SEVENTY-FOURTH SESSION

In re SINGH (Birendar) (No. 2)

Judgment 1243

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Birendar Singh against the Pan American Health Organization (PAHO) (World Health Organization) on 30 March 1992 and corrected on 8 April, the PAHO's reply of 2 June, the complainant's rejoinder of 6 July and the Organization's surrejoinder of 15 September 1992;

Considering Articles II, paragraph 5, and VII, of the Statute of the Tribunal, PAHO Staff Rules 470.1, 470.2, 470.3, 1020.1, 1020.2, 1050.2, 1230.3.2, 1230.7.3 and Article 21(b) of the Regulations of the United Nations Joint Staff Pension Fund;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of India who was born in 1932, joined the PAHO on 12 May 1980 under a fixed-term appointment and was assigned as a statistician at grade P.3 to Kingston, in Jamaica. His post was abolished and his appointment terminated on 31 October 1988. He lodged his first complaint with the Tribunal on 2 September 1988 against the Organization's failure to order the reduction-in-force procedure prescribed in the Staff Regulations.

In execution of Judgment 974, which the Tribunal delivered on 27 June 1989, the PAHO applied that procedure. The Reduction-in-Force Committee recommended reinstating the complainant in a post which was already filled. The Director of the PAHO wrote him a letter on 20 March 1990 to say that being loth to oust the official on that post he was creating a temporary P.3 post at Port-of-Spain, in Trinidad; the complainant would be reinstated at once and hold that post until his retirement at the end of February 1992, when he would reach the age of 60. In a letter of 30 March 1990 the complainant thanked the Director for the decision, adding that he would welcome "short-term assignments, even after ... retirement in February, 1992".

In July 1990 a PAHO circular told the staff of an amendment to Staff Rules 1020.1 and 1020.2 which had become effective on 1 January 1990 and said: "The normal age of retirement has been extended to 62 years for participants who enter or re-enter the United Nations Joint Staff Pension Fund on or after 1 January 1990". The age of retirement was still 60 for everyone else.

By a letter of 22 August 1990 the Secretary of the WHO Staff Pension Committee informed the Chief of Personnel that the PAHO should pay the Pension Fund by 30 September 1990 the actuarial costs of the complainant's participation from 1 November 1988 to 31 March 1990. In a letter of 8 October 1990 the complainant asked the Secretary of the Fund to confirm that his re-entry into the Fund had been later than 1 January 1990 so that he might exercise his rights under the amended Staff Rules. The Secretary's reply of 7 November was that the date at which he had begun to contribute to the Fund was still 12 May 1980 and that his "normal retirement age" under the Fund's Regulations was therefore still 60; any queries he wanted to make about the compulsory age of separation he should put to the World Health Organization.

In a reply of 1 March 1991 to a memorandum of 15 February 1991 from the complainant the Chief of Personnel of the PAHO pointed out that since he had accepted reinstatement at 30 March 1990 the date of his original entry into service had not changed and under the Staff Rules the age of retirement that applied to him was 60. After further correspondence he filed a notice on 12 July 1991 of his intention of appealing against the decision not to apply Rule 1020 to him and let him retire at 62. He filed his appeal on 24 July.

The Board of Appeal not having reported to the Director, the complainant appealed to the Tribunal on 30 March 1992 against what he took to be the implied rejection of his claim.

B. The complainant observes that he was made to retire on 29 February 1992 at the age of 60 in disregard of the

amendment of Rule 1020, which extended the age of retirement for some staff to 62.

He cites Article 21(b) of the Regulations of the Pension Fund, which reads:

"... participation shall not be deemed to have ceased where a participant resumes his contributory service with a member organization within 12 months after separation without a benefit having been paid to him."

He contends that since he had ceased to be a participant for over 12 months and benefits had been paid to him he "re-entered" the Fund on or after 30 September 1990, the date of payment by the Organization to the Fund of the actuarial costs required to cover the period in which he had not been contributing. He therefore has a right to retire at 62 under Rule 1020, which was changed before the creation of his post at Port-of-Spain.

