FIFTY-FIRST ORDINARY SESSION

In re HERRERA

Judgment No. 582

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mrs. Nychalyna Herrera on 11 March 1983, the PAHO's reply of 3 June, the complainant's rejoinder of 18 August and the PAHO's surrejoinder of 3 October 1983;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rules 1040, 1050 and 1230.8 and WHO Manual sections II.9.250, 260, 270, 280, 320, 340 and 360;

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, a citizen of Italy, joined the PAHO's Pan American Zoonoses Center, known as CEPANZO, at Ramos Mejía, Buenos Aires, in 1976 on a fixed-term appointment at grade G.1. In 1976 she became a library "helper". Her appointment was renewed each year and at the material time was to expire on 31 December 1980. In November 1979 recruitment was stopped for all vacancies in the General Service category at CEPANZO. In January 1980 she applied for a desk audit of her G.1 post. On 30 September 1980 the Directing Council of the PAHO decided to cut CEPANZO's budget. A working group set up at headquarters in Washington by the Executive Committee, reporting on 31 October, recommended abolishing 22 posts, including one G.1 post for a "helper". A joint working group appointed by the Director and comprising staff representatives studied the recommendations and reported on 7 November that of the two G.1 helpers it was the complainant who should be terminated. She was terminated on 10 December 1980 under Staff Rule 1050 ("Abolition of post and reduction in force"). Under Rule 1230.8 she appealed, in vain, to the Area Board of Inquiry and Appeal and then to the PAHO Board of Inquiry and Appeal in Washington. In its report of 5 October 1982 the Board held that, by seniority, she should have been given preference for retention and it recommended, among other things, reinstating her, completing the reclassification of her post in a reasonable lapse of time, and paying her legal costs, if any. The Director rejected those recommendations in a decision of 3 December 1982 which she received on 13 December and which she impugns.

B. The complainant submits that the PAHO acted hastily and did not follow properly the rules on reduction in force. (1) Under Manual section II.9.250 "the authorised number of posts may be reduced because the available funds have been reduced". PAHO abolished more posts than the cuts warranted. The savings were to be US$1,368,000 but some $876,000 was saved anyway by not recruiting for 24 vacancies, and so 14 of the 22 abolished posts could have been spared. (2) Under 260 "... offices must ... determine which posts are to be abolished", and other matters. The decisions were in fact taken in Washington. The purpose of having the local office decide is to make sure that all factors -- and they are best known on the spot -- are borne in mind. (3) There was also breach of 270: determining the posts to be abolished falls to "the officer responsible for the operation of the office". (4) 280.1 says: "Staff in posts subject to local recruitment compete only with similar staff in the same commuting area". Also in Buenos Aires is an Area Office of PAHO and the complainant's post was subject to local recruitment. All similar posts in the "commuting area" should have been taken into account. The complainant was competing with the holder of another similar G.1 post. The criteria for selection prescribed in 320 are seniority and performance. As the Board found, she and the other staff member had similar ratings of performance, but she had greater seniority and should therefore have been preferred. (5) 340 says that satisfactory employees must, if possible, be offered reassignment. None of the 24 vacancies was offered to the 22 staff made redundant. (6) Under 360, redundant staff must be preferred to outside candidates for suitable vacancies for twelve months after termination. New posts were advertised and filled within a year, and none of the 22 was offered one. (7) The classification of posts -- and, as the Board held, particularly the complainant's, of which review was long overdue -- should first have been reviewed. If the complainant ought to have had G.2 it was wrong to pit her against the

holder of a G.1 post. She seeks reinstatement and back-pay, or adequate financial compensation, and also damages, costs and any other relief the Tribunal thinks fit. She asks that "relief be granted to all 22 staff members at CEPANZO who were victims of illegal reduction-in-force".

C. The PAHO replies that it had to abolish many posts, mainly because of an unexpected rise in running costs, and to carry out policy decisions by its Directing Council. Under Article II(5) of its Statute the Tribunal is not competent to review policy. The complainant could have been terminated under Rule 1040: "Temporary appointments ... shall terminate automatically on the completion of the agreed period of service..."; or even 1050.1: "The temporary appointment ... for a post of limited duration may be terminated prior to its expiration date if that post is abolished". Aware of the hardships the cuts would cause, however, the Director chose to apply the rules on reduction in force (Rule 1050.2, 3 and 4 and Manual section II.9) although they normally apply only "when a post of indefinite duration, which is filled, is abolished" (1050.2). The complainant had a post "of limited duration", CEPANZO being a project, established by agreement with a government and receiving contributions from it, and her post a "project" one, which no one may expect to continue. She settled for an indemnity under 1050 -- $18,837 -- which she would not have got otherwise, and cannot go back on that. In any event, there was neither breach of the rules nor defect in the Director's exercise of his discretion. The procedure safeguarded the staff's interests: there were, for example, PAHO and CEPANZO staff representatives in the joint working group. Both knew of the vacancies and indeed recommended abolishing some of them. The criteria for selection were respected. Although the joint group found that the performance of the two G.1 helpers had been much the same, the factors for which the other had been rated "very good" were of greater weight; seniority therefore did not count. No reassignment was possible under II.9.340 since no similar post was available. Argument (7) in B above is irrelevant because there is no claim relating to reclassification and the results of a review are mere conjecture. The PAHO invites the Tribunal to dismiss the complaint as devoid of merit.

