

Registry's translation, the French text alone being authoritative.

FIFTY-FIFTH ORDINARY SESSION

In re DEL CANTO

Judgment No. 651

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Juan del Canto on 9 April 1984 and corrected on 17 May, the PAHO's reply of 5 July, the complainant's rejoinder of October 1984 and the PAHO's surrejoinder of 8 January 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 050, 335.1, 1040, 1050 and 1230.8.3 of the PAHO Staff Rules;

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 Chilean agronomist and agricultural engineer, joined the Pan American Sanitary Bureau, the secretariat of the PAHO, in 1974. He was stationed in Guatemala City, where he held a continuous series of short-term and fixed-term appointments at the Institute of Nutrition of Central America and Panama, known as INCAP. The Institute was founded in 1946. According to a basic agreement concluded between the six founder Member States in 1953 the PAHO runs the Institute. At the material time the complainant held a P.4 post. The PAHO informed him by a telegram of 28 October 1982 that because of the restructuring of INCAP his appointment would end on 31 January 1983 in accordance with Staff Rule 1040 ("Completion of temporary appointments") and he was given the three-month notice required by that rule. On the next day, 29 October, he was informed that INCAP would offer him an appointment under the new INCAP staff rules, and the official offer was made by INCAP on 10 November, the new appointment to start on 7 February 1983. By a letter of 3 November he asked the acting Director of INCAP for full information about the nature of the offer and the conditions of service, and the Director replied on 27 January 1983. He accepted the offer on the same day. The terms of his new appointment were, to his mind, in some respects not so good, and on 4 January he had filed an appeal with the PAHO headquarters Board of Inquiry and Appeal in Washington. On 31 January INCAP ordered him to return to his country to register with the PAHO representative in Santiago, in accordance with PAHO requirements. He accordingly went to Chile, intending also to establish his family there and return alone to Guatemala City. His personal effects were delayed in transit to Chile and he awaited their arrival. On 14 April he sent INCAP a telegram saying he could not report for duty until the end of May. By a telegram of 28 April INCAP withdrew its offer of appointment. In its report of 23 September 1983 the Board recommended (1) evaluating his qualifications for PAHO employment; (2) reconsidering the possibility of finding him a post with the PAHO; (3) in the meantime reissuing the offer of employment with INCAP and maintaining it for 60 days to allow him to take up duty; (4) granting him four months' salary as compensation; and (5) reimbursing the costs of his appeal. But by a letter of 18 November 1983, which was notified to him on 10 January 1984 and which is the impugned decision, the Director of the PAHO informed him that it would reconsider his candidature for employment, though no post had yet been found; that recommendation (3) was rejected because it was a matter for INCAP to decide; and that consequently (4) and (5) were also rejected.

B. The complainant submits that the PAHO was in breach of his contract of employment. He was offered the new appointment, along with other PAHO staff at INCAP, in anticipation of the ratification of a new basic agreement on INCAP which had been concluded in 1981. The practice had always been for the PAHO to engage Professional category staff for INCAP, who were subject to PAHO rules; INCAP recruited locally the General Service category staff, who came under its own rules. Under the 1981 agreement INCAP was to break off from the PAHO altogether and manage itself. But the agreement has not actually come into force and never will, because the Council of INCAP, its governing body, has since had a change of heart about leaving the PAHO. Since its foundation INCAP has formed part of the PAHO, and it still does. Any change in the terms of the complainant's employment ought therefore to have complied with PAHO rules. In fact his conditions of service would, in several respects, have been inferior to those he enjoyed as a PAHO official. There was also abuse of authority. The PAHO and INCAP

conspired to harass him by suddenly ordering him to go to Santiago and then using his delay in returning to Guatemala City -- which was due to reasons beyond his control -- as a pretext for revoking the INCAP appointment. But for the compulsory repatriation, he would now at least have a job at INCAP. There was also breach of Staff Rule 1050, which relates to reduction in force. When abolition of post and expiry of appointment coincide Rule 1050 should apply. Had the reduction-in-force procedure been properly applied, he might well have been kept on at the PAHO. He invites the Tribunal to order the PAHO to perform its contractual obligations by reinstating him in his former grade and post at INCAP with effect from 1 February 1983. He asks the Tribunal, if it finds that INCAP and the PAHO are separate bodies, to order the PAHO to apply the reduction-in-force procedure prescribed in Rule 1050. He also seeks any further relief the Tribunal deems just, and costs.

C. In its reply the PAHO explains that INCAP is an independent entity in international law. The PAHO used to finance the appointment of Professional category staff for technical co-operation work in nutrition, and such staff were PAHO officials; but, as it was competent to do, INCAP also recruited both Professional and General Service category staff under its own rules. For want of ratification the 1981 agreement has not come into force and the one of 1953 holds good. The Directing Council of the PAHO has agreed that PAHO should continue to run INCAP but appoint only its Director and Administrator, other staff being appointed by INCAP itself. That was how the complainant came to get a new appointment from INCAP: It is absurd to complain to the PAHO that INCAP would have treated him as an INCAP employee. Besides, INCAP's own rules do not allow appeal to the Tribunal. There was no breach of contract by the PAHO. It is misconceived to accuse a former employer of not applying its own rules to a contractual relationship between the complainant and another organisation. He knew exactly the nature of his conditions of service with INCAP and freely accepted its offer. Nor was there any abuse of authority by the PAHO. Three other PAHO employees who had accepted INCAP appointments were told to complete their repatriation under their PAHO contracts, and all reported back for duty in time. There is no evidence of a conspiracy to harass the complainant. It was not the PAHO, but INCAP, that required him to go to Chile. There was no breach of Rule 1050. The complainant's contract was correctly terminated under Rule 1040. The PAHO generously paid him an indemnity under Rule 1050.4 even though it was under no obligation to do so. It could find no suitable vacancy for someone with the complainant's qualifications.

D. In his rejoinder the complainant enlarges on his allegations of breach of his contract of employment, a plot to get rid of him, and disregard of Rule 1050. He affirms that, whatever the position may be in law, there is factual identity between the two organisations. He presses his claims.

E. In its surrejoinder the PAHO reaffirms that INCAP is a separate person in law with full capacity. There is no legal relationship between the complainant and the PAHO, which discharged all its obligations towards him. It acted in good faith throughout, the complainant acted of his own free will, and if he had any cause for complaint it would be with INCAP.

CONSIDERATIONS:

The relationship between the PAHO and INCAP

1. Under an agreement dated 24 May 1949 the Pan American Health Organization serves as the Regional Office of the World Health Organization (WHO) for the Americas. It is a person with full capacity in international law, and it belongs to the United Nations system. It is administered by the Pan American Sanitary Bureau.

As part of the WHO it is subject to the Tribunal's jurisdiction.

2. The Institute of Nutrition of Central America and Panama, known as INCAP, was founded on 20 February 1946 by the representatives of Costa Rica, El Salvador, Guatemala, Honduras and Panama, and the Pan American Sanitary Office (now Bureau), with the support of the Kellogg Foundation.

On 17 December 1953 the founder members of INCAP concluded a basic agreement Nicaragua subscribed later the agreement defines the legal status of INCAP and its relationship with the PAHO. It has legal capacity on the territory of its Member States. It has a Directing Council. It enjoys tax exemption and other immunities. It receives technical assistance from the PAHO, which is in charge of administration, i.e. co-ordinating and carrying out projects, though the INCAP Council may countermand it.

For several years some of its staff were recruited by the Institute itself and subject to its rules, some by the PAHO

and subject to PAHO rules.

3. On 25 September 1981 the parties to the basic agreement of 1953 signed another, the main purpose being to relieve the PAHO of responsibility for administration. Having been ratified by only two States and the PAHO, the new agreement is not yet in force, and on 19 August 1983, at its 34th Session, the Directing Council of INCAP adopted Resolution VII noting that the 1953 agreement held good.

On 29 September 1983 the Directing Council of the PAHO agreed, in keeping with that resolution, to continue for the time being to administer the Institute. But the PAHO had in the meantime decided to cut down the number of staff it appointed to INCAP and appoint only the Director and the Administrator, and it had accordingly terminated the appointments of all other PAHO officials assigned to INCAP.

The complainant's position

4. The complainant joined the PAHO on a short-term appointment on 17 June 1974. He had his appointment extended several times.

On 1 November 1974 the PAHO transferred him to INCAP, where he held post 0617 at grade P.4 as a "technical officer and agricultural economist".

Because of the restructuring of INCAP the PAHO terminated his appointment on 28 October 1982 as from 31 January 1983, thereby giving the three months' notice required under Staff Rule 1040. It also granted him an indemnity under Rule 1050.

