

FORTY-SEVENTH ORDINARY SESSION

***In re* PERRONE**

Judgment No. 470

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Julio Perrone on 22 December 1980, the PAHO's reply of 27 March 1981, the complainant's rejoinder of 18 May and the PAHO's surrejoinder of 8 June 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Staff Rules 1040, 1050 and 1230 and WHO Manual sections 11.5.260 and 270 and 11.9.370;

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. In 1966 the complainant, who is a citizen of Uruguay, joined the staff of the Pan American Sanitary Bureau, the secretariat of PAHO, as a statistician. His fixed-term appointment was extended several times by periods of two years, then by one year, by six months, and twice by one month, up to February 1979. His post was then abolished on financial grounds. He appealed to the PAHO Board of Inquiry and Appeal. The majority of the Board recommended dismissing his appeal; the minority was in favour of allowing it. By a decision dated 4 September 1980 the Director endorsed the majority recommendation and rejected the appeal. That is the decision now impugned.

B. The complainant observes that during nearly 14 years' employment his work was exemplary and that his services in Ecuador were found so useful that the Ministry of Health wrote several times asking that his appointment should be extended. At the time when his post was abolished there were two vacancies for someone with his special skills, one in Venezuela and the other in Washington, but he was offered neither. The Organization was wrong not to apply Staff Rule 1050 ("Abolition of post and reduction in force") in his case. Staff Rule 1050.2 reads: "When a post of indefinite duration, which is filled, is abolished, a reduction in force shall take place, in accordance with procedures established by the Director...". Unlike posts of limited duration, the termination of which may be predicted with certainty, posts of indefinite duration may come to an end because of a shortage of funds, the early completion of a project or other unforeseeable circumstances. The source of financing for the complainant's post changed several times. The work nevertheless went on and it met a specific need. The abolition of the post was a purely administrative measure based on matters of financing. The complainant believes that, although he held a fixed-term appointment, his post was one of indefinite duration. Staff Rule 1050 should, in his view, be read together with Staff Rule 1040 ("Completion of temporary appointments"), which provides that "temporary appointments ... shall terminate automatically on the completion of the agreed period of service". This rule relates to the appointment; if the reason for not extending the appointment is the abolition of the post, it is not Staff Rule 1040 but Staff Rule 1050 which applies. The criteria for extending fixed-term appointments are set out in WHO Manual section 11.5.260. They are the need for the staff member's services, the quality of his work and his own wishes. Due regard must be paid to the Organization's long-term needs, but above all extensions are permissible "irrespective of the funds from which their salaries are paid". Under the procedure set out in Staff Rule 1050.2 the Director shall compare staff performing similar duties at the same grade level as that of the post to be abolished. Such comparison was bound to be in the complainant's favour because of his competence, achievements and seniority and the need for his services; he ought therefore to have been offered a new post, especially since there were two vacancies at the time. The Organization has therefore failed to comply with the Staff Rules. There were, moreover, several flaws in the notification of the decision not to extend his appointment. Under Staff Rule 1050.3 he ought to have been given one month's notice, the period prescribed in Staff Rule 1040 being three months. His appointment was originally to end on 13 January 1979, but was extended to 28 February. He was given notice on 7 March 1979, the non-extension being retroactive to 28 February. The Organization's decision was also based on

personal prejudice: his friendship with the unsuccessful candidate in the election of the Director played a part. Over and above the facts mentioned above which the Organization overlooked, it ought to have borne in mind the fact that he needed only another one-and-a-half year's service to qualify for a pension. The decision affects his pension rights and has had a "traumatic" effect on him and his family and destroyed his peace of mind. After so many years of service, and knowing that the Government of Ecuador had asked for the extension, he was reasonably entitled to expect it. It is true that the Director does have discretion in extending a fixed-term appointment but in this case his decision was wrongful. The complainant accordingly invites the Tribunal to order (1) his reinstatement in the position which he would have held but for the decision he impugns and (2) the normal extension of his appointment by two years from 28 February 1979, with remuneration equal to his full salary for that period. He asks that he should suffer no diminution in his pension rights and seeks damages for moral prejudice and his costs.

C. In its reply the Organization points out that three members of the Board of Inquiry and Appeal - the majority - held in their report that the Organization was under no contractual or legal duty to grant the complainant further extensions and that his expectation was not supported by the circumstances surrounding his termination. The minority, the other two members of the Board, were mistaken in holding that several provisions of the Staff Rules had been disregarded. The Director accepted the majority view and rejected the appeal. The Organization disagrees with the complainant's reading of Staff Rules 1050 and 1040. Its contractual obligations towards its staff are determined by the nature and terms of the appointment. The complainant held a fixed-term appointment and Staff Rule 1040 declares that such appointments "shall terminate automatically on the completion of the agreed period of service". Staff Rule 1050 applies where a staff member is on a post of limited duration and his appointment is terminated before expiry by the abolition of the post. It also provides for a reduction in force according to criteria for comparison when a post of indefinite duration, which is filled, is abolished. In both cases an indemnity shall be paid, the amount depending on seniority. However, when expiry of a fixed-term appointment coincides with the abolition of the post, the Organization is not bound to apply Staff Rule 1050, whether the post is of limited or indefinite duration. Besides, the Manual states that the reduction-in-force procedures do not apply to staff members who hold fixed-term appointments of less than five years. In the PAHO's view Staff Rules 1040 and 1050 are quite different and govern different situations. When the Organization first gave the complainant notice that his appointment would end on 13 December 1978 he held a short-term six-month appointment. Though not bound under Staff Rule 1040 to give any period of notice, the Organization gave him 30 days' notice by extending his appointment by one month. Moreover, it further extended the appointment to 28 February 1979 and explained that if no funds were available by that date the appointment would expire. On 11 January it confirmed that the appointment could not be further extended. By a letter dated 7 March 1979 the "WHO's representative in Ecuador confirmed the prior notices of termination and asked the complainant to comply with the "exit procedures". The requirements of Staff Rule 1040 were therefore fully complied with and the decision was valid. The post was considered to be a temporary one depending on the availability of funds and it was indeed financed from several sources. In June 1978 the complainant was offered a transfer to a post as a statistician in Washington, at a lower grade and at a slightly lower salary, but he took no account of the offer. In December 1978 he was asked whether he would like to have his curriculum vitae circulated in the regional offices, but he did not reply. He was considered for vacancies along with other candidates. As to the vacancies he mentions, the majority of the Board of Inquiry and Appeal - with no objections from the minority - found that he was not qualified. He has misconstrued Manual provision 11.5.260. The provision relates, not to Staff Rule 1050, but to Staff Rule 1040, and merely says that fixed-term appointments may be - not that they need be - extended. The complainant offers not a shred of evidence for his allegations of personal prejudice. Lastly, under the Staff Pension Fund rules he was eligible for full deferred retirement benefits at the age of 55 or 60 or for partial deferred benefits at the age of 60 with payment of a lump sum. The Organization therefore invites the Tribunal to dismiss the complaint.

D. In his rejoinder the complainant explains that the PAHO's attitude and the Government of Ecuador had led him to believe that he would continue to serve in that country, and need not take seriously the proposal to transfer him to Washington. Besides a lower grade and salary, the post would have meant a quite unacceptable reduction in his responsibilities. Under Staff Rule 1040 an appointment may be terminated without stating the reasons. If, however, the reason given for non-renewal is the abolition of the post, then the material provision is Staff Rule 1050. The Organization contends that the reduction-in-force procedures do not apply to appointments for periods of less than five years, but successive appointments should be added together, and three two-year appointments are undoubtedly equivalent to one six-year appointment. As regards the period of notice, most PAHO posts are held by officials with fixed-term two-year appointments, and the Organization could evade the rules notice by extending the two-year appointment by one month after they have expired. The question of financing is a purely administrative one and just a matter of book-keeping. The decision was tainted with personal prejudice, and the complainant cites as evidence, among other things, a telephone conversation between the Director and the Minister

of Health for Ecuador.

E. In its surrejoinder the PAHO observes that from 1977 the complainant knew of the difficulties of financing his post and that it discharged its obligations by offering to transfer him to Washington. It gave further evidence of its goodwill towards him by giving him notice in December 1978, though that was not required by Staff Rule 1040. As regards the telephone conversation he mentions, he does not provide any proof, and besides the Organization would have been entitled to explain to the Government of Ecuador the difficulty over financing the post. It took reasonable efforts to provide him with further employment. It repeats its contention that it has not acted in breach of any of the Staff Rules or Manual provisions on which the complainant relies. Since he has failed to prove that his appointment was terminated for reasons other than the interests of the Organization or that the decision was tainted with abuse of authority or irregularity, his claims should be rejected as unfounded.

CONSIDERATIONS:

The applicability of Staff Rules 1040 and 1050.2

1. The complainant joined the staff of the PAHO in June 1966 as a statistician. His fixed-term appointment was regularly extended, and finally up to 28 February 1979. At that date he left the PAHO and his post, in which he was not replaced, was abolished. The Organization states that it decided to abolish his post, and therefore not to extend his appointment, because of lack of funds.

The parties dispute the legal consequences of the decision. The Tribunal will therefore first determine the applicable rule.

2. The PAHO is relying on Staff Rule 1040, which is headed "Completion of temporary appointments" and which reads: "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."

