

## **EIGHTY-SEVENTH SESSION**

### ***In re Gupta (No. 5)***

#### **Judgment 1860**

The Administrative Tribunal,

Considering the fifth complaint filed by Mr Shiv Raj Gupta against the World Health Organization (WHO) on 3 June 1998, the WHO's reply of 9 September, including comments invited by the Tribunal from Mr Deepak Chopra, the complainant's rejoinder of 16 November 1998 and the Organization's surrejoinder of 16 February 1999;

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's career in the WHO is described in Judgment 1473, dated 1 February 1996, on his first complaint. At the material time his grade was ND.4.

On 28 May 1996 the Administration of the Regional Office for South-East Asia (SEARO) in New Delhi issued a vacancy notice, with the reference SEAR 96/17, for a post of assistant I at grade ND.5 in the Fellowships Unit. The number of the post was 5.0047. The complainant applied for the post on 13 June. Following an interview with the Fellowships Officer, responsible for the Unit, he was included on the short list.

On 13 September, the Ad Hoc Selection Committee decided to hold a test for the eligible candidates to evaluate their computer skills. On 25 September, the complainant wrote a letter to the Regional Director asking him to take action against the decision. The Regional Personnel Officer sent him two communications dated 7 October. In the first he informed him that the holding of the test was in conformity with the vacancy notice and was designed to ensure that the best qualified candidate was selected; in the second he invited him to sit the test. The complainant did not take it.

In a letter of 30 October, the Personnel Officer informed the complainant that he had not been selected. On 6 December 1996, he appealed against the decision to the regional Board of Appeal. When the Board did not reply within three months, the complainant appealed to the headquarters Board of Appeal on 21 July 1997, in accordance with Staff Rule 1230.8.2(2). The regional Board of Appeal transmitted its report to the Regional Director on 20 August and recommended him to dismiss the complainant's appeal, which he did on 19 September 1997. On 13 February 1998, the headquarters Board of Appeal also recommended the dismissal of the complainant's appeal. By a letter of 27 March 1998, which is the impugned decision, the Director-General accepted this recommendation.

B. The complainant alleges that the selection procedure was contrived and that the selected candidate had been chosen beforehand by the Fellowships Officer, responsible for the Fellowships Unit. He cites in support a memorandum from the above official, dated 25 February 1997, in which he explained that the selection criteria for the post were not the same as in the past and that the person selected had to be well-versed in computer skills. In the view of the complainant, he gave priority to these skills to the detriment of other qualifications and influenced the deliberations of the Selection Committee. Despite the fact that adequate information was already available to him, the Fellowships Officer interviewed the candidates. He thereby transformed an objective exercise into an "arbitrary choice".

The complainant submits that only two of the candidates on the short list, namely Mr Chopra and Mr J.M. Mago, attended the computer tests required by the Selection Committee. Both of these candidates were selected, the first for post No. 5.0047, and the second for another post of assistant in the Fellowships Unit, namely post No. 5.1320, for which the vacancy notice was published a few months later.

He contends that there was breach of the applicable rules and procedures. In support, he cites a memorandum by

the Administration, dated 17 June 1994, which states that tests are conducted for certain posts with specific requirements for applicants at entry level. Post No. 5.0047 was not within the above category of posts, particularly since computer skills were not an essential requirement of the job. He emphasises that no test was held for this type of post either before or after the test which he did not attend, except for post No. 5.1320.

The complainant says that footnote No. 6 to vacancy notice 96/17, which states that a test may be held for the post, cannot justify the holding of the test, since the footnote appears in all vacancy notices and is never put into effect. He adds that the Administration breached a rule of general law when it changed the chairperson of the Selection Committee while the selection process was under way.

The complainant asks the Tribunal to order the quashing of the selection process and of the appointment of Mr Chopra, the holding of a fresh selection process in accordance with the applicable rules and procedures, and to grant him 10,000 United States dollars as compensation for the moral injury suffered, as well as costs.

