

NINETY-FIRST SESSION

In re Gupta (No. 8)

Judgment No. 2051

The Administrative Tribunal,

Considering the eighth complaint filed by Mr Shiv Raj Gupta against the World Health Organization (WHO) on 15 May 2000, the WHO's reply of 22 August, the complainant's rejoinder of 19 September and the Organization's surrejoinder of 20 December 2000;

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. Some information on the complainant's career in the WHO's Regional Office for South-East Asia (SEARO) in New Delhi is given under A in Judgment 1473 on his first complaint. At the material time he held grade ND.4, had worked at SEARO for nineteen years and held a career service appointment.

On 10 August 1998 SEARO issued a vacancy notice for a post (No. 5.2534) of clerk III, at grade ND.5, in the Office of the WHO Representative to India, in New Delhi. The complainant applied for the post. The last date for receipt of applications was 7 September. The post was to become vacant on 1 December 1998.

By information circular IC-98-23 of 14 October 1998 the WHO announced changes in the selection and recruitment procedures for General Service staff at SEARO and the WHO Representative's Office. The new procedures were to apply to posts falling vacant on or after 1 November 1998 and replaced those put in place in June 1994.

The complainant was on annual leave from 15 October to 8 November 1998. On 26 October the Special Assistant in the Representative's Office asked him by telephone to attend an interview within the next two days. The complainant replied that he was preparing for his daughter's wedding, which would take place on 31 October, and he would only be available after his return from annual leave. He was not interviewed, and by a letter of 6 November 1998 the Regional Personnel Officer informed him that he had not been selected for the post. By a memorandum of 14 December the complainant asked the Regional Personnel Officer whether the selection procedure had been conducted under the new procedure outlined in the circular of 14 October, or the "old" procedure which it replaced. He replied on 15 December 1998 that since the "processing of the selection" was initiated long before 1 November the "old" selection procedure applied.

The complainant appealed to the Regional Board of Appeal against the decision not to appoint him. In its report of 28 April 1998 the Board recommended that the selection for the post be set aside. The Regional Director did not uphold that recommendation and rejected the appeal. The complainant appealed to the Headquarters Board of Appeal, which, in its report of 22 November 1999, found that SEARO had failed to apply the correct selection procedures and had incorrectly excluded the complainant's application from consideration. It recommended quashing the selection procedure for post 5.2534, initiating a new one and awarding him costs. In a letter of 10 April 2000, the impugned decision, the Director-General informed the complainant that she was not entirely convinced by the Headquarters Board's reasoning and the selection process would not be quashed; however, as both Boards raised the possibility of a technical flaw, he would be awarded compensation of 2,000 United States dollars. The complainant was paid that sum on 19 April 2000.

B. The complainant submits that he was not given a "fair chance" in the selection process. He alleges personal prejudice against him on the part of responsible officials, incomplete consideration of the facts, abuse of authority and breach of due process.

He says the WHO "manoeuvred" the successful candidate, Mr K., into the post in order to facilitate his selection. That official was assigned to the Representative's Office at grade ND.4 in mid-1998 and his assignment was simply extended until he was promoted to ND.5 on the post in question on 1 December 1998.

The complainant contends that SEARO failed to give him proper notice when it asked him to come for an interview. He was genuinely unable to attend and, as a result, his candidature was effectively "cancelled" and his suitability for the post was ignored.

He claims that the selection process should have been conducted under the new procedure which applied to all General Service posts falling vacant on or after 1 November 1998. It therefore applied to post 5.2534 which was only to become vacant on 1 December upon the retirement of the incumbent. The selection process was "rushed through" so as to avoid it being made under the revised provisions. He would have benefited under the new procedure because of his seniority and excellent appraisal reports.

Furthermore, he argues that the Director-General's decision is "invalid". Both appeal boards recommended quashing the selection but in the impugned decision the Director-General gave no reasons for disagreeing with their findings.

He wants the selection to post 5.2534 to be set aside and a new selection process undertaken in accordance with the procedure defined in the circular of 14 October 1998. He asks for an award of damages in an amount of 10,000 dollars for material and moral injury and claims costs.

C. The Organization replies that the selection process was carried out in conformity with the applicable rules. The post was advertised in August 1998 and at that time the 1994 selection procedures applied. Having begun the process under the 1994 procedure it completed it under the same one. It would not have been sound personnel practice to apply two different procedures to the same selection. There is, moreover, no evidence that the complainant would have fared better under the 1998 selection procedures. Seniority is a factor under both the old and new procedures but it does not determine selection.

