

## SIXTY-EIGHTH SESSION

### *In re* SHARMA

#### Judgment 999

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hari Chand Sharma against the World Health Organization (WHO) on 3 April 1989 and received at the Registry of the Tribunal on 27 April, the WHO's reply of 28 June, the complainant's rejoinder of 31 July and the WHO's surrejoinder of 18 August 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Staff Rules 110.8.1 and .3, 530.1 and .2, 570.1.2, 1075.1, 1130, 1230.3.2, .3.3 and .4.3 and 1240.2 and WHO Manual provisions II.5.10, II.5.230, II.5.240 and II.9.490 to .495;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian born in 1951, joined the WHO's Regional Office for South-East Asia (SEARO), in New Delhi, in 1981 as a janitor under a fixed-term appointment. He became a storekeeper in the Office Supply and Stores Unit in 1985 at grade ND.4.

Suspecting the complainant of dishonesty, SEARO arranged with a local firm of suppliers, Jyoti Chemist, to set a trap for him. On 29 August 1986 Jyoti delivered supplies of sanitary napkins and rolls of lavatory paper. Jyoti had made out one invoice for 500 packets of napkins and another for 3,000 rolls, and the complainant signed them on the same day. The acting Administrative Services Officer (ASO) made an inspection on 11 September.

On 16 February 1987 the ASO said in a report on the complainant's performance in 1985-86 that he had dishonestly accepted short delivery. Though he rejected the charge on 24 February, the upshot was that in a letter of 14 April 1987 the personnel officer suspended him from duty on full pay, accused him of "serious misconduct" under Staff Rules 110.8.1 and .3 and invited him, in keeping with Rule 1130, to answer the following charges:

"1. At some time between 25 and 29 August 1986, you attempted to make an arrangement with Mr Promod Gupta of M/s Jyoti Chemist, from which the Organization had ordered 3000 toilet rolls and 500 packets sanitary napkins. Under the arrangement, the chemists would actually supply only 2000 toilet rolls and 300 packets sanitary napkins and you would receive a commission. In fact, Mr Gupta only pretended to conclude the arrangement with you.

2. On 29 August 1986, 2000 of the toilet rolls and 300 packets of the sanitary napkins that had been ordered were delivered by the suppliers to WHO Stores ... You were the officer responsible for receiving the delivery. You signed receipts for the full order, namely 3000 toilet rolls and 500 packets sanitary towels.

3. In the morning of 11 September 1986, Mr N.P.H. Milner, Acting ASO, checked the consignment of toilet rolls in the presence of yourself and Mr P.K. Wells. He told you that, according to his count, he believed that there had been a short delivery and asked you to check the consignment again. When Mr Milner returned in the afternoon of the same day, he found that the consignment (together with 150 rolls for which a voucher was shown to him) now comprised 3000 toilet rolls. He also found that there were two different brands of toilet rolls in the consignment, Wintex and Softex, whereas only one brand had been supplied by the chemists. There is no doubt that only 2000 rolls were delivered (see attached letter of 2.3.1987 from Jyoti Chemist). The Organization believes that it can only have been you who attempted to cover up the short delivery, since you alone had a motive for doing so together with the knowledge that the short delivery has been discovered only a few hours before.

4. Fearing that the short delivery of sanitary napkins would also be discovered, you secretly arranged with Jyoti Chemist to supply the missing 200 packets. The delivery took place on 16 September 1986. You received the consignment, and signed for it.

5. The toilet rolls needed to conceal the short delivery referred to above had previously been taken from WHO stores. In order to conceal the abstraction of those rolls from the stores, you falsified the requisition/ delivery slips changing the figures that had been entered between 9 June and 2 September 1986. In most cases, the change was from 100 to 200 rolls. To authenticate those changes you forged the signature of other officials, in particular that of Mr Virinder Singh Bisht. In connection with the charge of falsification, you have said that it was not deliberate; you should explain what you meant by the statement in your appraisal report that: 'there was no deliberate falsification of records because there was in fact, no short delivery in the long run'."

The complainant had his appointment extended by two months from 1 June 1987.

