FIFTY-FIRST ORDINARY SESSION

In re GAYDAR

Judgment No. 581

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Victor Hugo Gaydar 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. A citizen of Argentina, the complainant joined the PAHO's Pan American Zoonoses Center, known as CEPANZO, in Ramos Mejía, Buenos Aires, in 1975 on a fixed term appointment as a driver at grade G.2. His 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. 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.2 post for a driver. A joint working group appointed by the Director and comprising staff representatives studied the recommendations and reported on 7 November that of the two filled posts for drivers the complainant's should be abolished. He was terminated on 10 December 1980 under Staff Rule 1050 ("Abolition of post and reduction in force"). Under Rule 1230.8 he appealed, in vain, to the Area Board of Inquiry and Appeal and then to the PAHO Board of Inquiry and Appeal in Washington. On a recommendation made on 5 October 1982 by the majority the Director rejected the appeal in a decision of 3 December 1982 which the complainant received on 13 December and which he 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. If all the G.2 posts in the "commuting area" had been pooled his seniority and good performance -- the criteria prescribed in 320 -- would have secured one for him. (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 should first have been reviewed. If the complainant's ought to have been G.3 it was wrong to pit him against holders of G.2 posts. He seeks reinstatement and back-pay, or adequate financial compensation, and also damages, costs and any other relief the Tribunal thinks fit. He 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 1050.1, 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 his post a "project" one, which no one may expect to continue. He settled for an indemnity under 1050 -- $6,773 -- which he 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 of seniority and performance were respected: the joint group found that the other G.2 driver had performed better than the complainant. 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 his case in his 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 he 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. There is no evidence of lack of a post similar to the complainant's in the commuting area: the Administration failed to take account of the whole area. That the Director was carrying out PAHO policy does 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.

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. CEPANZO is an independent institution and does not exchange staff with PAHO: the existence of a similar post in the commuting area -- even supposing the area is the same, which it is not -- is immaterial. The complainant was given ample notice and generous compensation. The decision was a discretionary one 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 him in his former position as chauffeur with retroactive salary from December 1980 until the present, or 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 2 January 1975 as a chauffeur grade G.2 at CEPANZO, Ramos Mejía, Argentina. As a result of budgetary considerations, his post, 3431, was terminated on 10 December 1980. He submits that the termination of his employment was illegal as being in contravention of Staff Rules 1050.1 et seq. and Manual sections II.9.250 et seq.

The applicability of Staff Rule 1050.2

3. The PAHO contends that the fact that the complainant freely and voluntarily accepted the indemnity provided for in Rule 1050.4 constitutes a contractual agreement between the PAHO and the complainant and precludes the latter from pursuing his claim. The Tribunal will, naturally, examine the circumstances in which the payment was made and accepted in considering whether or not the complainant has renounced any claim he may have had against the Organization in connection with the termination of his services. In the circumstances of this case the Tribunal has concluded that the mere acceptance by the complainant of the said indemnity does not amount to a renunciation by him of his claim against the PAHO and is not a bar to his seeking relief.

4. PAHO Staff Rule 1050 regulates the abolition of posts and reduction in force in the Organization. Rule 1050.1 deals with temporary appointment to a post of limited duration. Rule 1050.2 provides:

"Where 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 following principles."

Those principles so far as they are relevant are:

(i) The Director 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);

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

(iii) 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); and

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

5. The PAHO contends that inasmuch as the complainant was not the holder of a post of indefinite duration Rule 1050.2 does not apply to him. The case is, according to the PAHO, governed by Rule 1050.1 so that when a reduction in force takes place the temporary appointment to a post of limited duration may be terminated prior to its expiration date if that post is abolished, or, in other words, for this kind of post its simple abolition is enough to justify the termination of the employee. In support of this contention reference is made to Rule 1050.4, which provides for the payment of an indemnity to staff members whose appointments have been terminated on a scale which not only takes into account years of service but distinguishes between staff holding career-service appointments and staff holding fixed-term appointments.

6. In Perrone v. PAHO (Judgment No. 470) the Tribunal considered the applicability of Rule 1050.2 to a staff member whose fixed-term appointment had been regularly extended and held that Rule 1050.2 applied in such a case. It is to be noted that in the instant case, as in Perrone, the complainant was the holder of a post of indefinite duration.

The Tribunal sees no reason to differ from the conclusion reached in Perrone or the reasoning on which that conclusion was based. It holds, therefore, that Rule 1050.2 applies in the instant case.

The reduction in force

7. As stated in the Final Report of the Executive Committee's joint working group on the abolition of posts at CEPANZO, the Director had decided, following consultations on the matter, to apply Rules 1050.1, 1050.3 and 1050.4 to all Professional and General staff concerned in order to be able to pay them the indemnity established in the last mentioned of those rules. In implementing this decision the joint working group, which was made up of representatives of the Director and of the staff, adopted the following criteria in recommending the staff members whose contracts would not be extended:

"(a) To determine the individuals whose posts would be abolished, those posts would be considered which

(i) were in the same category,

(ii) involved similar tasks based on the post description most recently approved, and

(iii) were located in the same duty station.

