

EIGHTIETH SESSION

In re GUPTA

Judgment 1473

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Shiv Raj Gupta against the World Health Organization (WHO) on 9 December 1994 and corrected on 21 December 1994, the WHO's reply of 29 March 1995, the complainant's rejoinder of 28 April and the Organization's surrejoinder of 5 July 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, 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. WHO Staff Rule 355 provides for payment to a staff member of the Organization of a special education grant for any "physically or mentally incapacitated" dependent child up to the end of the year in which the dependant reaches the age of 25. The grant covers the full amount of expenses the staff member incurs up to a specified maximum for the year.

The complainant, an Indian citizen, joined the staff of the WHO in July 1979 as a clerk/typist at grade ND.3 in the Organization's Regional Office for South East Asia (SEARO) in New Delhi. His present grade is ND.5.

In July 1979 he applied for the special education grant under Staff Rule 355 for his six-year-old daughter Neeta, who had residual paralysis of her right leg from poliomyelitis. In September 1981 the Organization agreed to pay him the grant with the rider that it would refund the costs of a private tutor and of conveyance by taxi "for up to twelve months, at the present time". It went on paying him the grant over the next few years.

On 20 March 1986 his daughter had an accident in which she suffered severe abdominal injuries and pelvic fractures. By a memorandum of 14 May 1986 to the Personnel Division of SEARO the complainant applied for a special education grant for his daughter for the school year 1984-85. He appended a letter dated 19 March 1983 from an orthopaedic surgeon stating that his daughter was "unable to concentrate on her studies as much as she should" and that "the need for a special tutor is justifiable".

By a memorandum of 4 August 1986 a personnel officer informed him that to claim the refund of the cost of private tuition he should provide medical evidence that his daughter needed it "on account of" her disability. The complainant thereupon submitted written evidence. He learned from a memorandum the personnel officer sent him on 27 April 1987 on the Regional Director's behalf that the Joint Committee on Special Education Grants at WHO headquarters, in Geneva, had found "no justification" for further payment of the grant. The Committee recommended that he submit to the regional Insurance Surveillance Committee, in New Delhi, his claims arising out of his daughter's accident in March 1986.

The complainant asked for review of that decision by a memorandum of 14 July 1987 to an insurance officer but the personnel officer confirmed it on the Regional Director's behalf in a memorandum of 22 December 1987. In a letter of 30 May 1988 the staff physician of SEARO asked the complainant's daughter to undergo examination so that he might "review her case". There followed correspondence on the subject between the complainant and the Administration. On 2 July 1991 the staff physician declared her to be "handicapped by 1) poliomyelitis of right leg and 2) tilting of pelvic bones due to injuries by accident".

The upshot was a memorandum dated 26 July 1991 from the personnel officer telling the complainant that the Joint Medical Service at headquarters did not consider her to be a "disabled child" within the meaning of Staff Rule 310.5.2 and she therefore failed to qualify for the grant under Rule 355.

The complainant objected and again the regional staff physician examined his daughter. By a memorandum of 2 April 1993 the personnel officer informed him that the Medical Service felt unable to change its earlier

"recommendation". The complainant having asked why, the Director of Personnel told the staff physician in a memorandum of 14 July 1993 that his daughter failed to qualify because she was not "mentally handicapped" and her difficulties in learning were "not attributable to her physical handicap".

On 5 October 1993 the complainant appealed against that decision. The regional Board of Appeal, which took up his case in January 1994, recommended rejecting it as time-barred. The Regional Director endorsed the Board's recommendation and the complainant got notice of his decision in a letter of 31 January 1994.

He then went to the headquarters Board of Appeal, which also recommended rejection in its report of 22 September 1994. By a letter of 18 October 1994, which the complainant impugns, the Director-General decided to endorse that recommendation.

B. The complainant submits that his complaint is receivable and the impugned decision unlawful. The WHO's calls for new evidence and the further medical examinations it ordered show that it was still reviewing his daughter's case and that he had to await a substantiated decision. The Organization shows bad faith in saying that it had already taken the appealable decision on 27 April 1987.

To stop the grant was arbitrary and in breach of Rule 355. His daughter suffers from permanent disability, and doctors and teachers blame it for her difficulty at school. What purpose is the grant to serve but to help disabled dependants to make the most of their abilities?

He seeks payment under Rule 355 to cover the costs of private tuition for his daughter and travel by taxi to and from school. He also claims 25,000 United States dollars in damages and an award of costs.

C. In its reply the WHO contends that the complaint is irreceivable. The memorandum of 27 April 1987 contains the final decision. He had sixty days in which to appeal and his challenge to it was over six years late.

On the merits the Organization submits that the decision complied with Rule 355.2. For want of medical evidence that his daughter's difficulty in learning arose from her disability, payment of the grant was not warranted.

D. In his rejoinder the complainant points out that the Administration never referred to its memorandum of 27 April 1987 as "final" until he put the matter to the regional Board. That is why he answered its requests for further medical evidence. The WHO's denial of his daughter's disability is at odds with the facts and with its earlier application of Rule 355.2.

E. In its surrejoinder the Organization presses its arguments in the reply. It has never denied the permanent disability of the complainant's daughter; but not every disability confers entitlement to the grant. In this case the conditions for payment are not met.

CONSIDERATIONS:

1. The complainant is employed in the General Service category of staff of the World Health Organization at its Regional Office for South East Asia in New Delhi. He is the father of a physically handicapped daughter, Miss Neeta Gupta, who was born in 1973. She suffers from residual paralysis due to poliomyelitis.

