

FORTY-SEVENTH ORDINARY SESSION

In re DICANCRO (No. 2)

(Execution of Judgment No. 427)

Judgment No. 480

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Miguel Dicancro on 3 March 1981, the PAHO's reply of 13 April, the complainant's rejoinder of 9 July, the PAHO's surrejoinder of 4 September and its further communication of 23 September 1981;

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

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. In accordance with the Tribunal's decision in Judgment No. 427 the complainant submitted claims for compensation to the PAHO by a telex of 9 January 1981 and a letter of the same date. The Organization received the claims on 12 January and on 11 February paid the complainant sums in compensation for loss of salary and diminution of pension rights. The complainant is not satisfied and has accordingly filed with the Tribunal a claim for assessment of the balance which he believes to be due.

B. The complainant contends that, under the head of compensation for loss of salary, the PAHO should pay him 112,707 United States dollars more than what he has actually received; under the head of compensation for diminution in pension rights, \$224,122.29 more; and \$13,500 to cover his counsel's fees. The total balance due is, by his reckoning, \$350,320.29. By virtue of the Tribunal's decision he claims sums equivalent to five years' salary. He states that the PAHO has paid him \$47,032.56, representing 18 months' salary at the rate in effect at the time of the termination of his appointment at his duty station in Peru; Plus \$138,197.64, representing 42 months' salary at the rate in effect in January 1981 at the same duty station. From the total of these two sums it has deducted \$112,707 as "imputed salary", or the amount he "earned or could have earned". (1) The complainant objects that the result is to pay him an annual salary for the five-year period of only \$14,646, although his annual salary at the time of termination was almost \$32,000. He alleges further errors in the calculation. The salary figure taken for the 42-month period does not include within-grade increases, cost-of-living increases and other salary increases. He estimates a 25 per cent average increase over the five years, which would entitle him to a further \$46,307.50, though he adds that he does not press the point. (2) The PAHO has erroneously deducted \$112,707 in respect of future earnings. Since his termination in 1979 he has not found employment. He was over 50 years old in 1979 and had spent his whole career in public service. He had thus lost the skills needed to earn a living as a private practitioner, and no one would offer him employment, especially no international organisation, in view of the adverse publicity he had received. (3) On termination he chose to have one-third of his accumulated pension rights paid in a lump sum, or \$33,000, plus a deferred annuity of \$7,201 for life from the age of 55. Had he retired at the age of 57 - at the end of a five-year contract starting in 1979 - he would have been entitled to a one-third lump sum of \$115,000 and an annuity of \$15,626. The lump sum was therefore reduced by \$81,937 and the annual pension by \$8,425: his life expectancy, according to official tables, being 20.3 years on retirement at the age of 57, his life-time pension rights have been reduced by \$171,027.50. The sum actually paid by the PAHO - \$48,832.21 - represents merely the amount of its 14 per cent contributions to the United Nations Joint Staff Pension Fund. (4) Legal expenses. The complainant has received no payment under this head and files a detailed account for \$13,500.

C. In its reply the PAHO contests the complainant's arguments. (1) Loss of salary. The PAHO rejects as speculative the contention that remuneration could rise significantly in terms of United States dollars over the 42-month period. Normally the only factor of increase is within-grade increments, and the complainant had reached the top of his grade by July 1977. The claim for salary increases should be dismissed. (2) Deduction of possible earnings. The complainant seems to believe at it is at his own discretion whether or not he works until 1984. This is in conflict with the spirit of the judgment. In fact he does have prospects of employment, either in medical practice or in the

service of the Government of Uruguay, especially since he has been vindicated by the judgment. The sum deducted is not speculative, but based on objective assessment of average earnings of doctors in Uruguay at a level corresponding to the complainant's qualifications; details are appended to the PAHO's memorandum. (3) Diminution of pension rights. The only way in which the PAHO can compensate for diminution of pension rights is by making over to the complainant the contributions which it would have had to pay to the Pension Fund for the additional period of the complainant's participation. It cannot restore his full pension rights since he is not entitled to reinstatement in membership of the Fund, not being a PAHO official. Only the Fund itself can calculate the value of his lost pension rights. Besides, his tally discounts the 7 per cent contributions he would himself have had to make to the Fund. Nor is it right merely to multiply the projected amount of the annuity by a number of years to work out a lump sum due. (4) Legal expenses. The PAHO has not rejected the complainant's claim under this head: the difficulty is that he has never put in what it can regard as a proper account of legal expenses, and it defers to the Tribunal's assessment of the amount reasonably incurred.

