

## NINETY-NINTH SESSION

**Judgment No. 2430**

The Administrative Tribunal,

Considering the second complaint filed by Mrs C.S.R. against the Pan American Health Organization (PAHO) on 30 April 2004, PAHO's reply of 16 August, the complainant's rejoinder of 7 October, and the Organization's surrejoinder of 16 December 2004;

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

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

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

A. Facts relevant to this case are to be found in Judgment 2363 on the complainant's first complaint. As explained in that judgment, in early 2003 a second competition was held for the post of Chief of the Operations Unit (post .0252), at grade P.4, in what is now the Department of Human Resources Management. The complainant, who was a Human Resources Officer at grade P.2 and had previously assumed the functions of post .0252 on a temporary basis, applied without success for the position. An external candidate, Mr R., was selected. On 27 May 2003 the complainant filed an internal appeal alleging irregularities in the selection process. She sought the quashing of the decision to appoint the successful candidate, asking that a new selection process be initiated.

The Director of PAHO set aside the decision to appoint the external candidate and appointed Mr F. to the post by reassignment. By a letter of 5 June the complainant asked the Director of PAHO to reconsider the decision to reassign Mr F. to post .0252. The Director responded in a letter of 7 August 2003, which the complainant says she received on 25 August. At the time of filing her first complaint with the Tribunal on 12 August 2003, her internal appeal was still pending and she challenged the implied rejection of her claims.

The Administration did not submit a reply or surrejoinder on her internal appeal. The Board of Appeal issued its report on 4 December 2003. It recommended: (1) quashing the decision to appoint the successful candidate (Mr R.) to post .0252; (2) initiating a new selection process to fill that post; (3) expunging from personnel records an appraisal of the complainant's work that was prepared on 19 March 2003, the day before the Selection Committee met; (4) compensating her retroactively for the period commencing 1 March 2002 when she performed the duties of post .0252 on an acting basis; (5) reimbursing the complainant's legal costs for her internal appeal; (6) conducting a classification audit of her current duties; and (7) dismissing a request she had made for papers in connection with the reclassification of her post to grade P.3 to be submitted to the Promotions Board. It also made some more general recommendations regarding selection procedures. The Director of PAHO issued a final decision on 2 February 2004. Taking up each of the recommendations made by the Board of Appeal, she pointed out that certain issues had already been addressed. Responding to the Board's fifth recommendation she did not agree to the reimbursement of the complainant's legal costs. It is the Director's decision of 2 February 2004 that is impugned in the complainant's second complaint, filed on 30 April 2004.

By Judgment 2363, delivered on 14 July 2004, the Tribunal dismissed her first complaint. In that judgment it dealt only with the issue of filling post .0252 by the reassignment of Mr F. and did not take up the subject matter of her internal appeal of 27 May 2003.

B. The complainant submits that the reassignment of Mr F. to post .0252 has ostensibly removed the foundation for her internal appeal. However, she suffered injury to her professional career, which has remained unaddressed.

She contends that, as was found by the Board of Appeal, there were numerous irregularities in the selection process that led to the external candidate being appointed to post .0252. She alleges abuse of authority on the part of the Director of PAHO, given that discretionary power was used for the wrong purposes. She also alleges bad faith on the part of the Director, as evidenced by the Organization's failure to participate in the internal appeal proceedings, its failure to adopt a harassment policy and its failure to appoint an Ombudsman.

According to the complainant, the real reason for assigning Mr F. to the post was to prevent her from being selected. She alleges abuse of authority and prejudicial action against her by the Human Resources Manager, particularly because she was not appointed Acting Chief of the Operations Unit during the 15 months when she was performing the duties of that post, and despite recommendations from the Chief of the Classifications Unit her post was not reclassified to P.3. She also claims that her performance was assessed “unfairly and unilaterally” the day before the Selection Committee met. Because of the prejudicial action taken against her, she believes that a “new selection process would not now be practicable” and that compensation is due to her.

The complainant asks the Tribunal: (1) to quash the selection process by which an unqualified external candidate was selected and appointed to post .0252; (2) to find that instead of reholding the selection process, PAHO should either appoint her to a P.4 post befitting her qualifications or pay her compensation for injury to her professional career; (3) to order that her “grade level be reclassified to P-4 from the date of selection of the unqualified external candidate”; (4) to order an award of damages in the sum of 460,000 United States dollars for “irreparable injury” to her career if her grade is not changed to P.4; (5) to order that the “unfair” performance appraisal of 19 March 2003 be removed from her personnel file, as recommended by the Board of Appeal; (6) to order an award of costs both for the internal appeal proceedings and the present complaint; and (7) to order any other relief deemed appropriate.

C. In its reply the Organization takes issue with the complainant’s failure to observe due process. It points out that when it was preparing to issue its reply on her internal appeal, it learned that she had filed a parallel complaint with the Tribunal. Because of that, it sought to have the internal appeal dismissed and filed a ‘motion to dismiss’ with the Board of Appeal. The Board, however, did not rule on the motion filed by PAHO, with the result that the Organization could file neither a reply nor a surrejoinder on the complainant’s internal appeal. It thus contends that it was denied the opportunity to defend itself against the complainant’s allegations.