D. The complainant develops her case in her rejoinder. The failure to reclassify CEPANZO posts is relevant since some of the terminated staff might have been spared. The complainant had had a contract for over five years and therefore had a "post of indefinite duration" within the meaning of Rule 1050.2. It is absurd to say she had no expectation of continuity. CEPANZO posts which have existed for years are not "temporary", whether they come under a project or not. The Tribunal's case law supports this view. If unclear, the rules should be interpreted in the official's favour. The rules on reduction in force applied, and they were not respected. That the Director was carrying out PAHO policy did not relieve him of his duty to look for alternative employment. Acceptance of an indemnity does not discharge the Administration of its duty to apply the rules fairly. The joint working group merely lent legitimacy to the action it had predetermined. It omitted to mention the complainant's considerable seniority over the other G.1 helper, and her performance had, in important respects, been rated more highly.

E. In its surrejoinder the PAHO enlarges on its arguments and answers the rejoinder. In particular it maintains that the reduction-in-force procedure, though not strictly applicable, was correctly and fairly followed. Careful thought was given to each abolition of post by two working groups including elected CEPANZO staff representatives, who unanimously endorsed the recommendations. The complainant was given ample notice and generous compensation. The decision was a discretionary one, based on a justified preference for the other G.1 helper, and shows none of the defects which would entitle the Tribunal to set it aside. The claims are devoid of merit.

CONSIDERATIONS:

1. The complainant seeks relief by way of an order that the PAHO reinstate her in her former position as library helper, with retroactive salary from December 1980 until the present or, in the alternative, monetary compensation, compensation for moral and professional injury and for emotional stress, and costs.

2. The complainant was employed by the PAHO on successive fixed-term contracts from 6 June 1967 as a labourer (laboratory) and later as a library helper, grade G.1, at CEPANZO, Ramos Mejía, Argentina. As a result of budgetary considerations, her post, 2114, was terminated on 10 December 1980.

The applicability of Staff Rule 1050.2

3. The complainant contends that the termination of her employment was illegal as being in contravention of Rules 1050.1 et seq. and Manual sections II.9.250 et seq. The PAHO, on the other hand, contends that inasmuch as the complainant was not the holder of a post of indefinite duration, Rule 1050.2 does not apply to her. Having considered the submissions of the parties, the Tribunal has come to the conclusion that Rule 1050.2 applies for the

reasons set out in Judgment No. 581.

The criteria for retention

4. The Board of Inquiry and Appeal found that "The criterion of performance was similar between the Appellant, incumbent of post 2114, and that of the incumbent of post 4285 ... and that the seniority criterion was not observed". The Board was clearly mistaken. The joint working group's analysis, on which the Director acted, was as follows:

"Having examined the performance assessment of both staff members for the periods 1976-77 and 1978-1979, it was seen that the 'Quality of Performance' was very similar in both cases during both periods. However, the Joint Group reached the conclusion that the factors in which Mrs. Brazuna had been rated 'Very Good' were of greater weight than those in which Mrs. Herrera had received that rating. Mrs. Brazuna also offered better qualifications in such aspects as dealing with the public and other evaluation factors that the joint group regarded as important in connection with the nature of the duties of those posts."

Rule 1050.2.4 provides that "preference for retention shall be based first upon performance, and when this is not decisive, upon seniority of service." The joint working group considered the performance of the complainant inferior to that of the staff member retained and gave cogent reasons for that conclusion. The question of seniority did not, therefore, arise.

The merits

5. As to the other issues raised in these proceedings, the complainant has been unable to show that she has been deprived of the benefit of the relevant Staff Rules and Manual provisions. The complaint therefore fails for the reasons set out in Judgment No. 581.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, the Right Honourable Lord Devlin, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December 1983.

André Grisel

Devlin

William Douglas

A.B. Gardner

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