SEVENTY-THIRD SESSION

In re BHOTLU and MITROO

Judgment 1191

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr. Veerubhtola Veeram Bhotlu on 14 October 1991 and Mr. Naresh Mitroo on 15 October 1991 against the World Health Organization (WHO), the WHO's single reply of 16 March 1992, the complainants' rejoinder of 26 March and the Organization's surrejoinder of 30 April 1992;

Considering the applications to intervene filed by:

P.K. Anand

J.K. Dass

R. Dass

P.D. Gautam

S.R. Gupta

H. John

J.C. Juneja

Y.P. Khullar

G. Krishna

C. Lal

J. Lal

G.P. Pathania

D.S. Phalswal

B.M. Tokish

G.P. Valmeki

and the WHO's observations thereon of 5 May 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 17 of the Rules of Court, WHO Staff Regulation 3.2 and WHO Staff Rules 1230.3 and 1310.3;

Having examined the written evidence and decided not to order oral proceedings, which none of the parties has applied for;

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

A. WHO Staff Regulation 3.2 reads:

"... The salary and allowance plan shall be determined by the Director-General following basically the scales of salaries and allowances of the United Nations, provided that for staff occupying positions subject to local recruitment the Director-General may establish salaries and allowances in accordance with best prevailing local

practices ..."

The text of Rule 1310.3 is similar.

0As Judgment 1160 explained, under A, every few years there is a review of salary scales of the WHO's General Service category staff on the strength of comprehensive surveys of local practice. Between such surveys there may be adjustments on the strength of "mini-surveys". As from 1 January 1985 the International Civil Service Commission (ICSC) approved a "general methodology" for carrying out surveys and the Consultative Committee of the United Nations on Administrative Questions (CCAQ) has issued a Manual on how to apply it. Paragraph A.2.2 of the Manual says that at each duty station a Local Salary Survey Committee should make the arrangements and, where there is none, it is up to the "designated agency" for the duty station to appoint one. At the material time the "designated agency" for New Delhi was the WHO.

At the bidding of WHO headquarters in Geneva the Local Salary Survey Committee carried out in November 1985 and early 1986 a comprehensive survey of the salaries of staff in the General Service category in New Delhi. It recommended applying as from 1 January 1986 new scales to such staff serving any of the United Nations organisations in New Delhi. The WHO approved new scales as from 1 January 1986 for its General Service staff in its Regional Office for South East Asia (SEARO), in New Delhi, and they are commonly known as "revision 27".

Headquarters having asked for interim adjustment, the Local Committee carried out a mini-survey in the first half of 1987. The Organization approved its recommendations and by what it calls "revision 28" brought in increases in salary for the General Service staff of SEARO as from 1 January 1987.

The nine complaints which the Tribunal joined and ruled on in Judgment 1160 of 29 January 1992 challenged both the 1986 and the 1987 scales. That judgment held the challenge to the 1986 scales to be irreceivable but quashed decisions that the Director-General had taken applying the findings of the 1987 survey and ordered him to take a new decision in the light of the judgment.

The Local Committee had carried out a second mini-survey in 1988, again purporting to follow the general methodology and the CCAQ Manual. WHO headquarters having approved the Committee's findings, SEARO announced new scales in a memorandum headed "revision 29" and applied them as from 1 April 1988. The WHO explains that the reasons for picking that date instead of 1 January 1988 were that one of the "comparator" local employers had put salaries up only as from April and an earlier effective date would have precluded counting that increase, and that the Indian Government had made tax changes as from 1 April.

The new scales provided for an average of 9.2 per cent increase in salary at grades ND.1 to ND.6. The application of the same increase to salaries at higher grades would have meant an actual increase of 0.9 per cent for ND.7 and none at all for ND.8 and ND.X because of "negative indexation" (a measure which is described in Judgment 1160, under A); instead a real increase of at least 3 per cent was paid to staff at those grades.

