FORTY-FIFTH ORDINARY SESSION

In re SETTINO

Judgment No. 426

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Eugene Settino on 16 November 1979, the PAHO's reply of 5 April 1980, the complainant's rejoinder of 30 April and the PAHO's surrejoinder of 25 July 1980;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Manual section II.13.30 and 60;

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, who is a United States citizen, joined the staff of the Pan American Sanitary Bureau, the secretariat of the PAHO, in 1953 and retired on 30 April 1975. On 8 August 1975 the United Nations Joint Staff Pension Fund, at his request, paid him the lump sum of $59,452.03 in settlement of one third of his pension rights. He paid United States tax on that sum and applied to the PAHO on 6 July 1976 for reimbursement of the tax. On 19 July the Chief of Finance replied pointing out that the tax which he had paid on his salary had already been refunded and that in fact he owed the PAHO a sum of $493.72 which had been overpaid. On 5 April 1977 the complainant replied that he utterly disagreed and was claiming from the Organization a balance of $6,116.60 - the tax he had paid on 1975 income - "since all of my income during 1975 was derived from PAHO/WHO". On 2 May 1977 the PAHO restated its case and again claimed the $493.72. The Chief of Administration confirmed that decision on 5 August. On 6 September the complainant appealed to the Board of Inquiry and Appeal. On 22 September, however, the Chief of Administration withdrew his decision of 5 August for "further consideration" in consultation with the WHO. Finally, on 18 May 1979 he wrote again to say that the PAHO abided by its former position and the complainant was therefore free to resume proceedings in the Board of Inquiry and Appeal if he so wished. The proceedings were not resumed, however, since on 6 November the Chief of Personnel, at the complainant's request, authorised him to appeal directly to the Tribunal. It is the decision of 6 November 1979 which he is impugning.

B. The complainant points out that the executive bodies of the PAHO have declared time and again that the PAHO must abide by the rules of the United Nations common system. In a resolution the United Nations General Assembly recognised that exemption from national taxation on salary and allowances was indispensable to the achievement of equality between staff members within an organisation. It is in keeping with that principle that the United Nations refunds tax paid by United States citizens on the third of their pension entitlements which is commuted into a lump sum. In Judgment No. 237 (in re Powell) the United Nations Administrative Tribunal held that practice to be lawful. In two instances the PAHO itself has refunded tax paid on pension entitlements which had been capitalised in into. That only one third was commuted is immaterial, and so is the fact that retirement entitlements which are commuted in toto are usually small. The lump sum representing one third of the complainant's pension entitlements should be regarded as a terminal payment, particularly since it corresponds more or less to his own accumulated contributions deducted from his salary over the years. To refuse to refund the tax would therefore constitute a serious breach of the principle of equality of treatment.

C. The complainant asks the Tribunal to quash the PAHO's decision not to refund the tax, to order it to reimburse the tax paid on the lump-sum benefits from the Pension Bund, to order that interest be paid at the prevailing rate on the amount refunded - to be computed from the date on which the complainant ought to have been repaid - and to award him costs.

D. The PAHO points out in its reply that under WHO Manual section II.13, paragraphs 30 and 60, tax is repayable only if it was paid on "WHO earnings". The list in paragraph 60 of payments which are made to staff members upon termination does not include lump-sum pension benefits, although they are much larger than the payments mentioned in that paragraph. The obvious intention was to exclude them. Besides, they are not "WHO earnings" but

benefits paid by the United Nations Joint Staff Pension Fund, which is legally and financially distinct from the PAHO. They are, moreover, paid to persons who are no longer or are not members of the staff. Terminal emoluments accrue on the date of termination whereas Pension Fund payments accrue no earlier than the day after termination. Repayment of tax paid on salary is a roundabout way of restoring equality between those staff members who pay national tax on their salary and those who do not. In the preparatory work on the Convention on the Privileges and Immunities of the United Nations it was expressly decided not to include any provision in the Convention to exempt international civil servants from tax on retirement benefits, and member States are therefore quite free to tax citizens who are former international civil servants. The United Nations General Assembly decided for reasons of public policy not to provide for exemption from tax on retirement benefits and in Resolution 2007/XIX of 1965 decided that in future pensionable remuneration should be based on gross salary without deduction of the staff assessment levied by the employing organisation in lieu of income tax. In other words, since 1965 pension benefits have been calculated at a level which takes account of the fact that they may be subject to national income tax. There is no difference between lump-sum benefits and pensions, and if tax on the former were reimbursed tax on the latter would have to be as well. The position in the United Nations is quite different, since the United Nations has made express provision for repayment of tax paid on lump-sum benefits. The defendant organisation maintains that the two instances of reimbursement cited by the complainant are exceptions to the rule which were allowed only because the retirement benefits dated back to periods wholly or partly before 1965, i.e. before pensionable remuneration was grossed up. Because of the notable difference in United Nations practice Judgment No. 237 of the United Nations Administrative Tribunal is immaterial except insofar as it endorses the principle that tax may be reimbursed only where there is express provision to that effect. The difference in practice between the UN and the specialised agencies is regrettable but the PAHO is not, as the complainant contends, automatically bound by United Nations rules. Fortunately the anomaly was removed with the adoption of General Assembly Resolution 34/165 on 17 December 1979: paragraph II.4 of the resolution contains a decision to abolish reimbursement of national tax paid on lump-sum pension payments with effect from 1 January 1980 (subject to transitional measures safeguarding the acquired rights of serving officials).

