

SEVENTY-NINTH SESSION

In re MALHOTRA (No. 2)

Judgment 1434

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Kashmiri Lal Malhotra against the World Health Organization (WHO) on 27 May 1994 and corrected on 10 June, the WHO's reply of 2 September, the complainant's rejoinder of 27 September as supplemented on 10 October 1994 and the Organization's surrejoinder of 17 February 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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. The complainant, a citizen of India born in 1936, is on the staff of the WHO in its Regional Office for South East Asia (SEARO), where he holds grade ND.6. Further information on his career is set out under A in Judgment 1372 of 13 July 1994 on his first complaint.

In September 1991 the Administration put up for competition a post, No. 5.0027, for an "assistant II" in the personnel unit at grade ND.7. The complainant was one of 23 applicants. An ad hoc selection committee drew up a short list and submitted it to the Regional Director, who took the final decision. By a memorandum of 19 February 1992 the Regional Personnel Officer informed the complainant that his application had not been successful.

On 14 April 1992 he appealed to the regional Board of Appeal on grounds of personal prejudice, incomplete consideration of the facts and failure to comply with the rules and with the terms of his appointment.

The regional Board asked the Administration, among other things, to produce the papers it had submitted to the selection committee and to indicate whether the committee's members included a representative of the Staff Association. The Administration refused to provide the papers on grounds of privilege and said that no representative of the Staff Association had agreed to sit on the committee.

In its report of 29 March 1993 the regional Board confined itself to the matter of compliance with the material procedure and rules since it could not compare the candidates' qualifications. It concluded that there was not enough evidence to bear out the complainant's plea of personal prejudice but made no recommendation on his other pleas for want of the information it had sought from the Administration. By a letter of 20 April 1993 the Regional Director told the complainant of the rejection of his appeal.

On 21 May 1993 he put his case to the headquarters Board of Appeal. In a report dated 25 January 1994 it recommended by a majority of four to one upholding the Regional Director's decision. The dissenting member observed that it had had no more information from the Administration than the regional Board and so was no more able to make a recommendation.

By a letter of 28 February 1994, which he impugns, the Director-General endorsed the majority recommendation.

B. The complainant pleads discriminatory treatment and breach of the applicable rules. As in his previous case he says he is the victim of prejudice for having spoken out on behalf of the staff in several joint bodies. He mentions procedural flaws in reports appraising his performance and in the review of his applications for other vacancies.

In his submission the Organization failed to follow the proper selection procedure. Although Rule 410.4 says that for "posts below the level of director" selection shall "normally be on a competitive basis", a single official in the personnel unit decided on one applicant and sat on the selection committee so as "to justify his choice". The work of the committee being a mere "formality", the president of the Staff Association refused to have any part of it. But the president's absence amounts to a breach of procedure and invalidates the committee's recommendation.

The complainant further objects to the Administration's failure to make available to the regional Board the documents on which the selection committee relied. Only the personal opinions of members of the committee are privileged. Meeting as he does the highest standards of "efficiency, competence and integrity" required for promotion under Regulation 4.2, he believes that the WHO has tried to conceal the Regional Director's disregard of his seniority and the breach of the duty of care it owes him.

He asks the Tribunal to quash the appointment made to post 5.0027 and declare him the successful candidate; award 30,000 United States dollars in compensation for "grave injury, moral prejudice, mental torture, and loss of reputation"; and award him costs.

C. In its reply the WHO says that, though the complaint is devoid of merit, it is willing, in the light of Judgment 1372 and subject to the complainant's approval, to send the case back to the regional Board of Appeal, which will have the full records of the selection committee's proceedings.

The complainant has not produced a shred of evidence of personal prejudice. On the contrary, at a time when he was "particularly active" as a staff representative the WHO granted him three "exceptional" within-grade increments.

There was no formal or procedural flaw. That the same personnel officer acted at various stages of the selection does not explain why the Regional Director picked a candidate other than the complainant. If the Staff Association chooses not to have a representative on the selection committee the Administration may not order it to appoint one. Since Manual paragraph II.3.390 merely says that selection committees for General Service posts in regional offices must "normally" consist of four members, the absence of the president did not constitute a breach of procedure.