It stresses that the staff member appointed to the post was chosen following an impartial process. He had been temporarily reassigned to the Representative's Office for a period of three months, to provide assistance in a busy office, but during that time he was not performing the duties pertaining to the post in question.

The Organization states that all eligible candidates were contacted on the same date and asked to come for an interview on 27 or 28 October. The acting WHO Representative in India, who was responsible for conducting the interviews, was to be absent from 2 November. The Organization's wish to conclude them before that date was therefore reasonable, particularly as the post was to fall vacant on 1 December. It says that it took reasonable steps to facilitate interviewing the complainant. It even offered to send a car and driver to fetch him. In declining the opportunity to be interviewed the complainant rendered his selection impossible since an interview was a prerequisite for selection.

Because both appeal bodies raised the issue of whether there was a technical flaw in the selection process the Director-General awarded the complainant 2,000 dollars. The complainant has thereby been amply compensated.

At the request of the Tribunal the Organization gave Mr K., the selected candidate, the opportunity to comment on the complaint. It produces a memorandum of 5 June 2000 in which he says that he does not wish to express any view.

D. In his rejoinder the complainant contends that the selection process does not begin with the issuance of the vacancy notice. It was unusual practice to issue the vacancy notice months before the vacancy was to arise. The post in question was to become free only on 1 December 1998 and therefore the Organization cannot justify using the 1994 selection procedures. Moreover, he did not decline to be interviewed - he merely sought "due notice" and a "fair opportunity".

The complainant takes up an issue raised by the Regional Board of Appeal in its report and contends that there was a flaw in the composition of the Ad Hoc Selection Committee which assessed the candidates for the post. The Board found that, according to the selection procedures instituted in 1994, the Ad Hoc Selection Committee had to include an official from the Unit with the vacancy but who was not a Director. However, it noted that the acting

WHO Representative in India, who was also responsible for conducting the interviews, was at Director level. The complainant contends that the latter was not competent to interview candidates. The Board also found the composition of the Committee to be flawed under the 1998 procedures.

E. In its surrejoinder the Organization affirms that the recruitment and selection process began with the publication of the vacancy notice. It notes that the complainant puts forward no other argument as to when it began. The process of reviewing applications started on 7 September 1998 and was steadily carried forward.

The complainant is wrong in his assertion that the acting WHO Representative should not have participated on the Selection Committee. He was a short-term professional at grade P.6 but was not a Director. He was not prevented by the rules from interviewing candidates.

CONSIDERATIONS

1. The complainant joined SEARO on 12 July 1979 and in January 1994 he was given a career service appointment. At the material time he held grade ND.4.
2. On 10 August 1998 a vacancy notice for the post of clerk III at grade ND.5 was issued and on 7 September 1998, the closing date for applications, the complainant applied. He was notified on 6 November 1998 that he had not been selected. He lodged an appeal against this decision with the Regional Board of Appeal which recommended setting aside the selection. The Regional Director did not accept this recommendation and dismissed the appeal. The complainant appealed to the Headquarters Board of Appeal. The Board recommended that the selection be quashed, that a new selection procedure be initiated and that legal costs be paid.
3. By a letter of 10 April 2000, the impugned decision, the Director-General refused to quash the selection process, but because both Boards of Appeal raised the question of a technical flaw in the selection process she awarded the complainant 2,000 United States dollars in compensation.
4. The complainant has three pleas. He claims that:
 - (a) The Organization should have applied the selection procedure outlined in information circular IC-98-23.
 - (b) The Organization did not give him adequate notice to attend an interview for the post and, as a result, he was no longer considered to be a candidate.
 - (c) The selection was the result of personal prejudice.
5. New selection and recruitment procedures for General Service posts were issued on 14 October 1998 and were to be applied for a trial period of one year. The procedures were to apply to posts falling vacant on or after 1 November 1998 in SEARO and the Office of the WHO Representative in India. In the present case, post No. 5.2534 was to fall vacant when its incumbent retired on 30 November 1998. The successful candidate would assume his functions on or after 1 December 1998.
6. The Organization did not apply the new selection procedure and instead used the selection procedure that had applied since June 1994. It seeks to justify this by relying on the fact that the vacancy notice was issued on 10 August 1998 and the closing date for applications was 7 September. It claims that the selection process commenced on 10 August 1998 when the vacancy notice was issued and therefore the 1994 procedure continued to apply. It maintains that the Administration acted correctly in applying it. For selections where the vacancy notice was issued on or after 1 November 1998 the Organization applied the 1998 procedures. It further claims that no matter which procedure was applied the outcome would have been identical. The complainant could not have been selected as he declined to be interviewed and an interview was an essential prerequisite for selection.
7. In the view of the Tribunal the Organization failed to apply a clear rule, laid down in information circular IC-98-23, that the new procedures applied to vacancies occurring on or after 1 November 1998. All that had occurred up to 14 October 1998 was that a vacancy notice had been issued and applications were received. The Organization was not entitled to refuse to apply the new procedure merely because the vacancy notice was issued before 14 October 1998.

