FORTY-NINTH ORDINARY SESSION

In re VARGAS

Judgment No. 515

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Fernando Vargas on 23 October 1981 and brought into conformity with the Rules of Court on 11 November, the PAHO's reply of 18 January 1982, the complainant's rejoinder of 2 April and the PAHO's surrejoinder of 17 May 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rules 1040, 1050, 1230 and 1240 and WHO Manual provisions II.5.260 and 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. The complainant, a Peruvian born in 1922, joined the Pan American Sanitary Bureau, the secretariat of the PAHO, in May 1966 as a grade P.4 sanitary engineer. His original twoyear appointment was extended, and he served under projects in Venezuela and Mexico. From 1 January 1975 his post came under a project in Venezuela funded by the United Nations Development Programme and the Venezuelan Government, and his appointment ran to 31 December 1978. The project, and his appointment, were extended to 31 December 1980. In August 1979 a new Government of Venezuela, preferring to employ short-term consultants, cut back on the project, and on 25 September he received a telex from the Chief of Personnel saying that his post would be abolished under Staff Rule 1050.1 and his contract terminated on 31 December 1979, although attempts would be made to transfer him. A letter of 23 October from the Chief of Personnel said that the attempts had failed and he would be paid an indemnity under Rule 1050.4. His appointment accordingly ended one year early, on 31 December 1979. On 4 January 1980 he appealed. The PAHO Board of Inquiry and Appeal reported on 9 July, submitting majority and minority opinions; on 21 August the Director of the Bureau rejected the appeal on the recommendation of the majority; and on 6 January 1981 the complainant appealed to the WHO Board of Inquiry and Appeal in Geneva. The headquarters Board, reporting on 7 July 1981, was also divided but by a letter of 27 July - the impugned decision - the Director-General accepted the majority's recommendation to reject the appeal.

B. The complainant argues that the PAHO should have applied Staff Rule 1050.2, which requires a "reduction in force" when an occupied post "of indefinite duration" is abolished, priority for retention on the staff being then granted according to such criteria as performance and seniority. It was mistaken to rely on Rules 1050.1 and 4, which apply to a staff member on a post "of limited duration" whose temporary appointment ends before expiry because the post is abolished. The complainant's post was, he contends, of indefinite duration. His duties were continuous and not limited to any one project. The future of his post was uncertain and its termination unpredictable. He served on a post for a sanitary engineer for over 13 years. Although the funding altered the post itself was constant. Had the abolition been treated as a reduction in force he would have been kept on since he had given long and useful service. Little attempt was made to transfer him, suitable posts were vacant in September 1979, and he got no "reasonable offer of reassignment" as required by Rule 1050.2.5. The PAHO failed to apply Manual provision II.5.260: "Extension [of appointment] should be considered with a view to giving a sense of security to fully satisfactory staff members". If it is in the PAHO's interests to keep a longstanding and efficient employee it is an abuse of authority not to renew his appointment. He seeks compensation for breach of contract corresponding to his salary and benefits for the last 12 months of his appointment; compensation for loss of a career amounting to two years' salary and benefits; compensation for the reduction in his pension benefits; compensation for mental distress and physical illness; and costs.

C. The PAHO replies that the complaint is devoid of merit. In its view the complainant's termination was neither an abuse of authority nor tainted with any other flaw. In fact his post was of limited duration. The project in

Venezuela had a two-year term, and its extension, and that of the post, had been in doubt for years. Besides, the consistent policy, as reflected in an internal memorandum of January 1977, is to treat all project posts as "of limited duration". Manual provision II.9.3170 actually states that "reduction-in-force procedures do not apply to project staff who hold fixed-term appointments of less than five years". The complainant's appointment was for less than five years, and Rule 1050.1 was correctly applied. Manual provision II.5.260 relates to extension of appointment and was therefore irrelevant. Length of service affords no grounds for appeal against termination. Loss of funding, especially for a project, is a risk any official faces, and the complainant was paid a large indemnity - some $56,000 - under Rule 1050.4. A "reasonable offer of reassignment" is required only under the rules on reduction in force. Manual provision II.9.370 requires the PAHO merely to try to employ surplus staff on suitable projects if their services have been satisfactory. There was no suitable post for the complainant, who did not even apply for posts that were vacant.

D. In his rejoinder the complainant presses his claims. He observes that the Tribunal has already held that Manual provision II.9.370 could not have the effect of restricting Rule 1050.2 and must be treated as void. The PAHO may not therefore rely on that provision. A definition of posts of limited and indefinite duration should appear in the rules, not in internal memoranda, of which the staff are not duly informed. The rules are not clear, and until they are, staff should be given the benefit of the doubt. The objection to applying Manual provision II.5.260 is semantic: it is irrelevant whether the case concerns extension of appointment on expiry or before it. The PAHO wrongly denied the complainant the benefit of the rules on reduction in force, which would have kept him in employment. It was callous to get rid of him after so many years and at his age. His pension benefits have been reduced. Since Rule 1050.2 did apply he ought to have been made a "reasonable offer of reassignment".

E. In its surrejoinder the PAHO observes that no rational definition of a "post of indefinite duration" could include the complainant's. All projects are fixed-term, and so are project posts. His post was designed to meet a specific need of limited duration under a project. Rule 1050.2 therefore did not apply. The arguments based on his age, seniority and record are relevant only to considerations of equity in labour-management relations, not to the observance of the rules. Besides, he has been well and fairly treated. Moreover, the remedies he seeks are unjustified: no special circumstances would justify such preferential treatment.

CONSIDERATIONS:

The complainant was in the service of the Organization for over 13 years, holding a succession of posts attached to government projects. On 31 December 1979 the post which he held, viz. post No. 4.3563 in a project for the Government of Venezuela was abolished with the result that his appointment was terminated while it still had a year to run. The question is whether the post was, as the Organization contends, "of limited duration" with the result that the appointment was properly terminated under Rule 1050.1; or, as the complainant contends, "of indefinite duration". in which case the Organization should have proceeded under Rule 1050.2. The claim is for compensation for the failure to follow the procedures established by 1050.2.

A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. Where a post is attached to a project and the length is not specifically prescribed, its length will be the length of the project; if the project is of limited duration, the post likewise will be of limited duration.

There is no evidence in the dossier of any instrument specifically prescribing the length of Post 4.3563. But, as stated above, the post was attached to a Venezuelan project for research of environmental pollution, which project was governed by a tripartite agreement made on 26 December 1978 between WHO, UNDP and the Government of Venezuela. The agreement states that the project is to start on 1 January 1979 and that its duration is to be two years. Accordingly, the duration of the post is that of the project and so is of limited duration.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and

Mr. Héctor Gros Espiell, Deputy 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 18 November 1982.

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

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