By a further memorandum which it issued to General Service staff on 1 February 1989 the Organization announced amended scales known as "revision 29, amendment 1". They brought in interim adjustments that were again to apply as from 1 April 1988 and it is they that are at issue in this case. Although the average increase was still 9.2 per cent, the inter-grade differentials were altered. Salaries were put up by 8.9 per cent at grades ND.1 to ND.6 and by 14 to 16 per cent (again subject to negative indexation) at higher grades. The number of steps in grades ND.5 to ND.8 was increased to 18.

Many of the General Service category staff in New Delhi objected to the new scales in revision 29, amendment 1, as well. Over thirty of them, including the two complainants, filed appeals with the Regional Board of Appeal, also at New Delhi: the complainants did so on 14 September 1989. Mr. Bhotlu held grade ND.6 and Mr. Mitroo grade ND.5 at the material time. The grounds for their appeals were incomplete consideration of the facts; failure to observe the WHO's rules, the terms of their appointments, the methodology and the CCAQ Manual; misapplication of the WHO's post classification standards; and personal prejudice. Each appellant sought, in substance, the quashing of the application to himself of the scales in revision 29, amendment 1, damages for moral injury and costs.

Five Regional Boards were set up to hear different groups of appeals. They reported on 18 January 1990. Though they found no evidence of personal prejudice, they were unanimous in holding that the Organization had acted in

breach of the methodology and the Manual and had had no "rational basis" for issuing the scales in amendment 1, which "violated the rights acquired by the staff members" under revision 29. They recommended "a uniform across-the-board increase of 9.2 per cent without any negative indexation" for all General Service category staff in New Delhi as from 1 April 1988; the restructuring of the scales so as to keep the same number of salary steps as before in all grades and maintain "inter-step and inter-grade differentials" in line with the methodology and the Manual; the redetermination of step 1 of grade ND.X; and the review of salaries of staff in ND.7 and in particular the matter of the grant of additional steps.

The Regional Director rejected those recommendations in letters which he sent the appellants on 19 April 1990. Just under thirty New Delhi staff, again including both the complainants, filed appeals on 11 May 1990 with the headquarters Board of Appeal pressing their original pleas and claims.

In its report of 29 April 1991 the Board concluded, with one dissenting opinion, that, though there had been neither personal prejudice nor misapplication of the rules and classification standards, the full facts had not been considered. It expressed surprise at the Organization's "high-handed approach", as shown for example in its failing to explain the changes made by amendment 1 of revision 29. It held that only a comprehensive survey afforded a proper opportunity for structural change. It recommended granting all the General Service staff in New Delhi as from 1 April 1988 9.2 per cent increases - which it held that the mini-survey had suggested they were entitled to - subject only to the "negative indexation" that had been in force at that date. It also recommended awarding reasonable costs.

In letters of 12 July 1991 the Director-General informed the appellants that, though he understood why the Board had made its recommendation for the 9.2 per cent increase, he rejected it because it would mean little or no increase in salary for grades ND.1 to ND.6 and "significant recoveries" from staff in grades ND.7 to ND.X. He agreed to meet reasonable costs.

Those are the final decisions the complainants are impugning.

B. The complainants give a detailed account of the second mini-survey and of the appeal proceedings and submit that for several reasons the decisions they impugn are unlawful.

(1) In the complainants' submission amendment 1 to revision 29 was in breach of their acquired rights. They observe that in accordance with revision 29 they were granted an increase of 9.2 per cent as from 1 April 1988 and it was paid to them, together with the arrears, in December 1988. The amendment reduced the increase retroactively from 9.2 to 8.9 per cent and the WHO made deductions accordingly. As the Regional Boards held, that was in breach of the methodology and the Manual and an irrational measure. Moreover as the Tribunal held in Judgment 323 (in re Connolly-Battisti No. 5), when an organisation has announced a payment of salary the staff acquire a right that the organisation may not destroy.

(2) The Organization misapplied paragraphs 59, 60 and 62 of the methodology and Part II.D.5.3 of the CCAQ Manual. Both documents provide that each grade shall ordinarily have between 9 and 12 steps, excluding longevity steps, and that the number of steps shall not change between comprehensive surveys. The adjustments in revision 29, amendment 1, were flawed in that the number of steps in Mr. Bhotlu's grade, ND.6, was increased from 17 to 18. That increase caused him injury because the financial value of each step in his grade fell accordingly.

