SEVENTY-FOURTH SESSION

In re SHARMA (No. 3)

Judgment 1238

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Hari Chand Sharma against the World Health Organization (WHO) on 18 May 1992, the WHO's reply of 21 July, the complainant's rejoinder of 28 August and the Organization's surrejoinder of 30 September 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Staff Rules 1070.1 and 1110.1;

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

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

A. Facts relevant to the present dispute appear in Judgment 999 of 23 January 1990 under A. The complainant, an Indian born in 1951, joined the WHO's South East Asia Regional Office (SEARO), in New Delhi, in 1981 under a fixed-term appointment as a janitor at grade ND.2. He was promoted to ND.3 in 1984 and appointed to a post as storekeeper at ND.4 in 1985. In 1986 the Administration arranged with one of its suppliers for short delivery of supplies to entrap him. In February 1987 he got a performance report for 1985-86 which referred to "misconduct on his part". By a letter of 21 July 1987 the Regional Director charged him with accepting short delivery in August 1986 and attempting to cover it up by altering indents, forging signatures and tampering with stock cards. The letter also ordered his dismissal as from 22 July 1987.

The Regional Board of Appeal, to which he appealed on 7 September 1987, found no evidence of misconduct and described his certifying short delivery of sanitary napkins as an "honest mistake". It considered the penalty of dismissal to be out of proportion to his offence and pointed out the Administration's failure to take account of facts and to comply with the material rules. It recommended reinstating him at a lower grade, amending his appraisal report, and paying him moral damages and costs. By a letter of 28 April 1988 the Regional Director rejected the Board's recommendation and the appeal.

The headquarters Board of Appeal, to which he then went, reported on 5 December 1988 that there was a "strong presumption" of misconduct. It recommended rejecting his appeal and the Director-General did so in a letter of 5 January 1989.

The complainant then came to the Tribunal and claimed the quashing of the Director-General's decision, reinstatement without loss of seniority or pay, the removal or amendment of the adverse remarks in his appraisal report for 1985-86, moral damages and costs. In Judgment 999 the Tribunal held that the internal appeal proceedings had been in breach of due process. The flaw was that there had been a meeting which the complainant was not invited to and whose purpose was to clarify whether he had forged the signature of another official, a Mr. Bisht. The Tribunal set the decision aside, sent the case back to the Organization for review of the complainant's internal appeal and awarded him damages.

On 11 April 1990 the complainant accordingly filed another statement of appeal with the Regional Board. In the ensuing proceedings Mr. Bisht admitted under cross-examination that the disputed signatures on the indents were his own, not forgeries.

In its report of 15 January 1991 the Regional Board again held that the main charges against the complainant were unproven and recommended reinstating him and paying him compensation for unpaid salary and 2,000 United States dollars in costs. But in a letter of 18 February 1991 the Regional Director rejected the Board's recommendations.

On 6 March 1991 the complainant again went to the headquarters Board of Appeal. Reporting on 28 October 1991, the headquarters Board concluded that misconduct had not been proven; though the short deliveries showed negligence no intent to defraud on his part had been shown. The Board recommended reinstating him at the same

grade and awarding him compensation for unpaid salary but withholding within-grade increments because of his "poor performance", as illustrated by his negligence in this particular case.

By a letter of 20 February 1992 the Director-General informed him that, even if his certifying full delivery of the sanitary napkins were regarded as negligence, "the act of altering the indents to cover up is inadmissible"; reinstatement in his old job was not in the Organization's interest and there was no suitable "position of less responsibility". He would be granted two years' salary in compensation and $200 in costs. That is the impugned decision.

B. The complainant submits that that decision shows several flaws.

(1) It does not state the legal basis for it. The Director-General could not have relied on Staff Rule 1110.1, which provides for dismissal in cases of misconduct, because, as both Boards of Appeal held, there was no evidence of misconduct. Nor could he have relied on Rule 1070.1, which provides for the dismissal of an official whose service is unsatisfactory or who proves unsuited for international service: that presupposes recurring lapses, not just one. The Director-General's statement that "altering the indents to cover up is inadmissible" gratuitously assumes a cover-up and coins a new term - "inadmissible" - to described his conduct so as to warrant action that was, for all that, ultra vires.

(2) The Director-General drew a mistaken conclusion from the evidence. It was unreasonable of him, when both Boards had recommended reinstatement, to say that it would not be in the WHO's interests. What does damage the Organization and its good name is its refusal to take him back.