(b) Once the individuals coming into question under a specific decision of the Executive Committee's working group were identified, their (i) performance assessment reports, (ii) seniority, and (iii) other factors would be considered in that order.

(c) In comparing performance assessment reports, primacy would be given to item 2.2 "Quality of Performance", whose components are technical competence, accuracy, attention to detail, problem solving ability, and willingness

to accept responsibility. On the basis of these factors, performance would be rated as 'very good', 'good', or 'regular'. In cases of essentially equal performance, the other assessment factors would be considered, including the comments of second level supervisors."

8. The issue which arises is whether these criteria and their implementation by the PAHO violate Rule 1050.2 and the PAHO Manual provisions dealing with a reduction in force.

9. Manual section II.9.250 defines "reduction in force", and states that the authorised number of posts may be reduced "because the available funds have been reduced". The complainant contends that the reduction was too far-reaching because the PAHO failed to take into account the fact that there were 24 budgeted but frozen posts amounting to $875,880, which should have been set off against the total of $1,368,000 by which the CEPANZO budget was to be reduced. It is not for the Tribunal to question the decision of the PAHO Executive Committee that there should be a reduction in force because of budgetary considerations. This is not the function of the Tribunal. The Tribunal is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the staff regulations. There being no suggestion that the reduction in force was merely a device to effect the unjustifiable removal of the complainant, the Tribunal will not, therefore, review the correctness of the PAHO Executive Committee's decision to reduce the staff at CEPANZO.

10. Manual section II.9.260 provides that where a reduction in force is necessary, offices must determine which posts are to be abolished, establish the extent of incumbent competition, arrange for competitive selection, determine which individuals will be the object of the reduction, offer affected persons any suitable opportunity for placement, terminate the appointments of any who cannot be placed and ensure that persons terminated are given priority in considerations for re-employment. To the extent that Manual sections II.9.260 and 270 purport to place responsibility on "offices" (section 260) or on "the officer responsible for the operation of the office or unit" (section 270) they are in conflict with Rule 1050.2 which places responsibility for carrying out any reduction in force squarely on the Director. In such a case the staff rule must prevail, and the objections taken by the complainant under Manual sections II.9.260 and 270 must fail.

11. It is urged on behalf of the complainant that the PAHO has misconstrued the terms "similar staff", "same commuting area" and "quality of performance" in Manual sections II.9.280 and 320. The joint working group determined which persons constituted "similar staff" by reference to the post descriptions. This seems to be a logical and reasonable approach. The term "same commuting area" was interpreted to mean the same duty station, in this case, Ramos Mejía. There is no evidence before the Tribunal to support the contention that because Ramos Mejía and the PAHO District VI Area Office are both within the province of Buenos Aires, that they are in the same commuting area. As to "quality of performance" the joint working group took into account technical competence, accuracy, attention to detail, problem-solving ability and willingness to accept responsibility. The Tribunal finds no fault with this interpretation.

12. In regard to the complaint that the PAHO failed to observe Manual section II.9.340 in regard to reassignment, the Tribunal will not review, for the reasons stated above, the decision of the Executive Committee that 24 posts at CEPANZO should remain vacant.

The merits

13. In respect of Manual section II.9.360, which deals with the re-employment of staff members whose appointments are terminated, whose services were satisfactory and who wish to be considered for vacancies during the twelve months after their separation, the complainant refers to the following findings by the minority of the Board of Inquiry and Appeal in its report dated 5 October 1982.

"(a) the reinstatement, six months later, of the very activities which were cut and which resulted in the RIF [Reduction in Force];

(b) the re-hiring immediately thereafter of at least one outside individual on "a purchase order basis" to replace one RIF'd employee;

(c) the reported recruitment of new staff at the present time which apparently does not include RIF'd personnel."

As to the first and third findings, there is no evidence that any activities which may have been reinstated at CEPANZO created any vacancy for a person of the complainant's qualifications within twelve months of the

termination of his employment, or indeed that he wished to be considered for such a vacancy. As to the second finding, this relates to a matter of policy which the Tribunal will not review.

14. In the result, although the PAHO did not consider that Rule 1050.2 should be applied to the complainant's post, the procedures implemented by the Director to deal with the situation created by the decisions of the governing authorities of the PAHO and to indemnify staff members whose contracts could not be extended have, in fact, met all of the requirements of the Staff Rules and the relevant Manual sections. The complainant, therefore, has not been able to show any failure by the PAHO to confer on him the benefits to which he is entitled under the Staff Rules.

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.