

## SEVENTY-SIXTH SESSION

### *In re* SHARMA (No. 4)

#### (Application for execution)

#### Judgment 1313

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 1238 filed by Mr. Hari Chand Sharma on 28 June 1993, the reply of 31 August from the World Health Organization (WHO), the complainant's rejoinder of 24 September and the Organization's surrejoinder of 25 October 1993;

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

Having examined the written submissions;

#### CONSIDERATIONS:

1. By Judgment 1238 of 10 February 1993, in which it allowed Mr. Sharma's third complaint, the Tribunal quashed two decisions by the Director-General of the WHO, one of 21 July 1987 ordering the complainant's dismissal as from 22 July 1987 and the other of 20 February 1992 informing him that reinstatement in his former position was not in the Organization's interest and that there was no suitable "position of less responsibility". The Tribunal further ruled, in 5:

"As to the future [the WHO] must do its utmost to reinstate him in the post which he held on 21 July 1987 or in any comparable one acceptable to him. Only if that proved impossible should it pay him additional damages equivalent to the salary, allowances and other entitlements which he would have received over a period of two years had he been reinstated in its employ as from the date of this judgment."

The Tribunal accordingly ordered in points 3 and 4 of its decision:

"3. [The Organization] shall reinstate him as from the date of this judgment.

4. If it cannot do so it shall pay him additional damages equivalent to the salary, allowances and other entitlements which he would have received over a period of two years had he been reinstated as from the date of this judgment."

2. In his fourth complaint the complainant is impugning a decision which the Director-General of the WHO notified to him in a letter of 20 May 1993 about the execution of Judgment 1238. The Director-General said in that letter that "with regard to point 3 [of Judgment 1238], I am not in a position to reinstate you; you will, therefore, be paid additional damages provided under 4".

3. The complainant submits that the Director-General has failed to carry out faithfully the Tribunal's decision: he "has not given any indication about his utmost efforts to find a post (ND.4 level which the complainant held at the time of his separation from service in 1987 or ND.5 post to which level his previous assignment has since been elevated)"; nor has the Director-General "given any reasons or justification why it had proved impossible for him to fix up a lowly ND.4/ND.5 employee in his vast organisation". The complainant asks the Tribunal to order that his reinstatement "be made absolute and unconditional effective from the date" of Judgment 1238. He also seeks such damages as the Tribunal deems fit for "vexatious harassment" and an award of costs.

4. In its reply the WHO points out that at the end of his letter of 20 May 1993 the Director-General explained that the delay in executing the judgment had been due to the "review of reinstatement possibilities". The Organization gives an account of that review and concludes that it did all that the judgment required of it. "The matter of reinstatement was", it says, "considered at the highest level and the grounds for taking a negative decision were founded on material and relevant facts". It argues that in any event the complainant's acceptance of the payment of damages, albeit with a reservation, estops him from pursuing his claim to reinstatement.

5. The Tribunal will take up first the plea of estoppel. It is true that in a letter the complainant wrote to the Director-General on 15 June 1993 he acknowledged receipt of a cheque from the Organization for 844,549 Indian rupees "in settlement" of his entitlements under Judgment 1238. But he went on:

"I am accepting this payment without prejudice to my rights that may arise out of the aforesaid judgment".

The Organization cannot therefore reasonably contend that he misled it. His express reservation made it plain that he was not surrendering his right to appeal to the Tribunal nor acquiescing in the WHO's manner of executing its judgment. Indeed he filed the present application for execution only a few days later. In Judgment 28 (in re Waghorn) the Tribunal held, in the last-but-one paragraph of A:

"... the complainant, by accepting on several occasions and without reservation the payments made to him by the Organisation, in sizable and generous amounts, may be considered under general principles of law as having acquiesced in the actual offers which were made to him and as having relinquished the remainder of his claims."

In other words, it is only unqualified acquiescence in the offer that will be read as relinquishment of claims and as bringing the doctrine of estoppel into play. The conclusion is that the plea of estoppel fails.

6. Judgment 1238 put the Organization under the obligation to reinstate the complainant as from the date thereof, 10 February 1993, and to discharge that obligation it was required to "do its utmost" to find him a suitable position. Only if it had done so, and to no avail, was it free to pay him damages instead. So the main issue is whether by the time the Director-General sent his letter of 20 May 1993 the Organization had done its utmost to reinstate the complainant. The Tribunal has had occasion to rule on the execution of a similarly worded order in another case. In Judgment 1242 (in re Bluske No. 2) it affirmed that "the Director-General had the duty to justify his decision by explaining why it was impossible to reinstate the complainant". The Director-General of the WHO had the same duty in this case, and it is evident that his letter of 20 May 1993 plainly failed to discharge it. The letter merely tells the complainant of a "review of reinstatement possibilities"; it does not say why reinstating him proved impossible. It is mere notification, not an explanation, of the decision. Indeed only in its reply to the complaint does the Organization give some account of the difficulties it says it faced in seeking to reinstate him. Its decision not to reinstate him therefore cannot stand.

7. Furthermore, in a letter of 26 March 1993 to the Director-General the complainant observed that the WHO's Regional Office for South East Asia (SEARO), where he had been employed before, had "advertised one vacancy against post No. SEAR/93/7", which was for a clerk at ND.4, the grade he held when he left. He got no reply to that letter, and the Organization apparently does not deny what he said in it. He further alleges in his rejoinder that on 18 May 1993, two days before the Director-General wrote his letter, SEARO's news bulletin announced that that vacancy was cancelled, only to announce, on 3 August 1993, that it had been revived as post No. 93/22. Again the Organization offers no rebuttal of those allegations in its surrejoinder.

8. In the circumstances the complainant's case must be sent back to the Organization for a new decision to be taken in proper execution of Judgment 1238. The Tribunal reaffirms that for that purpose it must "do its utmost to reinstate him in the post which he held on 21 July 1987 or in any comparable one acceptable to him".

9. He is in any event entitled to a further award of damages for its failure to execute Judgment 1238, and the Tribunal sets the amount at the equivalent of one year's salary, allowances and other entitlements. It also awards him 200 United States dollars in costs. DECISION:

For the above reasons,

1. The Director-General's decision of 20 May 1993 is set aside insofar as it refuses to reinstate the complainant as from 10 February 1993, the date of Judgment 1238.

2. The case is sent back to the Organization for a new decision on the reinstatement of the complainant as from that date.

3. The Organization shall pay the complainant the equivalent of one further year's salary, allowances and other entitlements in damages for all forms of injury he has sustained because of its failure to execute Judgment 1238.

4. It shall pay him 200 United States dollars in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda  
William Douglas  
Mark Fernando  
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.