

FORTY-FIRST ORDINARY SESSION

In re SITA RAM

Judgment No. 367

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the World Health Organization (WHO) by Mr. Sita Ram (also known as Sita Ram Bagga) on 15 December 1977, the WHO's reply of 29 March 1978, the complainant's rejoinder of 12 July and the WHO's surrejoinder of 15 August and communication of 23 August 1978;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the WHO Staff Regulations, particularly Regulations 1.2, 1.10 and 4.4, the WHO Staff Rules, particularly Rules 510.1 (formerly 410.1), 530.1.1 (formerly 430.1(a)), 555.1, 555.2, 565.2 (formerly 465.2) and 1030.8(a), and the WHO Manual, particularly provisions II.1.80, 100 and 180, II.3.50, 90, 180, 190, 310 and 340, II.5.195 and 325, and III.3.20, 40, 50, 90, 100, 110, 170, 200 and 350 to 370;

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings for the hearing of a witness;

Considering that the material facts of the case are as follows:

A. The complainant joined the staff of the WHO in May 1952 as a secretary-stenographer at grade ND.4 and was assigned to the WHO Regional Office for South East Asia (SEARO) in New Delhi. On 1 January 1956 he was appointed administrative assistant in Kabul and was there promoted. On 1 February 1959 he was transferred back to New Delhi as a secretarial assistant in administration and finance at grade ND.5. On 1 November 1962 he was promoted to grade ND.6 as administrative assistant and assigned to the Office of the Director of Health Services (DHS). In July 1966 he was given a career service appointment and in August 1968 promoted to grade ND.7 (then known as ND.X). In 1956 and again in 1969 he was given a step increase for meritorious service. He also received two step increases in May 1972 on completing 20 years' service and two more in May 1977 on completing 25 years' service.

B. From May 1973 the complainant served, in the capacity of administrative assistant, as Assistant to the Director of Health Services, Dr. Jungalwalla. When Dr. Loven was appointed DHS in place of Dr. Jungalwalla it was decided to fill a P.2 vacancy in the DHS office. A notice of vacancy was published. None of the applicants was thought suitable and in October 1974 the Regional Director agreed, on Dr. Loven's proposal, to the temporary appointment of a Mr. A.N. Varma. In July 1975 the Selection Committee of the Regional Office recommended appointing Mr. Varma to the post and the Director-General approved that recommendation in September 1975.

C. Meanwhile, on 24 March 1975, the DHS proposed to the Regional Director the transfer of the complainant to the Information and Retrieval Unit. The Regional Director accepted that proposal the same day. The complainant was actually transferred on 1 April, but he was not officially notified until some six months later after he had complained to Personnel and received from them a memorandum dated 30 September about his reassignment. The notice of personnel action on the complainant's transfer was issued on 16 October. A revised post description was established on 30 October and the complainant was so informed.

D. There followed, between 22 October 1975 and 2 March 1976, a lengthy exchange of correspondence between Personnel and the complainant in which he complained that the action taken was in breach of the provisions of the Staff Regulations, the Staff Rules and the WHO Manual, his new duties were less responsible than his former ones, and he had been humiliated and suffered loss of reputation. He asked that the status quo should be restored, in other words that he should be reinstated in his former post and that that post should be reclassified. Personnel refused those claims and said that the decisions were final.

E. On 31 March 1976 the complainant appealed to the Regional Board of Inquiry and Appeal. In its report of 19 November the Board dismissed the appeal but said, among other things, that the circumstances in which he had been transferred constituted a breach of several provisions of the WHO Manual and had caused him embarrassment and humiliation. On 23 December the Regional Director informed the complainant that he accepted the Board's

recommendation. On 21 January 1977 the complainant appealed to the Headquarters Board of Inquiry and Appeal. The Board dismissed his claims in its report of 7 July 1977 but recommended sending him a letter of apology for the treatment he had suffered, offering him a token sum of \$100 to cover his costs, taking no further prejudicial action and showing him the respect he deserved as a member of the Regional Office staff with over 20 years' laudable service to his credit. The Board concluded that the complainant had been made a victim of prejudicial treatment by the Administration through administrative irregularities and discourtesy at the time of Mr. Varma's appointment and the complainant's transfer. On 12 September 1977 the Director-General wrote informing the complainant that he accepted the recommendations of the Board of Inquiry and Appeal and offering him the Administration's apologies. The complainant thereupon lodged the complaint with the Tribunal.