Secondly, the methodology and the Manual provide that the "inter-grade differential", i.e. the difference in percentage between grades, should be between 15 and 35 per cent. The differentials in the new scales ranged between only 10 and just over 18 per cent.

Thirdly, the methodology stipulates that the "inter-step differential" shall be between 3 and 5 per cent of step 1 of the grade and uniform throughout the grade. The new differentials diminished in terms of percentage from step to step and were under 3 per cent in the higher steps.

Fourthly, both methodology and Manual prescribe an "across-the-board increase" if the mini-survey so warrants. Yet revision 29, amendment 1, applied different percentages of increase to different grades.

The complainants observe that the Regional Boards' conclusions supported their contentions and in particular rejected the WHO's view that creating more steps was a proper solution to the problem of keeping some staff at the top of their grade for too long.

(3) There were flaws in the proceedings before the headquarters Board of Appeal.

(a) The Board's chairman issued an unsigned notice on 7 May 1990, before the Board had even received some of the full statements of appeal, to say that since processing all the appeals "would require an enormous amount of time and work" he would "accept only one", Mr. Marwah's, the first to have been filed. Only in response to protest did the chairman back down, in a letter of 12 June from the secretary to the Board, and accept the other appeals.

(b) The Board took almost a year to report, though Rule 1230.3.3 requires it to do so within 90 days of the filing of the full statement of appeal. The Director-General took 74 days to decide on the Board's recommendations, though 1230.3.2 requires him to do so within 60. The Regional Boards were also dilatory in reporting and the Regional Director in taking his decision.

(4) The headquarters Board recommended a 9.2 per cent increase for everyone and made it "subject only to negative indexation". But negative indexation is not provided for in the rules.

(5) The impugned decisions show personal prejudice. In Judgment 495 (in re Olivares Silva) the Tribunal held that the first and greatest safeguard against prejudice was procedural requirements, whose "main object is to exclude improper influences". In this case several procedural requirements were overlooked.

Each of the complainants asks the Tribunal to order the WHO (1) to quash revision 29, amendment 1, "so far as it relates to grades ND.1 to ND.6 reflecting decrease in salary as compared to" revision 29; (2) to order that revision 29 be "restructured in accordance with" the methodology and the Manual; and (3) to award him 2,000 United States dollars in costs.

C. In its replies the WHO gives its own version of the facts that have prompted the dispute and submits that the complainants' pleas are devoid of merit.

(1) The methodology offers mere advice and guidance and allows for a flexible approach that may take account of local circumstances. That is plain from its use of terms like "desirable", "should" and "normally". So the Organization was free, for example, to adopt inter-grade differentials outside the range of 15 to 35 per cent. It was also right to increase the number of steps within grades because the comprehensive 1986 survey had already revealed that local employers gave more than 15 and the increase in steps improved the lot of General Service staff who had reached the top of their grade and so could get no further increment.

As measured not in percentages but in actual amounts, the inter-step differentials remained uniform in each grade in the 1988 salary scales. What the methodology requires is that the amounts be uniform; it is therefore impossible for the percentages to be uniform as well.

The 1986 survey revealed that, although in grades ND.1 to ND.4 salaries were in line with the best prevailing local rates, in ND.5 and above they were higher. Since there was therefore no question of increasing them, the scales of 1985 continued to apply unchanged to those higher grades and the inter-step differentials therefore held good.

(2) It is absurd to suggest that the findings of a mini-survey intended to update salary scales could be tainted with personal prejudice against the complainants or be in breach of their acquired rights. Judgment 1160 dismissed similar allegations about the 1986 and 1987 surveys.

(3) Negative indexation is a practice aimed at keeping salaries in line with the best local rates. Applying it in this instance caused the complainants no financial loss. There are precedents for applying it in the United Nations system both to the General Service and to the Professional categories of staff. It is only reasonable that there should be no express provision for it in the WHO's written rules since it is a practice the Organization will follow only when sound financial management and good staff relations so require. The practice is not unlawful for not being embodied in the rules. It is immaterial that the methodology and the CCAQ Manual do not provide for it since those texts are not binding in law anyway.

The WHO submits that the mini-survey duly followed the procedure set out in the methodology and the Manual and complied with its own rules and practices. It abided by the precedents set in earlier mini-surveys. The staff representatives were given every opportunity to take part throughout, although for reasons of their own they chose not to attend some of the Local Committee's meetings. Moreover, the complainants suffered no financial loss on

account of the application to them of the resultant salary scales.

D. In their rejoinder the complainants submit that much of the WHO's reply to their complaints is irrelevant.

They argue that since Judgment 1160 set aside decisions applying the findings of the 1987 salary survey as reflected in revision 28, the implication is that the findings of the 1988 survey are invalid as well: revision 29, amendment 1, cannot hold good now that the Director-General has to take a new decision on the scales that it is based on. The WHO'S plea that the 1988 survey complied with the methodology and the CCAQ Manual has therefore become irrelevant. Since the Tribunal has held that the 1987 survey, and by implication the 1986 one, were not properly carried out, the 1988 one must have been flawed too in that it followed the same methods and procedure.

The complainants explain why they regard the WHO's pleas in defence of negative indexation as unsound and develop the objections to it as summed up in Judgment 1160, under B and D. They enlarge on their pleas of breach of their acquired rights and of the Staff Rules. They observe that the Organization is still showing no concern about the General Service staff in New Delhi. At the time of filing their rejoinders they are in the dark about what new decision the Director-General intends to take in execution of Judgment 1160 as regards the 1987 salary scales, and the costs awarded under that judgment have not even been paid.

E. In its surrejoinder the Organization submits that the rejoinder goes over much-trodden ground and raises no new issue of fact or law that calls for any development of its reply. It points out, however, that the complainants are guilty of distortion in inferring from Judgment 1160 that the 1986 salary survey was not carried out in accordance with the methodology and the Manual. All that the Tribunal said - under 12 - was that it would "proceed on the assumption that the 1987 survey was not properly carried out". It did not rule on the merits of the 1986 survey at all because it upheld the Organization's objections to the receivability of the earlier complaints on that score.

The WHO observes that the Tribunal acknowledged the validity of negative indexation in Judgment 830 (in re Kossovsky and Shafner-Cherney) even though the relevant instruments made no express provision for it. So did the CCAQ in a document which it published in 1989 (ACC/1989/6, paragraph 62 b)) and which the Organization quotes.

The WHO maintains that no acquired right of the complainants has been violated.

Lastly, the Organization states that in execution of Judgment 1160 the Director-General wrote the complainants letters of 30 April 1992 which said:

"As you know, the 1987 mini survey only updated the results of the 1986 comprehensive salary survey. However, in order to lay to rest this long-standing complaint, but without prejudice to the legal principles involved in the decisions relating to those surveys, I am prepared to offer you a lump-sum payment based on the overall results of the 1987 interim adjustment to be applied across the board. Of course, the supplementary financial compensation given to you as per the memorandum of Director, Support Programme of 24 May 1989 would be deducted. I am also prepared to apply this decision to the 1988 mini-survey."

The Director-General further stated that, if the complainants accepted that offer, they should withdraw their complaints.

The Organization submits that the offer is fair and reasonable and invites the Tribunal to endorse it and accordingly dismiss the complaints as devoid of substance.

CONSIDERATIONS:

1. Judgment 1190 (in re Bansal No. 2 and others), also delivered this day, explains how the salary scales known as "revision 29" and "revision 29, amendment 1" came to be applied as from 1 April 1988 to the General Service category of staff in the WHO's Regional Office for South East Asia in New Delhi. The scales applied to the present complainants: at the material time Mr. Bhotlu held grade ND.6 and Mr. Mitroo grade ND.5. They each received a salary increase of 9.2 per cent under revision 29 but of only 8.9 per cent under revision 29, amendment 1.