E. In his rejoinder the complainant rejects the PAHO's line of reasoning. He states that in 1953, when he joined the PAHO, WHO Manual section II.13.30 (income tax) expressly included as WHO earnings, under item 7, lump-sum payments from the pension, in excess of the official's contributions". He therefore believes that he has an acquired right to repayment. The PAHO itself admits that the list in the Manual is not exhaustive, and that is clear from the two instances in which tax was refunded. It "regrets" the inequality between staff members, some of whom pay tax while others do not; but the Director-General of the WHO has the power to bring WHO practice into line with United Nations practice and should do so. It is beyond dispute that benefits from the Pension Fund are a form of deferred salary paid by the PAHO and were therefore a factor of decisive importance to the complainant in accepting employment with the Organization. Lastly, the benefits are consideration for the performance of services not to the Pension Fund, but to the PAHO.

F. In its surrejoinder the WHO observes that the Manual sections cited by the complainant were in force for only a few months in 1953 and were repealed in 1954 when the WHO found that they had no basis in law. The complainant may not plead that that was a factor of decisive importance to him when he joined the staff. He has therefore no acquired right to repayment, which at best would be due only for the ten-month period during which the provisions were in force. The judgment of the United Nations Tribunal states that it applies only to United Nations officials. Moreover, no official appointed by the United Nations after 1 January 1980 will be entitled to repayment. If, as the complainant asks, the WHO decided to make repayment so as to ensure equality with United Nations officials, that would merely give rise to other forms of inequality since none of the other United Nations agencies makes repayment either.

CONSIDERATIONS:

1. The employees of international organisations are of course of many different nationalities. Consequently, if their salaries were diminished by taxation under their own national laws there would be inequalities in the amounts of their net earnings. This is thought by all the international organisations to be undesirable. In fact a large number of countries, all those who have adhered to the Convention on the Privileges and Immunities of Specialised Agencies, exempt such salaries from national taxation; in lieu of tax the organisations deduct from the salaries paid to their officials a staff assessment which is the same for all. In the case of nationals whose government have not adhered to the Convention (which governments include the United States) the organisations (including in particular the defendant organisation in this case) deduct from the official salary the staff assessment but reimburse to him the national taxes which he has had to pay. In the defendant organisation the reimbursement is effected in accordance

with rules made to implement the relevant resolution of the Executive Board, which rules are set out in Manual section II.13.

2. Officials of the specialised agencies (including the defendant organisation in this case) are in general eligible for membership of the United Nations Pension Fund, hereinafter called the Fund, to which they make contributions by means of deductions from their salaries complemented by payments, usually double the deduction, made by the employing organisation. The retirement benefit, basically a pension, to which the official is entitled is prescribed by Article 29 of the Fund Regulations; it provides in particular that the pension may be commuted by the official into a lump sum "to the extent of one third of its actuarial equivalent or the amount of his own contributions, whichever is greater".

3. The pension is not of course subject to a staff assessment, neither is it under the Convention exempted from national taxes. Ever since 1946 this has been a subject of discussion in the Joint Staff Pension Board of the defendant organisation and doubtless in other international organisations as well. The defendant organisation invited the Pension Review Group to consider the problem. The Group in 1960 advised against an attempt to secure tax exemption for pensions. The Group pointed out, however, that within the international organisations pensions were calculated on the net salary after deduction of the staff assessment, so that officials were in this respect at a disadvantage as compared with other employees whose pension was normally based on gross remuneration. Consequently the General Assembly of the defendant organisation passed certain resolutions with the result that from 1965 the pension has been based on the gross salary without deduction of the staff assessment.

4. This is the background to the complainant's claim that he should be reimbursed by the Organization the tax levied on that part of his pension rights which he took in the form of a lump-sum payment. His contract provided: "Income Tax reimbursable on PAHO/WHO earnings only". There is not in the contract nor in Manual section II.13 a comprehensive definition of "earnings". In its natural meaning the word covers all the emoluments and benefits paid by the employer to the staff member. Paragraph 60 of Manual section II.13 says that the word "may include" certain specified items of this character if they are included in the income subject to national taxation: otherwise, as noted above, the word is not defined.

5. In the opinion of the Tribunal "earnings" do not, in the absence of an express provision to the contrary, include a lump-sum payment, payable not by the employer but by the Fund in which the staff member has in effect invested a part of his earnings.

The contrary is not very strongly argued in the complaint, which is mainly devoted to other considerations with which the Tribunal will now deal.

6. The complainant's employment with the Organization began on 9 March 1953. At that time the relevant provision in the Manual section included among the items specified as above as covered by "earnings" "WHO contribution to the Provident Fund and lump-sum payment from the Pension Fund in excess of official's contribution". This is a curious item. The lump-sum payment does not share the common character of all the other items, which are items payable by the Organization itself during employment. It is curious also and illogical in that it provides for reimbursement of tax on the lump-sum payment only. If the option to commute is not exercised, tax payable on the annual pension cannot be reclaimed. This exceptional item, which was introduced on 9 February 1953, was omitted from the "revision" published on 1 June 1954 and never thereafter repeated. The complainant contends that, since it was in force at the time when his contract of employment was made, it created for him an acquired right which the subsequent amendment or revision could not destroy.

7. An official, however, is not given an acquired right, i.e. a right of which he cannot be deprived by unilateral amendment, to every benefit conferred by his contract, but only to those which are fundamental. The right to salary and to the well-established allowances, such as those for dependants, is essentially a fundamental right. But this does not mean that every item making up the salary or allowance and every detail of the process by which it is calculated are to be deemed inviolate; or that minor benefits - what are sometimes called "fringe benefits" - are to be treated as unchangeable features of a contract that may last for 30 years or more. The provision for reimbursement of tax on lump-sum payments from the Fund was not only, as already observed, anomalous, but was also of dubious value. Reimbursement would be made only upon that part of the lump-sum payment which exceeded the complainant's contribution. Normally these would be about equal in value and the excess, if any, quite small.

8. Disregarding this limitation, the complainant claims reimbursement of $6,116 as the tax payable on the whole of the lump sum. This amount may look quite substantial now but has to be viewed as it would have been seen in 1953 by a candidate offered a contract and has to be compared with the total amount which he would expect to be receiving in salaries and emoluments over the next 21 years. There is nothing to show that the complainant himself considered it to be of any importance at all; there is no allegation that the removal of the supposed benefit only a year later occasioned any protest by him. In these circumstances the Tribunal concludes that the refusal of reimbursement is not a violation of an acquired right.

9. The complainant relies also on the principle of equality of treatment. In two individual eases, one in April 1969 and the other in April 1972, in which the officials concerned opted under Article 29 for a repayment of their own contributions, the Organization reimbursed taxation payable in respect of those contributions which were made before 1965. The Organization justified these exceptions on the ground of the change of practice made in 1965 which is explained in paragraph 2 above. The Tribunal considers that there is a categorical distinction between persons who elect to take a repayment of contributions and persons who elect to take a lump-sum payment in part commutation of a pension; and that the principle of equality does not require the two categories to be treated in the same way.

10. Finally, the complainant relies on the fact that for a long time past (and until quite recently the practice was altered for the future) the United Nations Organization has reimbursed tax on lump-sum payments. He urges this point in a number of ways. It is inequitable, he contends, that UN staff should have advantages which WHO staff have not: such a difference, he says, would infringe the common system, the Organization has frequently stressed the importance of adhesion to the common system and has given undertakings that it might conform to UN practice: furthermore, the UN Tribunal in Judgment No. 237 upheld the practice. To this the Organization replies that, while it regrets divergencies within the common system, the UN is the only one of the agencies to adopt the practice; and that the UN Tribunal in Judgment No. 237 said that "the ruling in this case is confined to the tax reimbursement regime of the United Nations". In the opinion of the Tribunal none of these matters relates to the question which it has to decide. This is simply whether the Organization has by its refusal to reimburse broken any staff regulation or rule or any obligation in the terms of appointment. The only such term which could possibly be relevant is the obligation not to discriminate, and this obligation applies only as affecting the officials of the Organization itself.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 11 December 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy

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