Registry's translation, the French text alone being authoritative.

EIGHTY-EIGHTH SESSION

In re Alvarez Vigil

Judgment 1938

The Administrative Tribunal,

Considering the complaint filed by Mr Julio Alvarez Vigil against the Pan American Health Organization (PAHO) on 13 October 1998 and corrected on 23 October 1998, the PAHO's reply of 3 February 1999, the complainant's rejoinder of 13 April and the Organization's surrejoinder of 26 July 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, of Chilean nationality born in 1932, worked for the PAHO for twenty years, from June 1976 to October 1996, under (1) a fixed-term appointment as a staff member (2) short-term consultancy contracts (3) temporary advisor contracts and (4) "contractual service agreements" as an independent contractor.

He joined the PAHO in Guatemala City on 3 June 1976 as a staff member under a two-year appointment. His family joined him in January 1977 but returned to Chile shortly thereafter when it appeared that the appropriate school was not available for his children. In March 1978 the complainant was informed that his contract would be renewed for only one year, due to lack of funds. In a letter of 22 March 1979 the Chief of Personnel informed the complainant of the terminal entitlements that he would be due upon his separation effective 3 June 1979. In November 1979 he was paid his repatriation grant and accrued annual leave.

At the end of his fixed-term appointment he remained in Guatemala to carry out different tasks for the PAHO under a short-term consultancy contract. Similar contracts followed, covering the complainant's collaboration with the PAHO from June 1979 to June 1988 and then again from June to September 1991.

On 27 May 1981 he received a letter from the Chief of the Consultant Staffing Unit informing him that, since he had not returned to Chile during the previous two years, Guatemala would now be his "normal place of residence" and in the future he would not be entitled to a daily subsistence allowance (per diem). In August 1981 the complainant replied saying that he had not taken any legal action to change his place of residence from Chile to Guatemala and he requested that the situation be reviewed. In a letter dated 13 October 1981 the Chief of the Consultant Staffing Unit reaffirmed her decision.

Between July 1982 and October 1988, the complainant received four short assignments as a temporary advisor to the PAHO. The longest of these assignments was for one month.

Between 1988 and 1996 the complainant worked for the PAHO under several "contractual service agreements". During the late 1980s he began working at PAHO headquarters in Washington, D.C. His last appointment ended on 31 October 1996.

On 22 July 1996 he wrote to the Director of the PAHO requesting that the PAHO pay the expenses for shipping his personal effects from Washington to Chile. In a letter dated 25 September the Chief of Personnel denied his request. The complainant then sent her a memorandum petitioning for various benefits that he believed were due to him. Interpreting the lack of reply as a denial, the complainant submitted his appeal to the headquarters Board of Inquiry and Appeal on 22 November 1996.

By a letter dated 16 July 1998, the Director of the PAHO informed the complainant that since the Board found him to be an independent contractor and not a staff member when he filed his appeal, the appeal was not receivable. Nevertheless, the Director informed the complainant that he could submit his complaint to the Administrative Tribunal of the International Labour Organization. This is the impugned decision.

B. The complainant makes two pleas. First, he contends that for much of his service with the PAHO he was a *de facto* staff member and, therefore, entitled to the benefits accorded to staff members. He argues that after his fixed-term contract with the office in Guatemala ended, he continued to perform the functions of a staff member under many of his contracts. He cites Judgment 701 (*in re* Bustos) in which the Tribunal found that "the work done for the PAHO ... was a continuous whole and that its division into contractual periods as a short-term consultant was fictitious" and argues that his own service should be viewed in the same manner. He places particular emphasis on the four years he worked as the coordinator of a programme on cholera prevention and control in Washington, which he maintains was without interruption. The complainant contends that his duties included inter alia hiring personnel and dealing with budget allocations, and that those duties went beyond those of a mere contractual employee. He alleges that the intention of the PAHO, in creating numerous short-term contracts over a 17-year period, was to deprive him of "the benefits of a regular staff member".

Secondly, the PAHO denied him his full benefits as a short-term consultant when it changed his place of residence from Chile to Guatemala. The complainant argues that the PAHO's decision to deprive him of a per diem while he worked in Guatemala was in breach of the Tribunal's case law and violated Staff Rule 460 on the procedure for determining an official's place of residence. He maintains that he took no legal action to change his place of permanent residence to Guatemala and refers to a certificate dated 6 June 1983 issued by the Chilean Consulate in Guatemala certifying that Santiago, Chile, was his normal place of residence.

He seeks compensation for the benefits he would have received as a regular staff member, such as: repatriation grant, contributions to his pension fund, vacation leave, meritorious within-grade step increases, health insurance, transportation of personal effects, travel expenses for himself and his dependants, education grant for his son, and other benefits due to staff members. He also claims moral damages and costs.

C. In its reply the PAHO contends that the complainant has received all benefits due to him under each contract.

The PAHO claims that the complainant was accorded in 1979, all benefits he was entitled to under his fixed-term contract, and that his claim to repatriation grant and transportation of his personal effects is unwarranted. The complainant cancelled his travel plans in order to remain in Guatemala to accept a short-term consultant contract and subsequently forfeited this right when he did not request a deferral to travel on a later date. In addition, his family did not qualify for repatriation travel since they did not stay in Guatemala for the requisite six months.