(3) The Director-General overlooked such essential facts as his unblemished record of service.

(4) The Administration acted out of bias. Of the five charges originally laid against him in April 1987 only two had survived by the time of his dismissal, and the Boards of Appeal rejected them. Even the lack of evidence of a cover-up did not sway the Director-General.

(5) The Regional Director's letter of 18 February 1991 referred to the proceedings in 1988 before the headquarters Board of Appeal. Since those proceedings were flawed the references are inadmissible.

The complainant presses the arguments summed up in Judgment 999 under B against the Regional Director's decision of 21 July 1987 to dismiss him. He again maintains, among other things, that the WHO failed to discharge the burden of proof and acted in breach of good faith and the rule of proportionality. It was so dilatory, too, that over four years passed between the filing of his first appeal and the impugned decision.

He seeks the quashing of the decision, reinstatement at his previous grade and compensation for unpaid salary, damages for moral injury including loss of reputation, the removal of adverse remarks from his report for 1985-86, and costs.

C. In its reply the WHO acknowledges that it was at fault in dismissing the complainant and owes him compensation for wrongful dismissal. So there is no need, it contends, to establish what staff rules it applied. The Director-General's use of the term "inadmissible" is not, as he suggests, a devious way of declaring him guilty of misconduct. Certifying the invoices was negligence and tampering with the indents and stock cards - even if in good faith and reported to his supervisor - was unsatisfactory service. What kept him from withholding certification until after checking? The Director-General's assessment of the Organization's interests rests on acknowledged facts and shows none of the flaws the complainant alleges.

The decision to award damages in lieu of reinstatement was at the Director-General's discretion and is beyond reproach.

The Tribunal ordinarily limits damages for wrongful dismissal to the equivalent of two years' salary. As it held in Judgment 542 (in re Firmin), it will not make a complainant whole if there was fault on both sides. The complainant's performance warranted removing him from his post as storekeeper and giving him a less responsible position. There being no suitable vacancy, the award of two years' salary is proper compensation for the loss of employment and moral injury.

Because the WHO improperly used his appraisal report to introduce disciplinary proceedings, it is willing, as he

asks, to strike the adverse remarks from his report.

D. In his rejoinder the complainant objects to the Organization's citing throughout its reply the findings by the headquarters Board of Appeal in 1988, which the Tribunal has declared improper. Correcting the stock cards in good faith was not "falsification": the essence of that is dishonest intent, something the Administration has failed to show. Even though the Regional Director alleged in his letter of 18 February 1991 that he had intended to "defraud the Organization", the Administration does not even try to prove that he sought personal gain in the single instance on which its charge of "inadmissible" conduct rests.

He objects to the Organization's insinuating that if its witness had appeared before the Regional Board its case against him would have held. Perhaps the witness was just a figment in the minds of those who plotted against him.

Though the WHO recognises that the charges in the original letter of dismissal fail, it denies him reinstatement on the very same grounds: it admits to breaking its own rules but refuses to reverse its unlawful decision.

His case is quite different from the one ruled on in Judgment 542, which was about an official who was seriously at fault. In cases like his own the Tribunal has ordered reinstatement.

As for the WHO's interests, he has never caused the Organization to lose a rupee in his work as storekeeper. Even supposing he was remiss in counting supplies on one occasion, that one "honest mistake" did not make him unfit for service.

Short of reinstatement, expunging the remarks in his report will be derisory redress. If he is left to bear the stigma of dismissal, his search for suitable employment may prove hopeless. He presses his claims.

E. In its surrejoinder the WHO submits that the witness it called refused to testify because of threats from the complainant that included court action for "cheating and making false statements to WHO". Though the complainant reported his fault to his supervisor, that no more absolved him than did the Administration's failure to react at the time. The Organization should not have to reinstate him simply because of breach of due process: actions that he himself admits to would make reinstatement "neither possible nor advisable".CONSIDERATIONS:

1. The Tribunal having ordered in Judgment 999 that the complainant's internal appeal be reconsidered, both the Regional and the headquarters Boards of Appeal held that the charges had not been established and recommended reinstating the complainant and paying him compensation for unpaid salary. The Director-General decided, however, that reinstatement was not in the Organization's interests and granted him two years' salary in compensation.

