

## SEVENTY-NINTH SESSION

### *In re* MOOSAI

#### Judgment 1444

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Robin Moosai against the Pan American Health Organization (PAHO) on 18 May 1994, the PAHO's reply of 17 November 1994, the complainant's rejoinder of 21 January 1995 and the Organization's surrejoinder of 6 March 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Canadian who was born in 1947, is a virologist. He used to be employed in Toronto as a research scientist for the Ministry of Health of Ontario. The PAHO has a Caribbean Epidemiology Centre, known as CAREC, at Port-of Spain in Trinidad. In April 1991 the Director of CAREC offered him a short-term appointment as a consultant virologist with the Centre. Having accepted the offer, he took up that appointment on 1 September 1991 under a contract that ran to 31 July 1992. His performance in that period was evaluated in a report dated 12 February 1993.

The PAHO issued a notice of vacancy on 25 October 1991 offering a post, graded P.4 and numbered 5302, for a virologist at the Centre. The complainant was one of several applicants. In a telex of 1 July 1992 to the Director of CAREC a personnel officer at the PAHO's headquarters in Washington D.C. said that the complainant had been selected. PAHO granted him a fixed-term appointment for two years from 1 August 1992. In the first year he was to be on probation in accordance with Rule 420.4 of the PAHO Staff Rules, which reads:

"Any appointment of one year or more shall be subject to a period of probation, which shall be at least one year and may be extended up to two years when necessary for adequate evaluation of the staff member's performance, conduct and suitability to international service."

The first report appraising the complainant's performance on probation was dated 11 June 1993 and covered the period since 1 August 1992. His first-level supervisor described his performance as "satisfactory" according to ten "evaluation factors" and as needing "improvement" according to two others, assessed his management skills as "less than satisfactory" and said he was "not fully convinced about the quality of Dr. Moosai's contributions and performance". He recommended extending probation by six months. The second-level supervisor, who was the Director of the Centre, commented on 16 June 1993 that the complainant had "fallen short of expectations at both technical and managerial levels". The upshot was that on 24 June he had his probation extended by six months.

His first-level supervisor made a second probation report on 30 November 1993 and it was about his performance since 1 August 1993. The ratings ranged from "outstanding" on one aspect of performance (headed "Provides timely/correct information to subordinates and supervisor") to "unsatisfactory" on another (headed "Resolves conflicts effectively"). His second-level supervisor concluded that because of "major continuing deficiencies" it was not in the Organization's interest to keep him on.

By a letter of 19 January 1994 the Chief of Personnel gave him one month's notice of termination under Staff Rule 1060, which is about non-confirmation of appointment on the grounds of unsatisfactory performance or unsuitability for international service.

In a letter of 9 February he appealed to the Director of the PAHO under Rule 1210.1 seeking another extension of probation.

By a letter dated 15 February 1994 the Director confirmed the earlier decision but extended the period of notice to 18 March 1994. That is the decision impugned.

B. The complainant submits that the termination of his appointment is unlawful. He has three main pleas.

He first alleges flaws in the process of appraisal. His first-level supervisor did not even realise until March 1993 that he was supposed to be supervising him. So how could he have given him regular guidance on performance? Not until the Administration made the second probation report did it bring "major deficiencies" to his attention. So it was in breach of Rule 530.1.4, which required his supervisor to hold frequent discussions about his work with him. For want of proper guidance his performance appraisals are invalid.

His second plea is breach of due process. The Chief of Personnel told him that the decision of 19 January rested not only on the two probation reports but also on "further assessment" of his performance. The PAHO's failure to show him the text of that assessment and to invite comment from him is a fatal flaw.

Lastly, he contends that there was "no reasonable basis" for termination. His technical ability is sound and he is "enthusiastic" about new techniques. Though he discharged a workload which was increased because of understaffing he fell foul of a supervisor who failed to understand his own part in the process of appraisal.

He claims reinstatement as from 18 March 1994, moral damages and costs.

C. In its reply PAHO contends that its decision not to confirm the complainant's appointment was lawful. His performance during probation was unsatisfactory and his appraisal reports identified the areas that needed improvement and gave him express warnings. Throughout his tenure in the PAHO he had the same first-level supervisor, the Head of the Laboratory Division of CAREC, who was "totally aware" of his duties as supervisor. The complainant's failure to get on well with other staff made him unsuited to international service. That too afforded grounds for termination of his appointment under 1060.

In any event the case law makes it plain that the Director enjoys the broadest discretion in confirming a probationer's appointment. The complainant has not proved any flaw fatal to the Director's decision.

D. In his rejoinder the complainant disputes some allegations of fact and the arguments in the reply and enlarges on his own pleas. By making out that he is unsuited to international service the Organization has shifted ground. The Chief of Personnel "had no authority" to rely on "anything but the initial and extended probationary appraisal reports". So the impugned decision was "taken without authority" and in breach of the rules and rested on a "clearly mistaken" conclusion.