8. Since the Organization failed to apply its own rules the complainant is entitled to succeed on this point.
9. The complainant's second plea concerns lack of notice on being called for interview. He took approved annual leave from 15 October to 8 November 1998 to prepare for his daughter's marriage on 31 October 1998. On 26 October the Special Assistant in the Representative's Office contacted him by telephone to arrange an interview on 27 or 28 October. The complainant said he was unable to attend as he was busy making arrangements for the wedding. He offered to come for interview on 10 November after he returned from leave. This did not suit the Administration as the acting Representative would be away from 2 November. On both 27 and 28 October another official contacted him urging him to come for an interview, but the complainant's response was the same. Because he did not attend the interview his name was removed from the list of candidates considered by the Ad Hoc Selection Committee when it met on 2 November 1998.
10. No explanation is given as to why only one day's notice was provided before the interviews were held, nor why it was necessary to rush them through, nor why the selection had to be made in early November when the vacancy did not arise until 1 December. It is reasonable that the complainant could not attend an interview in the middle of the pre-wedding preparations. There is also no explanation of why the complainant could not have been interviewed when the acting Representative, who was the responsible officer, returned from his absence.
11. The failure to give reasonable notice to the complainant to attend an interview by refusing to take into account the family circumstances of the complainant at the time, followed by the elimination of the complainant from consideration when he could not attend, constitutes another flaw in the procedure adopted by the Administration in respect of the selection for this post. The complainant succeeds also on this point.
12. The complainant claims there was personal prejudice against him because the candidate selected for the post was placed in the Representative's Office in mid-1998 by the Special Assistant in anticipation of the vacancy that was to arise on 1 December 1998. The complainant claims this was to facilitate the eventual selection and promotion of this person to the post. He also claims that the selection process was rushed through by the Regional Personnel Officer and the Special Assistant in the mistaken belief that the more objective revised procedure would not apply, whereas there was no necessity for such haste.
13. The person appointed to the post, Mr K., said that he did not wish to express any view as far as the complaint was concerned.
14. The Organization claims that, prior to his selection, the successful candidate had been temporarily reassigned to the Representative's Office to provide additional assistance in a busy office. The duties he performed had previously been performed by a retired staff member who was under contract until May 1998. They were not the duties pertaining to post 5.2534. Moreover, the Special Assistant did not participate in the selection process and did not interview candidates. His role was limited to providing administrative support such as contacting candidates to arrange interviews.
15. Whatever suspicions the complainant may have, the Tribunal is unable to hold that he has proved personal prejudice. The duties which the successful candidate was asked to perform in the Representative's Office were not those pertaining to post 5.2534. Also, the lack of notice for the interview does not appear to have been directed solely at the complainant. This plea fails.
16. Since the complainant succeeds on the first two scores, he is entitled to have the selection for post 5.2534 set aside and a new selection made in accordance with the selection procedure currently applicable, albeit on the understanding that the Organization must shield the successful candidate from any injury that may result from the quashing of an appointment accepted in good faith.
17. The complainant claims damages amounting to 10,000 United States dollars for material and moral injury for depriving him of a fair chance of selection to the post. He has already been awarded and has received 2,000 dollars. Since the complainant will be entitled to apply for the post under the new selection process, the Tribunal considers a further award of damages as unnecessary. He is, however, entitled to an award for costs.

For the above reasons,

1. The selection made for post 5.2534 is set aside.
2. The Organization should proceed with a new selection in accordance with the procedure currently applicable.
3. The complainant is entitled to 500 United States dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

Mella Carroll

Flerida Ruth P. Romero

Catherine Comtet