Over five months after the filing of the parties' written submissions the Board of Appeal had not yet heard his case although he even withdrew a request for replacement of one of its members so as to speed things up. He has heard nothing since the end of January 1992, when he was assured that his case would go before the Board. Yet Staff Rule 1230.3.2 stipulates that the Board "shall report its findings and recommendations to the Director within ninety calendar days" of receiving the complainant's full statement of appeal. The Board's "inordinate delay" meant that he got no decision before he retired and that he could not work for the PAHO beyond February 1992. The Administration influenced the Pension Fund by setting the wrong date for his re-entry, viz. 1 November 1988, thereby eluding the requirements of Staff Rules 1020.1 and 1020.2.

Since a new post was created for him he was not reinstated as a result of the reduction-in-force procedure. In a letter of 28 August 1991 to the Director he objected to the PAHO's treating the payment for the period of separation from service as an "award". Unlike salary and allowances, awards do not qualify for refund of United States income tax.

He claims compensation for the loss of two years' salary and allowances and of the possibility of increasing his pension. He also seeks damages for "wrongful treatment".

C. The PAHO replies that the complaint is irreceivable.

First, the Director's letter of 20 March 1990 spoke of "reinstatement", the compulsory age of separation at 60 and the date of retirement. That letter constituted "final action" within the meaning of Rule 1230.7.3, and the complainant's letter of 12 July 1991 giving notice of appeal to the Board was out of time because the time limit in that rule for filing an appeal is sixty days.

Secondly, although the Secretary of the Board kept in touch with him its caseload was so heavy it could not hear his appeal promptly. Since the Board was still trying to meet and report on his case it was premature for him to infer rejection of his appeal.

Since for those two reasons he has failed to exhaust the internal means of redress he has not met the conditions of receivability in Article VII(1) of the Tribunal's Statute.

The Organization observes on the merits that in execution of Judgment 974 it cancelled the complainant's separation retroactively and granted him full pay and allowances for the period of "administrative leave" from 1 November 1988 to 20 March 1990, the date of his appointment to a temporary post. It reinstated him under Rule 470.1 and did not re-employ him under Rule 470.2. It therefore continuously employed him from 12 May 1980 to 29 February 1992.

The Organization rejects the complainant's contention that his appointment was not the outcome of the reduction-in-force procedure, the purpose of which is reinstatement in its employ and obviously not in the very post which the staff member held before, and which will have been abolished anyway.

Since the complainant was reinstated the amended text of Rules 1020.1 and 1020.2 did not apply. The first sentence of Rule 1020.1, which remained unchanged, reads: "Staff members shall retire on the last day of the month in which they reach the age of 60", and that is the material provision.

The period of his earlier participation in the Fund was linked to the one which expired in February 1992, and payments were made to ensure that he suffered no loss of rights. As the Secretary of the Pension Fund said several

times, the starting date of the complainant's participation is still 12 May 1980. In any case Rule 470.3 states that "Restoration of prior contributory service in the United Nations Joint Staff Pension Fund is governed by the Regulations of the Pension Fund".

D. In his rejoinder the complainant dwells on several issues of fact, enlarges on his earlier pleas and seeks to refute the PAHO's pleas in its reply.

He submits that his complaint is receivable. First, he is appealing, not against the Director's decision of 20 March 1990, but against the one of 26 June 1991 conveyed to him by the Chief of Personnel about the applicability of the amended Staff Rules. So his appeal was filed within the sixty-day time limit in Rule 1230.7.3.

Secondly, PAHO is in breach of the Staff Rules by failing to observe certain procedural requirements. By delaying the hearing of his appeal indefinitely it has ensured that there was no final decision for him to challenge. It now blames him for not exhausting the internal means of redress. By dilatory tactics of that kind an organisation can "let an appeal die a natural death".

As to the merits he contends that Rule 470.1 is inapplicable because there was a break of 17 months in his service. That rule covers only staff who are re-employed within a year of termination. PAHO has not met his wish that payments to him should not be treated as an award, and that lends support to his contention that he was re-employed, not reinstated. He presses his claims.