The conditions for applying Staff Rule 1040 were fulfilled in this case. The complainant held a temporary appointment. The final period of service expired on 28 February 1979, and there was neither offer nor acceptance of extension. The most that can be said is that the termination of the appointment was not "automatic" despite the use of that word in Staff Rule 1040. In fact the decision was a discretionary one and as such is subject to limited review by the Tribunal.

3. In support of his claims the complainant is relying on Staff Rule 1050.2, which comes under the heading "Abolition of post and reduction in force" and which reads: "When a post of indefinite duration, which is filled, is abolished, a reduction in force shall take place, in accordance with procedures established by the Director, based upon the ... principles" set out in Staff Rules 1050.2.1 to 1050.2.5.

Contrary to what the PAHO contends, the conditions for applying Staff Rule 1050.2 are fulfilled in this case as well as those for applying Staff Rule 1040.

(a) The complainant's post was one of indefinite duration even though it could survive only if the Organization had the funds to pay the incumbent. If any different view were taken, there would be no such post in the Organization - since the employment which it creates obviously depends on the state of its finances - and Staff Rule 1050.2 would be pointless.

(b) The parties are right not to dispute that the complainant's post was abolished. It is immaterial whether the Organization had the funds to keep the complainant on its staff after 28 February 1979. The mere fact that he has not since been replaced shows that the post has gone.

(c) The PAHO contends that Staff Rule 1050.2 does not apply to temporary staff members, like the complainant, whose appointment expires when their post is abolished. This restrictive interpretation is not borne out, however, either by the letter or by the purpose of the text.

First, where Staff Rule 1050.2 applies, the Director is empowered under Staff Rule 1050.2.3 to "establish priorities among the several categories of temporary staff". Staff Rule 1050.2 therefore applies to temporary staff as well as to holders of "career-service" appointments and the text draws no distinction between temporary staff members on the grounds of the date of abolition of their posts.

Secondly, there is no sound reason to apply Staff Rule 1050.2 in favour only of officials whose post is abolished during an appointment to the exclusion of those whose post is abolished at the end of the appointment. It is true that in general the former fare worse than the latter. The difference between the two is not, however, such as to warrant any difference in treatment.

Thirdly, if Staff Rule 1050.2 did not apply to temporary staff members when the post was abolished and the appointment terminated at the same time, the Organization could evade the rule by making abolition and termination coincide. The rights conferred on staff members by Staff Rule 1050.2 would become to some extent illusory.

(d) The PAHO is mistaken in contending that under Manual provision 11.9.370 the procedure prescribed for reduction in force does not apply to staff appointed for less than five years, such as the complainant, who was in that position.

The relationship between Organization and staff is governed by the Staff Regulations, the Staff Rules and the Manual. The Regulations are supplemented by the Rules. which are elaborated on in the Manual. There is therefore a hierarchy under which the Rules may not derogate from the Regulations, nor the Manual from the Rules.

In denying the benefit of Staff Rule 1050.2 to staff members with an appointment for less than five years Manual provision 11.9.370 sets a restriction on the Staff Rule, which neither expressly nor by implication provides for such exclusion. The Manual provision is at odds with the principle of the hierarchy of rules and must therefore be treated as void.

This conclusion is all the more justified in that the restriction which the Manual sets on the Rules is a large one. According to Manual provision 11.5.260 a temporary appointment may be extended for not more than five years. If Manual provision 11.9.370 were rigorously applied only staff members appointed for five years - no doubt the minority of temporary staff members - could rely on Staff Rule 1050.2.

4. As appears from the foregoing, the conditions for applying both Staff Rule 1040 and Staff Rule 1050.2 were met in this case, and since the provisions conflict a choice must be made.

The Tribunal need not discuss the point in general terms. It will merely declare its view that in this case Staff Rule 1050.2, and not Staff Rule 1040, should apply. When he left the complainant had been working for the Organization for over twelve years and was near the age of retirement. His work had never aroused criticism. Had his post not been abolished, therefore, he would certainly have had his appointment extended. To refuse an extension to such a deserving staff member would have constituted a misuse of authority which would have entitled the Tribunal to interfere. Accordingly, it was the abolition alone which made the complainant leave and the consequences of abolition must be determined in the light of the directly relevant rule, Staff Rule 1050.2.

This conclusion is in any event the fair one. By terminating the complainant's appointment under Staff Rule 1040 the PAHO did not pay him any compensation. As appears below, however, Staff Rule 1050 . 4, which supplements Staff Rule 1050.2, requires the payment of compensation. It would be quite unjust, when someone with such a record of service has been compelled to leave the Organization, not to pay him compensation.

Breach of Staff Rules 1050.2 and 1050.4

5. According to Staff Rule 1050.2 a reduction in force shall be based on the following principles:

The Director shall give preference according to quality of performance and, subsidiarily, seniority (Staff Rule 1050.2.4).