The impugned selection was a proper exercise of discretion. The complainant's seniority was but one of several criteria by which the Administration assessed his and the other 22 applications. The Regional Director did not overlook any essential fact and his choice showed none of the flaws that might warrant setting it aside.

D. In his rejoinder the complainant refers to what in his third complaint he alleges to be the WHO's failure to execute Judgment 1372 in full: if the Organization flouts a decision of the Tribunal's, how scrupulously can it be applying its own rules? He enlarges on his earlier pleas and accuses the Regional Director of overlooking the regional Board's inability to make a recommendation.

E. In its surrejoinder the WHO points out that the issues the complainant raises in his third complaint are immaterial. It was in his appeal to the headquarters Board that he should have raised his objections to the Regional Director's decision. As to his claim to the quashing of the decision the WHO points out that according to the case law the Tribunal will not assess candidates on merit.

CONSIDERATIONS:

1. In 1964 the complainant joined the WHO as a secretarial assistant at grade ND.5 in its Regional Office for South East Asia (SEARO) in New Delhi. His post was upgraded to ND.6 and he was promoted to that grade in 1979. His complaint is that the Organization did not select him for a post which fell vacant in September 1991 for an assistant at grade ND.7 in the personnel unit. He is asking the Tribunal to quash the selection, declare his own appointment to the post and award him damages for moral injury and costs.

2. He was one of 23 applicants for the post. He appealed to the regional Board of Appeal against the Regional Director's decision to appoint another applicant, pleading that that decision was based (1) on personal prejudice, contrary to Staff Rule 1230.1.1; (2) on incomplete consideration of facts, contrary to 1230.1.2; and (3) on failure to observe or apply correctly the Staff Regulations and Staff Rules and the terms of his contract, contrary to 1230.1.3.

3. As in the case which prompted the complainant's first complaint, and on which the Tribunal ruled in Judgment 1372, the regional Board of Appeal took the view that it could not "go into the comparative merits and ultimate quality of the individual applicants"; that it should consider only whether there had been compliance with the rules and procedures for the selection of staff; and that for the proper adjudication of the appeal it required the further information and documents which had been available to the selection committee, but which the Organization refused to provide on the grounds of confidentiality. So the Board was unable to make any recommendation on the complainant's pleas (2) and (3). The Regional Director rejected his appeal; he made an appeal to the headquarters Board; and the Director-General rejected it too on 28 February 1994.

4. It was on 13 July 1994, after he had filed this complaint, that the Tribunal delivered Judgment 1372 on his first one and therein affirmed that an item that formed part of the proceedings which had led to an impugned decision might not be withheld from the scrutiny of the Tribunal or of any internal appellate body.

5. On 2 September 1994 the Organization wrote a letter to the complainant and filed its reply to the complaint. In both its letter and its brief it stated that it accepted the Tribunal's ruling and agreed that the case should be sent back to the regional Board, and if need be to the headquarters Board, to enable them to take up the complainant's case anew with full access to the records of the selection committee's proceedings. It suggested that the complainant should withdraw suit.

6. The complainant declined to do so, mainly from a mistaken belief that the Organization had not duly executed Judgment 1372 in that it had not revoked the selection he had impugned in his first complaint but had instead promoted the successful candidate. He did, however, also refer to the fact that the Tribunal might award him damages and costs.

7. For the same reasons as those stated in Judgment 1372, this case too must be sent back to the Organization for a fresh hearing of the complainant's appeal.

8. For the reasons it gives in Judgment 1435 delivered this day on the complainant's third complaint the Tribunal will not quash the impugned selection, and it cannot declare the complainant's appointment to the post in question.

9. Yet he was denied due process in the internal appeal proceedings, and for that he was entitled to redress. The Organization did not offer him any. The Tribunal will therefore award him 3,000 United States dollars in moral damages and 200 dollars in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 28 February 1994 is quashed.
2. The case is sent back to the Organization so that the regional Board of Appeal and, if need be, the headquarters Board may take up the complainant's appeal anew.
3. The Organization shall make available to the boards of appeal the full records of the selection committee's proceedings for the purpose of appeal.
4. It shall pay the complainant 3,000 United States dollars in moral damages.
5. It shall pay him 200 dollars in costs.
6. His other claims are dismissed.

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

Delivered in public in Geneva on 6 July 1995.

William Douglas
P. Pescatore
Mark Fernando
A.B. Gardner