E. In its surrejoinder the PAHO denies any blame for delay in the Board of Appeal's proceedings. The scheduling of its hearings depends on the caseload and on the travel plans of its members and the time they need to read the written evidence. The complainant was well aware of the Board's intention of hearing his case; it was sheer impatience that led him to drop the internal proceedings and go straight to the Tribunal. Moreover, the letter of 26 June 1991, which he seeks to treat as a new decision, merely confirmed the decision in the Director's letter of 20 March 1990 and therefore set off no new time limit for internal appeal.

As to the merits the Organization maintains that in full compliance with the letter and intent of Judgment 974 it reinstated him as a full staff member, i.e. without any interruption in service.

CONSIDERATIONS:

1. By Judgment 974, delivered on 27 June 1989, the Tribunal held to be wrongful the termination of the complainant's appointment as from 31 October 1988 on the grounds of abolition of post. It quashed the decision by the Director of the Organization rejecting his appeal. It directed the Organization to apply to him the "reduction-in-force" procedure set out in Staff Rule 1050.2.

2. Although there was much delay in applying that procedure, and the complainant says it caused great hardship to him and to his family, he makes no complaint now on that score. The Director did not find it possible to follow the recommendations of the Reduction-in-Force Committee but by a letter of 20 March 1990 informed him of a decision -

"... to establish a temporary post of statistician in [the Caribbean Epidemiology Center] with duty station in Port-of-Spain, Trinidad and Tobago, and to reinstate you in the Pan American Health Organization. This post is at grade P.3, is effective immediately, and will end on 28 February 1992. In other words, this assignment is valid until your retirement. You will be reinstated in accordance with the rules of the Organization and the amounts which have been paid to you following your termination, while employed under Personal Services Contracts in Jamaica, will be deducted from the P.3 emoluments which will be paid to you retroactively ... Your effective date of reinstatement in the Organization will be the day on which you report for duty."

In a letter of 30 March 1990 the complainant unreservedly accepted that decision and expressed the hope that he would receive "short-term assignments, even after [his] retirement in February, 1992". At the time he was clearly acting in the belief that the compulsory age of retirement was 60 years and he would accordingly have to retire by February 1992.

3. On 11 July 1990 he became aware of an amendment made in Staff Rules 1020.1 and 1020.2 as from 1 January 1990 whereby the normal age of retirement was extended to 62 years for participants in the United Nations Joint Staff Pension Fund who entered or re-entered the Fund "on or after 1 January 1990".

His present case is that he "re-entered" the Fund after 1 January 1990 and accordingly need not retire until February 1994.

4. The Organization replies that he was reinstated; the original termination having been on 31 October 1988, his reinstatement was effective from 1 November 1988 and so for all purposes he enjoyed continuity of employment; the Fund also reinstated him as from 1 November 1988 and that was the date of his "re-entry".

5. The complainant received a lump-sum payment on his termination in 1988 as well as periodic benefits from 1 November 1988 to 31 March 1990. On 16 May 1990 the Organization informed the WHO Staff Pension Committee of his reinstatement "retroactive to 1 November 1988 as if his service was continuous" and asked the Fund to discontinue his monthly pension payments as from April 1990. In a memorandum of 22 August 1990 to the Organization the Staff Pension Committee said:

"In view of the above reinstatement following ILO Judgment No. 974 ... and since full contributions were not received by the Fund concurrently with the accrual of contributory service ... rectification of Mr. Singh's pension status during the period from 12 May 1980 to 31 March 1990 must be made in accordance with Article 25(e) of the Regulations.

The total actuarial cost for the above period payable to the Fund under Article 25(e) as of 30 September 1990 is $138,559.72. It is therefore imperative for WHO to remit to the Fund the above amount by its due date. Out of this total of $138,559.72, the amount due from the participant should be $46,534.24 which includes the amounts of lump sum payment of $31,705.83 together with periodic benefits of $6,820.13 from 1 November 1988 to 31 March 1990 under Article 29 of the Regulations, accrued interest of $1,440.05 and regular contributions of $6,568.23 due from 1 November 1988 to 31 March 1990.

Please note that the actuarial cost of $138,559.72 should be made on or before 30 September 1990 ... Otherwise, additional interest through the date of payment will become due. ..."