C. In its reply, the Organization explains that it was not for the complainant to decide whether or not the specific job required computer skills, but for the official responsible for the Unit which put the vacancy up for competition. In the material case, computer skills were essential.

The Administration had to organise interviews for the candidates in accordance with the WHO Manual and the memorandum of 17 June 1994.

In his letter dated 25 September 1996 to the Regional Director, the complainant implicitly recognised that he did not possess the skills required for post No. 5.0047. The candidate who was appointed, Mr Chopra, attended the test and, having obtained the highest score, was selected. The Organization submits that, under the terms of the memorandum of 17 June 1994, nothing prevented the objective verification of the skills of the serving staff who apply for a specific post through the holding of a test.

It observes that the complainant offers no proof of the preselection of Mr Chopra. The Selection Committee was not influenced by the Fellowships Officer, since it decided to hold a test rather than to base its decision on the short list prepared by the above official. The process was carried out in compliance with the rules. The complainant was not selected, not as a result of bias against him, but because he did not meet the requirements of the post.

It refutes the allegation that it changed the chairperson of the Selection Committee while the process was underway. It merely appointed an alternate member to replace the titular member who was unable to attend a meeting in October 1996, in order not to delay further the selection process. The Manual does not state that the membership of a Selection Committee cannot be modified in the case of necessity.

In his comments dated 8 September 1998, Mr Chopra confirms that he attended the test along with other candidates.

D. In his rejoinder, the complainant emphasises that it was the Selection Committee which decided that computer skills were essential, whereas such a decision was the prerogative of the Administration. The Administration made the test central to the selection process when, in accordance with the memorandum of 17 June 1994, it should also have examined the other skills of the candidates. He did not take the test because it was illegal. He reiterates that these skills were not "essential", but only "desirable".

He contends that the procedure followed by the regional Board of Appeal was flawed, since its chairman was changed during the process.

E. In its surrejoinder, the Organization presses its arguments. It explains that computer skills were indeed essential, while skills which were merely desirable were described as such in the vacancy notice. It adds that computer skills were not the only criterion and that it considered the other qualifications of the candidates.

The complainant had been informed by a circular that the chairman of the regional Board of Appeal had been appointed for one year. At the time, he did not challenge the composition of the Board.

Finally, it states that it has never maintained it is necessary to conduct a test to fill all vacancies, but that the decision is taken on a case by case basis.

## CONSIDERATIONS

1. The complainant joined the Regional Office for South-East Asia (SEARO) of the World Health Organization in New Delhi on 12 July 1979 as a clerk-typist at grade ND.3. Following several appointments within SEARO, he was reassigned on 1 July 1992 to the Budget and Finance Unit and promoted to grade ND.4. On 1 January 1994, he was awarded a career service appointment with retroactive effect from 1 July 1993.

2. On 28 May 1996, SEARO issued a vacancy notice - SEAR 96/17 - for a post of assistant I at grade ND.5, with the number 5.0047. On 13 June 1996, the complainant applied for the post and, on 30 October, he was informed that he had not been selected.

3. The complainant lodged an internal appeal against this decision with the regional Board of Appeal. On 27 March 1998, the Director-General of the WHO definitively dismissed the appeal brought by the complainant, who filed his complaint with the Tribunal.

The complainant seeks the quashing of the selection process and of the appointment of the selected candidate, a fresh selection process in accordance with the prescribed procedures, the payment of 10,000 United States dollars as compensation for the moral injury suffered, and costs.

4. The material case concerns the lawfulness of an appointment to a post covered by a vacancy notice and of a process for the selection of candidates. The Tribunal considers it necessary to specify the scope of its power of review. As it has emphasised on many occasions, the decision of an international organisation in respect of an appointment is at its discretion and is therefore subject to only limited review. The Tribunal will therefore exercise the greatest care in reviewing an appointment, since it may not replace the organisation in deciding on the respective merits of the various candidates.

5. In challenging the legality of the impugned decision, the complainant has five pleas, which the Tribunal will examine below.