He shall choose from among staff performing similar duties at the same grade level as that of the post to be abolished (Staff Rule 1050.2.1).

He shall take account of the distinction between Professional category posts and those subject to local recruitment (Staff Rule 1050.2.2).

He shall give priority to holders of career-service appointments over temporary staff, among whom he may also

establish priorities (Staff Rule 1050.2.3).

Staff Rule 1050.4 contains a schedule for calculating indemnities payable to staff members whose appointment is terminated under Staff Rule 1050.

6. The PAHO implicitly acknowledges that it failed to comply with these provisions.

It is true that on 1 June 1978 it invited the complainant to take up a post as a statistician in Washington at a lower grade and salary. It is also true that on 13 September 1978 it offered to circulate his curriculum vitae to the field offices. It also appears from the evidence that it took him into account when filling vacancies. But all this failed to meet the requirements of Staff Rules 1050.2 and 1050.4.

First, Staff Rule 1050.2 required the Organization not just to offer the complainant any available employment which might suit him but to give him priority on certain conditions. Secondly, having completed over twelve years' service by the time he left, he was entitled under Staff Rule 1050.4 to compensation, which has not been paid to him.

The other flaws alleged by the complainant

7. The complainant alleges that the Director was in breach not only of Staff Rules 1050.2 and 1050.4 but also of Manual provision 11.5.260, failed to give proper notice, showed personal prejudice, overlooked essential facts, denied due process and committed an abuse of authority. None of these pleas succeeds. Manual provision 11.5.260 does not lay any obligation on the Organization but confers on it authority which it is not obliged to exercise in the event of abolition of a post.

The one-month period of notice set in Staff Rule 1050.3 should be regarded as having been observed in this case in view of the PAHO's communications in December 1978 and January 1979. Staff Rule 1040 did not apply, and it is therefore immaterial whether the periods of notice prescribed in that rule were respected.

It is true that a minute which the Director addressed to a PAHO official on 6 March 1979 may be regarded as evidence of hostility towards the complainant as well as an act of sound administration. Similarly, the telephone conversation which the Director is alleged to have had with a member of the Government of Ecuador is open to more than one interpretation. However, after informing the complainant on 16 March 1977 that his appointment would end on 30 June, the Organization extended his appointment several times and thereby displayed genuine consideration. The Tribunal cannot therefore find that the allegation of personal prejudice is proved.

There is nothing to suggest that the Director was guilty of incomplete consideration of the relevant facts before taking the impugned decision.

The allegations of denial of due process and abuse of authority form part of the above allegations and should therefore also be rejected.

The Tribunal's decision

8. The complainant's principal claim is for extension of his appointment by two years from 28 February 1978 (this should read 1979). He files a subsidiary claim for compensation equivalent to two years' salary. The Tribunal will consider these claims in the light of Staff Rule 1050.2, which it finds has been violated.

Under that rule the Director is required to take steps to try to keep on the staff someone whose post has been abolished. Such steps are not called for in this case. By his own account the complainant would have received a retirement pension a year and a half after leaving the Organization, i.e. after 28 February 1979. Even if he had obtained an extension of his appointment at that date, he would therefore have left some time in 1980. There are therefore no grounds for now ordering his reinstatement.

The only question is the amount of the compensation, and the Tribunal will determine it in accordance with Staff Rule 1050.4. The rule does not state that the official whose post has been abolished shall be entitled to full compensation for the prejudice he has suffered. Instead it contains a schedule setting out the lump sums to be paid in compensation scaled according to years of service. The Organization should therefore pay the complainant the compensation he is entitled to under the schedule.

9. The complainant objects to any reduction in his pension rights. By implication he is claiming compensation for loss suffered by reason of his departure before the age of retirement.

This claim is unfounded. The complainant is not entitled to financial compensation other than that prescribed in Staff Rule 1050.4. The rule does not grant the official who has lost his post any compensation over and above that which is prescribed in the schedule, and which the complainant is awarded under 8 above.

10. Lastly, the complainant claims compensation for moral prejudice on the grounds of the strain which the impugned decision caused him and the members of his family.

This claim is disallowed. That a staff member should have been the subject of a flawed decision does not alone entitle him to compensation for moral prejudice. For that he must have suffered more severe prejudice than that normally caused by an improper decision. The complainant did not. Although the decision not only had financial consequences but caused strain to him and his family, it is unlikely to have had abnormal effects. In any event, in so far as it was based on lack of funds it was in no way humiliating. Moreover, the moral prejudice he alleges has been mitigated by his appointment with the Government of Ecuador.

11. The Tribunal awards the complainant 3,000 United States dollars in costs.

DECISION:

For the above reasons,

1. The Organization shall pay the complainant the compensation due to him under Staff Rule 1050.4 and 3,000 United States dollars in costs.

2. The other claims for relief 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