**SIXTY-SIXTH SESSION**

## *In re* SINGH (Birendar)

**Judgment 974**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Birendar Singh against the Pan American Health Organization (PAHO) (WHO) on 2 September 1988 and corrected on 23 November, the PAHO's reply filed on 4 January 1989, the complainant's rejoinder of 11 February and the PAHO's surrejoinder of 16 April 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Rules 1040 and 1050 and WHO Manual provision II.9.250 to .375;

Having examined the written evidence and dismissed the PAHO's application for oral proceedings;

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

A. PAHO Staff Rule 1040 reads:

"Temporary appointments, both fixed-term and short-term, shall terminate automatically on the completion of the agreed period of service in the absence of any offer and acceptance of extension. However, a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof not later than three months before the date of expiry of the contract. ..."

Staff Rule 1050 reads:

".1 The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if that post is abolished.

.2 When 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 ..."

The complainant, a citizen of India born in 1932, joined the PAHO on 12 May 1980 under a fixed-term appointment. He was stationed in Kingston, the capital of Jamaica, and served as a statistician on post 5031 at grade P.3. He had his appointment extended to 31 May 1988.

By a telex of 6 March 1987 the Chief of Personnel at headquarters in Washington D.C. told him that his post, being no longer required, would be abolished on 1 June 1987; his appointment would end on 31 May under Staff Rule 1050 and if no suitable vacancy were found he would be paid the indemnity prescribed in 1050.4.

In a telex of 17 March to headquarters he asked for transfer to a vacant P.3 post for a statistician in Caracas.

On 29 April his counsel gave notice of appeal against termination.

Headquarters informed him in a letter of 30 April 1987 that termination was postponed to 31 August 1987 to allow time to consider him for "other posts within the region" and in a telex of 4 May that he was a candidate for the post in Caracas. Also on 4 May, before he got that message, he sent a telex of his own applying for direct appointment to the post. On 30 June a selection committee recommended appointing him to it, the Director of the Organization agreed, and he was told on 13 July that he would be appointed subject to clearance by the Venezuelan Government. In the meantime the appeal proceedings were suspended. By a telex of 12 January 1988 headquarters told him that the Government had refused clearance; the notice of termination being confirmed, he would leave on 15 February 1988.

In a telex of 18 January the WHO Representative in Kingston said that the Jamaican Government wanted to keep him and she recommended postponement of termination until 31 May 1988. Washington having agreed, a telex of 29 January from the Chief of Personnel informed him that his contract would expire on 31 May - the actual date of

expiry of his appointment - in keeping with Rule 1040. He sent a telex to the Chief of Personnel on 21 March asking for transfer to a new P.3 post for a statistician in Washington. Though he was a listed candidate the post went to someone else.

On 16 May the Permanent Secretary of the Jamaican Ministry of Health wrote to the WHO Representative asking that the complainant be given another four months. His appointment was accordingly extended to 30 September 1988.

The Board of Appeal had met in March and April 1988 to hear his appeal. In an undated report it unanimously held that since post 5031 was one of "indefinite duration" Rule 1050.2 applied; it recommended giving him a suitable vacant post or, failing that, the benefit of the "reduction-in-force" procedure in 1050.2. But in a letter to him of 7 June, the decision he impugns, the Director said that his appeal was rejected.

Meanwhile he was proposed for a post in the Bahamas and had his appointment extended to 31 October to allow time for clearance from the Government. But by a telex of 4 October 1988 the Chief of Personnel told him that, the Government having rejected him, the notice of termination would take effect on 31 October. That was when he left, and the Organization has paid him the indemnity prescribed in 1050.4.

B. The complainant observes that 1050.1 applies if the abolished post is "of limited duration", 1050.2 - which prescribes the reduction-in-force procedure - if it is "of indefinite duration". Under 1050.2.1 the holder of the post may compete for retention on the staff along with others "performing similar duties" and so does not necessarily lose his job, as he will under 1050.1. Even if unsuccessful in the competition he must, under 1050.2.5, be "made a reasonable offer of reassignment if such offer is immediately possible".

The complainant submits that according to the Tribunal's earlier rulings on 1050 the test of a post of indefinite duration is whether a period was set by the instrument that created the post or the project. As the Board of Appeal held, the circumstances suggest, in the absence of written records, that the complainant's post was one of indefinite duration.

The Tribunal has also held that limited duration may become indefinite if extended beyond the period for which the post was originally established. The complainant's post was said in the telex of 6 March 1987 to be no longer required as from 1 June 1987; yet the duration of it was extended many times beyond that date.

For many months he and his family suffered great distress and uncertainty about their future.

He asks the Tribunal to order the application of the reduction-in-force procedure in Rule 1050.2 and in Manual provisions II.9.250 to .375 and award him damages amounting to 200,000 United States dollars and costs.

C. In its reply the PAHO submits that the complaint is devoid of merit. Whether or not the complainant's post was "of indefinite duration" is immaterial. Although his appointment was for a fixed term that expired on 31 May 1988, the post was extended, and he held it, for five months after that date. He was not terminated because of abolition of his post: the abolition did not occur until his appointment had expired. Had he never been given notice of abolition he would have had no right to extension of his appointment after its expiry on 31 May 1988. Even if the PAHO had transferred him to another post it need not, according to Rule 1040, have kept him on after that date. So he got more than he was entitled to. Even if the reduction-in-force procedure had been applied and he had been put on another post the PAHO would have had no obligation towards him after 31 May 1988. Besides, his claim to damages is unreasonable.

D. In his rejoinder the complainant discusses several issues of fact. He observes that the Organization's case rests on the mistaken assumption that his appointment expired on 31 May 1988 and that his post was not abolished until 31 October 1988. In fact the PAHO's own belief, to judge from its telexes, was that it was terminating him under 1050 for abolition of post. Though termination was postponed several times he was told that the notice of termination held good, and the grounds continued to be abolition. Then the telex of 29 January 1988 postponed termination to 31 May 1988, the date of expiry of his appointment, and stated that termination was "also conveyed in terms of Staff Rule 1040". Thereafter the Organization repeatedly said that his termination would take effect under both 1040 and 1050; so plainly it did terminate him partly because of abolition of post. Besides, it is wrong to say that his appointment expired on 31 May 1988: headquarters extended it several times to 31 October.

Although extension is not a right, letting an appointment expire is still a decision, and it has to be lawful. There is

no reason to doubt that had the complainant been put on an enduring post he would have been kept on.

The amount he claims in damages is reasonable. The treatment of him was unlawful and the PAHO's distant attitude towards him aggravated its breach of the rules. Being kept for nearly two years on short extensions he got no home leave and could not plan his future or his family's. He lost the post in Washington that he could have got had the reduction-in-force procedure been applied. He is therefore entitled to full pay, less other earnings, for the period since termination. If the Tribunal orders application of the procedure and he is still not reinstated he should get full pay up to the date of his retirement, in 1992.

E. In its surrejoinder the PAHO seeks to refute the pleas in the complainant's rejoinder. It points out that he admits to having no right to extension of his appointment yet claims benefits as if he did. It is willing to pay him terminal benefits and repatriation grant, that being all he is entitled to on the most favourable interpretation of the circumstances. It was considerate in that it employed him for seventeen months in all after the date he was given in the original notice of termination. Attempts to place him in at least three posts failed, but through no fault of the Organization's, and it was still trying at the date of writing the surrejoinder, beyond the call of its duty in law, to find him employment.

CONSIDERATIONS:

1. According to Staff Rule 1050.1 when a post of limited duration is abolished in the PAHO the temporary appointment of the staff member on the post may be terminated; but when the abolished post is one of indefinite duration Rule 1050.2 provides for a "reduction in force" in accordance with procedures established by the Director of the Organization and with the principles therein set out.

2. The first issue is whether the post held by the complainant at Kingston, in Jamaica, was one "of indefinite duration" within the meaning of 1050.2.

The PAHO Board of Appeal investigated the circumstances in which the post had been established. It found that no personnel or project documents indicated any time limit and that the original documents recording the proposal for the creation of the post had been put in the Organization's archives in 1980 and destroyed in 1985. It concluded that the post was one of indefinite duration. That is what the complainant contends, the Organization does not contest the point and indeed its arguments are based on that assumption.

In the circumstances the Tribunal is satisfied that the post was one of indefinite duration.

3. The complainant held a fixed-term appointment that was due to expire on 31 May 1988. He was informed by a telex of 6 March 1987 that his post would be abolished on 1 June 1987.

Although in giving notice the Organization cited 1050.1 and 1050.3, 1050.1 was not applicable because the post was not one of limited duration. Had it been actually abolished on 1 June 1987 the complainant would have been entitled to the application of the reduction-in-force procedure. But his appointment and the duration of his post were extended several times, first to 31 August 1987, then pending approval of another assignment by the Government of Venezuela - which in the event did not give it - then to 15 February 1988 and to 31 May 1988.

On the occasion of the extension to 31 May 1988 the Organization gave as an additional basis for termination Rule 1040, which is headed "Completion of temporary appointments".

There were two more extensions, to 30 September and to 31 October 1988. Undoubtedly the reason for the successive extensions was that efforts were being made to place the complainant in another post. Since they had proved unsuccessful he was terminated, and his post ceased to exist, on 31 October 1988.

4. In the absence of a specific provision in the rules the Tribunal holds that, for the reasons it stated in Judgments 470 (in re Perrone) and 891 (in re Morris), the right to the application of the reduction-in-force procedure arises on the abolition of a post of indefinite duration even though the official may have only a fixed-term appointment.

5. The Organization seeks to distinguish Perrone from the present case.

(a) It submits that whereas in that case the abolition of post and the termination coincided in this case they did not.

It is mistaken: the complainant's appointment terminated, after several extensions, on 31 October 1988 and his post ceased to exist at the same date.

(b) It argues that the payment of compensation makes this case different.

The payment of the indemnity is an entitlement on abolition whether the post is one of limited or of indefinite duration. The distinction is that if it is of indefinite duration the reduction-in-force procedure should first be followed and only if it is unsuccessful will the indemnity be payable.

(c) The Organization makes a distinction between Mr. Perrone's seniority and the present complainant's. The complainant has more years to serve before retirement age than Mr. Perrone had.

That is an argument, not against applying the reduction- in-force procedure, but in favour of it. In Judgment 470 the Tribunal declined to order the application of the procedure because in the ordinary course of events the complainant would have retired before the Tribunal had made its ruling. The same considerations do not apply here.

(d) In Perrone the Organization relied on 1040 alone and was not going to pay any compensation, whereas in the present case it relies on 1050.1 and 1050.3 and will pay the indemnity under 1050.4.

The answer to that is that the Organization is wrong in law in applying 1050.1 since the post is not one of limited duration: 1050.2 is the material rule.

6. There being no reason to distinguish Perrone, the principles set out in Judgment 470 must apply. Since, as was said above, the post was one of indefinite duration, since the complainant held a fixed-term appointment, and since termination and abolition coincided, the conditions for applying both 1040 and 1050 were met and a choice had to be made. The Organization correctly decided to apply 1050 since it was because of the abolition that the complainant had to leave. But instead of applying 1050.2 and following the reduction-in-force procedure the Organization purported to apply 1050.1, and wrongly so because the post was not one of limited duration.

The Director's decision was therefore based on a misinterpretation of the rules due to his failure to determine the nature of the abolished post correctly. It must be set aside and the reduction-in-force procedure followed.

7. The complainant claims an award of damages. The Organization did make strenuous efforts to find another posting for him and it gave him in recognition of his competence a "personal services contract" from 5 December 1988 to 30 January 1989 for which he was to be paid 7,000 United States dollars. But its failure to apply the reduction-in-force procedure in due time did cause him monetary loss. If the procedure proves successful and a new post is found for him he should be paid the sums he would have received in the form of salary and allowances from the date of his termination up to the date at which he takes up the new post, less any actual earnings during that period. If the procedure is not successful he should be paid the indemnity prescribed in 1050.4 and interest thereon from 1 November 1988 at the rate of 10 per cent a year.

8. There are no grounds for awarding any further sum in damages for stress. There is no evidence to show that the Organization acted high-handedly: it simply erred in interpreting its rules and there is no entitlement to damages in such circumstances. Whether the complainant is compensated for actual loss of earnings or is awarded the indemnity under 1050.4 that will suffice.

9. Lastly the Organization contends that he had no "right" to serve beyond the date of expiry of his fixed-term appointment.

The point is not material. If the post had not been abolished the Organization would have had to take an actual decision not to reappoint him when his fixed-term appointment came to an end. Rule 1040 provides that "... a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof not later than three months before the date of expiry of the contract". The complainant has been denied the benefit of that provision; indeed it seems unlikely that the Organization, which recognises his competence and abilities, would have decided against reappointing him.

DECISION:

For the above reasons,

1. The Director's decision of 7 June 1988 is quashed.

2. The Organization shall apply the reduction-in-force procedure to the complainant in accordance with Rule 1050.2.

3. It shall pay him in compensation the sums reckoned as set out in 7 above.

4. It shall pay him 3,000 United States dollars in costs.

5. His other claims are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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