SIXTY-FOURTH SESSION

In re CONTAIFER

Judgment 888

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hildemir Contaifer against the Pan American Health Organization (PAHO) (World Health Organization) on 13 March 1987 and corrected on 28 June, the PAHO's reply of 14 September and the letter of 24 October 1987 from the complainant's counsel informing the Registrar of the Tribunal that he did not wish to file a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rules 110.8, 1075, 1110.1 and 1130 and WHO Manual provision II.6.210;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. In 1978 the PAHO appointed the complainant, a Brazilian born in 1952, to the staff of an affiliate near Rio de Janeiro known as Panaftosa, a centre that combats foot-and-mouth disease. He was a clerk at grade G.4. He was granted salary increments each year and in 1981 was promoted to G.5 as an accounting assistant. His annual reports consistently praised him as efficient and hard-working. Some time in 1983 Panaftosa suspected staff of having submitted false certificates for sick leave issued by the Brazilian public health service (INPS). It accused the complainant of putting in three such certificates covering one day in 1979, one in 1980 and two in 1981. On 14 September 1984 the Chief of Personnel at headquarters in Washington sent him a telex charging him with "misconduct" within the meaning of Staff Rule 110.8, giving him one month's notice of dismissal under Staff Rule 1075 ("Misconduct") and allowing him, in accordance with Rule 1130, eight days in which to answer the charges. The next day he wrote back saying that he had not known the certificates to be false when he had presented them and that pending investigation by the Brazilian police his guilt was not established; he asked that the decision be postponed. But a telex of 26 September from the Chief of Personnel confirmed his dismissal as from 26 October. On 13 December 1984 he lodged an internal appeal with the Board of Appeal at headquarters. In its report of 17 October 1986 the Board recommended rejecting his appeal and the Director of the PAHO did so in a letter to him of 15 December 1986, the decision he impugns.

B. In his account of the facts the complainant repeats that, though the certificates were false, he did not know it at the time. He affirms that he was ill on the days they covered and that the INPS clinic which issued them did treat him. He was seen each time by someone who was not a doctor. Other staff dress like doctors, blank certificate forms are available to everyone on the staff and, as is notorious, many are making money on the side by posing as doctors. Since without even producing certificates he had annual and sick leave entitlements to cover the days he took off, he had no need to cheat.

He submits that (1) the PAHO has failed to discharge the burden of proof. He cites Tribunal judgments which establish that the burden is on the organisation to prove disciplinary charges, not on the staff member to refute them. In denying that he wittingly passed false certificates he shifted the burden to the PAHO, which must show intent to deceive.

(2) The PAHO did not respect his right to a hearing, which, as the Tribunal has held, included the right to take part in the scrutiny of evidence. He was not able to address the charges against him in a formal setting until two years after dismissal, before the Board of Appeal. A single opportunity to answer the charges within eight days of getting notice of dismissal did not amount to a proper hearing.

(3)The penalty was disproportionate to the alleged offence. No account was taken of extenuating circumstances. Nothing he did was incompatible with the proper performance of his duties. Merely taking four days off without authorisation over a period of twenty months that ended three years before dismissal would at most warrant a reprimand under Staff Rule 1110.1.

He seeks the quashing of the decision, reinstatement with payment as from the date of dismissal, and costs.

C. The PAHO retorts (1) that it discharged the burden of proof, even supposing - quod non - the complainant's mere denial of the accusations shifted that burden. He does not deny submitting false certificates. The Brazilian police had already concluded there were criminal charges for him to answer, and the PAHO was entitled to take that into account. Since he knew full well that the clinic was not properly run he had a duty to be more alert to the need to find a proper doctor there and to make sure that the certificates he got were valid. There is no evidence to show that he did not realise at the time that they were not, or that he was ill or went to the clinic at the time, or even that he got the certificates there. That he did not need to lie does not prove he did not lie. Since the facts raise concurring presumptions of guilt there is no burden on the PAHO to establish the state of his mind at the time.

(2) The PAHO respected his right to a hearing. He knew of the charges as early as June 1984, when the Brazilian police questioned him, and so had ample time in which to think out an answer to them. Indeed he gave one the very day after he got the telex of 14 September inviting it. There was no need for any formal encounter with him. The delays in the appeal proceedings were his own counsel's fault for seeking extensions of deadlines for filing papers.

(3) The penalty was not disproportionate. There were no extenuating circumstances, and the complainant offered no evidence of any. His misconduct consisted, not in taking the four days off, but in wittingly supplying false medical certificates. His work record was irrelevant when three wilful acts of deception had shown him to be unworthy of his employer's trust. If such a gross breach of good faith had earned a mere reprimand there would be no check to abuse by other staff. Besides, the Tribunal will not substitute its own judgment for the Director's in deciding what sort of penalty is fitting. He fared no worse than other staff found guilty of similar offences, none of whom has lodged an appeal.

CONSIDERATIONS:1. The complainant was originally employed for eight years at the Organization's centre known as Panaftosa, near Rio de Janeiro, as a local employee, not as a staff member. He was taken on the staff of the Organization on 1 January 1978 as a clerk and was later promoted to accounting assistant. Before the termination of his employment in 1984 his performance reports were uniformly very good. During his years as a staff member the complainant never used up his accumulated annual leave in any year. Under WHO Manual provision II.6.210 such leave would have been available to him for uncertified sick leave.