On 29 October 1982 INCAP offered him a post at grade IN-15 as from 7 February 1983, his pay to be based on Rule 210.7 of the new staff rules of INCAP.

On 3 November 1982 he asked INCAP to give him full information on the post he was offered.

On 10 November INCAP sent him a formal offer.

On 4 January 1983 he filed notice of appeal with the PAHO Board of Inquiry and Appeal.

On 27 January he received the information he had sought from INCAP and accepted its offer.

On 31 January INCAP told him that before taking up duty he was ordered to return home to Santiago, in Chile, to "register" with the PAHO representative there. He travelled with his family to Santiago. His personal effects did not arrive, he says, until much later, and so he asked that the date on which he was to take up duty should be postponed.

On 28 April INCAP cancelled its offer of employment on the grounds that the complainant had failed to report for duty.

The complainant's pleas

5. The complainant contends that despite the termination of his appointment with the PAHO and his appointment by INCAP he is still an official of the PAHO, of which INCAP is just an "arm"; the PAHO was bound by its own rules to safeguard his rights as a PAHO official since the conditions for the change in his status were not fulfilled; and it was in breach of its obligations in that on appointment to INCAP he forfeited financial and other benefits he had enjoyed at the PAHO.

But his plea is at variance with valid decisions by the PAHO and INCAP. The PAHO terminated him as from 31 January 1983 and it did not provide for replacing him: it abolished his post. Then INCAP appointed him, as from 7 February 1983, and became his sole employer. Both organisations have personality and full capacity in law and acted correctly. Accordingly, from 31 January 1983 the PAHO was no longer under any contractual obligation towards the complainant, who was entering into a contract with INCAP. In other words, as from 31 January 1983 the PAHO was not liable for any changes in the complainant's position.

A different ruling would be possible only if what the two organisations did was just a ruse to hide an intention to

keep the complainant on the PAHO staff. Such a ruse is highly implausible. The changes reflect the clear intent of the draft agreement of 1981, namely that the PAHO should cut its costs and INCAP have greater administrative independence. It is immaterial that, because fewer than four States have ratified, the agreement of 1981 is not in force. The 1953 agreement, which was still in force at the time, did not prevent the PAHO and INCAP from taking the action they took with regard to the complainant.

His case is even weaker for his having accepted INCAP's offer without qualification after being given information on the position he was to hold.

If he is dissatisfied with his conditions of employment at INCAP his quarrel is with INCAP, not the PAHO. The Tribunal will hear disputes between the PAHO and its staff, but not disputes between INCAP and its officials.

6. The complainant contends that he fell foul of a conspiracy between the PAHO and INCAP to deprive him of his employment. In particular he objects to having been ordered to go to Chile, from which, through no fault of his own, he was unable to return in time. This plea is also unsound.

First, it was INCAP that instructed him to go to Chile to sort out his position with the PAHO. If the instructions were unlawful INCAP alone would be liable.

Secondly, even if the PAHO had asked INCAP to give him such instructions it would not have acted in breach of any of its own Staff Rules. It is immaterial whether and, if so, in what circumstances the Director of the PAHO may be bound to make an exception to the Staff Rules in accordance with Rule 050.

Thirdly, a conspiracy is unlikely: three other PAHO officials were instructed to return home and each of them, though at different dates, later took up duty at INCAP.

7. The complainant has a subsidiary plea that the PAHO denied him the priority he was entitled to under the reduction in-force procedure in Rule 1050.2. This too fails.

The rule does provide that where a post is abolished the Director of the PAHO must choose between staff members with particular regard to their qualifications, seniority, the nature of their employment and the duration of their duties. But that does not mean that the complainant had the right to demand that the PAHO keep him on. He observes that there are five posts for nutrition advisers in the PAHO, but he fails to establish that he was qualified for any of them or better qualified than the incumbents. In other words, he has not shown that the conditions for granting him the priority he claims were fulfilled. In fact it is probable that, as the PAHO says, it could not find any post for an agronomist like himself. In any event by 31 January 1983 it had done a great deal, though to no avail, to keep him.

Lastly, the complainant does not deny that the period of notice stipulated in Rule 1040 was observed and that the compensation prescribed in 1050.4 was paid.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Edilbert Razafindralambo Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 18 March 1985.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A.B. Gardner

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