FORTY-SEVENTH ORDINARY SESSION

In re O'CONNELL

Judgment No. 469

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan-American Health Organization (PAHO) (World Health Organization) by Dr. Maria Isabel O'Connell on 26 November 1980, the defendant Organization's reply of 23 February 1981, the complainant's rejoinder of 1 April and the Organization's surrejoinder of 25 May 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal and PAHO Staff Rules 1040, 1050, 1230 and 1240;

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 of Argentinian nationality, joined the staff of the Pan-American Sanitary Bureau, the secretariat of the PAHO, on 15 November 1971 and was appointed to the Pan American Zoonoses Centre (CEPANZO) in Argentina. She was given a one-year appointment, which was extended by one year at a time, and then up to 30 November 1978. She held post 3707 as a junior administrative assistant at grade G.6. In a minute addressed to headquarters on 10 October 1978, of which a copy was given to the complainant, the Director of CEPANZO expressed agreement with proposals made by the complainant's immediate supervisor for changing the duties of post 3707 to those of a "bilingual secretary" and reducing the grade to G.5 so as to make better use of resources. He suggested that "consideration" should be given to appointing the complainant to the post once the change in duties had been approved and that in the meantime her appointment should be extended to 31 January 1979. On 30 October 1978 she wrote to the Director of CEPANZO expressing the view that in fact post 3707 was being abolished and a new post with the same number created, that if the post was really the same one there should be no need for her to apply for it, and that the proposed new duties did not match her qualifications or bear any relationship to the duties she had been performing satisfactorily for nearly seven years. After further correspondence between CEPANZO and headquarters, it was decided on 21 November 1978 to abolish Post 3707 on 31 January 1979 and to create a G.5 post for a bilingual secretary on 1 February 1979, numbered 5275. On 28 November, two days before the expiry of her appointment, her supervisor informed the complainant that it was extended to 31 January 1979. On the same day she wrote to the Director asking him when the extension had been approved, under which rule it was being granted, and why her post was to be abolished and her appointment terminated on 31 January 1979. In a minute dated 30 November the Director replied, among other things, that he had recommended the extension on 10 October and that if she declined it she should do so in writing. The complainant thereupon filed an appeal with the Board of Inquiry and Appeal of Area VI, in which CEPANZO is situated. On 5 January 1979 her appointment was extended to 15 February 1979. The Area VI representative having rejected her appeal on 14 September 1979, she appealed, on 9 November, to the headquarters Board of Inquiry and Appeal under Staff Rule 1230.8.5. In its report dated 3 July 1980 the headquarters Board found that the administration had created conditions whereby Staff Rule 1050[(1)] applied; that the administration had decided instead to apply Staff Rule 1040 (automatic termination upon expiry of contract); that the Area VI representative had not taken all the facts into consideration; and that his decision should therefore be set aside and compensation paid to the complainant under Staff Rule 1050. By a letter dated 25 August 1980, which she states that she received on 8 September, the Director of the PAHO informed the complainant that he did not consider the PAHO liable to pay her the indemnity under Staff Rule 1050. That is the final decision she is impugning.

B. The complainant observes that the material facts of the case are that she held a temporary appointment which was to expire on 30 November 1978, that it was extended to 15 February 1979 and that her post was abolished on 31 January 1979. Staff Rule 1040 is therefore inapplicable since her post was abolished before her appointment expired. The applicable rule is Staff Rule 1050, and it entitles her to compensation which, according to the criteria set out in Staff Rule 1050.4, should amount to five months' salary. The administration stated that it was extending her appointment to 15 February solely in order to comply with Staff Rule 1040, but in the meantime it abolished

her post. The complainant alleges that its actions were a "poorly disguised attempt to punish [her] for her Staff Association activities" and they afford proof of "personal prejudice" against her in breach of Staff Rule 1230.1.1. Even though her post was abolished, there was still a need for her services. CEPANZO put an advertisement for a bilingual secretary in the Buenos Aires Herald on 12 July 1979, and it was at pains to conceal the vacancy from the complainant although at the time she was avidly seeking re-employment. The reason for the abolition of her post was therefore inadmissible. She therefore asks the Tribunal (a) to set aside the Director's decision of 25 August 1980; (b) to order the PAHO to pay her an indemnity amounting to five months' salary in accordance with Staff Rule 1050; (c) to order her reinstatement on the grounds of the breach of Staff Rule 1230.1.1; (d) (since she is unlikely to find other employment) to order payment to her of a sum equal to the salary she would have earned but for the administration's decision; or - in lieu of (c) and (d) - (e) compensation in respect of the period from 15 February 1979 to the present, plus an award for moral prejudice; and (f) to award the costs she has incurred over her internal appeals and the present complaint.