The Organization argues that the claims regarding per diem are both time-barred and devoid of merit. A final decision was taken by way of the letter of 13 October 1981. As the complainant did not appeal against this decision within the sixty-day time limit required by Staff Rule 1230.7.3, his claims are now time-barred. It also points out that the rationale behind the payment of a travel per diem, provided for in Staff Rule 830, is to cover incidental expenses arising under travel status, inter alia charges for meals, lodging, fees and gratuities. At the time in question, the complainant was residing in Guatemala City with his family and not accruing incidental travel expenses.

When the complainant worked as an independent contractor with the PAHO he was not a staff member and therefore - under the terms of the Contractual Service Agreements that he signed - arbitration, and not the Tribunal, is the proper forum for settling disputes. The complainant was aware that the language of his contract precluded any finding that he was an employee of the PAHO; he was also aware of the difference between his own contract and that of a regular staff member. On more than one occasion he had unsuccessfully attempted to secure a staff position, indicating on his application that he wished "to obtain a permanent post" with the Organization.

D. In his rejoinder the complainant contends that the PAHO has failed to prove it has accorded him all

benefits due to him. He is "not asking the Tribunal to rewrite the contracts" but requests compensation for the wrongdoing of the Organization in depriving him of his entitlements. He acknowledges that he did not return to Chile at the end of his fixed-term contract, but contends that it would have resulted in a loss of opportunity to continue with the PAHO. He offers his passport visas for Guatemala as further proof that Chile continued to be his country of residence and his visas for the United States as proof of his relationship as a staff member of the PAHO.

Responding to the issue of arbitration raised in the PAHO's reply, he maintains that the PAHO had numerous opportunities to raise this issue, that it should have been raised during his internal appeals, and that by raising it now the PAHO is trying to "obstruct and delay the resolution of the issues". He contends that the ILO Administrative Tribunal is the proper forum because he raises issues regarding his contract and his pension fund, both areas falling within the competence of the Tribunal.

E. In its surrejoinder the PAHO rebuts all the complainant's arguments as being devoid of merit and reaffirms that he received all benefits to which he was entitled.

The complainant had ample time to investigate schools in Guatemala and determine whether his children's needs would be met. The PAHO was under no obligation to investigate the quality of education for his children. Furthermore, he forfeited his own right to repatriation travel when he cancelled his ticket to Chile and did not request an extension of this right.

The PAHO rebuts all the arguments that the complainant was a *de facto* staff member. Refuting the complainant's claims that his visa for the United States was facilitated by the PAHO, it states that his visa was not sponsored by the PAHO and that he held a generic tourist visa.

It also maintains that it was under no obligation to call the complainant's attention to the arbitration clause in his contract.

CONSIDERATIONS

1. The complainant, who is of Chilean nationality, was engaged by the Pan American Health Organization (PAHO) on 3 June 1976 to serve in Guatemala under a two-year appointment, which was extended for one year in 1978. Although this fixed-term appointment ended on 3 June 1979, the complainant then worked almost continually for the PAHO in Guatemala or at its headquarters in Washington, D.C., no longer as a regular staff member, but as a short-term consultant, temporary advisor or an independent contractor. In this latter capacity, he concluded several contractual service agreements with the Organization, and when the last of these came to an end on 31 October 1996, he was responsible for coordinating in Washington a programme on cholera prevention and control for the region covered by the PAHO.

2. Shortly before the expiry of his last contract, the complainant wrote on 22 July 1996 to the Director of the PAHO requesting him to give the necessary instructions to pay the cost of shipment of personal effects from Washington to Chile. The Chief of Personnel of the PAHO replied to this letter on 25 September 1996 that, since the complainant had personally decided to live in Washington and had not been a regular member of the staff since 1979, it was impossible to accede to his request. As soon as he had received this refusal, the complainant once again wrote to the Chief of Personnel recalling that he had served the PAHO for twenty years and requesting payment of benefits which had been denied him over that long period and which he considered to be due to him. He claimed a repatriation grant, annual leave, health insurance, merit steps for years of service and a better pension. As the Administration did not reply to this request, he appealed in November 1996. On 19 June 1998, the headquarters Board of Inquiry and Appeal found that the appeal was not receivable as the complainant was not a staff member at the time that he had filed it. The Board nevertheless drew the attention of the Director of the PAHO to the fact that the complainant had been able to feel that he was a staff member in view of the full-time responsibilities entrusted to him and that in the future the PAHO should apply more strictly the clauses of the Conditions for Use of Contractual Service Agreements. By a decision of 16 July 1998, which is the impugned decision, the Director of the PAHO decided to accept the Board's conclusion that the appeal was not receivable since it had been filed by a contractor who was no longer a staff member of the Organization.

