FIFTY-SEVENTH ORDINARY SESSION

In re BUSTOS

Judgment No. 701

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. José Raul Bustos Alonso on 12 January 1985, the PAHO's reply of 12 April, the complainant's rejoinder of 10 July, corrected on 19 August, and the PAHO's surrejoinder of 20 September 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal and PAHO Staff Rules 940, 950, 1040, 1050 and 1240;

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. From September 1970 the complainant was employed under short-term contracts in the Latin American Centre of Perinatology, known as CLAP, an affiliate of the PAHO in Uruguay. The Centre was set up under an agreement concluded in 1970 between the Government of Uruguay, the University of the Republic and the PAHO. The complainant was in charge of a neonatal unit in the Centre and of the pediatric section of a health programme in Uruguay. His original contract was regularly succeeded by further contracts. In a memorandum addressed to staff in October 1981 the acting Director of the Centre warned that there might be financial difficulty over granting further contracts. On 23 December 1982 the complainant was informed that his contract would terminate on 31 December, and he left on the latter date. He protested in letters dated 13 January 1983, 28 February and 13 April against the non-renewal of his contract. On 12 May he was offered 7,089 United States dollars in settlement of his claims, but he refused. On 5 July he appealed to the Area Board of Inquiry and Appeal seeking retroactive reinstatement at the Centre as a PAHO staff member and payment of salary, or else an award of compensation. On 25 October the Board made a recommendation in his favour, but the acting PAHO Area Representative rejected it on 14 December 1983. He appealed on 6 February 1984 to the headquarters Board of Appeal in Washington, which recommended rejecting his claims. By a letter of 2 October 1984, which he received on 15 October, the Director of the PAHO announced the rejection of his claims, and that is the decision he impugns.

B. The complainant explains at length that his duties were of a continuing nature since he worked under long-term programmes. His first contract was succeeded by an unbroken series of appointments until his sudden dismissal at the end of 1982, except for one year's authorised study leave which he spent abroad. His contracts were never temporary, because his duties were not, being spread over nearly twelve years. In his submission it is generally acknowledged that constant renewals of a short-term contract convert it into a permanent one. He accordingly concludes that at the time of dismissal he had been under a contract of indeterminate duration with the PAHO for nearly twelve years.

The complainant further contends that the rules on staff reduction, notice and compensation for abolition of post -- Staff Rules 940, 950 and 1050 -- ought to have been applied. Only a few days before his contract expired was he given notice of termination; and only five months after dismissal was he offered compensation "for any injury you might have been caused by the non-renewal", an amount which was in any event reckoned according to the less generous criteria prescribed by Uruguayan law. He alleges severe moral and material injury. There is little demand in the private sector for the specialised work he did at the Centre, which is the only body capable of making use of his knowledge, and he has since failed to attain the income he had in 1982. His sudden dismissal caused him serious financial difficulty, aroused suspicion in medical circles about the reasons for his termination and severely harmed his professional reputation.

He claims reinstatement at the Centre as a PAHO staff member with full back pay plus interest. Alternatively, he seeks compensation equivalent to the difference between the amounts he actually received at the Centre and the amounts he would have received had he been a "regular employee" of the PAHO. He seeks damages for moral injury and for the PAHO's bad faith in prolonging his irregular position. He claims costs.

C. In its reply the Organization gives a detailed account of the facts. It submits that, since the complainant was an independent contractor and not a staff member within the meaning of the PAHO Staff Regulations and Staff Rules, the Tribunal is not competent to hear his complaint. He signed the contracts freely and without qualification and was never offered formal contracts of service with the PAHO. The criteria for the appointment of staff laid down in the Staff Regulations and Staff Rules were never as plied to him because the Organization never had any intention of appointing him as a staff member.

Turning to the merits, the PAHO observes that the Centre's continued existence depends on the conclusion of agreements, the last of which was for three years, and that the Centre is not a permanent body. Even though the complainant worked at the Centre for many years, he was not a PAHO staff member and so was not dismissed. His last contract simply expired at the appointed date in accordance with Staff Rule 1040. Nor was he ever given any reasonable expectation of making a career at the Centre; indeed from October 1981 he knew that for financial reasons he and others at the Centre were in danger of not having their contracts renewed.

The PAHO invites the Tribunal to declare the complaint irreceivable for lack of competence or to dismiss it as devoid of merit and, subsidiarily, should the complainant be awarded compensation, to order that the amount be calculated according to Uruguayan law.

D. In his rejoinder the complainant maintains that, being a PAHO staff member within the meaning of Staff Rule 1240, he does have access to the Tribunal. He develops his arguments, reaffirming that he was entitled to the treatment due to anyone whose relationship with the PAHO was of indeterminate duration. He discusses in detail his position at the Centre and compares the status of local and international staff, observing that the latter fare better. He presses his claims.

E. In its surrejoinder the Organization reaffirms that the complainant never held any status other than that of an independent contractor or occasionally, when he travelled abroad, that of a PAHO adviser or consultant. The agreements on CLAP provide for only a few PAHO posts, and none of these was ever held by the complainant. The PAHO maintains its submission that the Tribunal is therefore not competent to hear the complaint.