C. In its reply the PAHO observes that where a fixed-term employee holds a post which is abolished, and the expiry of the appointment and the abolition of the post coincide, it is not required to pay the indemnity prescribed in Staff Rule 1050. Its original decision, notified to the complainant on 28 November 1978, was that her appointment was being, not terminated, but extended to 31 January 1979, the implication being that it would not be extended again since Post 3707 was then to be abolished. This arrangement would have satisfied the rules in Staff Rule 1040 about notice; but ex abundante cautela the PAHO gave further notice by extending the appointment to 15 February. This decision could not, however, invalidate its contention that the grounds for termination were the completion of a fixed-term appointment under Staff Rule 1040. If it wants to reduce fixed-term staff, it has only to let their appointments expire; other-wise there would be little point in giving them fixed-term appointments. To decline to renew a fixed-term appointment is a discretionary decision, and the Tribunal will set it aside only if it is tainted with one of the flaws which entitle it to do so. The Director of CEPANZO reduced staff by abolishing the complainant's post and not renewing her appointment. By offering her preferential consideration for the new post created, he took reasonable steps to give her further employment. She declined it on 30 October 1978, and it is therefore difficult to see how she can infer from the press advertisement evidence of unwillingness to employ her. The PAHO was under no obligation to draw her attention to the vacancy, which was similar to one she had already declined. The PAHO accordingly invites the Tribunal to dismiss the complaint as unfounded. Lastly, as regards redress, it considers that in any event reinstatement would be inadvisable since the staff of CEPANZO has been reduced by 21 General Service category posts to meet a budgetary shortfall in 1981.

D. In her rejoinder the complainant alleges that she was one of those whom the administration decided in 1978 to get rid of in an "extensive purge" of all deemed to be disloyal to the Director of the PAHO. If it had really wanted to make provision for her, it would have informed her earlier of its intentions. Besides, even though she was the incumbent of the post, it said that it would only give "consideration" to appoint in her. She answers PAHO's main arguments as follows: (1) She rejects the PAHO's denomination of abolition of her post as termination of her appointment under Staff Rule 1040. In fact the abolition and the termination did not coincide since the former occurred on 31 January and the latter on 15 February 1979. Besides, even if the two had coincided, the argument is devoid of merit. The Staff Rules do not expressly cover the situation where a post is abolished and the incumbent's appointment ends at the same time. The purpose of Staff Rule 1050 is to compensate a staff member who loses his appointment through no fault of his own, and the same policy considerations require compensation of one whose post is abolished at the same time since he would be the obvious person to occupy it but for its abolition. (2) It is not true to say that the only reason for extending the complainant's appointment to 15 February 1979 was to give the prescribed notice. She was given notice on 28 November 1978 that her post would be abolished on 31 January, and that already constituted 64 days' notice. The real purpose was to use her services for exactly the period for which she was needed, the post of bilingual secretary not having been filled.

(3) Nor was the PAHO merely attempting to make a lawful reduction in staff. The complainant has never contended that such reduction could not be made by non-renewal of appointments on their expiry. Hers was not simply a case of non-renewal, but of abolition of post prior to expiry. (4) The PAHO did not take reasonable steps to offer further employment. It ought to have informed her earlier of the abolition of her post; offered her the new post, not just invited her to compete for it; and offered her the post advertised in the Buenos Aires Herald. (5) Reinstatement would not, as the PAHO contends, be inappropriate. The prejudice caused to her by wrongful termination far outweighs any inconvenience the PAHO may suffer in having to fund her employment.

E. In its surrejoinder the PAHO takes up two points: the arrangements made for the termination of the appointment, and the applicability of the staff reduction procedures. As to the former, it points out that final notice of termination

was given on 5 January, to take effect on 15 February 1979 - a period of just over the month required by Staff Rule 1040. This short extension cannot have the effect of bringing the termination under the rules on reduction in staff. The termination was clearly indicated to be on grounds of abolition of post. As to the second point, the rules relating to reduction in staff cannot apply where the appointment terminates on expiry. Any other conclusion would put fixed-term and "permanent" appointments on a par and so frustrate the purpose of the distinction in the Rules. Indemnity is payable under Staff Rule 1050 only to staff members holding fixed-term appointments in respect of the unexpired period of the appointment. If the contract is completed, as in this case, no indemnity is due. The PAHO accordingly again invites the Tribunal to dismiss the complaint.

CONSIDERATIONS:

As to the claim for an indemnity

1. The complainant claims the indemnity provided for by Staff Rule 1050.4 on the ground that her appointment was terminated under Staff Rule 1050.1. The Organization denies the claim on the ground that the appointment was not terminated under Staff Rule 1050 but under Staff Rule 1040,which contains no provision for any indemnity. The material partsof the Rules are as follows:

"1040. 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. However, a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof at least one month and normally three months before the date of expiry of the contract.

1050.1 The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if that post is abolished.

1050.4 A staff member whose appointment is terminated under this rule shall be paid an indemnity in accordance with the following schedule: ..."