He rejected the charges in letters of 21 April 1987 and 10 and 17 June. But on 21 July the personnel officer informed him that the Regional Director had decided to dismiss him as from 22 July under Rule 1075.1 and to pay him a month's salary in lieu of notice; the grounds were that on 29 August 1986 he had certified invoices for 3,000 rolls of paper and 500 packets of napkins when only 2,000 and 300 had been delivered and that, to cover up, he had tampered with stock cards and with order forms made out from June to September 1986.

He appealed on 7 September 1987 to the Regional Board of Appeal.

In its report of 3 March 1988 the Board held that the only proven charge was that he had certified short delivery of napkins and by that "honest mistake" had failed to carry out his duties satisfactorily. It found breaches of the procedure in WHO Manual provisions II.5.240 and II.9.490 to 495 in that neither his supervisor nor anyone else with authority had made a formal proposal for dismissing him, the performance report having been used for that purpose. There had been breach of the obligation in II.9.495 to consult the Chief of Personnel. Dismissal was, in the Board's view, out of proportion to the offence, and it recommended reduction in grade under Rule 570.1.2, which authorises that sanction for "unsatisfactory performance or misconduct". It also recommended amending his performance report and awarding him costs. There followed correspondence between the Regional Director and the chairman of the Board about certain points and further inquiry was made at the Director's request at which the complainant was not present. The Director wrote to him on 28 April 1988 rejecting the Board's recommendation and his appeal.

On 30 May 1988 he appealed to the headquarters Board of Appeal.

In its report of 5 December 1988 the headquarters Board found a strong presumption that the complainant, having wittingly accepted short delivery of the rolls of paper, had committed misconduct; it recommended rejecting his appeal. The Director-General did so in a letter to him of 5 January 1989, the decision he impugns.

B. The complainant submits (1) that by giving no reason for rejecting the Regional Board's recommendations the Regional Director acted arbitrarily and unlawfully.

(2) In support of the charge about the 1,000 rolls of paper the WHO cites letters dated 24 October 1986 and 2 March 1987 from Mr. Promod Gupta of Jyoti offering to supply the allegedly missing rolls or give credit therefor. Yet the complainant was never allowed to cross-examine Mr. Gupta, whose statements no other evidence bears out. That was a breach of his right to a hearing.

(3) Of the five original charges against him only two were pressed; yet the penalty was as severe as the one proposed on the strength of all five. The WHO's predisposition in favour of dismissing him made the decision an abuse of authority. So was the extension of his appointment by only two months from 1 June 1987 when he had always been given two years before.

(4) Being in breach of the principle of proportionality, the decision showed a mistake of law.

(5) Essential facts were overlooked. His record of service was very good and the WHO can accuse him of no other dishonesty despite "intensive" watching of him for over six months. Jyoti may have had improper motives for hatching a plot against him; after all, the two owners of the firm were "not above board". He was in charge of many costlier items than rolls of paper and napkins, in which there is a quick turnover and which he understandably paid less heed to.

(6) Wrong conclusions were drawn from the evidence. As the Regional Board held, the charge of dishonestly signing for 3,000 rolls instead of 2,000 is not proven, and the headquarters Board found a mere "presumption" of

guilt. Mr. Gupta's letters are not admissible evidence and not conclusive anyway. The WHO has wrongly imputed a dishonest motive to him for correcting entries in orders for rolls of paper: the corrections were not "falsification" because he had no intent to deceive. The headquarters Board erred in presuming his guilt from only a few items of evidence. It further erred in subtracting several hundred rolls from the numbers in stock to support its finding that there were 1,000 short, and it made other mistakes of fact. After all, evidence appended to the Regional Board's report shows that 3,000 rolls were delivered.

(7) Many circumstances suggest that the complainant's supervisors were deeply prejudiced against him.

(8) He alleges several breaches of the rules and of procedure.

(a) After getting the Regional Board's report the Regional Director sought "clarifications", the complainant was not informed of the Board's reply, and that was a breach of due process.

(b) The delay in writing his report for 1985-86 was in breach of Rule 530.2, which requires reporting on staff members' performance at least once a year.

(c) Under Manual provision II.5.230 supervisors are required to report without delay to the personnel service any misconduct by a staff member. Instead the complainant's supervisors acted of their own accord by setting a trap for him in collusion with Jyoti.

(d) Since the purpose of a performance report is not to make charges of misconduct there was breach of Rules 530.1 and .2 and Manual provision II.5.10.