PAHO rejects the complainant’s numerous allegations and accusations on the grounds of irreceivability, absence of injury, or *res judicata*. It submits that many of the causes of action put forward by her are new, and are thus irreceivable as there is no decision to impugn. For example, the alleged failure to adopt harassment policies or to appoint an Ombudsman is a matter that the complainant has raised for the first time and is not the subject of a final decision. Moreover, with respect to some claims presented to the Board of Appeal, the complainant has already obtained the relief she sought and shows no cause of action. On the issue of abuse of authority, her complaint is barred under the *res judicata* rule, as the Tribunal found in Judgment 2363 that the complainant had “failed to disprove the Organization’s claim that the reassignment was made in the best interests of the Organization”. It unequivocally denies any prejudicial treatment against the complainant by either the Director of PAHO or Human Resources Management. It adds that on a financial level the complainant received additional pay in accordance with Staff Rule 320.5 while she was acting as Chief of the Operations Unit.

In addressing each of the claims made by the complainant it points out that in her internal appeal she sought the voiding of the selection process for post .0252. The Director did that, and any “irregularity” was thus cured by the Organization. Regarding her claim for the reclassification of her grade to P.4, she is well aware that under the Staff Rules she may submit a request for reclassification at any time. She has not done that, and there is consequently no decision to challenge.

D. In her rejoinder the complainant presses her pleas and maintains her claims. She states that the purpose of putting forward evidence of abuse of power and harassment was to demonstrate that the irregularities in the selection process were not accidental – they were intentional wrongs.

E. In its surrejoinder the Organization argues that the claims in her second complaint are without foundation as it has already granted all relief that the complainant sought in her internal appeal. Noting that in her rejoinder the complainant focused to some extent on harassment issues, PAHO points out that the present case is not about harassment; rather it concerns her allegations regarding the selection procedure. Post .0252 was ultimately filled by reassignment, and in Judgment 2363 the Tribunal found that there was neither abuse nor prejudice in the decision by which a serving staff member was transferred to fill the post.

## CONSIDERATIONS

1. The present complaint arises out of the same factual circumstances as in Judgment 2363 but, as noted in paragraph 3 of the latter, the report of the Board of Appeal and the Director of PAHO’s decision thereon were not

before the Tribunal at that time.

2. As in her previous complaint, the complainant alleges abuse of power, bad faith, and prejudicial treatment arising out of the Board's report and the Director's decision resulting therefrom. However, as in her first case, the complainant has failed to lead any convincing evidence to support her very serious allegations.

3. Two preliminary observations must be made with regard to the Board's report. Firstly, a 'motion to dismiss' the internal appeal had been filed by PAHO, but was never addressed by the Board and no explanation was given for its failure to do so. That motion was based on the apparent duplication of procedures before the Board and the Tribunal. It was of the nature of a preliminary exception and was quite properly made prior to the Organization answering the complainant's internal appeal. It was, of course, within the Board's powers to dismiss the motion but it could not do so without notifying the Organization and requiring it to plead to the merits.

4. Secondly, the report was rendered *ex parte*, the Board having received and considered only the complainant's submissions. The Board, acting in breach of the most elementary rules of procedural fairness, had first agreed to extend, and then retracted the extension of the filing date for submissions by the Organization and foreclosed the latter from being heard before it. In those circumstances, the Tribunal can place no reliance whatever on any findings made by the Board.

5. Notwithstanding these serious failures on the part of the Board, the Director, in the impugned decision, implemented the majority of the Board's recommendations. The first, third, fourth, sixth and seventh recommendations were accepted by the Director. The subject matter of the second recommendation, regarding the initiation of a new selection process, was dealt with in Judgment 2363. With regard to the sixth recommendation, the Director's decision correctly required the complainant to request a re-evaluation of her post, as specified in Staff Rule 230.

6. The fifth recommendation was the only recommendation that was not accepted by the Director. The Board recommended that the complainant be reimbursed for her costs of the internal appeal. The impugned decision refused such reimbursement and this is not a matter on which the Tribunal would intervene in the absence of special circumstances which do not exist here.

7. That the complaint lacks substance appears clearly from a consideration of the various requests for relief:

(a) The complainant seeks the voiding of the selection process. However, the selected candidate (Mr. R.) did not meet the requirements of the position and the appointment was never implemented.

(b) She seeks a holding that the post was improperly filled and that she either be appointed to a P.4 post or paid damages. The argument regarding the impropriety of the filling of the vacancy by internal transfer was conclusively disposed of by the Tribunal in Judgment 2363. She has established no right to damages.

(c) The complainant's request that her post be reclassified to grade P.4 was properly refused: she must go through the internal remedy provided in Staff Rule 230 and any applicable internal appeal process before appealing to the Tribunal.

(d) The complainant seeks damages for "irreparable injury" to her career. However, no such irreparable injury has been shown to exist.

(e) The complainant asks for the performance appraisal of 19 March 2003 to be removed from her personnel file. The Organization says that this has been done.

(f) The complainant asks that the legal costs incurred during the internal appeal be paid. The failure of PAHO to pay her legal costs is not evidence of abuse of power, bad faith, or prejudicial conduct.

(g) She claims such further relief as the Tribunal may see as fair and just in the circumstances. No discussion is necessary; there is no warranted further relief.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet