SEVENTY-SIXTH SESSION

In re GILLESPIE

Judgment 1327

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought by Mr. George Gillespie against the Pan American Health Organization (PAHO) on 22 January 1993 and corrected on 11 March, the PAHO's reply of 21 April and the letter of 14 June 1993 from the complainant's counsel informing the Registrar that he did not wish to rejoin;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, PAHO Staff Rules 1020 and 1230.7, Manual provision II.9.70 and PAHO Directive 78-10 of 4 May 1978;

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 the United Kingdom who was born in 1931, joined the staff of the PAHO in November 1967 as a dental officer at grade P.4. The Organization employed him under contracts that it regularly extended. In September 1972 it upgraded his post to P.5 and promoted him to that grade. By a letter of 17 November 1988 the Chief of Personnel told him that his appointment would be extended under Staff Rule 1020.1 until 30 June 1991, the last day of the month in which he was to reach the compulsory retirement age of 60.

In a memorandum of 28 September 1990 to the complainant the Chief of Personnel outlined the terms for granting him home leave in 1990 and 1991, stipulating that there must be "at least twelve months interval between home leaves" and he must take such leave "no later than December 1991 so that there is at least six months remaining to your contract upon your return".

In a letter of 13 March 1991 to the complainant the Chief of Personnel confirmed that he would retire at 30 June 1991 in compliance with Rule 1020. He applied for an extension of contract for personal reasons in a letter dated 27 March to the Director of the PAHO. By a letter of 16 April the Chief of Personnel again confirmed the date of his retirement.

The complainant became president of the Staff Association on 1 May 1991 but resigned on 20 May.

In a letter of 15 May to the Chief of Personnel he objected to the letter of 16 April. On 28 May the Chief of Personnel acknowledged receipt. The complainant sent him another letter on 17 June and the Chief of Personnel wrote in reply on 21 June to say that his retirement had already been processed.

In a letter of 17 August 1991, received on 22 August, he gave the Board of Appeal notice of appeal. In their report dated 24-28 August 1992 the members of the Board held by four to one that the appeal was irreceivable, having been filed beyond the 60-day time limit stipulated in the Staff Rules.

In a letter of 23 October 1992 the Director of the PAHO informed the complainant that he accepted the Board's view. That is the decision impugned.

B. The complainant submits that his internal appeal was receivable. Staff Rule 1230.7.1, he observes, states:

"No staff member shall bring an appeal ... until ... the action complained of has become final. An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action."

and Rule 1230.7.3 says:

"A staff member wishing to appeal against a final action must dispatch to the Board, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal ..."

He observes that Directive 78-10 of 4 May 1978 reaffirms that under the rule that then corresponded to what is now Rule 1230.7.1 the Chief of Personnel must let a staff member know when a decision is final and whether it is appealable. Since the letter that the Chief of Personnel sent him on 13 March 1991 did not say that the action was "final" he got no due notice of it. The sixty-day time limit for internal appeal therefore did not start until the actual date of his retirement - 30 June 1991 - and since he filed notice of appeal 53 days later, on 22 August, he acted in time.

He argues alternatively that when they met on 27 March 1991 the Director advised him to apply for an extension "for personal reasons". If the letter of 13 March had indeed been the "final action" within the meaning of Rule 1230.7.1 such advice would have made no sense. Further communications from the Chief of Personnel led the complainant to believe that no final action had been taken: the letter of 16 April said "In the event that there is a possibility later on to alter this course of action ..." and the letter of 28 May said that the Chief of Personnel would inform the Director of the complainant's "concerns", something that would have been pointless had a final decision already been taken. So the earliest possible notice of a final action came when he got the letter of 21 June 1991, i.e. on 25 June, and he filed notice of appeal 58 days after that date, and so again was in time.

Turning to the merits, he contends that the Director made an enforceable promise to extend his contract but failed, merely because he had exercised his right of association, to keep that promise.

He cites Judgment 782 (in re Gieser):

"According to the rules of good faith anyone to whom a promise is made may expect it to be kept ...

The right is conditional. One condition is that the promise should be substantive, i.e. to act, or not to act, or to allow."

In September and November 1990, he says, he had talks with the Director that were neither witnessed nor recorded and in which the Director told him that his contract would be extended to June 1992. In further talks in February 1991 the Director appeared to take such extension for granted.

Circumstantial evidence, too, corroborates his allegations of a promise. First, the Chief of Personnel's memorandum of 28 September 1990 said that home leave must be taken "no later than December 1991 so that there is at least six months remaining to your contract upon your return": the six months would have expired in June 1992, at the end of the promised extension. Secondly, under Manual provision II.9.70 the Personnel Department normally reminds the supervisor of the staff member's retirement at least six months beforehand. In his case it should have done so by 31 December 1990 but did not. Thirdly, while on mission to Buenos Aires in November 1990 the Director, according to a signed statement by a dentist working on PAHO programmes in Latin America, had a conversation about the complainant with that dentist which gave him the impression that the complainant would stay on beyond June 1991.

The complainant further pleads breach of his right of association. Only two days after the deadline for nominations for president of the Staff Association did he get the letter of 13 March. The Staff Association was in bad odour with the Director at the time and the Director wanted to get rid of him on the grounds that - to quote the complainant - he was "biting the hand that promised to feed him".

