

FORTY-SIXTH ORDINARY SESSION

In re DOBOSCH

Judgment No. 451

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Pan American Health Organization (PAHO) (World Health Organization) by Mrs. Dora Dobosch on 18 April 1980, the PAHO's reply of 12 September, the complainant's rejoinder of 20 October and the PAHO's surrejoinder of 17 November 1980;

Considering the further items of evidence which the Tribunal asked for on 15 January 1981 and which the PAHO supplied on 26 February 1981;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal, PAHO Staff Regulations 1.5, 4.2 and 11.1, former PAHO Staff Rule 130 (now 230), PAHO Staff Rules 410.1, 440.1, 510.1, 530.1 and 4, 565.1 and 2, 570.1 and 2 and 1230 and WHO Manual sections II.1.95(PAHO) and II.10.330;

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. The complainant graduated in biochemistry and pharmacy from the University of Buenos Aires in 1959. On 1 September 1967 she joined the staff of the Pan American Center of Zoonoses (CEPANZO) of PAHO in Argentina as an assistant bacteriologist at grade G.6.

At first she held post 2108 in the Leptospirosis unit. After one year she was assigned to the new Food Microbiology unit. In 1974 three General Service category posts, but not the complainant's were regraded in the Professional category. In December 1975 she applied for the reclassification of her post. In May 1976 the Chief of Personnel at PAHO headquarters in Washington accordingly asked her to provide a description of her duties. In August the Director of CEPANZO informed her that her appointment would not be extended and that her post was to be abolished. At the instance of the headquarters Staff Committee, however, her appointment was extended and in March 1977 she was transferred to the Brucellosis unit and given new duties. The complainant protested against the transfer on the grounds that her new duties were less responsible. On 31 May 1977 she repeated her application for reclassification in the Professional category. In November 1977 the area Staff Committee recommended that the Director transfer her to the Food Microbiology unit and regrade her in the Professional category. The recommendation was not followed. In March 1978 the Chief of the Brucellosis unit, the complainant's supervisor, wrote an unfavourable report on her performance and on 22 May 1978 she was transferred to the Tuberculosis unit. She maintains that her duties in the Tuberculosis unit, set out in no post description, were less responsible than her earlier ones. On 16 August 1978, after taking a course in food microbiology in Massachusetts, she formally applied for transfer to the Food Microbiology unit. In his reply of 24 October the Director said that unfortunately there was no vacancy in the unit, and he added: "... if in the future our program of activities requires the creation of a post with duties you are able to perform, you will have all the opportunities to apply for it." In March 1980 the complainant was transferred to the Library.

B. On 22 November 1978 the complainant appealed to the Board of Inquiry and Appeal for Area VI, in which CEPANZO is situated, against the decision not to transfer her to Food Microbiology. She afterwards added an appeal against the decision not to reclassify her post. Since the PAHO Headquarters Board of Inquiry and Appeal in Washington was competent to hear appeals relating to classification, the Area VI Board forwarded the two claims to it on 12 February 1979. On 12 October the Headquarters Board in Washington sent the case back to the Area Board on the grounds that it related primarily to the question of transfer and the application for reclassification referred to a post which the complainant was not occupying at the time. The Headquarters Board also invited the Area Board to make up for lost time by hearing the appeal within 30 days. The Board nevertheless decided to postpone hearing the case until March 1980. In March a further difficulty arose since the complainant believed that one of the Board's members, Dr. Otoniel Velasco, was acting as both judge and party. The Board not yet having met, on 18 April the complainant appealed to the Tribunal in accordance with Article VII, paragraph 3,

of the Statute.

C. The complainant observes that 16 months elapsed after she filed her appeal without any reply from the defendant organisation. She alleges several flaws in the procedure: Dr. Lopez Ferrer, the WHO/PAHO representative for Area VI, acted ultra vires in recommending that the Area Board send the appeal to the Headquarters Board and, contrary to the express request of the Headquarters Board and in breach of its own procedural rules, the Area Board was remiss and let the case drag on. As to the merits, the complainant puts forward the following arguments. (1) Her successive transfers and her assignment to duties which had nothing to do with her specialist knowledge of food microbiology were in breach of Staff Regulation 4.2 and Staff Rules 410.1, 510.1, 565.1 and 2, 570.1 and 2 and contrary to the Organization's interests and her own, which the Director was required to take into account. Her successive transfers were also in breach of Staff Rules 440.1 and 530.1 and 4, which set out the rules on transfer, including post descriptions. Lastly, the harassment which she alleges that she suffered because of her claims over her transfers constituted a breach of Staff Regulation 1.5 and Manual section II.10.330, which require that courtesy and respect be shown at all times to staff members. (2) The expedients to which the Organization resorted so as not to reclassify post 2108 constituted a breach of the post classification standards in the Manual and of Staff Rule 1230. When she was transferred to the Food Microbiology unit she performed Professional category duties, her performance was judged satisfactory and she took advanced training in the subject. As soon as she applied for reclassification, her supervisors' attitude changed, she was persecuted and discriminated against, and there was an obvious desire to get rid of her.

D. The complainant invites the Tribunal to order: (a) that she be reassigned to the Food Microbiology unit; (b) that the description of her duties in that post be in accordance with the duties she performed before her successive transfers and with her qualifications; (c) that she be accordingly assigned a post in the Professional category according to the level of responsibility required; (d) that the documents which damage her personal and professional reputation be removed from her personal file; (e) that she be awarded compensation for the moral prejudice and mental distress she has suffered; (f) that she be awarded damages for injury to her professional reputation; and (g) that she be awarded costs.

E. The PAHO states in its reply that it is not clear from the facts that the Administration failed to answer the complainant's claims and that the complaint is irreceivable because she has failed to exhaust the internal remedies. Subsidiarily, the PAHO argues that the complainant was not recruited to fill a Professional category post. The description of post 2108 set out in detail at the time her duties and responsibilities and made it clear that secondary education was required. The work performed by the complainant matched the post description. Her later transfers complied with the rules. In particular the Administration respected Staff Rule 510.1, which provides that transfers fall within the discretion of the Director, who shall take account to the extent possible of the staff member's abilities and interests. In her later assignments to the Brucellosis and Tuberculosis units she was given similar duties and was subordinate and responsible to Professional category staff members. She lodged no internal appeal against her transfer to the Library and her claim in this matter is therefore irreceivable. Her appeals against the transfers to the Brucellosis and Tuberculosis units are time-barred. Her arguments in favour of her transfer to the Food Microbiology unit relate to the management and the needs of technical projects of CEPANZO, and those are matters which it is beyond her competence to judge. As for her claim for the reclassification of her post, when she made her original application in 1975 the duties she was then performing were still much the same as those that she had performed at the time of her appointment. With her transfer to the Brucellosis unit, her application for the reclassification of her post in the Food Microbiology unit lost its relevance and any inquiry into the level of her responsibilities would then have been based on her duties in the Brucellosis unit. In reply to her allegations of prejudice the PAHO states that she was given the same treatment as other staff members of the Center. She alleges prejudice from the time when her performance reports became unfavourable and it is worth noting that she levels her charges against all her supervisors. The unfavourable reports and her difficulty in accepting criticism seem to have done much to breed antagonism between her and her supervisors. The PAHO was by no means opposed to transferring her to the Food Microbiology unit. Indeed the Director did not refuse her transfer: he merely said that there was no vacancy, but that one might occur in the future. A post did fall vacant, and on 3 September 1980 the Administration offered to transfer her to the unit and to study the functions performed by her within six months in order to determine the appropriate grade of her post. In a desire to have the matter settled the Administration also offered her 1,500 United States dollars towards her costs.

F. In her rejoinder the complainant maintains that the Administration did fail to answer her claims since the Area Board of Inquiry and Appeal, which had her appeal as early as February 1979, did nothing at all, took no account of the Headquarters Board's recommendations and, nearly two years after the appeal was filed, has not yet heard it.

Such dilatoriness makes the rules on internal appeals meaningless. As to the merits, it is not true to say that when she was appointed she was given only duties corresponding to a secondary education. The newspaper advertisement which she answered stated that university qualifications were required. The policy at the time was to recruit over-qualified people and assign them to General Service category posts. Besides, several staff members holding posts comparable with her own were later promoted to the Professional category by means of reclassification of their post, transfer or promotion. It is also untrue to say that her duties in the Brucellosis and Tuberculosis units were as responsible as her duties in the Food Microbiology unit, which were unmistakably Professional category duties. She nevertheless did all her work conscientiously, however humiliating it sometimes was. The PAHO's arguments are inconsistent: on the one hand it maintains that her duties were the same in her various posts; on the other it says that the reason why her application for reclassification, which related to the post in the Food Microbiology unit, was not considered after her transfer elsewhere was that she was not performing the same duties. She alleged prejudice long before her performance reports became unfavourable and the unfavourable reports were the result of her pressing for reclassification of her post. The purpose was to make out a case for dismissing her. It is not true to say that all her supervisors agreed with the unfavourable evaluation: there were notable exceptions. Lastly, as regards the letter of 3 September 1980 offering to transfer her to the Food Microbiology unit, the duties set out in the appended post description are less responsible than those she was performing on her first assignment to the unit. She has not declined the offer, but on 9 November 1980 indicated that she wanted it to be reconsidered. She has applied for one year's leave without pay to work as a "guest researcher" at the Center for Disease Control, Atlanta, Georgia (United States). On 10 November 1980 she was informed by telegram that as a consequence of budgetary reductions beyond the Administration's control her appointment had to be terminated on 10 December 1980.

G. In its surrejoinder the PAHO contends that the complaint is irreceivable because the complainant has failed to exhaust the internal remedies. That the Administration has not failed to answer her appeal is clear from the fact that the Area Board of Inquiry and Appeal has now met and that its chairman made recommendations to the Director in early November 1980. The complainant was not led to believe at the time of her appointment that she would be given greater responsibilities. She was clearly given to understand at the time that her duties would not include representation of the Center, working out new techniques or instructing trainees. Every time she took it upon herself to go beyond the scope of her duties she was admonished. The Food Microbiology unit did not exist when she was appointed, and it is therefore untrue to say that her transfer disregarded her specialist knowledge of food microbiology. There was therefore nothing surprising about her transfer to the Brucellosis unit, brucellosis being more nearly akin to leptospirosis than to food microbiology, and the transfer was in the PAHO's interests. Contrary to what she contends, the unfavourable performance reports were made before, and not after her application for reclassification. For example, her report for the period from 1 September 1973 to 31 August 1974 contained serious criticism of her work. The position of the other staff members to whom she refers is irrelevant. Lastly, the PAHO explains that because of the financial difficulties facing the Center since 1979 its Council expressly instructed its Director and Executive Committee to reduce staff at the end of 1980. The Executive Committee set up a working group to suggest which posts should be abolished. The working group reported on 31 October 1980 and the complainant's post, No. 2108, was one of the forty-odd posts which it recommended abolishing. PAHO is therefore no longer able to make its offer to transfer the complainant to the Food Microbiology unit and has therefore had to dismiss her.

CONSIDERATIONS:

Receivability: the facts

1. Article VII of the Statute of the Tribunal declares that a complaint shall not be receivable unless the complainant has exhausted such other means of resisting the decision impugned as are open under the applicable Staff Regulations. In the present case the means are those prescribed in accordance with Staff Regulation 11.1, which requires the Director to establish administrative machinery with staff participation to advise him in case of any appeal by staff members against an administrative decision. The administrative machinery so established consists of Boards of Inquiry and Appeal constituted in accordance with Staff Rule 1230. There is an Area Board, composed of three persons, whose function it is to make findings and recommendations to be reported for the decision of the Area Representative; at Headquarters Board at Washington D.C. consisting of five persons, who report in the same manner to the Director. In the ordinary way an appeal is made first through the Area Board with a right of appeal to the Headquarters Board from the decision of the Area Representative. Staff Rule 1230.2, however, reserves for the Headquarters Board any appeal alleging the improper application of post classification standards.

2. The complainant was in 1967 employed as an assistant bacteriologist G.6 in post 2108 in CEPANZO, a department of PAHO operating at Buenos Aires and made up of a number of units. After about a year she was assigned to the unit of Food Microbiology, which she considers to be her speciality. For a number of years her work was satisfactory, but in 1974 according to the Administration it began to deteriorate. In that year she was given a bad appraisal report which was the first of a series. She considered that she was working at a Professional level and that post 2108 ought to be reclassified accordingly. Staff Rule 130, as it then read, provided that a staff member might at any time request a re-examination of the classification of her post; and in December 1975 the complainant so requested. About this time several of her colleagues were promoted and she attributes her failure and their success, as also her supervisors' criticisms of her work, to prejudice.

3. It is not clear what happened to her request. Possibly the consideration of it was affected by the fact that in August 1976 she was notified that her contract would not be renewed.

She appealed and after negotiations through the Staff Committee the contract was renewed until 31 May 1978. On 1 March 1977 she was transferred to the Brucellosis unit, where she went under protest. She continued to press for reclassification and received the support of the Staff Association who on 16 November 1977 made a recommendation, addressed to "the authorities" that she should be returned to Food Microbiology and classified as Professional. The authorities, however, took a different view. When in May 1978 the time came to renew her contract again, it was renewed only for a year- the renewal was accompanied by a severe letter in which she was told that unless she showed "unquestionable improvement" it would not be renewed again; also she was transferred to the Tuberculosis unit where her new supervisor was to be told "to watch over you carefully".

4. This is the background to the complainant's memorandum to Dr. Meléndez, the Director of CEPANZO, which initiated the proceedings in this case. She had not been getting on well with her new supervisor, who was eventually to ask for her removal. In a memorandum dated 16 August 1978 and headed "Request for Transfer" the complainant asked to be informed if she -

(1) could be transferred to a working position in Food Microbiology, and

(2) could be reclassified to an adequate Professional level.

She asked for a reply "in the sense of Staff Rule 1230.8", which meant that she was asking for a final decision which she could take to the Board of Inquiry and Appeal. Dr. Meléndez replied non-committally on 24 October and on 22 November the complainant sent to the Area Board a written statement of her intention to appeal in accordance with Staff Rule 1230.8.3.

5. This rule requires the Board-to open its proceedings at the earliest possible moment. This is made more precise by Article 10.10 of the Board's Rules which requires it to "meet to consider the appeal within 25 days of receipt of notification of the intent of appeal". The Board, however, did not meet for 82 days, and then only to "analyse a suggestion" made by the Area Representative that the appeal should be sent to the Headquarters Board since it incorporated a request for reclassification. At its meeting on 12 February the Area Board decided to accept this suggestion. For reasons which are not given in the dossier there was a delay of more than six months before the Headquarters Board met on 27 August 1979 to consider this short procedural point. The Headquarters Board then decided that the case was not receivable by it on the ground that "the appeal dealt primarily" with the denial of the complainant's request for a transfer. There was a further delay, for which likewise no reasons are given; of a month and a half before on 12 October this decision was communicated to the Area Board. In the letter communicating it the Area Board was asked for its "assistance in ensuring" that the appeal be heard within a reasonable period, preferably within thirty days.

6. More than thirty days elapsed before the Area Board met again and then it was only to fix a date for the hearing. Meanwhile the claimant on 12 November 1979 wrote to the Headquarters Board to enquire about the status of the appeal and to mention "irregularities" but, if there was an answer, it is not in the dossier. When the Area Board met on 3 December the chairman and Dr. Velasco, the latter being the member nominated by the Administration, said that their work prevented them from studying the case in time for an early hearing, while the third member, who pressed for an early hearing, also had to point out that they could not begin until the Administration had delivered a reply. Dr. Velasco "engaged himself" either to compose the reply or to see that it was delivered (one can only presume the latter) by the first week of March and the hearing was fixed for 3 March 1980. The complainant, however, not unreasonably when the text of the minutes of the proceedings is looked at, presumed the former. On

17 December she wrote to the chairman of the Area Board to ask him to form a board that excluded Dr. Velasco; she protested also against the postponement to 3 March and asked for an earlier date. This letter was apparently unanswered. On 15 January 1980 Ms. Alonso, the Chair-person of the Legal Sub-Committee of the Staff Association, wrote to the Chairman of the Headquarters Board to complain of this and other delays. She asked the Headquarters Board to reconsider its decision to remand the case to the Area Board; she wrote: "This sub-committee is now seriously considering seizing the ILO Tribunal should all internal avenues of redress continue to be closed to this appellant"; she added, with correct foresight: "We have no guarantee that the appellant's case will be heard even in March". If there was an answer to this letter, it is not in the dossier; but it must be noted that the extent of the delay, and also the position of Dr. Velasco, are matters that are considered only cursorily in the Administration's pleadings.

7. 3 March 1980 came and went without any hearing. Dr. Velasco was evidently unable to fulfil his engagement, which is not surprising since it was only on 22 April 1980 that the Area Representative designated Dr. Larghi as the Administration's Representative to reply to the appeal. Four months later when Dr. Larghi withdrew "because of grave personal impediment" Dr. Carrillo was appointed to succeed him. On 18 September 1980, that is, more than a year and three-quarters after the presentation of the complaint, an answer was delivered and the hearing fixed for 10 October. But long before that the complainant (whose appointment was to be terminated on 10 November) had given up the struggle. On 12 April 1980 she had filed her complaint with this Tribunal.

Receivability: the law

8. The rule that a complaint shall be receivable only if the internal means of redress have been exhausted is not a hard and fast one even though the Statute does not allow any derogation from it. If a complainant does all in her power to procure a decision and if nevertheless the internal appeals body either by its statements or by its conduct evinces an intention not to give a decision within a reasonable period, justice requires that an exception should be made. A failure to proceed with all proper speed and diligence will not of itself suffice to prove such an intention. But when the proceedings have been allowed to deteriorate to a point at which there is a denial of justice, that is, when the delay is inordinate and inexcusable such an intention can be inferred. The Tribunal concludes that that point was reached in this case on or before 18 April 1980.

9. The Administration does not in its pleadings in the dossier try to justify the length of time taken by the proceedings. Instead, it makes two points designed to show that the complainant did not do all in her power to procure a decision. The first is that the complainant failed "to attempt to assure herself that the Area Board was not prepared to hear her appeal". As to this, it is true that it would be a wise precaution for a complainant in her predicament to deliver an ultimatum in the form of a final application to the Board before taking the extreme step of addressing the Tribunal. The complainant did not do this formally. But she or Ms. Alonso on her behalf had written two unanswered letters, one on 17 December 1979 protesting against the postponement and the other on 15 January 1980 (written to the Headquarters Board but which should have been passed down to the Area Board) with a clear warning against further postponement. It does not appear from the dossier that the Board, before postponing the hearing fixed for 3 March, heard any submission from the parties or indeed that it made any formal order. The only inference that can be drawn is that the postponement was allowed simply because after a year and three-quarters the Administration was still in default with its written answer and had not even appointed anyone to represent it in the appeal. This is inexcusable.

10. The second point is the contention that the complainant should "in the second instance" have addressed the Headquarters Board which had recommended that the appeal should be heard within a reasonable period. This is in effect what the complainant did without any result by the letter of 15 January 1980. Anyway, there is no obligation on an appellant to explore ways of putting pressure on an area board to discharge its duty. Putting pressure is the most that the Headquarters Board could have done, since under Staff Rule 1230.8.5 it could not assume jurisdiction until there had been a decision by the Area Representative based on the recommendation of the Area Board.

11. The Tribunal, being of the opinion that the delay in hearing the appeal was inordinate and inexcusable, need not consider the other irregularities alleged by the complainant in the appeal process, and in particular the position of Dr. Velasco. The complainant's request that Dr. Velasco should be disqualified was never considered or determined by the Board; on 22 April 1980 the Area Representative confirmed him as a member of the Board designated by the Administration.

Merits

12. Undoubtedly from about 1975 onwards the complainant failed to find favour with her various supervisors. The controversy about whether this was due to prejudice against her - "a reprisal", as she puts it, "for my rightful aspiration of being recognised by my contribution and my continuous desire for the correct utilisation of my professional potentiality" - or to her own demerits fills the dossier, but is irrelevant to the validity or otherwise of the decision of 24 October 1978, which is the decision impugned. By that decision all that Dr. Meléndez did was to temporise. He wrote that he had appointed a committee to study the request and that at present there was no suitable post in Food Microbiology. The fact that Dr. Meléndez was non-committal did not necessarily mean that he was not going to do anything. In the event he did on 3 September 1980 offer the complainant a position which she found unacceptable, in the Food Microbiology unit at a grade which was to be fixed after six months' service. It is impossible to argue that the Director's failure to respond instantly and affirmatively to the

complainant's demands amounted to an abuse of power.

Costs

13. The complainant has incurred legal fees and expenses of translation in the preparation of her case for which she seeks reimbursement. It is unusual to award costs to a complainant who has failed in the result. But since in this case she has succeeded on the important issue of receivability the Tribunal will award her 2,000 United States dollars.

DECISION:

For the above reasons,

The Organization is ordered to pay to the complainant US\$2,000 towards her costs but, save as aforesaid, the complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1981.

André Grisel
Devlin
H. Armbruster

A.B. Gardner