3. In reviewing the Tribunal's competence with regard to the various claims made by the complainant, who

in his submissions claims benefits which have not been paid to him over the past twenty years, a distinction must be made between two categories of claims. In the first place, there are those concerning the indemnities which he says were due to him upon the expiry of his last contract as an independent contractor, which was governed by the Conditions for Use of Contractual Service Agreements, and particularly his claims for shipment and repatriation expenses. In the second place, there are the indemnities which he says should have been paid to him throughout his career as a regular staff member, short-term consultant or temporary advisor.

4. As an independent contractor the complainant concluded contractual service agreements which explicitly provided that any dispute arising in their interpretation or execution would be subject to conciliation or, if that should fail, would be settled by arbitration and that the parties would accept the arbitral award as final. This clause, which was agreed to by the complainant, has the effect of removing disputes concerning the application of the above agreements from the jurisdiction of the Tribunal, as indicated by the PAHO, which rightly cites Judgments 75 (*in re* Privitera) and 77 (*in re* Rebeck). The fact that the PAHO did not itself invoke this arbitration clause during the internal appeals procedure does not prejudice the fact that the two parties freely accepted recourse to arbitration to settle disputes arising out of the application of contractual service agreements, thereby perforce excluding them from the Tribunal's jurisdiction. The fact that, as emphasised by the complainant and noted by the Board of Inquiry and Appeal, the functions discharged by the complainant were in reality of a permanent nature, which should normally have been entrusted to regular staff members, cannot invalidate an arbitration clause explicitly subscribed to by the parties. The complainant cites in support of his argument Judgment 701 (*in re* Bustos), in which the Tribunal recognised its competence to examine an issue raised by a complainant who was bound to the PAHO by regularly renewed consultancy contracts, but who was not a regular staff member of the Organization. However, the similarities with the case at issue are only apparent. In the Bustos case, the complainant had concluded short-term contracts which did not contain any arbitration clause. In the present case, the complainant was bound to the Organization for the last years of his activity by contractual service agreements which included the arbitration clause examined above. The Tribunal therefore finds that the claims respecting the various indemnities, in particular the repatriation grant and shipping expenses from Washington to Santiago de Chile following the expiry of the complainant's last contract, do not lie within its jurisdiction.

5. There remain certain claims which do merit examination. These are set out, admittedly in an extremely general manner, in the letter sent on 25 September 1996 to the Chief of Personnel. They relate to a period during which the complainant was either a staff member, or was bound by contracts of employment which give grounds for considering that his relationship with the Organization had become permanent, within the meaning of the case law established in Judgment 701 cited above. Moreover, these contracts did not envisage recourse to arbitration in the event of any dispute as to their interpretation or execution. The Tribunal further notes that the PAHO does not raise any objections to these claims in relation to the jurisdiction of the Tribunal, even though it deems them irreceivable or devoid of merit.

6. The complainant appears to be challenging the indemnities which he received at the end of the period when he was a regular staff member of the Organization. It is very surprising that these claims should be made over fifteen years after the expiry of his fixed-term appointment on 3 June 1979. Moreover, irrespective of the delay in challenging these measures, the PAHO provides proof that the complainant received all the entitlements which he could claim at that time. He was paid a repatriation grant of 4,798.62 United States dollars. If he did not receive an air ticket, travel expenses or shipping expenses of his personal effects from Guatemala to Chile, it was because he had decided to remain in Guatemala. He was also paid 4,051.68 dollars in accrued annual leave and does not produce any evidence of prejudice in his entitlements to promotion, pension, accident and health insurance, sick leave or education grant during the period in question.

7. With regard to the entitlements which the complainant says he was denied during the period when he was covered by short-term consultancy contracts, he complains principally that he was not granted a daily subsistence allowance (per diem) when he was posted to Guatemala City, even though he was a Chilean citizen and, according to a certificate issued by the Chilean Consulate in Guatemala, his permanent residence was in Santiago de Chile. But the PAHO shows that the issue was settled in 1981, when he was informed in a letter of 27 May 1981 that his normal place of residence would be considered to be Guatemala City and not Santiago de Chile, which he had not visited since 1979, and that PAHO Manual paragraph II.12.320 only permitted the payment of the allowance in question for periods of service outside the normal

place of residence. The complainant did not at that time lodge an appeal against the Organization's position, which was entirely lawful, and he provides no evidence that he was denied any allowance or benefits to which he would have been entitled under his consultancy contracts.

8. With regard to the very short periods during which he worked for the Organization under temporary advisor contracts, namely from 25 to 30 July 1982, 7 September to 4 October 1987, 12 to 22 June 1988 and 3 to 7 October 1988, the complainant provides no information which would allow him, several years after the material facts, to challenge the benefits which he received. In practice he is seeking to obtain a revision of the whole of his career from 1976 to 1996. But he himself accepted the contractual conditions offered to him. He did not challenge the decision taken in 1979 not to renew his fixed-term appointment and not to convert it into a permanent appointment. Moreover, he offers no legally valid argument to challenge the way he has been treated since 1979. His claims must therefore be dismissed, either as being devoid of merit or, for those relating to the contracts envisaging recourse to conciliation and arbitration, as not being within the Tribunal's jurisdiction.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Julio Barberis
Seydou Ba

Catherine Comtet

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