He seeks reinstatement as from 1 July 1991 and awards of damages for moral injury, and costs.

C. In its reply the PAHO contends that the complaint is irreceivable because the complainant appealed to the Board of Appeal after expiry of the sixty-day time limit in the Staff Rules. The Director's final decision to apply Rule 1020 and make him retire at the age of 60 was in the letter of 13 March 1991 from the Chief of Personnel.

Besides, his complaint is devoid of merit. The Director made him no promise of extension beyond the age of retirement. Judgment 782 is irrelevant because, for a promise of extension to be "substantive", there must be action by the Director in the form of explicit instructions to the Chief of Personnel. There were no such instructions; nor did the memorandum of 28 September 1990 from the Personnel Department about the complainant's home leave make any explicit promise of extension.

His right of association was fully respected. He resigned of his own accord as president of the Staff Association because he did not qualify for the position on retirement.

CONSIDERATIONS:

1. After he had served the PAHO for 23 years the complainant's contract was to expire on his reaching the compulsory age of retirement on 30 June 1991. He was refused an extension of contract and in this complaint he is claiming "reinstatement" in accordance with Rule 1020.1 of the PAHO Staff Rules, which reads:

"Staff members shall retire on the last day of the month in which they reach the age of 60. In exceptional circumstances the Director may, in the interests of the [Organization], extend the retirement age ..."

2. The complainant alleges that in private talks in September and November 1990 the Director of the Organization promised to extend his appointment up to 30 June 1992. The Organization denies any such promise.

3. By a letter dated 13 March 1991 the Chief of Personnel informed the complainant that the Organization confirmed his retirement on 30 June 1991. The complainant alleges that at a discussion on 27 March 1991 the Director said that he had decided "not to sign an extension of ... contract" but might consider a request from him for an extension "for personal reasons". The complainant immediately made such a request. But on 16 April the Chief of Personnel replied on the Director's behalf confirming termination at the compulsory age of retirement as notified by his letter of 13 March 1991 but adding that "in the event that there is a possibility later on to alter this course of action, we shall not fail to communicate with you". After further correspondence the Chief of Personnel wrote him a letter on 21 June 1991 confirming the date of retirement but again giving an assurance that he would not "fail to let [the complainant] know in the event there is any change in this matter".

4. Rule 1230.7.1 of the PAHO Staff Rules reads:

"No staff member shall bring an appeal before the Board until all the existing administrative channels have been tried and the action complained of has become final. An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action."

And Rule 1230.7.3 provides:

"A staff member wishing to appeal against a final action must dispatch to the Board, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal, specifying the action against which appeal is made and the subsection or sections of Rule 1230.1 under which the appeal is filed. The Board shall open its proceedings at the earliest possible moment after receipt of the appellant's full statement of his case."

5. The complainant appealed to the Board of Appeal on 17 August 1991 against the refusal of extension of contract in the letter of 21 June 1991. In its report dated 24-28 August 1992 the Board concluded by a majority of four to one that his appeal was irreceivable because he had failed to lodge it within sixty days - the time limit set in Rule 1230.7.3 - of the decision of 13 March 1991, which the Board regarded as the "final action" on the matter of his retirement. The dissenting member of the Board took the view that the decision of 13 March was just the first notice of retirement that the PAHO had given him, that the ensuing correspondence gave effect to his right to exhaust administrative channels before submitting an appeal, and that his appeal was therefore receivable, although on the merits it was "frivolous". In a letter of 23 October 1992 to the complainant the Director said that he accepted the view of the majority and noted the minority opinion that his case was frivolous.

6. The complainant is impugning that decision and is claiming reinstatement and awards of damages for moral injury and of costs. He contends that since the Director had invited him on 27 March 1991 to apply for extension the letter of 13 March 1991 might not be treated as "final action" within the meaning of Rule 1230.7.1 and that the letter of 16 April 1991 was not final either because it left open the possibility of a change of position. He also relies on Directive 78-10 of 4 May 1978, which says that "it is for the Chief of Personnel to inform a staff member when an action or decision is final in terms of [the relevant] Staff Rule"; he submits that the Chief of Personnel failed to inform him that either of the two letters was final.

7. The Tribunal holds that the letter of 13 March 1991 from the Chief of Personnel is to be treated as the Organization's final decision that the complainant should retire at 30 June 1991 in accordance with the compulsory age of retirement in Rule 1020.1. That decision remained "final" within the meaning of Rule 1230.7.1 even though later incidents and correspondence may have suggested that there was some possibility of a change in the Organization's position. The fact that the Chief of Personnel failed to comply with the directive the complainant

cites is immaterial to determining the starting date of the time limit: see Judgment 918 (in re Schmid) under 9.

8. As the majority of the Board of Appeal held, the complainant's internal appeal was irreceivable because he had not filed it within the time limit of sixty days after notification of the final decision in the letter of 13 March 1991. Since he therefore failed to exhaust the internal means of redress, his present complaint too is irreceivable under Article VII(1) of the Tribunal's Statute. That being so, there is no need to go into the merits of the case.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 31 January 1994.

William Douglas
P. Pescatore
Mark Fernando
A.B. Gardner

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