The PAHO further challenges several allegations of fact and answers pleas developed in the rejoinder. It observes that each time he signed a new contract the complainant was alerted to his status as an independent contractor. The offer of compensation was made to him only from a sense of moral obligation.

CONSIDERATIONS:

Jurisdiction

1. The Organization objects to the jurisdiction of the Tribunal on the ground that the complainant was never a staff member. But in the jurisprudence of the Tribunal its jurisdiction does not depend upon staff membership. In re Chadsey (Judgment 122) the Tribunal said:

"While the Staff Regulations of any organisation are, as a whole, applicable only to those categories of persons expressly specified therein, some of their provisions are merely the translation into written form of general principles of international civil service law; these principles correspond at the present time to such evident needs and are recognised so generally that they must be considered applicable to any employees having any link other than a purely casual one with a given organisation, and consequently may not lawfully be ignored in individual contracts. This applies in particular to the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure."

The facts hereinafter set out show that the complainant's link with the Organization was more than a purely casual one. Accordingly the objection is overruled.

Facts

2. In 1970 the Government of Uruguay, represented by the Ministry of Public Health, under a tripartite agreement with the University of the Republic, represented by its faculty of medicine, and with the PAHO, agreed upon a programme of scientific research and advanced education by means of an organisation known as CLAP. The objectives of CLAP are stated as being "the reduction of the maternal and foetal mortality and morbidity rates and

the subsequent achievement of adequate health conditions for the child by promoting research and training". It was not supposed that these objectives could be speedily achieved; the 1970 agreement incorporates a "work plan for the first two years". The 1970 agreement was succeeded by a second agreement in 1974 and a third in 1978, the latter being the agreement in force at the time of the complainant's termination. In these later agreements the objectives and the work plan were greatly expanded.

3. The obligations of the PAHO, as set out in the 1970 agreement, were not substantially changed in the second and third agreements. Ee obligations were to provide personnel and equipment, scholarships and grants. The wording of these obligations was changed only in one respect. In the first agreement eight posts to be filled were specified, including three perinatologists; in the last this is described as "full time services of perinatology and maternal and child health consultants". In addition PAHO was to provide the consultation services of its headquarters staff and "short-term consultants" acting as professors or as experts.

4. In 1970 the complainant was among a number of persons recruited apparently as short-term consultants. His contract was for a period of four months. De written contract is not in the dossier. But since it was followed by more than 30 other short-term contracts, all in the same pattern on a printed form and with typed insertions for matter that was variable, its exact contents do not matter. It set out the tasks or duties assigned to the complainant, and prescribed the hours of work a week and the monthly remuneration. A printed clause stated that it was "a lease of work and not a relation of subordination". The remaining contracts followed one another consecutively until 31 December 1982 when the procession ceased: on 23 December 1982 the PAHO had informed the complainant, as well as a number of others who held similar contracts, that there would be no more. The main issue between the parties is whether this procession of contracts describes and determines the true legal relationship between the parties. The complainant contends that it does not.

The law

5. The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties. When a contract is expressed in writing, the intention is normally to be ascertained from the documents produced. In some cases, however, the parties -- or at any rate the party which is in a position to formulate the document -- do not desire that the true relationship should be revealed. The reason for this is that, if the true relationship was made manifest, the law would impose consequences which the parties -- or at any rate the stronger of them -- do not wish to face. In the commercial world this sort of situation quite often arises when the relationship between the parties, expressed in one way, would attract taxation and, expressed in another way, would not. In the circumstances in which the parties to the present case operate, the situation might be that the parties -- or one or other of them -- do not wish the contracts to be governed by the Staff Regulations: the easiest way of achieving that is for the parties to exhibit in the document a relationship which does not make the employee a staff member. Another way in which a divergence can be created is by a change in the relationship over a period of time so that the originating agreement becomes obsolete, coupled with the failure of the parties to make the necessary changes in the text to cover the new developments.

6. The complainant contends that the true relationship between the parties was one of master and servant in which the complainant was the servant or subordinate. The PAHO contends to the contrary that the complainant as a consultant was an independent contractor. There is much discussion in the dossier as to which category is appropriate to the present case. Certainly there are factors which support either view. But the Tribunal will not try to answer the question. This is because, for the reasons given in paragraph 11 below, there is only one claim by the complainant which the Tribunal can entertain. This is the claim for compensation for the wrongful termination of a contract. If the contract was, as the complainant contends, a single contract of service for an indefinite period, it must be conceded that it could be lawfully terminated only by reasonable notice and that no reasonable notice was given in this case. But there is no reason why an expert or professional man should not be retained, either as a consultant or otherwise, to perform for a salary such tasks as may be allotted to him. Such a retainer might be either for a fixed period or for an indefinite period to be terminated by notice. The question to be decided in this case is whether the relationship between the parties was truly expressed by a series of separate contracts for fixed periods or whether it could be properly expressed only by a single contract for an indefinite period.