2. The cause of his dismissal was three medical certificates which proved to be false. One dated 13 December 1979 was for 8 hours' leave, one of 14 January 1980 for 8 hours and one of 10 August 1981 for 16 hours. The complainant does not contest that they are false but he says that he did not know they were when he presented them. The false certificates were not discovered until 1983 when, another employee having submitted false certificates, the Organization decided to screen its personnel files to see whether there were other false medical certificates. During the seven years of his employment as a staff member the complainant presented a total of 15 certificates covering 418 hours. Three of them proved false.

3. The explanation the complainant gives as to why he did not know the certificates were false when he presented them is that he was in fact sick on those days and was treated at a facility of the Ministry of Social Security, known as the INPS, where he was given them. The only way he can account for their falsity is that he was treated by someone who was not a doctor. He alleges:(1) that doctors, nurses and attendants wear the same uniform without identification badges;

(2) that the crowding is such that patients are more likely to be treated while standing in a hallway than in rooms set aside for that purpose;

(3) that it is a constant scandal at the INPS that people who are not doctors treat patients with routine ailments in order to receive the customary tip; and

(4) that blank medical certificates are readily accessible to all staff.

4. The complainant was informed in May/June 1984 that he was under suspicion of submitting false medical certificates. He was questioned by the police in June and August of 1984 and charged with passing fraudulent documents. His trial has not yet taken place. On 14 September 1984 the Chief of Personnel at headquarters informed him by telex that his employment would be terminated for serious misconduct on 23 October 1984:

"This notice has been sent taking into consideration Staff Rule 1130 and letting you know that you have 8 days to submit a response, whether you consider this accusation proper. In the event that we don't receive your response on or before 22 September 1984, the action of your termination shall be completed."

5. The complainant responded immediately by letter dated 15 September 1984 stating that when he had presented the certificates he had not been aware they were false, that the situation was being investigated by the Brazilian authorities and that he had retained an attorney for his defence in court. He asked the Organization to consider waiting for the court's final decision. On 26 September 1984 the Chief of Personnel sent a telex stating that his answer of 15 September 1984 had been carefully considered but that the termination was confirmed at 26 October 1984.

6. What the complainant was asked to do in the telex of 14 September 1984 was to say whether he considered the accusation proper. His statement that he did not know the certificates were false was, if true, a complete answer to the charges. The Organization never inquired further from him saying they needed more details and to this day say they have no knowledge of the matters he alleges in his explanation, although, if true, they are matters capable of objective proof. Do all the staff wear the same uniform without identification? Are patients treated in corridors? Are doctors tipped for their services? And are blank certificates readily available? Though the decision confirming the termination of the complainant's employment is stated to be made after careful consideration of his answer, that cannot be so, since there was no attempt to elucidate why he did not know the certificates were false. If he was required to furnish all relevant information in his reply he should have been asked to do so and not just to say whether he agreed the accusation was proper, a question that gave the impression of asking whether he was contesting it or not. Since he did contest it the Organization should have asked him for full submissions. It had to be satisfied, not just that the certificates were false, but that he presented them in the knowledge that they were false.

7. The initial decision by the Chief of Personnel was defective in that it did not reply to the complainant's letter inviting the Organization to wait for the outcome of the trial and did not require him to furnish his full defence. It was made without the complainant's having fully exercised his right to be heard.

8. The view expressed by the Board of Appeal on the complainant's right to be heard was that from May or June until 14 September 1984 he had the opportunity to take action to prove he had acted without knowledge of the irregularity of the certificates and to submit evidence in his defence. But during that period the complainant was only under suspicion. He did not have to prove anything to his employer before the accusation was made: there is no obligation on an employee to dispel a suspicion though he may be called on to answer an accusation.

9. The Board of Appeal also held that he exercised his right to be heard as invited in the telex of 14 September 1984. It did not advert to the fact that what he was asked in the telex was whether he considered the accusation proper, that he had sought a postponement of the decision and that no response was sent. In those circumstances the complainant cannot be said to have exercised his right of reply.

10. The Director's decision of 15 December 1986, the one impugned, endorsed the Board's findings and conclusions and is therefore tainted with the same defects as the decision by the Chief of Personnel.

11. The impugned decision dismissing the complainant was therefore tainted with a procedural flaw and cannot stand. His claim to reinstatement succeeds, save that the Organization may resume the disciplinary proceedings if it thinks fit.12. The complainant is awarded an amount equivalent to the pay which he lost on account of the dismissal, less any sums he may have earned elsewhere during the period in question.

13. Since he succeeds because his right to be heard was not fully respected, the other pleas relating to burden of proof and lack of proportionality need not be entertained.

DECISION:

For the above reasons,

1. The decision of 15 December 1986 is quashed and the complainant is reinstated as from 26 October 1984.

2. The complainant is awarded an amount equal to the pay which he lost from the date of dismissal to the date of

reinstatement less any sums he may have earned elsewhere during that period.

3. The complainant is awarded 3,000 United States dollars in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner

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