2. In November 1971 the complainant was appointed to post 3707. She was appointed on a fixed-term contract for one year. The contract was thereafter renewed annually and at the material time was due, unless renewed, to expire on 30 November 1978. On 28 November, two days before the date of expiry, the complainant was informed that her post 3707 would be abolished with effect from 1 February 1979 and that her contract would be renewed but only until 31 January 1979.

3. The text of Staff Rule 1040 is not entirely clear and unambiguous, since there is a possible conflict between the provision for an automatic termination and the need for a decision not to re-appoint. The rule has, however, in common with other similar rules in other organisations, consistently been interpreted by the Tribunal so as to require a decision by the Director-General not to renew (this being a decision over which the Tribunal has only a limited power of review) and notification thereof to the complainant before the date prescribed. To interpret the rule as terminating the appointment automatically on the expiry date whether or not a notification was given would not only do violence to the text by rendering the provision for notification otiose, but would also be unreasonable and unfair; it would mean that a staff member who like the complainant had served for seven years could be dismissed without notice at the end of the period. What then is the effect of the failure to give notice? In the opinion of the Tribunal the effect can only be that the contract is by implication renewed for another term.

4. Accordingly, the fixed term of the complainant's contract being for a year, when on 31 October the last date (it being unnecessary to consider whether or not in this case there were abnormal circumstances) passed without notification of non-renewal, the effect was to extend the appointment until 30 November 1979. The notice to extend until 31 January 1979, which was never accepted by the complainant, was therefore ineffective, and her appointment was terminated prematurely by the abolition of her post.

5. It appears that before the abolition took effect the attention of the Organization was drawn to the fact that a two-day notification of non-renewal was hardly consistent with Staff Rule 1040. Accordingly on 5 January it extended the appointment until 15 February, thus giving, it says, more than one month's notice of termination. It is hard to follow the reason for this curious manoeuvre. Either a notice was necessary to terminate the appointment; or it was not. if it was necessary, the notice of 28 November was bad because given out of time, and so the appointment was not terminated. if it was not necessary, the appointment terminated automatically on 30 November. Presumably, it

must be the view of the Organization that the failure to give notice in time does prevent the automatic termination, but preserves the right of the Organization to give a month's notice at any time thereafter, irrespective of whether the circumstances are normal or abnormal. The Tribunal cannot adopt this construction of the rule.

6. However intended, the effect of the manoeuvre was to produce an argument from the complainant (though she did not accept the extension to 15 February) that it could now no longer be contended (since the cessation of the appointment did not antedate the abolition of the post) that she was not entitled to an indemnity under Staff Rule 1050.4. This evoked in reply what may be the Organization's real contention, namely, that it could select between two grounds of termination that were open to it, the one under Staff Rule 1040 which carries no indemnity or the other under Staff Rule 1050 which does, and that it selected the former.

7. It is true that the abolition of a post does not automatically terminate the holder's appointment and therefore does not automatically attract an indemnity under 1050.4. Does this give the Organization the option of terminating the appointment under another rule? In the circumstances of this case it is unnecessary for the Tribunal to answer that question. The complainant's appointment, having been renewed until 30 November 1979, the notice of 5 January to extend it until15 February was ineffective. Consequently the only way in which the termination can be justified is under 1050.4. Apart from this, however, it must not be assumed that the power of non-renewal under 1040 could properly be used to prolong an appointment for a period just long enough to survive the abolition of the post and with the sole object of avoiding payment of an indemnity under 1050. This is a matter which is discussed in the dossier but upon which it is unnecessary for the Tribunal to reach any conclusion in this case.

As to the claim for reinstatement

8. The complainant asks for reinstatement or compensation in lieu thereof on the ground that the abolition of Post 3707 was caused by personal prejudice and/or that she ought to have been selected for post 5275 which was established in its place. This claim was not submitted to the Headquarters Board of Inquiry and Appeal from whom the complainant obtained a recommendation that she should be paid an indemnity and that the Administration should bear her legal costs. The rejection of this recommendation by the Director on 25 August 1980 is the decision impugned. The Organization does not object to the claim for reinstatement as irreceivable. But it is one which is in any event bound to fail, being inconsistent with the claim on which the complainant has succeeded. She cannot obtain an indemnity for the termination of her appointment and at the same time ask to be reinstated in it.

DECISION:

For the above reasons,

1. The decision of the Director of 25 August 1980 is quashed;

2. The Organization is ordered to pay to the complainant the indemnity due under Staff Rule 1050.4;

3. The Organization is ordered to pay the complainant 2,500 United States dollars in costs; and

4. The remaining claims are dismissed.

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 28 January 1982.

(Signed)

André Grisel
J. Ducoux
Devlin

A.B. Gardner

1. Staff Rule 1050 reads:

"1. The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if that post is abolished.

...

4. A staff member whose appointment is terminated under this Rule shall be paid an indemnity...".

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