6. After such payment had been made the complainant asked the Fund by a letter of 8 October 1990 to confirm that although his pension status had been restored as of 12 May 1980 his re-entry into the Fund had taken effect after 1 January 1990. The Fund's reply of 7 November 1990 was that the date of his re-entry as a participant was 1 November 1988.

7. The complainant maintained, however:

(a) that his prior contributory service had been restored from 12 May 1980, the date of his recruitment and participation in the Fund;

(b) that the date of validation of his non-contributory service was 1 November 1988, the date when he had become ineligible for participation because of the unlawful termination; and

(c) that the date of his re-entry into the Fund was 30 September 1990, when his pension status had been corrected.

Accordingly, by a memorandum of 15 February 1991 he asked the Director to confirm that the date of his re-entry into the Fund was 30 September 1990 and for him the compulsory age of retirement was 62 years; he also requested copies of correspondence relating to his reinstatement in the Fund.

8. By a letter of 1 March 1991 the Organization asserted that its letter of 20 March 1990 and his of 30 March, taken together, established that for him the age of retirement was still 60 years, but if he wished to contest the Fund's letter of 7 November 1990 he should address the Fund. He did so on 11 April 1991.

9. By a letter dated 10 April 1991, confirmed on 12 June 1991, the Fund stated its position in the following terms:

"Under article 25(e) of the Pension Fund's Regulations, WHO then requested the Fund to 'reinstate' your contributory service as from 1 November 1988 and to 'restore' your prior contributory service from 12 May 1980 to 31 October 1988; WHO paid to the Fund the total actuarial costs entailed (US$138,559.72) in thus recognizing that your contributory service was continuous as from the commencement of your partipation in the Fund on 12 May 1980. The rate of accumulation applicable to your contributory service since 1 November 1988 is consequently

determined by article 28(c) rather than by article 28(b) of the Fund's Regulations, i.e., it is at a flat rate of 2 per cent for each year of service, rather than starting at a flat rate of 1.5 per cent per year and increasing in stages to 2 per cent. If your periods of participation had been treated as separate, with the second period commencing on 1 November 1988, then the rate of accumulation to such second period would have been governed by the provisions of article 28(b) of the Fund's Regulations."

10. The complainant again requested copies of documents. The Organization having supplied them, by a letter dated 6 June 1991 he made a request to the Organization for review of its earlier decision. By a letter dated 26 June, which he received on 10 July, the Organization "reconfirmed the notification, as conveyed by the Director in his letter dated 20 March 1990". The complainant appealed to the Board of Appeal on 24 July 1991.

Receivability

(a) The alleged failure to lodge the internal appeal in time

11. The Organization contends that the Director's letter of 20 March 1990, which the complainant accepted without reservation in his own of 30 March, contained a decision that he must retire by the end of February 1992 and that he may not now question that decision, having failed to pursue the internal remedies and to appeal within the prescribed time limit.

12. The plea is mistaken. If the complainant had "reentered" the Fund after 1 January 1990 within the meaning of amended Rule 1020, the compulsory age of retirement for him would have been 62 years and his assignment would have been effective till 28 February 1994.

The complainant had no occasion to question the Organization's decision until he had become aware of the amendment to Rule 1020. Although his letter of 30 March 1990 referred to "retirement in February, 1992", that cannot be treated as waiver of his rights under provisions which he became aware of only later.

13. The decision in the Organization's letter of 1 March 1991, referred to in 8 above, was not final. It implied that if the Fund accepted that the date of his re-entry had been after 1 January 1990 that decision would be reviewed. It was thus the decision of 26 June 1991, the complainant having failed to persuade the Fund to alter its decision, which was final, and therefore his appeal of 24 July 1991 to the Board of Appeal was within the period of sixty days laid down in Rule 1230.7.3.

(b) The allegedly premature filing of the complaint

14. Rule 1230.3.2 stipulates that the Board of Appeal must present its report to the Director within ninety days of the date of filing of the appeal. Both parties obtained extensions of time for filing their pleadings with the Board. By a memorandum dated 20 December 1991 the Board sought the consent of the parties to its exceeding the ninety days. The Organization immediately agreed. By a letter dated 8 January 1992 to the Secretary of the Board the complainant noted that his case was next for hearing and would be disposed of by the end of January 1992, and he therefore acquiesced in the extension of the ninety days. That would have ensured a decision before the challenged date of his retirement. He came to the Tribunal on 30 March 1992, and at that date the Board had not yet submitted its report or even set a date for hearing his case.