F. For the reasons summarised in D above and on the grounds that Dr. Loven showed favouritism in arranging to have Mr. Varma appointed to the post which the complainant feels he himself ought to have been given, he asks the Tribunal: (1) to declare his removal from the DHS office void as a breach of the established rules and procedures; (2) to restore to him the duties given to Mr. A.N. Varma in his place; (3) to give him retroactively the grade given to Mr. Varma; (4) as an alternative to (1) and (3) above, to award him the difference between the salary drawn by him and that which he would have got at P.2 (taking account of the change in pension and other entitlements of Professional category staff members from January 1975) if Mr. Varma had not been recruited in his place; (5) to award him damages for the moral and material prejudice suffered by him on account of the wilful violation by the Administration of staff rules and procedures, and for the humiliation he suffered through having his responsibilities curtailed and being put under a lower-grade supervisor; (6) to award him costs, which he sets at \$4,000; and (7) to restrain the Organization from further "harassing and humiliating" him.

G. The WHO contests the receivability of the complaint and asks the Tribunal to dismiss it on the merits.

CONSIDERATIONS:

Receivability:

1. In the Regional Office of the WHO in New Delhi the Director of Health Services, DHS (who ranks second after the Regional Director), had in 1975 a small office consisting of an Administrative Assistant, who was the complainant, at the grade of ND.7, two other assistants at ND.6 and ND.4 respectively and a typist. On 4 February 1974 there had been established a post 5.1871 of Technical Officer (Programming) at grade P.2 whose duties were described as in general to assist the DHS; but it had been left vacant. On 7 August 1975 this post was filled by the appointment of a Mr. Varma from outside the Organization. It is agreed by all concerned that there was not enough work in the office to justify such an addition to the existing staff, and in fact on 1 April 1975 the complainant had been transferred to another unit. Both these decisions, the new appointment and the transfer, were discretionary decisions to be taken by the Regional Director in the interests of the Organization. The complainant, however, contends that the discretion was abused with the object of finding a place in the Organization for Mr. Varma who was a friend of the Director DHS. The allegation is of sufficient substance to require a detailed examination of the relevant events. Manifestly in a critical examination the two decisions have to be looked at together, since they are both said to be incidents in a single scheme. but the complainant alleges also irregularities, including breaches of the Staff Rules, affecting each of the decisions separately. Also he contends that he ought to have been considered as a candidate for the post 5.1871.

2. The Organization does not dispute the receivability of the complaint in general terms; in particular it does not dispute the complainant's right to challenge the assignment of 1 April 1975, but it contends that the complainant failed to challenge within the time limits the decision of 7 August and submits that the first four claims should be rejected as non-receivable in so far as they relate to the circumstances of that decision. In these four claims the complainant does not ask that the decision of 7 August be quashed, But he does ask for remedies that would appear to be consequential on the quashing, such as the restoration to him of the duties given to Mr. Varma, the retrospective grant of the grade given to Mr. Varma and, in the fourth claim, the increase in salary that he would have got as P.2 if Mr. Varma had not been recruited. It is not within the competence of the Tribunal to grant relief in these forms and it is unnecessary therefore to consider to what extent the claims are time-barred. At the same time the fact that a challenge to the decision of 7 August is time-barred, if that be assumed, does not mean that the complainant is obliged to concede the validity of the decision. As appears from the preceding paragraph, he could not, if that were conceded, successfully allege on the facts an abuse of discretion against the decision of 1 April. Nor does it mean that in presenting his claim for compensation (the fifth claim) he would be prevented from arguing that one of the adverse consequences of his assignment was that he lost the chance of promotion to P.2 and

so suffered the sort of damage indicated in his fourth claim.

Relevant facts:

3. The complainant had in 1975 been in the employ of the Organization for 23 years. He had been at grade ND.7 for seven years and had held a career service appointment (permanent) for nine years. He had twice received special increments for meritorious services and his appraisal reports contain many glowing tributes to his worth. In 1962 he entered the office of the Director DHS as Administrative Assistant and had served under six directors before Dr. Loven was appointed as Director on 1 October 1974. For a short time in 1971-72 there had been in the office an Administrative Officer at the grade of P.2 to act as the confidential assistant to the Director. But within a few weeks of the appointment of Dr. Jungalwalla as Director this officer was transferred and not replaced. Thereafter, as Dr. Jungalwalla testified, the complainant "undertook the work of a P.2 level Administrative Officer and has carried out these duties with exceptional competence".