7. As has been stated, the first contract given to the complainant on 1 September 1970 was for a period of four months. Since we do not know exactly what tasks or duties were prescribed, we cannot say whether four months would have been a genuine estimate of the period necessary for performing them. We know that the work plan was expected to last for two years and more. It may have been that it was intended that the complainant should be

engaged only for some preliminary work; or that the contract was intended to cover only some sort of probationary period. But as the work developed the text of each contract was moved further and further from reality. Long before the end of the complainant's service the divorce was complete.

8. It is unnecessary to trace the development in detail. To provide an illustration, the Tribunal has examined the period of 35 months between 1 February 1976 and 31 December 1978. This period is covered by six contracts. The first was for five months, the second, third and fourth for six months each, the fifth for two months and the sixth for ten. In each contract the description of the tasks to be performed is in the same words as follow:

"(a) Direct and coordinate the research work, training and advisory services of the group of neonatologists of CLAP, being held responsible for the work performed by this group.

(b) Coordinate the integration of this group with the other personnel of CLAP and of the Department of Obstetrics and Gynecology "B" and of the Institute of Pediatrics.

(c) Coordinate the cooperation that the group of neenatologists of CLAP gives in the care of fetuses and newborns of the Department of Obstetrics and Gynecology "B".

(d) Any other task that, related to his work, may be indicated by the Director of the Center."

In every contract, except possibly the last, the periods allotted as above could not possibly have been intended as genuine estimates of the time to be taken for the performance of the tasks. Moreover, it can never have been seriously contemplated that the work of directing and co-ordinating a group or unit could be satisfactorily discharged if the personnel of the unit -- not only the director of it but all the members of his team -- were to be changed every three or four months. Incidentally, the phrase "being held responsible for the work performed by this group" is one of the factors most strongly relied upon as clearly inconsistent with consultancy.

9. From all the evidence in the dossier the Tribunal concludes that the work done for the PAHO by the complainant over more than eleven years was a continuous whole and that

its division into contractual periods as a short-term consultant was fictitious. The mutual intention, formed, if not at the beginning, then at the latest by 1976, was that the complainant should be employed for as long as his services were required and he was willing to give them. To an agreement of such a character the law adds the term that reasonable notice of termination must be given. The PAHO has broken this term. In the circumstances of this case reinstatement is inadvisable and so the Tribunal will assess the appropriate compensation.

10. The present case is of a very exceptional, if not unique, character. It can only be very rarely indeed that a case comes before the Tribunal in which it will look behind the documents to ascertain the intention of the parties. The facts set out in paragraph 8 above illustrate the overwhelming strength of the evidence that is necessary to justify the Tribunal in taking the course which it has in this case. In any event the Tribunal's decision does not affect short-term appointments in general.

Compensation

11. The Tribunal rejects the complainant's claim that compensation should be assessed as a sum equal to the difference between the amount the complainant actually received during the contract period and the sum which he would have received as a regular employee of PAHO. The Tribunal has no power to reconstruct the contract retroactively nor to reform the version of it in which until its termination the complainant acquiesced. The decision under appeal was given by the Director on 2 October 1984 in a letter in which he confirmed the decision by the headquarters Board of Appeal that it had no jurisdiction in the matter. The complainant, having thus exhausted his internal remedies, may bring before the Tribunal the decision which he submitted to the Board. This, as appears from his letter of 6 February 1984, was the decision to terminate. To that decision the Tribunal has applied the terms of the true contract and not of the fictitious one, but it cannot now entertain an appeal from any other decision.

12. The Tribunal assesses the period of the notice which PAHO ought to have given as twelve months, that is, one month for every year or fraction of a year of service. This is the measure prescribed by Uruguayan labour law and it is also one which is employed in a number of other countries. Accordingly, the compensation under this head will be based on an estimate of the salary which the complainant would have received for the year 1983.

13. The complainant asks also for compensation for moral damage caused, first, by the failure to give adequate notice of termination, which failure is alleged without any supporting evidence to have caused tremendous damage to the complainant's reputation; secondly, for the Organization's bad faith in continuing the irregular employment situation for twelve years. Ee second head is inadmissible for the reasons given above. As to the first, the Tribunal does not accept that there was any likelihood of damage to reputation. However, the Tribunal accepts that a sudden termination without warning, especially in the legal situation which the Organization has the greater responsibility for leaving obscure, is not fully compensated by reimbursement of salary. The Tribunal will take this factor into consideration.

14. The complainant asks also for reimbursement of all legal costs. The complainant has failed in his major claim and the amount awarded to him may not greatly exceed the offer by the Organization, which the complainant rejected, to give him an indemnity calculated in accordance with Uruguayan law. Having regard to these matters the Tribunal will award a sum which is intended as a contribution to rather than a reimbursement of all legal costs.

DECISION:

For the above reasons, the appeal is allowed, the Director's decision of 2 October 1984 is quashed and the Organization is ordered to pay to the complainant:

(1) the sum of 17,500 United States dollars as compensation with interest thereon at the rate of 10 per cent per annum from 1 July 1983 until the date of payment; and

(2) the sum of $1,000 towards his legal costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, the Right Honourable the Lord Devlin, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 14 November 1985.

(Signed)

André Grisel

Devlin

William Douglas

A.B. Gardner

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