D. In his rejoinder the complainant takes up the PAHO's replies to his arguments under the four heads set out above. (1) Loss of salary. It is not correct to say that his salary would not have increased over the 42-month period. The PAHO is well aware of the increases in Professional category salaries based on the post adjustment, which rises with inflation and cost-of-living increases at the duty station. In Peru the rate of inflation was 60 per cent in 1980-81 alone. (2) Deduction of possible earnings. During the 18 months while his case was pending the complainant tried to no avail to find employment. His lost earnings for that period are therefore ascertainable. Now he is older and his prospects of employment have further diminished. Why should he, who has committed no wrong, be forced to live on the reduced annuity paid by the Organization? Most of all he wanted reinstatement and he objects to any suggestion that he would not accept an offer of employment. Earning potential should be gauged from past experience, not by speculation about the future, and he should be given the benefit of any doubt. He provides evidence to show that he does not hold any paid position in the Uruguayan Ministry of Public Health or indeed any public or private remunerative employment. Those, like himself, who have left employment with the Ministry of Public Health and later return are, he alleges, required to start again at a level at which the pay would be poor. (3) Diminution of pension rights. Pension benefits are worth much more than the aggregate of contributions to the Fund. The material question is: what actuarial value was denied to the complainant? The PAHO contests his method of calculation based on a life expectancy of 20.3 years, but offers no reasonable alternative. It objects that no allowance is made for his own 7 per cent contributions, but these sums can easily be deducted provided that the remainder is paid. (4) Legal expenses. The account appended to the original statement of claims filed with the Tribunal does not cover all his costs. In any event it is more detailed than is customary. In another instance where the PAHO paid legal expenses the account submitted was less detailed. The complainant believes that he has delivered an account of legal fees reasonably incurred. In sum, he presses his original claims, less \$24,416 representing his own pension contributions, plus \$700 for additional legal fees, to give a corrected balance of \$316,197.

E. In its surrejoinder the Organization puts forward the following arguments. (1) Loss of salary. Basic salary does not normally change: it is paid in dollars and is therefore not subject to inflation at the duty station. The post adjustment system is designed to take account of changes in the exchange rates and local purchasing power. High local inflation strengthens the exchange rate of the dollar against the local currency and someone on a dollar salary is often better off with inflation. In a spirit of compromise, however, the PAHO will round up the amount of post adjustments by nearly \$4,000 in return for final settlement of the claim. The PAHO has demonstrated its resolve to give full effect to the judgment by assuming a five-year extension of contract, although his last contract was for only two years. It has also taken account of the widest possible range of allowances. (2) Deduction of possible earnings. The complainant has to give credit for any financial gains he could have made. The view that this principle applies not only to the past but to the whole five-year period was confirmed by the Tribunal in a letter addressed by the Registrar to the parties on 23 April 1981. The PAHO does not see why the complainant should not work at a lower salary if it makes up the balance. He should actively seek employment, and he has adduced no evidence to show that he has ever done so. He might, for example, have returned to private medical practice in Uruguay or indeed, because of his broad international experience, sought employment in any Latin American country, and not necessarily at the low salary which he alleges he would have to accept in Uruguay. After all, the Tribunal has fully rehabilitated him. The PAHO cannot accept that he would have to start at such a low level as he alleges, having formerly served as Under-Secretary in the Ministry of Public Health. He was supported by the Government of Uruguay in his candidature for Director of the Pan American Sanitary Bureau, and he would most likely benefit from an exception to the rule he alleges. Even if he were employed at a low level in the Ministry it is common for government-employed physicians to work only part-time and to carry on private practice. Besides, in an annex to his rejoinder he states that in 1968 he could have returned to the Ministry as a deputy director of

division, a post four grades higher than the one he now alleges to be the highest open to him. (3) Diminution of pension rights. Full compensation is possible only if the Pension Fund treats the complainant as if he had been reinstated for five years. But the Fund refuses to do so. His method of calculating his pension expectations is arbitrary and cannot replace actuarial evaluation by an expert. (4) Legal expenses. Noting that there is a further claim for \$700 under this head, the PAHO again defers the matter to the Tribunal. In conclusion, it invites the Tribunal to declare that it has given effect to paragraphs (1) and (3) of the decision in Judgment No. 427 and to assess the amount of legal fees to be paid under paragraph (2).

CONSIDERATIONS:

1. In the assessment of compensation as ordered by the Tribunal in Judgment No. 427 there remain in dispute between the parties four items as set out in the Organization's observations, namely:

- (1) future salary increases;
- (2) deduction for possible earnings from other employment;
- (3) calculation of pension diminution;
- (4) legal expenses.

Future salary increases

2. The complainant has not provided any satisfactory evidence that his salary would have increased if he had remained in the Organization. It would no longer have increased by annual increments, since he had already reached the top level of his grade. His emoluments were expressed in United States dollars and there is no evidence of possible adjustments for cost of living. This item is not very energetically pressed by the complainant and should be disregarded.

Possible earnings

3. The Tribunal ordered that the complainant should "give credit for any financial gains which he has or could have made from other employment". He has not found, and he says that he has been unable to find, any other employment. The Organization contends that he could as a doctor in Uruguay have earned up to \$112,707, which sum they have deducted from his compensation for loss of salary.

The complainant is being paid compensation in lieu of reinstatement. As the Tribunal has said recently in Judgment No. 431, the compensation generally awarded is less than the remuneration which the complainant would have received had he been reinstated. This is because he is not necessarily deprived of all means of livelihood. He is, however, not normally obliged to seek work different in status from that appertaining to the post of which he has been wrongfully deprived or from that which, as in the case of a doctor, belongs to his profession. If he can bring evidence to show that he has made all reasonable efforts to find such work and has failed, he may prove an entitlement to full compensation; if not, he must accept some diminution. The complainant says that when he left the Organization he was 51, that his entire career had been in public and international service and that he had lost the skills that would allow him to earn a living as a private practitioner. It is also reasonable for him to contend that until his reputation was re-established by Judgment No. 427 he could not be expected to seek employment in international service. But he does not bring any evidence of efforts made since the date of the judgment to obtain any other appointment in international service or elsewhere. In all the circumstances the Tribunal decides that a sum of 50,000 United States dollars should be deducted - instead of \$112,707 - for possible earnings from other employment.

Diminution of pension

4. The complainant was awarded on termination on 30 June 1979 a lower pension than he would have received if his appointment had been renewed, as the Tribunal considered it ought to have been, until 30 June 1984. The Organization contends that the complainant is sufficiently compensated for this by the payment to him of the contributions towards the pension payable by the Organization during the five-year period. This is not correct. The true measure of the complainant's loss is the difference, actuarially calculated, between the value of the pension the complainant is receiving and the value of that which he would have received if he had retired on 30 June 1984,

deducting in the latter case the contributions which the complainant himself would have had to make. If the parties cannot agree upon this actuarial calculation or upon an actuary whose calculation they would accept, the matter must come back to the Tribunal, which, acting under Article 11 of the Rules of Court, will appoint an expert to fix the sum.

Costs

5. The complainant claims 13,500 United States dollars, being the account for that sum delivered to him by his lawyer in Washington. The account gives no details beyond a statement of the heads of work covered. In the light of the work done and the importance of the case, the Tribunal considers that \$10,000 would be a reasonable fee.

DECISION:

For the above reasons,

1. Under paragraph 3 the sum of US\$50,000, instead of US\$112,707, should be deducted as representing possible earnings from other employment.
2. Under paragraph 5 above the Organization shall pay to the complainant US\$10,000 in respect of legal expenses.
3. The claim for diminution of pension shall be settled in accordance with paragraph 4 above.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., 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 28 January 1982.

André Grisel
J. Ducoux
Devlin

A.B. Gardner