2. On 12 July and 12 November 1979 the complainant applied for a grant in respect of his daughter under WHO Staff Rule 355, which is headed "Special Education Grant for Disabled Children". Staff Rule 355.2 reads:

"The special grant is payable when the Organization determines, on the basis of medical evidence and in accordance with review procedures established by the Director-General, that one of the following circumstances applies:

355.2.1 the child is unable by reason of physical or mental disability to attend a normal educational institution and therefore requires special teaching or training to prepare him for full integration into society;

355.2.2 the child, while attending a normal educational institution, requires special teaching or training to assist him in overcoming the disability."

3. On 4 September 1981 the Organization approved the reimbursement to the complainant of the cost of special

shoes for his daughter and of her doctor's fees, and for up to twelve months her treatment by physiotherapy, coaching by a private tutor and fares for taxis to take her to and from the centre for physiotherapy. It later authorised up to the school year that ended in 1986 the payment to the complainant of medical fees, charges made for physiotherapy, equipment and the costs of private tuition.

4. On 20 March 1986 the complainant's daughter suffered serious injury in an accident which caused, among other things, fractures and tilting of her pelvis.

5. By a memorandum dated 27 April 1987 a personnel officer in the Regional Office told the complainant that the headquarters Joint Committee on Special Education Grants -

"could find no justification for further payment of special education grant for Neeta Gupta, since it did not appear that in fact she required, or was receiving, any 'special' teaching or training designed to meet a specific physical or mental disability."

6. By a memorandum of 14 July 1987 to an insurance officer in the Regional Office the complainant applied for review of that decision. After referring to his daughter's handicap and the injuries she had suffered in the accident in 1986 he maintained that she was "not in a position to travel by bus" and had therefore "been going to school by taxis".

7. The Organization's position having nevertheless remained unchanged, correspondence ensued on the subject between the parties. In 1991 the regional staff physician referred the case to the Joint Medical Service at headquarters in Geneva. In a memorandum dated 26 July 1991 the personnel officer told the complainant that according to the Medical Service "Miss Neeta Gupta could not be recognised as disabled and, therefore, she is not eligible to be covered by the articles 310.5.2 and 355 of the Staff Rules". The complainant having objected, the regional staff physician had his daughter examined again by an orthopaedic surgeon in New Delhi. By a certificate dated 14 November 1992 the surgeon declared her to be suffering from 50 per cent permanent disability in the right leg and unable to walk long distances. The staff physician then made a new report to headquarters. The upshot was that by a memorandum of 14 July 1993 to SEARO, of which the complainant got a copy, the Director of Personnel stated the Organization's conclusion that his daughter's "scholastic difficulties are not attributable to her physical handicap ... Thus Neeta no longer qualifies for special education grant since those expenses are only for teaching or training services and/or related equipment".

8. On 5 October the complainant appealed against that decision to the regional Board of Appeal. In January 1994 the Board recommended rejection of the appeal and the Regional Director endorsed that recommendation in a letter of 31 January 1994. The complainant then put his case to the headquarters Board of Appeal. In its report of 22 September 1994 that Board too recommended rejecting the appeal, and the Director-General decided to follow that recommendation by a letter dated 18 October 1994. That is the decision the complainant is impugning.

9. The first material issue is whether or not the Organization's decision of 27 April 1987 was a "final" one within the meaning of Article VII(1) of the Tribunal's Statute. The complainant says not, on the grounds that throughout the exchange of correspondence between headquarters and the Regional Office the matter remained open. In his submission it was not until 14 July 1993 that the Organization at last decided that his daughter's scholastic difficulties were not attributable to her physical handicap and that he had a decision of "some substance" to appeal against. For its part the Organization contends that its final decision was in the personnel officer's memorandum of 27 April 1987.

10. In Judgment 1304 (in re Coe) the Tribunal ruled, under 5, that there had been an express decision to terminate the complainant's appointment and that the "further action he took or any proposals that may have been made to him" did not detract from the finality of the decision. Likewise in Judgment 1327 (in re Gillespie) the Tribunal held, under 7, that a decision remained final within the meaning of the defendant organisation's staff rules "even though later incidents and correspondence may have suggested that there was some possibility of a change" in that organisation's position.

11. Much of the pleadings in this case debates whether or not the complainant's daughter is disabled. But that is a separate issue. In support of his application under Rule 355 the complainant attached to his memorandum of 14 May 1986 to the Personnel Division of SEARO a letter dated 19 March 1983 from an orthopaedic surgeon saying that because of physical disability his daughter was "unable to concentrate on her studies as much as she should".

The complainant appends to his rejoinder a certificate dated 4 July 1987 by a psychiatrist stating that his daughter "is in need of special coaching". But he did not append that certificate to his memorandum of 14 July 1987 seeking review of the Organization's decision of 27 April 1987. In that memorandum he merely sought reimbursement of the cost of taxis his daughter had taken to and from school, and he made no mention of her need for private tuition on account of physical disability. So the Organization concluded that his daughter's scholastic difficulties were "not attributable to her physical handicap" and that she no longer qualified for a special education grant.

12. The Organization's decision of 27 April 1987 was final in refusing payment of the special education grant. Though the Organization was willing to consider further medical reports and change its mind if the evidence so warranted, that decision was still a final one. In the event the complainant failed to produce admissible evidence and it took no new decision. Having failed to make his internal appeal against the decision of 27 April 1987 within the time limits set in the Staff Rules, he has not properly followed the internal procedure of appeal and his complaint is therefore irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 1 February 1996.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner