

## SEVENTY-NINTH SESSION

### *In re* MALHOTRA (No. 3)

#### (Application for execution)

#### Judgment 1435

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Kashmiri Lal Malhotra on 16 September 1994 for the execution of Judgment 1372, the reply of 17 November from the World Health Organization (WHO), the complainant's rejoinder of 12 December 1994 and the WHO's surrejoinder of 13 March 1995;

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

Having examined the written submissions;

#### CONSIDERATIONS:

1. The complainant is employed in the WHO's Regional Office for South East Asia (SEARO). On 13 December 1990 he appealed to the regional Board of Appeal challenging the decision not to appoint him to a grade ND.7 post he had applied for in the Regional Office and asking that the selection of the successful applicant be quashed.
2. Having considered the Board's report the Regional Director rejected his appeal on 27 January 1992. The complainant having appealed to the headquarters Board of Appeal on 26 May 1992, the Director-General decided on 6 August 1993 to confirm the Regional Director's decision. That was the decision that the complainant impugned in his first complaint.
3. For the reasons set out in Judgment 1372 of 13 July 1994 the Tribunal quashed the Director-General's decision and awarded the complainant damages and costs. It sent the case back to the Organization to enable the regional Board, and if need be the headquarters Board, to take up the complainant's appeal anew and it ordered that the Organization make available to the boards of appeal the full records of the ad hoc selection committee's proceedings.
4. With effect from 1 September 1994 the Organization promoted to grade ND.8 the candidate whose selection the complainant had challenged in his first complaint.
5. On 9 September 1994 it paid the complainant the damages and costs awarded in Judgment 1372.
6. Since the Organization had not, despite the lapse of two months, yet referred the complainant's case to the regional Board the complainant filed this application on 16 September 1994 asking that the WHO be reprimanded and that:
  - (a) because the Director-General's decision of 6 August 1993 had been quashed the Organization should cancel the selection of the successful candidate, put him back on his former ND.6 post and stay his promotion to ND.8;
  - (b) proceedings should begin anew on the complainant's appeal as directed in Judgment 1372; and
  - (c) he should be awarded interest for one month on account of the delay in the payment of damages and costs.
7. There is no longer any dispute over interest, the Organization having paid him on 9 November 1994 interest at the rate of 10 per cent a year.
8. The effect of Judgment 1372 was to annul the internal proceedings subsequent to the complainant's appeal to the regional Board and the Director-General's conclusion of 6 August 1993 that the selection was in order. That meant only that the complainant's challenge to the process of selection had to be considered anew. He is mistaken in thinking that the judgment quashed the selection at once; if that were so, the Tribunal's order that the complainant's appeal be considered anew would have been superfluous. It is only after such reconsideration that the Organization

will decide whether to withdraw the impugned selection. The selection will therefore remain in effect unless and until it is declared null and void. The claim fails.

9. The Organization submits that the promotion of the successful candidate to grade ND.8 was in accordance with its Staff Rules.

10. The complainant has not on any grounds challenged that promotion by way of an internal appeal and he has therefore failed to exhaust the internal remedies available to him. What is more, he has failed to show that he was adversely affected by the promotion. So the Tribunal will not in the context of this application determine whether or not the promotion was valid.

11. The WHO contends that because it has fully complied with Judgment 1372 the complaint is devoid of merit. It says:

"Compliance with Judgment No. 1372 was confirmed by the complainant in his letter to the Organization's Director of Personnel, dated 7 September 1994 (nine days before the date of his complaint), in which he states, 'I am glad to note that you have decided to implement ... Judgment No. 1372, I believe in toto'."

12. The complainant made that statement in reply to the Organization's letter of 2 September 1994 which dealt, not with this matter, but with his second complaint, objecting to the selection made for another post. In that letter the Organization proposed by way of settlement that the complainant should withdraw that complaint, whereupon the regional Board would reconsider his appeal against that other selection.

13. The Organization made no unequivocal statement that his first appeal, which led to Judgment 1372, would be sent back to the regional Board. The complainant was justified in applying to the Tribunal after the lapse of two months for execution of the judgment. Only on 2 November 1994 did the Organization inform the complainant for the first time that his appeal had been returned to the Board for rehearing.

14. Though the Organization did not execute the judgment as promptly as it should have, the Tribunal will make no award of damages in view of the award it makes in Judgment 1434 of this day on the complainant's second complaint. It awards him two hundred United States dollars in costs.

#### DECISION:

For the above reasons,

1. The Organization shall pay the complainant 200 United States dollars in costs.
2. His claim to damages is 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