darismé) has had her appointment terminated and many staff representatives have been promoted or taken part in staff training. For years relations with the staff have been difficult, and there is no evidence of any deliberate attempt to deny the right of association.

CONSIDERATIONS:

Issues

1. The complainant was first employed by the Organization in October 1973 on a two-year contract which since then and until October 1979 was renewed from year to year. He was then notified that because of the unavailability of funds his contract would not be renewed under Staff Rule 1040 after its expiry on 31 December. Staff Rule 1040 provides:

"Temporary appointments, both fixed term and short term, shall terminate automatically on the completion of the agreed period of service in the absence of any offer and acceptance of extension."

It is well established that the decision to make or withhold an offer of extension is a discretionary decision to be taken by the Director in the interests of the Organization, and therefore one over which the Tribunal has only a limited power of review. It is also established that in accordance with the principle of freedom of association officers and members of the Staff Association may act in furtherance of their common interests and shall not be penalised by the Administration for any such activity that is not otherwise improper. It is not disputed that any such penalisation would be an abuse of the Director's discretion and within the power of the Tribunal to review.

2. For the three years 1977, 1978 and 1979 the complainant was the Vice-Chairman of Filial II, i.e. the Mexican chapter or branch of the Staff Association. This was a period of "strained relations", as it is described in the report of the Board of Inquiry and Appeal, between the Director and the Staff Committee of the Staff Association, which Committee operates from headquarters in Washington D.C. In July 1978 the Director addressed several branches of the Association in the country, including the Mexican Filial, in which he described the Committee as unrepresentative and named some of them as "bad apples". In the same month he marked his disapproval by resigning from the Staff Association. Poor staff relations was a subject of discussion at the 20th Pan American Health Conference in September 1978 (see Judgment No. 427, paragraph 4). Throughout 1979 there was a running dispute between the Director and the Staff Committee about the withdrawal of facilities.

3. The complainant alleges that the non-renewal of his contract was not for the reason given but because the Director was prejudiced against him as an officer of the Staff Association. This is the main issue in the case. If the complainant fails on this issue, there is a subsidiary issue as to whether his appointment was lawfully terminated under Staff Rule 1040. If it was, he is not entitled to any compensation. The complainant however contends that the rule which should have been applied is Staff Rule 1050, which deals with the consequences of the abolition of a post and provides for some compensation.

4. The Tribunal is not here concerned with the merits of the quarrel between the Director and the Staff Association. Its existence however creates a difficult situation in which it is necessary to take into account the serious possibility that the Director might consciously or unconsciously be prejudiced against those to whom he is controversially opposed. It is argued on behalf of the complainant that in matters of non-renewal of contract, promotion, assignments and transfers, etc., involving consideration of organisational or financial questions about which an outsider is inevitably poorly informed, it is easy for a Director to exercise prejudice and conceal it. It is argued on behalf of the Organization that the work of administration cannot be carried on if officers of the Staff Association are to be automatically protected from termination or from changes in status which they may dislike. A staff member who cannot understand why he should be, as it appears to him, unfavourably treated, is naturally inclined to suspect prejudice. One of the unfortunate results of the existing disputes is to create the belief that any decision adverse to an active member of the Staff Association is to be explained by his staff activities.

5. The Tribunal does not accept the submission of the complainant that in every case in which such a staff member is involved the burden of proof passes to the Organization to show that his activities had nothing to do with the decision. Each case must be decided on the proper inferences to be drawn from its own facts. The first matter to be examined, which is considered in paragraphs 6 to 8 below, is the reason given for the decision. If in the case of an active staff member no reason is given, an inference could be drawn that his activities had been improperly taken into account. The second matter in a case such as this is the presence or absence of evidence of any particular animosity by the Administration towards the complainant, and of evidence of the part, prominent or otherwise, which he played in the controversy and of any act or attitude by him calculated to excite the Administration's disapproval; this aspect of the case is considered in paragraphs 9 to 12 below. A third matter is whether or not there had been as alleged by the complainant in this case, a "pattern of victimisation". It would be, as the complainant contends, easy for the Administration to conceal in a single case what may be the real reason for an adverse

decision; concealment in a number of cases is more difficult. This is examined in paragraphs 13 to 21 below.