4. On 4 February 1974, as noted in paragraph 1 above, post 5.1871 was established, providing once again for a P.2 post in DHS. On the next day Vacancy Notice N.70/4 was issued for the post. This notice shows that at that time the Administrative Assistant was intended to remain and that part of the new officer's duties would be to supervise him. At about this time it was settled that Dr. Loven should succeed Dr. Jungalwalla on 1 October 1974. The vacancy notice gave 24 March 1974 as the final date for applications and these were reviewed by Dr. Loven as well as by Personnel at headquarters; no one suitable was found.

5. Dr. Loven was still at this time the WHO Representative in India, which he had been since 1969. He was located in the Ministry of Health in New Delhi in which Mr. Varma was the Deputy Secretary. Mr. Varma was then 57 and nearing superannuation. On 19 April 1974 he filled in an application form for employment in the WHO which was acknowledged by Personnel at headquarters on 6 May.

6. On 17 October the complainant's most recent appraisal report, signed by Dr. Jungalwalla as first supervisor, came before the Regional Director as second supervisor. In his self-appraisal the complainant declared (with the agreement of Dr. Jungalwalla) that he had been performing the duties of Administrative Officer. He attached a comparison of his actual duties with his post-description duties, couched in language which did not undervalue the former. The Regional Director was displeased. He noted on 18 October that the complainant should "not carry out the functions of DHS as claimed by him". Opposite the sentence "most of the duties are performed without reference to the supervisor, but final products are put up to DHS", he wrote: "This is a reflection on the DHS", He sent the report, marked in this way, to Dr. Loven, who had by then taken over, and asked for his comments. Dr. Loven replied that he did not need "an additional DHS", but did need "a good administrative officer to relieve me of routine administrative functions" and that when this was done the complainant's functions "will be somehow less".

Dr. Jungalwalla accompanied the report with a recommendation for a double meritorious increase. In this he mentioned that, to meet target schedules, the complainant had worked very long hours and attended the office at almost all weekends without any claim for overtime. The recommendation was not accepted.

7. Dr. Loven followed up quickly his hint that he needed a good administrative officer. On 23 October he sent to the Regional Director a memorandum in which he said that he had gone through the applicants for post 5.1871 and found no one suitable. He agreed that the post should be advertised again but in the meantime suggested the engagement of Mr. Varma as a temporary measure "to relieve me of pressing administrative matters ... in the first instance his services could be availed of for six to eleven months". He attached "his personal history form" which was presumably the application form referred to in paragraph 5 above. The Regional Director agreed and Mr. Varma set about obtaining his release from government service. He obtained this on 31 January 1975 and immediately began work in the Organization on a contract for six months, his duties being "in general to assist the DHS". As the Organization says in paragraph 36 of the reply, "there could not be room in the same unit for two posts with overlapping duties". Dr. Loven gave effect to this conclusion on 24 March 1975, on which date he sent a memorandum. "After case study done of the functions of DHS' office since I took over", he felt that the complainant could with advantage be transferred to IRU (Information and Retrieval Unit). This would "strengthen and further streamline" the activities of that unit and the complainant's long experience might be of help to them.

His duties could be distributed between Mr. Varma and Mr. Sarna, one of the ND.6s whose promotion to ND.7 he strongly recommended. The Regional Director on the same day agreed to the complainant's reassignment and

directed that the Assistant Director "should submit proposals for work in that unit"; he did not agree forthwith to Mr. Sarna's promotion but said that a recommendation could be made later.

8. On 1 April 1975 the Assistant Director set out in the form of a memorandum to DHS four functions for which the complainant could be utilised. The complainant was not given a copy of it, no post description was prepared and no formal notice of reassignment was given. The complainant was not consulted about the new assignment as he should have been and not even an explanation of it was offered to him. His table was moved out of the DHS office and he was left to pick up what he could of his new duties from Mr. Subramanayan, the officer who was running the IRU and who was in fact at ND.6 a grade lower than the complainant.

Most of these errors and omissions are admitted in the Organization's reply.