2. The Organization concedes in its reply:

"The complainant was improperly dismissed on the basis of the charges of misconduct made in the letter of 21 July 1987, since, based on the findings of both the Regional and headquarters Boards of Appeal, these charges cannot be substantiated.

Consequently, the Organization was at fault in dismissing him and owes him compensation for the wrongful dismissal."

It also states that "As the charges have been abandoned and the Organization acted incorrectly in using the performance appraisal to introduce disciplinary procedures, it is prepared to expunge the adverse remarks", as the complainant asks, from his performance appraisal report for 1985-86.

3. The WHO refuses reinstatement on the grounds that the Director-General decided that it was not "in the interest of the Organization"; that the Director-General's appreciation of that interest was based on admitted or proven fact, there being neither a wrong conclusion of fact nor an error of law; that he properly exercised his discretion in deciding not to reinstate the complainant but to award him compensation instead; and that a sum equivalent to two years' salary and allowances was fully adequate as compensation both for the loss of his employment and for the moral injury.

4. An employee who is wrongfully dismissed is ordinarily entitled to reinstatement. But the Tribunal may refuse to order it if it is not possible or advisable. It would not, for instance, order reinstatement if the circumstances of the

dismissal were such that it would no longer be reasonably possible for the employee to perform his duties effectively or harmoniously or for the employer to continue to feel confidence or trust in him.

Even if the Director-General has discretion to refuse reinstatement "in the interest of the Organization" he must exercise it fairly and reasonably after considering all the material facts. Here the facts were that the complainant had throughout had irreproachable appraisal reports. He had been granted a salary increment for 1985-86 after the incident that led to the dispute. Despite surveillance, without his knowledge, for six months prior to that incident no wrongdoing, negligence or irregularity on his part was discovered. Some of the many categories of items he was in charge of were much costlier than sanitary napkins, and at no time was any shortage or irregularity discovered in other items. This was the first occasion of proven negligence on his part, a single blemish upon an exemplary record of service. Although the Director-General states in his letter of 20 February 1992 that "the act of altering the indents to cover up is inadmissible", both Boards held that the charge of forgery of the indents had been disproved and that there was no mala fides or intention to defraud on the part of the complainant. Moreover, the Organization suffered no actual loss.

The Director-General has failed to take into consideration the above material facts and has erred in treating the complainant as guilty of a "cover-up". The refusal of reinstatement was thus not a proper exercise of whatever discretion he had in the matter. To condemn someone to unemployment on account of a single negligent act unaccompanied by improper intention, and in circumstances that do not justify loss of confidence by the employer, is to demand a humanly impossible standard of performance by the employee and makes the right to reinstatement illusory.

5. In the circumstances the refusal of reinstatement is not justified, and the fact that dismissal occurred over five years ago does not stand in the way of reinstatement, especially since the complainant was not responsible for any of the delay. He is accordingly entitled to reinstatement. The Organization shall pay him the salary, allowances and other entitlements which he would have received had he remained in its employ from 22 July 1987 up to the date of this judgment.

As to the future it must do its utmost to reinstate him in the post which he held on 21 July 1987 or in any comparable one acceptable to him. Only if that proved impossible should it pay him additional damages equivalent to the salary, allowances and other entitlements which he would have received over a period of two years had he been reinstated in its employ as from the date of this judgment.

6. Since he succeeds in his claim to reinstatement the question of the adequacy of compensation does not arise.

7. He is entitled to have the Organization strike out its adverse comments from his performance report for 1985-86 and to an award of costs.

8. The Tribunal held in Judgment 999 that the complainant had been caused "injury, whatever the outcome may eventually be" and it awarded him $500 in damages. Since he has already obtained that relief, his claim to moral damages is refused.

DECISION:

For the above reasons,

1. The decisions of 21 July 1987 and 20 February 1992 are quashed.

2. The Organization shall pay the complainant the salary, allowances and other entitlements which he would have received had he remained in its employ from 22 July 1987, to the date of this judgment.

3. It shall reinstate him as from the date of this judgment.

4. If it cannot do so it shall pay him additional damages equivalent to the salary, allowances and other entitlements which he would have received over a period of two years had he been reinstated as from the date of this judgment.

5. The Organization shall expunge the adverse remarks from his performance appraisal report for 1985-86.

6. It shall pay him $2,500 in costs.

7. His other claims are disallowed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

William Douglas
E. Razafindralambo
Mark Fernando
A.B. Gardner

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