(a) In the first place, the complainant submits that the whole selection process was tainted with bias. He accuses the Fellowships Officer who was responsible for organising the competition, of stage-managing it, and influencing the members of the Ad Hoc Selection Committee so that the candidate who was selected to the vacant post would be one of his choice and who only had good computer skills to the exclusion of clerical skills. He cites as proof a memorandum of 25 February 1997, in which the Fellowships Officer states what skills the candidate appointed as assistant should have.

Even though this memorandum contains the opinion of a staff member of SEARO, it cannot be deduced from the text that it is designed to exert pressure on the members of the Selection Committee. The complainant has not provided any proof to demonstrate the partiality of the Fellowships Officer or the alleged influence exerted on the members of the Selection Committee. Since the complainant has not proven his allegations, this plea must fail.

(b) Secondly, the complainant submits that the interviews held by the Organization should not have been part of the selection process. The Tribunal finds that the complainant's arguments lack coherence. On the one hand, he refers to Manual paragraph II.3.430, under which the responsible officer must interview the candidates. On the other hand, he claims that in the material case interviews were neither essential, nor relevant, since the candidates were already staff members of SEARO and therefore known to the Selection Committee. The complainant alleges that holding interviews changed an objective selection exercise into a subjective and arbitrary choice.

The Tribunal observes that in accordance with the Manual the selection process had to include interviews with the candidates. The fulfilment of this duty by the Organization cannot be held against it as grounds for setting aside its decision.

(c) Thirdly, the complainant also contests the legality of the selection process and alleges that the holding of the computer test was not normal practice. On 13 September 1996, the Selection Committee unanimously decided to invite all candidates to take a computer skills test on 10 October 1996. The complainant protested against that decision in a memorandum of 25 September 1996 addressed to the Regional Director of SEARO. He stated that he had been working on a word processing programme for several years and it would be unfair to ask him to take a database test. In his rejoinder, he explains that he did not take the test as it was "illegal" and "unauthorised". The complainant endeavours to demonstrate that computer skills were not essential for the post which had been put up

for competition and that the test was contrary to the practice of the Organization. He recognises that the vacancy notice explicitly referred to the possibility of holding a test, but contends that the vacancy notice form is used for all competitions. He presses his claims that the selection process was tainted with bias and adds that the holding of the test was merely a formality intended to justify the appointment of an applicant pre-chosen by the Fellowships Officer.

The Tribunal cannot accept the complainant's arguments as to whether or not computer skills are necessary for the post in question. This is a matter which is at the discretion of the Organization. The Tribunal confines itself to noting that in the vacancy notice it was explicitly stated that candidates might be invited to take a test. Furthermore, the complainant has not identified the rules which he alleges that the Organization breached in deciding to hold a test. For these reasons, the plea fails.

(d) Fourthly, the complainant advances a plea based on the existence of a memorandum of the Regional Director of SEARO, dated 17 June 1994, on staff selection and recruitment procedures, from which he quotes the following passage:

"Tests are conducted for certain posts with specific requirements, viz. editor, equipment operator including computer personnel, clerk-typists and secretaries at entry level."

The complainant deduces from this text that no internal candidate was obliged to take the test held by the Organization. He is mistaken. In the first place, the term "viz." implies that an enumeration offering examples by way of illustration will follow. In the second place, the memorandum is of a general nature and is not incompatible with the specific requirements set out in the vacancy notice, which explicitly states that candidates may have to undergo a test in computer skills. The specific requirements established in the vacancy notice prevail over the general provisions in the memorandum.

(e) The fifth and final plea is based on the fact that the composition of the Selection Committee is alleged to have changed during the competition. This argument must fail, since the written submissions show that, due to the absence of a titular member, it was necessary to replace her with an alternate member.

6. For the reasons set out above, the Tribunal finds that the complaint must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

*(Signed)*

Michel Gentot  
Julio Barberis  
Seydou Ba

Catherine Comtet