9. Mr. Varma's contract would come to an end on 31 July 1975. On 22 June Dr. Loven wrote to the Regional Director strongly recommending that Mr. Varma be confirmed. The Director agreed and Personnel was told to hold an ad hoc selection committee which met on 23 July. It does not appear that there had been any further advertisement for candidates or that any other than Mr. Varma were considered. The committee had before it only an appraisal by Dr. Loven of the personal qualities and of the performance of Mr. Varma. The committee recommended his appointment. Since he was a national of the country in which he would serve, the appointment had to receive the approval of the Director-General, which was given subject to its termination at the normal retirement age, which in Mr. Varma's case would occur in July 1977.

10. On 11 August 1975 the complainant sent a memorandum to Personnel on the subject of his reassignment. He wrote:

"In view of my highly satisfactory record of service and the recognition of meritorious service by the Organization more than once, I would have thought of receiving some verbal or written instructions from my supervisors or a formal communication from you about the then ensuing change in my duties and lines of supervision. As I am in the dark, I shall be grateful if you will be good enough to clarify early my status and also let me know the duties expected of me."

In spite of a reminder this was not answered until 30 September when Personnel apologised for not informing him about his reassignment, gave him a list of duties by which he should be guided until his post description was ready and told him that his immediate supervisor was the Assistant Director. The Assistant Director then produced a post description from a draft prepared by Mr. Subramanayan and this was sent to the complainant on 30 October.

Conclusions:

11. In his complaints to the internal boards of appeal the complainant presented his case in accordance with Staff Rule 1030, alleging that there was under that rule both personal prejudice against him and an incomplete consideration of the facts. Since the existence of either ground would justify the interference by the Tribunal with a discretionary decision, it is convenient to consider the case as it is presented on these two grounds. In the opinion of the Tribunal and for the reasons given in the following paragraphs the case is established on both grounds. Incomplete consideration of the facts is the wider ground and it is therefore convenient to take it first.

12. A proposal to appoint a P.2 officer in the DHS office would require the consideration of three questions, as follows:

1. Was there a need for such an officer?

2. If so, should the post be filled by the promotion of the Administrative Assistant?

3. If the answer to (1) was Yes and to (2) No, the question would arise whether, since the Administrative Assistant would have to be transferred, there was a place where his services could be utilised, so that the change would be on balance in the interests of the Organization.

As to the first question, there is nothing in the dossier to show that it was considered at all. The existing set-up had, except for a brief interlude, lasted under six different Directors for 13 years. There is no hint in the dossier that anybody considered it unsatisfactory. Dr. Loven wrote that he wanted "a good administrative officer to relieve him of routine administrative functions": if "assistant" is substituted for "officer", it would seem that the position was

already filled. What was the point of creating a new post? When Mr. Varma retired after two years, the new post was dropped.

As to the second question, it is not disputed that the complainant had for several years past discharged de facto the duties of a P.2 officer satisfactory. If a P.2 post was wanted for the sake of appearances, he was the obvious candidate. The policy of the Organization in the filling of vacancies, as embodied in Staff Regulation 4.4, is to prefer the promotion of existing staff members. There is a dispute about whether the complainant put in his name in response to the vacancy notice (it seems that Mr. Varma did not), but MS II.3.340 allows the Administration to put forward the name of any qualified candidate.

As to the third question, it is manifest that the Regional Office had no place for the complainant outside DHS. Had there been any real need for his services in IRU or any streamlining to be done, it is inconceivable that he would have been left for six months without any proper instructions.

13. When outstanding considerations are overlooked, it suggests that the matter is not being examined objectively; and this in turn suggests in the case of competent examiners such as the Regional Director and Dr. Loven, that it is prejudice rather than lack of perception that is at work. In the case of Dr. Loven, it was not on the evidence a prejudice against the complainant but a prejudice for Mr. Varma. The Board of Inquiry and Appeal concluded - and the Tribunal agrees - that there was "an arrangement between the DHS and Mr. Varma that he be introduced into the Organization". There has been no suggestion of corruption. The Board appreciated "the desire of a newly appointed high official to choose a collaborator with whom he is well acquainted and in whose ability and co-operation he can place his complete confidence". But a selection process, as the board in effect goes on to say, cannot be fair if the head of the department is openly pressing his own candidate, putting him at an advantage by clothing him temporarily with the office, and failing to see that there are other candidates. The Board noted that the complainant was not considered for the vacancy, "presumably because the Administration was eager to recruit Mr. Varma". The complainant fell a victim to Dr. Loven's prejudice for another.

The prejudice of the Regional Director is less easy to account for. That there was prejudice is the inescapable conclusion from the way in which the complainant was treated. If the Regional Director had decided quite impartially upon the change in the interests of the Organization, it would have been natural for him to have recognised at the same time the exceptional services that the complainant had rendered to the DHS; but it does not appear that Dr. Jungalwalla's recommendation for a meritorious increase was even considered. It would have been natural too for the Regional Director to ensure that the complainant left the office with dignity instead of being swept out of it like dirt. It seems to have been the complainant's excess of zeal that displeased the Regional Director, either that or annoyance that a General Service officer should assume the tasks of a Professional. But if there was to be indignation about the latter, it should have been visited upon Dr. Jungalwalla who clearly approved and encouraged it.

14. Moreover, the decision to transfer the complainant was effectively taken in less than a week. For once an offer of a temporary job was made to Mr. Varma, it followed that sooner or later the complainant would have to go; there could not be an overlapping that lasted as long as six months. The period of the temporary job could have been used, as the Headquarters Board remarks, to see whether the complainant could "demonstrate his ability to co-operate with the new DHS": he had after all co-operated successfully with six. That it was not so used can be explained only by prejudice in favour of Mr. Varma or against the complainant. The Tribunal concludes that the Regional Director's decision of 1 April 1975 was affected by prejudice and incomplete consideration of the facts and should be quashed accordingly.

Compensation:

15. The complainant does not seek to be reassigned to DHS and in any event his service with the Organization is due to end in January 1979. His true remedy must be in his fifth claim for compensation. As to this, his emoluments were not affected by the assignment. The duties specified in his post description, when it was eventually issued, were less responsible than those which he had actually been discharging, but did broadly correspond (the Headquarters Board so finds and on such a point the Tribunal would hesitate to differ) to ND.7 level.

16. Thus the claim for compensation must be based on the moral prejudice which the claimant has suffered. Some of this - the fact, for example, that his new assignment offered him much less congenial and responsible work -

would not attract compensation if the decision to assign had been valid. But some of it - for example, the humiliating way in which the transfer was effected - would attract compensation whether or not the decision was valid. Just as it is implicit in every contract of service that the staff member shall be loyal, shall treat his superiors with due respect and shall guard the reputation of the Organization, so it is implicit that the Administration in its treatment of staff members shall have a care for their dignity and reputation and shall not cause them unnecessarily personal distress. Often distress and disappointment cannot be avoided but, where it can be, it should be. As in all organisations, the staff member must take the rough with the smooth and there are bound in management to be pieces of clumsiness or tactlessness which can be sufficiently smoothed over by apology or explanation. The Tribunal is not likely to concern itself with cases other than those of grave injury which has been left unredressed and which affects the staff member's career.

17. The Tribunal concludes that the Administration in its treatment of the complainant, and irrespective of whether its decision to assign was right or wrong, failed to observe the general obligation set out above, The Regional Board of Appeal referred to the treatment as "embarrassment and humiliation" and the Headquarters Board as "discourtesy and disregard" and "moral injustice". This Board recommended that a letter of apology be sent to him and "that he be accorded the dignity and respect he deserves as an efficient and valuable member of SEARO staff with over 20 years of laudable service to his credit". On 12 September 1977 the Director-General by way of compliance with this recommendation thought it sufficient to endorse a statement already made by the Administration to the effect that it regretted that the circumstances of his transfer had caused the complainant to have unintended feelings that he had suffered from discourtesy and disrespect. The Tribunal does not consider that an apology in this form redresses the distress caused to the complainant.

As to his career, the complainant had only four years left of it but these years were seriously affected. He was denied the satisfaction of ending it in the job in which he had excelled for 13 years and deprived of the hope he might reasonably have entertained of promotion to a Professional grade.

18. The Tribunal fixes at \$12,000 the sum to be awarded to the claimant as compensation. By his sixth claim he asks also to be reimbursed his costs amounting to \$4,000. He has itemised this claim and the figures are not as figures contested by the Organization.

DECISION:

For the above reasons,

1. The first claim is allowed and the Regional Director's decision of 1 April 1975 is quashed.
2. The second, third, fourth and seventh claims are disallowed as falling outside the Tribunal's competence.
3. The fifth claim is allowed and the Organization is ordered to pay the complainant as compensation \$12,000.
4. The sixth claim is allowed and the Organization is ordered to pay to the complainant \$4,000 as reimbursement of costs incurred by him.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 13 November 1978.

M. Letourneur
André Grisel
Devlin

Roland Morellet