E. In its surrejoinder the PAHO maintains that the decision was a proper exercise of discretion. All the complainant offers in support of his case is hearsay evidence and documents that do not form part of the "official record". The "general" language that the Director used to explain his decision covered the ability to maintain satisfactory working relations as well as other aspects of performance and suitability for service. The complainant has failed to show any flaw so "glaring" as to warrant quashing that decision.

#### CONSIDERATIONS:

1. The complainant took up duty with the Organization at its Caribbean Epidemiology Centre (CAREC) on 1 September 1991 as a short-term consultant virologist on an eleven-month appointment. The appointment was granted solely on the strength of his credentials pending the outcome of the formal process to fill a vacancy for a virologist at grade P.4. The complainant applied and was appointed to the post as a staff member as from 1 August 1992. He had a contract for two years, in the first of which he was on probation. The period of probation was extended on 24 June 1993, by six months, to 31 January 1994. By a letter of 19 January 1994 the Chief of Personnel gave him notice in accordance with Staff Rule 1060 that his appointment was to end at 28 February 1994. He appealed under Rule 1210.1 in a letter of 9 February to the Director of the PAHO. In his reply of 15 February the Director upheld the decision to terminate his appointment, though the date of termination was postponed to 18 March 1994. That is the decision he is impugning.

2. Rule 1060 provides:

"If, during an initial or extended probationary period, a staff member's performance or conduct is not satisfactory, or if he is found unsuited to international service, the appointment shall not be confirmed but terminated. The staff member shall be given one month's notice. No indemnity is payable."

Rule 1070.1 reads:

"A staff member's appointment may be terminated if his performance is unsatisfactory or if he proves unsuited to his work or to international service. It shall be considered unsatisfactory performance if the staff member does not or cannot perform the functions of the post to which he is assigned, and unsuitability for international service if he fails to establish satisfactory working relationships with other staff members or with nationals of other nations with whom he is working."

Lastly, Manual paragraph II.9.410 says that the final decision on termination of a probationary appointment "is taken on the basis of the performance appraisal report and on the staff member's comments on the report".

3. In the course of his two-and-a-half years' stint with CAREC the complainant had his performance evaluated three times: first, as a short-term consultant; secondly, for the original period of probation; and thirdly, for the six months' extension of probation.

4. The first, an "evaluation report" dated 12 February 1993, was about his work as a short-term consultant from September 1991 to July 1992. It was written by the Director of CAREC "in consultation with" his first-level supervisor, the Head of the Centre's Laboratory Division. Though partly favourable, their report spoke of "weaknesses" which they described as follows: "some difficulty translating emphasis on quality control into action"; "difficulty in translating results into appropriate strategies"; and "over-emphasis on high technology as the answer to epidemiological diagnostic policies". A note in the report said that he had submitted "late, after second request" his own report on his activities.

5. Secondly, a probation report was written in June 1993. It appraised his performance in the period since August 1992. His first-level supervisor, the Head of the Laboratory Division, commented that he "did not understand fully the dimension of role and responsibilities of virologist position". In answer to a question in the report form about the quality of his contribution to the objectives of the Organization the same supervisor said:

"I am not fully convinced about the quality of Dr. Moosai's contributions and performance in relation to the requirements of post and organizational objects and stability of virological services".

He described the complainant's "management capabilities" during the period of review as "less than satisfactory" and accused him of failing to "appreciate full dimension of managerial/

supervisory responsibility attached to his position". He based his assessment on his own findings and on "the feedback received from within and out of CAREC". The Director of the Centre, too, expressed dissatisfaction: he commented that the complainant had "fallen short of expectations at both technical and managerial levels"; "His approaches to problem solving are too often theoretical/impractical"; "Increasing concerns have been expressed by clients (internal and external) about apparent deterioration of virology services (e.g. timeliness of reports) and whether he appreciates the clinical relevance"; since "he has not fully understood the significance of these concerns for the continuation of his post", he is to be "granted an additional 6 months' probation". "However" - the Director concluded - "if there is no major improvement, it will not be possible to confirm him at the end of this period".

6. Thirdly, a second probation report, written in November 1993, was about his performance since 1 August 1993. In answer to the question about his contribution to the Organization's objectives the Head of the Laboratory Division spoke of the need for him "to provide leadership" and to communicate effectively with subordinates. He had, said his supervisor, "not yet regained the trust and confidence of his subordinates based on the feedback received from the staff". There had been many incidents of conflict between him and other staff. In general he had "not shown considerable improvement" since the last appraisal. His "role as a CAREC clinical virologist in support of the [Expanded Program on Immunization]" was "not satisfactory". By way of conclusion the Director wrote:

"... it is quite clear now that [his] continued service in this post is not in the interest of PAHO/CAREC due to major continuing deficiencies".

7. The Organization terminated the complainant's appointment on the strength of the evaluations in those three reports and in accordance with Rule 1060. It submits that not only were his performance and conduct unsatisfactory but he was unsuited to international service in that he failed to establish satisfactory working relations with other staff. It says that "problems with his managerial and supervisory skills" were borne out by many reports on the

performance of staff working directly under him.

8. Termination of an appointment is a discretionary decision which the Tribunal will set aside only on limited grounds: if there was a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority. Furthermore, as the Tribunal said in Judgment 1161 (in re B.) about the case of someone who, like the present complainant, had been on probation:

"The purpose of probation is to find out whether a probationer has the mettle to make a satisfactory career in the Organisation. The competent authority will determine on the evidence before it and possibly after extension of the probation ... where doubt still lingers, whether to dismiss the official or to confirm the appointment. It must indeed be allowed the widest measure of discretion in determining whether someone it has recruited shows the highest level of qualifications required for a post in the particular field in which he is to be working."

9. The complainant contends that the Head of the Laboratory Division was not aware of his responsibilities as first-level supervisor. The plea fails. The Head of the Division was the complainant's first-level supervisor throughout the material period. He was consulted in that capacity by the Director of the Centre before the writing of the first probation report. And he had several meetings to discuss performance with the complainant, including talks that lasted some eight hours and were spread over three days. So the complainant's contention is simply not credible.

10. The complainant further contests the termination of his probationary appointment on the grounds that his first-level supervisor failed to give him the "guidance and feedback" he was entitled to under Rule 530. The rule provides:

"530.1 Supervisors shall be responsible for facilitating the adjustment of a staff member to his work by:

530.1.1 providing him with a clear statement of his duties and his official relationships;

530.1.2 instructing and guiding him in performing his functions;

530.1.3 introducing him properly to those staff members with whom he will be required to work;

530.1.4 discussing his work with him at frequent intervals."

The argument again fails. The Tribunal is satisfied on the evidence that several meetings were held and memoranda exchanged between the complainant and both his supervisors about his performance and that such discussions and correspondence, together with the three evaluation reports, provided him with the guidance that Rule 530 required.

11. The complainant submits that "there was no reasonable basis" for the Head of Division's conclusions and so for the termination of his appointment. He observes that the appraisals show "inconsistencies" and "disagreement" between his two supervisors. Be that as it may, supervisors do not have to have identical opinions: indeed it is a safeguard for any staff member to be evaluated by more than one supervisor and to have them bring possibly different views to bear. Moreover, the complainant has failed to prove any mistake of fact or any wrong conclusion about the assessments of his performance.

12. The complainant implies that it was not any shortcomings of his own but the Centre's financial situation that really prompted the decision not to confirm his appointment. But he offers no evidence to support that view. Indeed shortly after his departure, by a vacancy notice dated 22 August 1994, the PAHO offered for competition the post he had held and at the time of its reply to the complaint - November 1994 - it was holding interviews with candidates.

13. The complainant pleads that his supervisors failed to follow correct procedures on the grounds that the "evaluation report" - the first of the three - purported to cover the period from July 1991 to August 1992, whereas the period really ran from 1 September 1991 to 31 July 1992. That is immaterial. The two probation reports were correctly stated to cover the periods from 1 August 1992 and then from 1 August 1993 to 1 February 1994. The mistake in the evaluation report about the date at which the complainant took up duty with the Organization does not invalidate the comments about his performance. He says that the Director of the Centre started to write a probation report in May 1993 and then discarded it. But the point is irrelevant since the first probation report was later completed by both the Head of the Laboratory Division and the Director.

14. The complainant cites the letter that the Chief of Personnel wrote him on 19 January 1994 terminating his employment and explaining that the decision was based on his "initial and extended probationary appraisal reports as well as a further assessment of [his] work performance". He submits that that offended against natural justice since he was given no opportunity of seeing the "further assessment", let alone commenting on it. But the decision he is impugning is contained in the letter of 15 February 1994, in which the Director of PAHO stated:

"I have personally examined your case, which included a review of your initial and extended probationary appraisal reports, and have concluded that the impugned decision has been taken for reasons connected with your performance.

I have also found that you have been given ample opportunity to reply to the appraisals of your work performance made by your first- and second-level supervisors, and that your initial probationary period of one year was extended for six months in order to accord you the opportunity to correct deficiencies in performance, as noted by your supervisors."

That text shows that the final decision was taken in accordance with the requirements of Manual paragraph II.9.410.

15. Lastly, the complainant pleads that the Organization shifted ground by contending that he was unsuited to international service. But that was not the reason that the Director gave for the termination of his appointment: the Director relied, as the above-mentioned Manual paragraph required, on the probation reports.

16. In sum the Tribunal is satisfied that the two probation reports afforded ample grounds for terminating the complainant's appointment and that he has failed to show any flaw in the Director's decision that would warrant setting it aside.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, Judge, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas  
Michel Gentot  
Mella Carroll  
A.B. Gardner