FORTY-SECOND ORDINARY SESSION

In re DURAN

Judgment No. 375

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Pan American Health Organization (PAHO) (World Health Organization) by Miss Maria Susan Duran on 18 February 1978, the PAHO's reply of 28 April, the complainant's rejoinder of 23 June (supplemented on 20 July) and the PAHO's surrejoinder of 21 August 1978;

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Regulations 2.1 and 4.2, PAHO Staff Rules 120, 410.1, 465.2, 465.3, 650.2, 670.1, 740.1.1, 930.5, 980 and 1030.8(b) and WHO Manual provisions II.1, II.3, II.5 and II.6;

Having examined the documents in the dossier, 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. On 12 February 1962 the complainant joined the staff of the Pan American Sanitary Bureau, the secretariat of the PAHO, in Washington on a temporary one-month appointment. On 12 March 1962 her appointment was extended by three months. On 1 May 1962 she was appointed to a secretarial post in the Personnel Office. On 1 September 1964 she was promoted to assistant in that Office. On 1 March 1968 she was appointed to the Professional category at grade P.1, her post having been regraded. In July 1969 she was given a career service appointment. On 1 May 1971 her post was regraded P.2. On 1 September 1973 she was appointed Deputy Chief of Personnel. At the time of filing her complaint she had reached P.4.

B. In March 1975 the Department of Management and Personnel of the Bureau, to which the complainant belonged, was abolished and in future the Personnel Section was to report directly to the Chief of Administration. The complainant was then informed that she was to be transferred to a P.4 post in Barbados. She protested against the transfer, and it was eventually cancelled because of the objections of Dr. Dulac, the Director of the Joint Medical Service, who on medical grounds advised giving the complainant sedentary work in Washington. On 14 July 1976 the PAHO medical referee, Dr. Sadin, said that the complainant was fit for service in Brasilia provided that she would not be required to travel, and on 2 August 1976 the Chief of Administration officially informed her of her transfer to Brasilia.

C. The complainant then went on annual leave and later on sick leave. On 4 November 1976 the Chief of Personnel was informed by the medical referee that the complainant should be put on sick leave or temporary disability for a period of six to twelve months and that she would require medical clearance before returning to work. The complainant then left for Florida, where she took a university course between October 1976 and May 1977 there was a series of medical reports on her - in particular by consultant psychiatrists, Dr. Lebensohn and Dr. Barnes - and the Director of the Joint Medical Service then decided that she was fit to resume work, in the post in Brasilia if it was still available. On 8 June 1977 the Chief of Administration asked the complainant to take up her post in Brasilia and first to report to Washington for briefing. She was to arrive in Brasilia by 2 August at the latest. On 27 June the complainant's attorney informed the Chief of Administration that she refused to go to Washington on the grounds that she had not been given adequate medical clearance for her prescribed duties. On 2 August the Chief of Administration told her that if she did not report to Brasilia by 22 August her appointment would be terminated on that date in accordance with Staff Rule 980 for abandonment of post. Having failed to comply, on 23 August she was informed that her appointment had been terminated with effect from the day before.

D. Meanwhile the complainant had appealed to the Board of Inquiry and Appeal against the termination of her sick leave and her transfer to Brasilia. In its report of 4 October 1977 the Board held that the Administration's decision to terminate the complainant's sick Leave was invalidated by the fact that it had been taken without having her "medically re-evaluated" and that the decision to transfer her to Brasilia was invalidated by the fact that she did not have proper medical clearance. The Board therefore recommended that she should be "medically evaluated" to "assess her fitness to resume duty" and that in the meantime she should again be put on sick leave and have her

transfer postponed. On 21 November 1977 the Director of the Bureau informed the complainant that he did not accept the Board's recommendations and upheld his decision to transfer her to Brasilia. It is the final decision of 21 November which she is now impugning.

E. The complainant alleges that the decision to send her to Brasilia constituted a breach of several provisions of the Staff Regulations and Staff Rules and that the appointment in Brasilia was a less responsible one and would therefore have proved damaging to her career. She takes the view that the PAHO did not have adequate medical grounds for terminating her sick leave and transferring her to Brazil. She therefore asks the Tribunal to reinstate her in sick leave with pay from 20 June 1977 until termination of the sick leave is justified by facts set forth by medical experts who shall have evaluated her; to cancel her reassignment to Brasilia or, failing that, to postpone such reassignment until she is medically cleared for the post; to order the repayment of reasonable fees for her attorney and expenses incurred in the internal proceedings and in the Tribunal proceedings.

F. The PAHO contends that the complaint is not receivable in so far as it relates to the actual decision to transfer the complainant to Brasilia. Dr. Dulac, the Director of the Joint Medical Service, gave his consent to the transfer. He had formed his own opinion, after consulting his colleagues, that the complainant was fit for work and in particular for the post in Brasilia. There was therefore no need for the Administration to obtain further medical clearance before deciding to assign her to that post. Moreover, that post was not, as the complainant contends, at a lower level than the one she had held till then: it, too, was graded P.4. The PAHO therefore asks the Tribunal to dismiss the complaint.

CONSIDERATIONS.

As to receivability:

1. On 2 August 1976 the claimant was assigned to a post in Brasilia, Brazil, where she was to report on 15 September. She did not appeal against this decision. As from 24 August 1976 she was on sick leave which continued until 20 June 1977. On 8 June 1977 the Chief of Administration notified her of his decision to terminate her sick leave as from 20 June and instructed her to report to him with the object of taking up her post in Brasilia. She did not report; she appealed from this decision within the permitted period.

2. The Organization does not contest the receivability of the complaint in so far as it challenges the decision to terminate sick leave. In so far as it challenges the assignment to Brasilia, the complaint raises three issues. The main issue is health; the claimant contends that, irrespective of whether or not she was fit for work generally, she was not fit in June 1977 for the post in Brasilia. The second issue concerns procedural irregularities, as alleged in paragraph 19 below. The third issue challenges the validity of the assignment on the ground that the vacancy the complainant was filling in Brasilia had not been advertised in accordance with the Rules and that the vacant post was not one of equal responsibility to that from which the complainant was being transferred. The first issue could not have been raised in August 1976 when the assignment was first made because the complainant's state of health was not then known. The Organization does not object to the receivability of the complaint in so far as it relates to this issue, nor in so far as it relates to the procedural irregularities alleged. The third issue, however, could have been raised in its entirety in an appeal against the decision given on 2 August 1976 and nothing that has since transpired has affected it in any way; the Organization submits that as regards this issue the appeal is irreceivable as being out of time.

3. The submission fails. The test of receivability is applied to decisions, not to issues. If an appeal against a decision is receivable, the appellant must be allowed to raise any issue that is relevant to the decision unless that issue has actually been decided and so become res judicata.

On the merits:

4. The complainant, an American national, joined the Organization in Washington in February 1962 as a temporary secretary on a month's contract. Her abilities were such that by 1973 and still in her early thirties she was Deputy Chief of Personnel at the grade of P.4. On 23 April 1973, however, the result of a periodical medical examination was not completely satisfactory. She was classified in category l(b), that is to say, with restrictions as regards type or location of work. The restrictions did not affect her existing job.

5. In 1975 serious differences arose between the complainant and her immediate chief, Dr. Ortega, Chief of

Personnel. The complainant said among other things that she was not being given meaningful assignments. In June the differences were brought to the attention of Mr. Muldoon, Chief of Administration, and on 18 July the complainant had an interview with the Director. She was assigned to undertake a salary survey in Brazil and the Argentine which involved her in duty travel from which she returned on 7 October, completing her report on 7 November. On 11 December she had a talk with Mr. Muldoon about her next assignment and on 16 December she was notified by the Director that he was transferring her to a project in Bridgetown, Barbados, as Administrative Officer at the grade of P.4.

6. On 15 January 1976 the complainant appealed against the decision to transfer her. Apart from the grounds for the appeal a question immediately arose about her medical fitness for the new position and on 29 January she was asked to see the Regional Medical Referee, Dr. Sadin. The final recommendation, however, would be made in Geneva by Dr. Dulac, the Director of the Joint Medical Service, to whom Dr. Sadin would report. Before reporting Dr. Sadin wished her to see a cardiologist. Eventually on 6 April Dr. Dulac recommended "that she can only be considered fit to work in a temperate climate at low altitude in sedentary work where good facilities are available". This recommendation doubtless arose out of the report of the cardiologist; it appears from later reports that the complainant had a history of rheumatic heart disease for which she had been treated successfully, but that her doctor had been concerned about the possibility of her having to work in an unfavourable climate which might subject her to excessive cardiac stress or where there was not good medical support. On 9 April the Director rescinded the decision to transfer and instructed that the complainant was to resume her old post.

7. On 7 May 1976 Dr. Ortega wrote to Dr. Sadin to advise him that the complainant would be transferred to an Administrative Officer's post in Brasilia where the work would be sedentary and in a new air-conditioned office. Dr. Dulac was asked to give a medical clearance for this assignment which he did on 25 May. The post ranked as P.4. There was some conversation between Mr. Muldoon and the complainant; on 2 August the former wrote to the complainant confirming the assignment and requesting that she should report in Brasilia not later than 15 September. She went on leave on 7 August and while on leave saw a Dr. Ball who decided to evaluate the possibility that she was suffering from Cushing's disease: Dr. Ball certified that the evaluation could not be concluded before 1 October and that meanwhile she was incapacitated for duty. The possibility of this disease was in due course negatived, but in the meanwhile Dr. Sadin had asked that the complainant should see a psychiatrist, which she did on 24 September and on two subsequent occasions.

8. On 18 October the psychiatrist, Dr. Lebensohn, reported to Dr. Sadin as follows:

"In summary, I think there is no doubt that Miss Duran is suffering from a rather complex psychiatric condition which has produced a good deal of emotional instability, anxiety, and depression. There are also many situational factors in this case and I have serious doubts about her ability to benefit from any type of psychotherapy unless she removes herself from her present work situation for at least six months to a year. I could not give her clearance for overseas duty because of her present psychiatric condition and any overseas assignment would have to be re-evaluated following a year of freedom from symptoms."

On the strength of this Dr. Dulac recommended six months' sick leave with the proviso that the complainant saw Dr. Lebensohn again in December. The visit was made on 20 December and Dr. Lebensohn recommended at least another six months' sick leave. He found the complainant to be suffering from "Adjustment Reaction of Adult Life" with marked emotional instability, anxiety, and deep depression: situational factors were paramount and if the complainant were forced to return to Washington, she would experience a distinct recurrence of symptoms. But she did not wish to be inactive for a whole year and intended in January to go to the University of Miami in order to get a Master's Degree in Business Administration. The doctor suggested that her case should be revaluated when she had completed this.

9. Up to 1 December 1976 the complainant was treated as qualified under Staff Rule 670.1 as a person "incapacitated from the performance of their duties by illness" to receive her full pay as sick pay. Thereafter she entered under Staff Rule 650.2 into a period of "special leave under insurance cover" in which she received benefits under the Organization's Accident and Illness Insurance Policy. There is nothing in the dossier to suggest that the conditions in the policy differ from those in Staff Rule 670; the Tribunal will assume that these conditions, particularly the condition as to incapacity, are the same. In a letter of 18 January 1977 in which Dr. Dulac sought the opinion of Dr. Sadin on "the present situation", he wrote:

"It seems to me rather difficult to explain to the Insurance Company that, on the one hand she is fit to follow a

university course leading to a Master's degree but on the other hand, she is unfit to work."

It seemed clear, he continued, that the problem was likely to be exactly the same in six months' time and that Rule 930.5 might be applied. This rule provides for the termination, subject to a specified notice and with an indemnity, of the appointment of a staff member for whom, because of physical limitations, no assignment can be found.

10. The solution found was to bring in another psychiatrist, Dr. Barnes, whom the complainant saw on 21 March. On 21 March Dr. Barnes gave his report. He agreed with Dr. Lebensohn's diagnosis that this was "a situational reaction". Even after the completion of her university course the return to work at PAHO might reactivate her neurosis. He had asked her how at the end of the course she would feel about an assignment to Brasilia and her response was that she would then have to make a decision. He thought that she felt a very close link to PAHO and a separation might cause her to respond rather violently. He advised a negotiation of the differences between her and the Administration either immediately or at the completion of her course; he considered termination with indemnification was one feasible alternative.

11. Dr. Sadin got in touch with Dr.. Barnes again and on 9 May 1977 Dr. Barnes wrote a letter which both Dr. Sadin and Dr.. Dulac regarded as a medical clearance for the complainant's return to work. Dr. Barnes pointed out that the period of sick leave suggested by Dr. Lebensohn expired on 20 June and said that it had had an ameliorative effect; "her symptoms would not appear to me to be any longer disabling and I believe that she might reasonably be expected to return to her employment on June 20, 1977". She herself, he wrote, wished to continue her university courses in Florida: "however, in an objective assessment of her capacity to work, I would have to say that she is neither psychotic nor so disabled by anxiety and depression as to be unable to resume employment". Dr. Dulac received this report on 16 May and on 18 May he sent a memorandum to the Personnel Officer in Washington saying that in view of Dr. Barnes' conclusions and the fact that the complainant had been following a university course in Florida, he considered her fit to resume duty with the same reserve made previously (sedentary work close to good medical facilities). He enclosed a letter to be sent to the complainant in which he said that it was not possible for him to approve sick leave any longer. It is said that the complainant did not receive this letter. On 8 June Mr. Muldoon wrote to the complainant requesting her to report to his office on 21 June 1977 so that arrangements might be made for her to undertake the assignment to Brasilia. The complainant did not report to Mr. Muldoon and on 8 July gave notice of intent to appeal against the termination of her sick leave and her assignment to Brasilia.

12. The question whether a staff member is incapacitated from work is in a case of this sort a matter of judgment. The Tribunal will not substitute its judgment for that of the Director or of the expert advisers on whom he relies: it will intervene only if on the evidence the judgment appears to it to be wholly unreasonable or based on clearly mistaken conclusions. It cannot be said that Mr. Muldoon's decision of 8 June, based as it was on the recommendation of Dr. Dulac, was unreasonable. Nor can it be said that Dr. Dulac's recommendation was, on the material which he had, unreasonable. But before the Board of Inquiry and Appeal further evidence was produced. Dr. Barnes changed his opinion, first, by saying that in reporting the complainant as fit to return to duty on 20 June, he was not referring to Brasilia, and, secondly, by saying that his report had assumed the complainant would have a medical evaluation before a final decision was made. Dr. Sadin also gave evidence and is reported as confirming that the complainant should have had a medical evaluation; it may however be doubted whether he was fully understood since in a letter to Dr. Ortega, which he wrote after reading the Board's Report, he said that Dr. Dulac's decision had had his concurrence. Finally, the Board was reminded of Dr. Lebensohn's opinion as summarised in paragraph 8 above. The Board recommended that the complainant should be medically evaluated and that meanwhile her sick leave should be continued and her assignment to Brasilia postponed.

13. The question for the Tribunal is not whether Mr. Muldoon's decision was right or wrong at the time it was given. The decision appealed against is that of the Director who on 21 November 1977 confirmed the decision of 8 June when, so it is contended, he ought in the light of the Board's Report to have rescinded or modified it. The question for the Tribunal is therefore whether on the whole of the material known to the Director on 21 November it was unreasonable for him, first to terminate the complainant's sick leave and, secondly, to assign her to Brasilia. The two questions are obviously connected, but it may clarify matters to consider them separately in the first instance and to take sick leave first.

14. An entitlement to sick leave with its accompaniment of sick pay is not a matter to be settled simply by a medical evaluation. It is not uncommon for a specialist to advise, as Dr. Lebensohn did, that the patient should give up his job until his symptoms disappear, then allow a year free from symptoms to elapse and then begin to consider

going to work again. When such advice is given to the ordinary patient, he has to reconcile it as well as he can with his resources and his obligations and to come to a practical decision about how much of it he can afford. The Director, or the Staff Physician, i.e. Dr. Dulac, upon whom he relies, also has to take a practical decision. The advice tendered may well be the best way of effecting a complete cure in the long run. The question for the Director is not whether it should be accepted or rejected - that is for the patient - but whether the cure proposed should be financed by the Organization or an insurance company. The Director is bound by the regulations. He cannot decide that the insurance company should pay unless he has concluded under Staff Rule 670.1 that the staff member is incapacitated from the performance of his duties. "Incapacitated" is a strong word. The good employer endeavours to avoid a hard and fast test and to find a solution for each case in consultation with the staff member and his or her advisers. There is no evidence of any lack of willingness on the part of Dr. Dulac or Dr. Sadin (it was he indeed who suggested a psychiatrist) to look for a solution in this way. But if no such solution can be found the only course open to the Director is to examine and assess the evidence of incapacitation. The conclusion of the Board, though framed as a recommendation for a medical evaluation, was in effect a finding that on the evidence as it stood and without a further evaluation, the complainant was incapacitated. Could the Director reasonably differ from this conclusion?

15. There are two criticisms of the evidence of incapacity. The first is that it rests largely on the opinion of Dr. Barnes who said before the Board virtually the opposite of what he had said five months before. Then he gave his opinion that the complainant was "neither psychotic nor so disabled by anxiety and depression as to be unable to resume employment". When he wrote that, he was aware of the possibility of a post in Brasilia; if he had meant his opinion to apply only to work in the United States and if indeed she would be disabled by anxiety and depression from working in Brasilia, it is an extraordinary omission. When he gave his opinion, there were only six weeks to run until the date of her proposed employment; there is nothing in the whole body of the evidence to suggest the possibility of a sudden alteration during such a period nor was any evidence given to the Board that the complainant's condition had in fact altered by October 1977.

16. The second criticism is on the indeterminate character of the evidence. It is virtually conceded that the complainant can work anywhere except at her old job or "overseas". The former disability is readily understandable, but no attempt is made by any of the witnesses or in the arguments advanced for the complainant to explain why she cannot work overseas. It is understandable that a line should be drawn between those countries which have and those which have not temperate climates and good medical facilities, but not readily understandable why that line should coincide with the line drawn between the United States and other countries. It is nowhere explained why the complainant is capable of doing the work which she wants to do in Miami but incapable of doing the work that she does not want to do in Brasilia. A decision to send her to Brasilia does not mean a decision to keep her there if her health suffers; it need mean no more than a decision to give it a trial. There is nowhere in the medical evidence a firm, clear and reasoned statement that merely to begin work in Brasilia would be likely to cause disablement by anxiety and depression. In its absence it is not unreasonable for the Director to conclude that incapacitation is not established.

17. As to the assignment itself, the Director's choice was strictly limited. The complainant could not in her own interests, apart from those of the Organization, be returned to headquarters. It is not suggested that there was any other place of duty in the United States to which she could be assigned. The choice lay between an assignment to Brasilia, about the results of which the evidence is at best obscure, and a termination of her appointment, the result of which according to Dr. Barnes might be a violent response, either in a reactivation of the neurosis or some other assertion of her anger and feeling of injustice. A decision to give the former a trial before resorting to the latter cannot, considering only the claimant's interest, be faulted.

18. On 23 August 1977, i.e. more than a month after the complainant had entered her appeal against the decision to terminate her sick leave and assign her to Brasilia, the complainant not having gone to Brasilia, Mr. Muldoon notified her that her employment was terminated under Staff Rule 980 for abandonment of post. This decision is the subject of a second appeal with which the Tribunal is not now concerned; nothing that is contained in this judgment is intended to affect it.

19. The second issue as listed in paragraph 2 above concerns procedural irregularities In her rejoinder the complainant alleges that the Director sent a copy of the Board's Report to Mr. Muldoon and Dr. Ortega and that from this it is to be assumed that he was asking for their opinion on the report. This, she contends, was a procedural irregularity. Even on this assumption the Tribunal sees no irregularity in this case. The Director has to take a decision on the report and on this as any other matter he is entitled to seek the opinion of his advisers. He

should not allow them to present a new aspect of the case which is not to be made known to the complainant. It might be unwise for him to consult anyone who has already expressed a strong view which has been rejected by the Board. In this case Mr. Muldoon was in no sense a protagonist of any view; his decision was the obvious consequence of Dr. Dulac's recommendation and it would be proper and natural for the Director to ascertain through him whether in the light of Dr. Barnes' qualifications and the Board's conclusion. Dr. Dulas wished to change his recommendation. In a supplementary rejoinder the complainant takes this point further. She alleges that Dr. Ortega sent the report to Dr. Sadin and she has produced a letter from Dr. Sadin to Dr. Ortega, the one referred to in paragraph 12 above, criticising the report. She invites the Tribunal to infer that Dr. Ortega sent this letter to the Director with a view to influencing him against the report. There is no evidence to support such an inference and the Tribunal does not draw it.

20. The third issue challenges the validity of the assignment. The first ground of attack is that the reassignment was outside the Director's powers. Staff Rule 4.65 provides that a staff member may be reassigned whenever it is in the interests of the Bureau to do so. Nevertheless it is well established that in the ordinary case the transfer must not involve a change of grade or a reduction in salary or a lowering of dignity. To this the complainant seeks to add a requirement that it must not involve a diminution in responsibilities as measured by a detailed comparison of the two post descriptions. That in this case the responsibilities of the two posts are broadly the same follows from the fact that they carry the same grade of P.4.

It may be that to be the Senior Administrative Officer in a regional office is to hold a less important and desirable position than to be Deputy Chief of Personnel at headquarters. But if this be so, it is a sacrifice which in the interests of the Organization (which in this case, since no one disputes the need for a transfer, coincide with her own) the complainant must be prepared to make.

21. The second ground of attack is that the assignment was not made in accordance with the procedure laid down in the Administrative Manual II.3.230 in that a vacancy notice was not issued for the post in Brasilia to which the complainant was assigned. Paragraph 230 says that "an announcement is not normally made" in certain cases and these exceptions are themselves qualified by certain provisos. The Tribunal will not follow the complainant's argument through the intricacies of paragraph 230. The whole argument is misconceived. The section which contains the provision about announcement of vacancies has as its purpose to "establish the administrative policies and procedures required to implement" inter alia "the Staff Rules relating to recruitment and selection". The provision itself is not a staff rule. It can confer rights on the complainant only in so far as it is incorporated in her contract of employment. It is true that an administrative policy or procedure may be proclaimed or acted upon in such a way as to imply a promise, upon which a staff member is entitled to rely, that the Administration will continue to act in the same way at least until further notice. No such implication can be made here. If there is any promise, it is addressed only to prospective candidates.

DECISION:

For the above reasons,

It is decided that the complaint is receivable and is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 June 1979.

M. Letourneur
André Grisel
Devlin

Bernard Spy

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