2. As is stated in B above, the complainants seek:

(1) the quashing of revision 29, amendment 1, "so far as it relates to grades ND.1 to 6 reflecting decrease in salary as compared to" revision 29;

(2) the restructuring of revision 29 in accordance with the methodology approved by the ICSC and the CCAQ Manual; and

(3) $2,000 in costs.

The breach of acquired rights

3. The complainants submit that to amend revision 29 was in breach of their acquired rights. Under that revision they had been granted a 9.2 per cent increase in salary and the sums that were accordingly due to them in salary and in arrears of salary were paid to them in December 1988. After the amendment of revision 29, however, the WHO made retroactive deductions from later payments of salary.

4. In their joint report of 18 January 1990 the Regional Boards of Appeal referred to the Organization's plea that it had not actually issued revision 29 and they rejected that plea on the evidence. (The Organization did not press it when the case went to the headquarters Board of Appeal.) They held further that the Administration had failed to explain why it had changed the percentages and that its action had been irrational. In its report of 29 April 1991 the headquarters Board in turn held that the Administration had not properly answered the staff's plea of breach of acquired rights and it recommended granting an increase of 9.2 per cent to all staff "subject only to negative indexation".

5. The WHO has not offered the Tribunal either a satisfactory answer to the plea. All it says in its reply to the complaints, in a passage that addresses both the issue of acquired rights and the complainants' charge of personal prejudice, is the following:

"These allegations have no merit whatsoever. How could a mini survey intended to update the earlier salary scales be motivated by prejudice and violate the complainants' acquired rights? It is absurd to raise these issues, and it may [be] worthwhile mentioning that similar allegations with respect to the 1986 survey and the 1987 mini-survey were made before the ILO Administrative Tribunal but those allegations were rejected by the Tribunal. (See Judgment No. 1160, p. 17, paragraph 20.)"

Judgment 1160, which the defendant cites, rests on the finding that the mini-survey which led to the interim adjustment of the salaries of General Service staff in SEARO in 1987 was not properly carried out. It held that, in the absence of any explanation to the contrary, it was not administratively impossible to carry out a new survey, and it sent the case back to the Director-General with an order to take a new decision. What it dismissed was all the complainants' "other claims". The Tribunal did not even entertain, let alone reject, the complainants' allegations about the actual survey.

6. By virtue of revision 29 an unconditional salary increase of 9.2 per cent was announced to the staff, the sums due were paid, and the staff thereby obtained a right to the increase. No subsequent amendment with retroactive effect might deprive the complainants of the right they had to that salary. As was said in Judgment 323 (in re Connolly-Battisti No. 5) under 34, "when the Organization has calculated a payment of salary and announced it, the officials entitled to it acquire a right which the Organization has no power to destroy".

The claim the complainants base on breach of acquired rights therefore succeeds.

The claim to restructuring of the scales

7. The Tribunal will not, however, entertain their claim to the restructuring of revision 29. It was superseded by revision 29, amendment 1, anyway. Although they are entitled to restoration of the average salary increase of 9.2 per cent, there is no evidence to suggest that the increase in steps from 17 to 18 in grades ND.5 and ND.6, which allowed staff at the top of their grade to get one further annual increment, caused the complainants any injury. The inter-step differentials in their grades were constant throughout and were not reduced. Nor was there any change in the inter-grade differentials for their grades.

So the Tribunal will not further review the application of the methodology insofar as it affected the complainants.

Costs

8. Since the complainants have succeeded in part they are entitled to awards towards costs.

The applications to intervene

9. There are fifteen applications to intervene. They are receivable under Article 17 of the Rules of Court and are allowed. The applicants shall have the same rights as the complainants themselves insofar as they are in like case in law and in fact

DECISION:

For the above reasons,

1. The Director-General's decision dated 12 July 1991 is quashed insofar as it reduced from 9.2 to 8.9 per cent the increase in the complainants' salary.

2. The sums due to the complainants in accordance with revision 29, amendment 1, shall be recalculated so as to grant them a 9.2 instead of an 8.9 per cent increase and shall be paid accordingly.

3. The Organization shall pay each of the complainants 250 United States dollars towards costs.

4. The interveners shall have the same rights as the complainants insofar as they are in like case in law and in fact.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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