Unavailability of funds

6. The complainant was a dentist who worked in Ecuador in an established post 4130 at grade P.4 but on different projects for which money had to be found in the annual budget. This could not always be done by a regular allocation. It might have to be done by what is referred to as "creative budgeting", i.e. the use of savings made within the regular budget and supplemented perhaps by money procured from external sources, e.g. international foundations. At the beginning he was for over a year working in Ecuador on Project 6600. Then he was transferred to Project MEX-1600 in Mexico, where he was working when the question of extending his two-year appointment came up for consideration. It was extended for a year, i.e. until October 1976, with the aid of a grant from the Pan American Health and Education Foundation (PAHEF). The next extension depended in part upon a grant from the Kellogg Foundation; it was made at first tentatively until 31 December 1976 and then for the full year to October 1977. In July 1977 it proved possible to budget for the complainant's post within the regional programme of technical co-operation under Project MEX-1600 and so the complainant was given a two-year extension until October 1979. But in July 1978 the Mexican Government expressed the desire that at the end of the year the funds employed in the dental project should be used in a project concerned with epidemiology which it deemed to be of higher priority. The consequence was that from 1 January 1979 the complainant's post was without project finance and thrown back on the Area II (Mexico) Budget. He was assigned as a consultant in dental cases and his services' put at the disposal of governments which wished to use them. They were in fact extensively and successfully used in 1979.

7. On 19 July 1979 the Personnel Department raised the matter of an extension to the complainant's contract. Dr. Sotelo, the Area Representative, recommended an extension because of the complainant's professional capability. He said that he could find the finance until 31 December and would study the position after that. The contract was on 26 September extended accordingly. On 24 October Dr. Sotelo suggested as finance for 1980 diverting the funds available for a vacancy for an epidemiologist which there was difficulty in filling, but nothing came of this. On 11 October Dr. Gillespie, the complainant's supervisor, perceiving an unfilled post in Brazil (Project 5100), sent a memorandum to headquarters suggesting that the assignment of the complainant to this post should be considered if his continuation in Mexico was not feasible. The suggestion in the complainant's case that this memorandum was suppressed is not sustained by the facts. The Administration left the post unfilled because they knew that the Brazil health authorities were reviewing the programme. Eventually, the authorities decided to use short-term consultants instead. On 16 October, after discussion with the Director and Deputy Director, it was decided to terminate the contract on 31 December "since we do not foresee any possibility for reassignment in the near future".

8. It is not disputed that, as found by the Board of Inquiry and Appeal, the complainant was an unusually competent staff member whose services were greatly sought after by PAHO Member Governments. Surely, it is urged on his behalf, the Organization could have found the money from somewhere to retain his services. In 1979 they were constantly in use and after his termination there were many requests for short consultancies. Why did the Administration not extend the contract at least until the decision of the Brazilian Government was made known? And why was no use apparently made of Dr. Sotelo's suggestion? On the last question there is no information. But as to the rest the Organization argues that it is simply a question of whether it could afford to keep a full-time job alive. It states:

"The various requests for complainant's services do not, in themselves, provide the basis for funding a full-time inter-country expert. In fact, their short-term nature and sporadic frequency supports the Organization's conclusion throughout the hemisphere, that dental services could be more economically provided by short-term consultants."

On the whole the Tribunal is not satisfied that funds were not or could not have been made available for some extension.

Evidence of a particular animosity

9. There is in general no evidence at all of how the complainant conducted himself as Vice-Chairman of his Filial. The only evidence to be noted is of a single official act which he performed and of one occasion when he came into contact with the Director.

10. After the address to the Mexican Filial on 21 July 1978 mentioned in paragraph 2 above, the Director's remarks

were cabled to the Staff Committee in Washington who on 11 August wrote to the Director strongly protesting against them. The cable is not in the dossier, but the complainant claims to have been the author of it. If he was, there is no evidence that the Director ever knew it.

11. In December 1978 the complainant sought an interview with the Director to clarify, he says, his situation as Vice-Chairman and to say why he felt it his duty to support the Staff Association. He told the Director that he was at the July meeting at which the Director "attacked the professional reputation" of two named officials and that, unlike some members of the staff, he could not change his version of the facts. The Director said that he believed in labour activities but was opposed to some elected representatives at headquarters whom he named. There was some discussion about the future (Project MEX-1600 was then being wound up) and the Director mentioned a post as Regional Dental Adviser which could possibly be created in Mexico.

12. It is not entirely clear what significance the complainant wishes to be attached to this conversation. Presumably it is that the Director, although he said that his quarrel was only with individuals, must have secretly resented the complainant's proclamation of loyalty to the Association and resolved to get rid of him. If so, it is difficult to see why the Director, instead of simply terminating him in October, extended his contract for a further three months, running the risk that some funded job might turn up during that period. Moreover, the Organization questions the accuracy of the complainant's recollection. There is in the dossier a memorandum made by the complainant of this conversation, but it is not contemporary. It was made a year later in December 1979. By then the complainant had been terminated and on 20 December he challenged his termination by an intent of appeal in which he alleged personal prejudice. The statement that the Director attacked "the professional reputation" of the men he named is contrary to much of the other evidence. The protest of 11 August 1978 refers to "personal attacks" based on the distortion of the Committee's deliberations; it does not complain of an attack on their professional reputation. Dr. Sotelo, who was in the chair at the meeting, specifically denies that the Director made any reference to professional competence. It may be added that there is no evidence, except what is in the memorandum itself, for the statement in the complainant's argument that the Director promised Dr. Olivares Silva employment "if he would go along with his program".

Victimisation: the general principle

13. Evidence of this character has not hitherto been tendered to the Tribunal. It is therefore desirable to consider of what it should consist and to what extent it is relevant. The Tribunal will state first the general principle of relevancy in cases where prejudice is alleged.

14. Prejudice is usually concealed and so its existence usually has to be established by inference. When the facts of a single case are sufficiently strong to establish an inference, there is no need to examine other cases. But they may be strong enough to create only a suspicion falling short of complete proof of the allegation; an example is the case of Quiñones cited in paragraph 21 below. In such a case proof of a similar suspicion in similar cases becomes relevant. Suspicion means that the facts from which the inferences were drawn may be susceptible of either a guilty or an innocent explanation. An innocent explanation which is credible in a single case may cease to be credible when it has to be applied to a number of similar cases; by this means the doubt which defeats proof in a single case may be removed. But there must be enough evidence within the case that is being judged to create a suspicion that prejudice is at work. Where there is not the slightest evidence of prejudice within the case itself, it cannot be proved by proving prejudice in other cases.

15. How should the evidence be presented? There must in each of the supplementary cases, as they may be called, be a precise and detailed allegation supported by the same sort of evidence as would go to prove the validity of a complaint. Indeed, in a case in which no complaint is being made by the staff member affected and no reason given for his apparent acquiescence, an organisation is likely to comment that the allegation cannot be worth much. At any rate, where there is no complaint, it is useless to put an allegation into a paragraph and rely for support on facts scattered over a dossier or maybe over several dossiers. The Tribunal sustains the Organization's objection to a presentation of this sort.

16. It would be wrong to suppose that every case of alleged prejudice is likely to require the close examination of numerous other cases. The first and greatest safeguard against the operation of prejudice lies in the procedural requirements which every set of Staff Regulations contains and whose main object is to exclude improper influences from an administrative decision. As is illustrated by several of the cases to be cited below, proof of prejudice is rendered unnecessary when procedural requirements have not been observed.

Victimisation: the cases

17. In his argument the complainant alleges that countless other top executives of the Staff Association were suddenly receiving notices of adverse administrative actions, but he identifies no cases and gives no details. Doubtless he is relying upon the evidence given by the Staff Association. In support of their affirmative answer to the question: "Does the PAHO Administration follow a policy of penalising staff members because of their activities in the Staff Association?", the Association gave evidence of ten of their leaders who "were callously ousted from the Organization under various guises". One of these names, given twice, is that of the complainant himself. Of the remaining nine, three have not made complaints so that there is no dossier to be examined, and two, García and Márquez, have complained as representatives only and have not sought relief in respect of any alleged punitive action. This leaves four cases which are fully documented and which are reviewed below.

18. Beaudry-Darismé, Judgment No. 494

(a) In March 1978, Dr. Beaudry-Darismé had held for three years the position of Regional Adviser in Nutrition Education with the rank of P.4. She worked at headquarters in Washington. In March 1977 she had been elected as Vice-Chairperson of the Staff Committee, i.e. the body which ran the affairs of the Staff Association. This is the committee which the Director began to criticise in 1977 and to denounce forcibly in 1978; Dr. Beaudry-Darismé was not, however, specifically named by him. On 18 March 1978 she was informed by her divisional chief, Dr. King, that effective 1 January 1979 her post would be transferred to Guatemala City and that the transfer had already been discussed with the Director and agreed. The failure to consult her opinion or her interests might have been due to the insensitivity of Dr. King, but in the circumstances it is not surprising that it was taken to be the first step in removing her from the scene of her staff activities.

(b) If it was such a step, the Administration thought better of it. It was followed by prolonged discussions in which it was established that the transfer of the post was part of a scheme of decentralisation. Dr. Beaudry-Darismé was nevertheless reluctant to move because of the damage she considered would be caused to her programme. Eventually in June 1979 she was summarily dismissed for refusing to move. On the recommendation of the Board of Inquiry and Appeal that proper procedures had not been observed, the Director on 14 July 1980 made a new decision offering to reinstate Dr. Beaudry-Darismé in Guatemala City, thus affirming the transfer of the post. Dr. Beaudry-Darismé refused the offer and appealed against the new decision. The Tribunal found that this decision was not tainted by prejudice and dismissed the appeal.

19. Dicancro, Judgment No. 427

(a) This staff member was terminated on 16 October 1978. The reason initially given was that, when he stood as a candidate in the election of September 1978 in which the Director was re-elected, he had employed what the Director considered to be improper procedures. The Tribunal exonerated Dr. Dicancro from any impropriety and quashed the decision to terminate on the ground that the Director was, because of his resentment against Dr. Dicancro as a rival, unfit to take a detached view of his value to the Organization.

(b) In his statement of his case, Dr. Dicancro alleged that between 1975 and 1978 he had been harassed by the Director by transfers and similar administrative actions and attributed these in part to his activity in staff affairs. The Board of Inquiry and Appeal found "that there were policy considerations and budgetary constraints" justifying the actions complained of. The Tribunal did not find in these incidents, looked at by themselves, evidence of prejudice. Dr. Dicancro held no office in the Staff Association. There is evidence in the dossier that in January 1978 he summoned at the request of the Association a meeting at the Area III Office for the election of a representative. The Administration objected in mysterious language to the "mechanisms of communication utilised by the Staff Association through various telexes to Dr. Miguel Dicancro". Some enlightenment on this may be obtained from the dossier in García and Márquez, Judgment No. 496; see in particular paragraph 31. At the Conference in September 1978 at which the Director was standing for re-election the Staff Association was anxious to have the Conference discuss an item entitled "alleged irregularities imputed to the Director" and it is possible that the Director believed Dr. Dicancro to be working with the Association in this matter.

20. Troncoso, Judgment No. 448

(a) Dr. Troncoso was appointed on 23 January 1977 on a two-year contract. On 30 October 1978 she was notified that her contract would not be renewed. No reason was given. Later she was told orally that the reasons were

unsatisfactory performance and her political activities of which three governments had orally complained. She was told that no details could be given of these complaints because of embarrassment to the governments concerned.

(b) The Board of Inquiry and Appeal found that Dr. Troncoso "participated very actively and visibly" in matters concerning the Staff Association in Guatemala (Area III) where she was stationed; she was one of the five members of a board elected on 21 April 1978 by the staff in Guatemala for the purpose of preparing a draft proposal which would permit establishment of a Staff Association in Area III. It may well be that the Director would not have looked with favour on the establishment of a new filial. In these circumstances and in the obscurity of the circumstances surrounding her termination a suspicion of prejudice would naturally arise. It proved however unnecessary for the Tribunal in its judgment either to confirm or dispel the suspicion. The appeal was allowed, partly because of procedural flaws, but also because the Director failed to take account of essential facts; he ignored the evidence praising her performance. As to political activities, the Tribunal, after noting that two of the governments who were said to have complained had subsequently requested her services, held that political activities which were never investigated could not form a ground for the decision.

21. Quiñones, Judgment No. 447

On 14 May 1979 Miss Quiñones was, as the Tribunal found, "hastily and over her objections" and despite her age and work record, transferred to a post which did not suit her. She believed that it was to punish her for her Staff Association activities. The Tribunal allowed the complaint against the decision, first, because the Administration had broken Staff Rule 510.1 by failing to take account of the complainant's particular interests; and, secondly, because the decision was tainted with prejudice. Under this second head the Tribunal did not find affirmatively that the ground of the prejudice was Staff Association activities. As to that, the Tribunal found that Miss Quiñones was a loyal member but not particularly active in the Association; it would not regard as proved her allegation of a breach of the right of association. But it considered that only prejudice of some sort could account for the lack of consideration with which she was treated.

Victimisation: conclusion

22. The cases cited are too few in number and too diverse in character to give the Tribunal much help in resolving the question whether participation in the Staff Association was of itself a source of prejudice. Dicancro is the strongest case on the force of prejudice, but the evidence of his connection with the Staff Association is uncertain. The case undoubtedly shows that when the Director's anger was aroused, his discretion was not to be trusted. A similar showing appears from the case of García and Márquez, Judgment No. 496. This latter case was not a case of the victimisation of any individual, but it is highly relevant as an illegal attempt to punish or coerce the Staff Association as a whole. The attempt, which was made in October 1978. succeeded but only at the cost of a running battle with the staff which was still in progress in October 1979 when the Director took his decision in the present case.

General conclusion

23. In this case good reasons can be found either for renewal or for non-renewal of the complainant's contract. Objectively a decision either way could be justified. In such a case it is enough for the complainant to show that it is more probable than not that a bias against him was a factor in the Director's mind when he was considering whether or not the contract should be terminated. The Tribunal concludes that it was more probable than not and therefore will quash the Director's decision. In view however of the uncertainty of the complainant's prospects the compensation to be awarded to him cannot be large. Since, however, it is larger than would have been paid to him under Staff Regulation 1050, it is unnecessary to consider the subsidiary issue mentioned in paragraph 3 above.

DECISION:

For the above reasons,

1. The Director's decision of 20 October 1980 is quashed;

2. The Organization is ordered to pay to the complainant US$15,000 as compensation for the non-renewal of his contract and US$8,000 in respect of his costs.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right

Honourable Lord Devlin, P.C., 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 3 June 1982.

André Grisel

J. Ducoux

Devlin

A.B. Gardner

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