15. The Organization contends that the complaint is premature. It argues that the Board made reasonable endeavours to report promptly; that authority to make a decision is vested in the Director, who has had no opportunity of making a new decision on recommendations from the Board; that there is no implied rejection of the complainant's claim; and that he may not have recourse to the Tribunal until the Board has concluded its proceedings.

16. According to the case law, where a complainant does everything necessary to get a final decision but the appeal proceedings appear unlikely to end within a reasonable time, he may go to the Tribunal. Rulings to that effect are to be found, for example, in Judgments 451 (in re Dobosch) and 499 (in re Tarrab No. 9).

In this case the Board of Appeal secured the parties' consent to the extension of the 90-day period stipulated in Rule 1230.3.2 until the end of January. Yet the Board did not report by that date, and there is no evidence to suggest any effort by the Board to report even after it.

The conclusion is that the time limits have been complied with, there has been no failure to pursue the internal appeals procedure and the complaint is therefore receivable.

The merits7. The material issue is whether the complainant reentered the Fund after 1 January 1990. The Tribunal quashed his termination and ordered the application of the reductionin-force procedure. It further ordered that "if the procedure is not successful he should be paid the indemnity prescribed in 1050.4 and interest".

A new post was found for him, and he was "reinstated in accordance with the rules". The Tribunal required that "If the procedure proves successful and a new post is found for him he should be paid the sums he would have received in the form of salary and allowances from the date of his termination up to the date at which he takes up the new post, less any actual earnings during that period".

18. Reinstatement thus meant fully restoring the status quo. The Organization and the Fund did so. The "effective date of reinstatement", referred to in the Director's letter of 20 March 1990, was "the day on which you report for duty" and it served to determine the period for which actual earnings had to be deducted from his back-pay. But that expression was not used to refer to the date of his "re-entry" into the Fund. He was thus restored to the position in which he would have been had he not had his appointment terminated on 31 October 1988. He did not "re-enter" the Fund on some date in 1990 but was deemed for all purposes never to have left it.

19. The complainant relies on Article 21(b) of the Fund Regulations:

"Participation shall cease ... when [the participant] dies or separates from such member organization except that participation shall not be deemed to have ceased where a participant resumes his contributory service with a member organization within 12 months after separation without a benefit having been paid to him."

He contends that he was terminated, and therefore "separated", on 31 October 1988; that he had more than twelve months of separation; that benefits had been paid to him; and therefore his participation in the Fund had ceased. Accordingly he argues that he re-entered the Fund on 30 September 1990, when the required payments were made.

20. The plea is untenable. That date - 30 September 1990 - was the one fixed for the computation of the payment due, after which interest would become payable on that payment. The "separation" contemplated by Article 21(b) does not include a termination which is reversed by the Organization - for example on an internal appeal - or quashed by the Tribunal. Termination that is so reversed or quashed becomes null and void ab initio and is not separation, although of course there may be default in the payment of contributions, and accordingly participation will not be deemed to have ceased provided rectification is duly made in respect of such default.

21. The complainant did not re-enter the Fund on or after 1 January 1990, and for him the compulsory age of retirement was 60 years. His complaint fails on the merits.

22. One matter relied on by the Organization is the statement in the complainant's memorandum dated 28 August 1991 about reimbursement of income tax: he recognised that he had been reinstated and given an entitlement to salary and allowances from the date of termination to the date at which he took up his new post; he complained that the Organization had refused him reimbursement of taxes paid on those sums by wrongly treating them as an amount paid upon an award and therefore not tax-reimbursable. The Organization submits in its reply that the complainant's reinstatement with full entitlements made him eligible to reimbursement by the Tax Equalization Fund and concluded that "if there is any monetary tax liability on the part of complainant as a result of his reinstatement ... PAHO/WHO will reimburse complainant accordingly".

In view of that undertaking no order on this matter is necessary.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

William Douglas
E. Razafindralambo
Mark Fernando
A.B. Gardner

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