(e) Although Rule 110.8.3 defines "misconduct" as "any improper use or attempt to make use of his position as an official for his personal advantage", the WHO has offered no evidence to suggest that the complainant was seeking or got such advantage.

(f) The headquarters Board committed nine breaches, which the complainant sets out, of Rules 1230.3.3 and .4.3 and of its own rules of procedure. In particular it took too long to report.

(g) The WHO acted in disregard of his dignity in suspending him from duty: it should have put him on another post.

(h) There was breach of II.9.490: "A proposal to terminate an appointment for misconduct is based on a report prepared by the supervisor or by another authorized WHO staff member stating the established facts considered to constitute misconduct". No such proposal was made, and the facts were not established.

(i) It was inconsistent to grant him a salary increment, which is a reward for satisfactory service, for 1985-86.

(9) The WHO acted in bad faith by entering into an "unholy alliance" with Jyoti to set a trap for him.

(10) It has failed to discharge the burden of proof, as the case law, particularly Judgment 635 (in re Pollicino), requires. Its case is implausible: though the short delivery was supposedly made with its knowledge on 29 August 1986, it did not inspect the stores until 11 September.

The complainant seeks the quashing of the impugned decision, his reinstatement without loss of seniority or pay, the removal or amendment of the adverse remarks in his report for 1985-86, moral damages and costs.

C. In its reply the WHO explains that the Regional Office set a trap for the complainant because it suspected him of misconduct, but things went awry because Jyoti's agents refused to give evidence beyond written recognition of short delivery. Yet there is still a "set of precise and concurring presumptions" of the complainant's guilt.

(1) In answer to his allegations of breaches of procedure, the WHO observes that it made no use of information from Jyoti's agents about collusion with him. Though it was in breach of his right to a hearing not to ask him to take part in the further inquiry made at the Regional Director's request after the Regional Board had reported, that was not a fatal flaw since nothing emerged to his detriment and the Board's findings held good.

True, there was another error of procedure in that the Regional Office failed to make a proper investigation and

then charge him with misconduct in accordance with the procedure in Rule 1130, and the charges first appeared in his performance report. But he was no worse off on that account than if the proper procedure had been followed, and the error did not invalidate the dismissal.

The time the headquarters Board took to report was not so long as to amount to abuse of procedure.

(2) As to the merits, the WHO observes that it had to waive three of the original charges because Jyoti's agents refused to give evidence. The complainant having admitted to signing a receipt for the full number of napkins, the Regional Board rightly held that he had failed to carry out his duties. Stock control was lax, and the explanation he has given for failing to check the consignment is unconvincing.

As for the rolls of paper, he does not deny changing the figures in the order slips, and on the whole the evidence - which the WHO discusses in detail - suggests that he knowingly accepted short delivery and later altered the earlier order slips "to justify a counting of what purported to represent a full delivery". That was serious misconduct, not just unsatisfactory performance.

(3) The sanction was not disproportionate: a storekeeper who accepts short delivery and alters records to make them tally with stocks causes his employer financial and moral injury.

(4) Both the Regional Director and the Director-General gave sufficient reasons for their decisions; the charges against the complainant had been fully stated and he was given his say.

(5) The allegation that Jyoti concocted the whole story is unsupported by evidence and makes no sense: what did Jyoti stand to gain from falsely accusing him? Besides, his dismissal did not depend on any statement by Jyoti's agents.

(6) There is no evidence of personal prejudice: in particular the errors of procedure, which caused him no injury anyway, were not prompted by such prejudice.

D. In his rejoinder the complainant asks how the WHO came to suspect him in the first place and who set things in motion in the Regional Office. He points out that whereas the Regional Office told the Regional Board that it was an agent of Jyoti's who first accused him the reply makes out that it was the Office that approached Jyoti. There were two fatal breaches of due process: not to let him be present when the chairman of the Regional Board and the Regional Director saw witnesses after the Board had reported, and not to make any proper inquiry into the truth of the charges.

As to the merits, the WHO has failed to show what the "precise and concurring presumptions" are. Since there is no evidence of any deal between him and Jyoti or of forgery of signatures, how can short delivery or cover-up be presumed? Nor is there evidence of lax control of stocks: no other item was found to be short. There was no discrepancy between records and stocks after bona fide corrections had been made. The complainant presses his claims, stressing that anything short of reinstatement would deny him full rehabilitation.

E. In its surrejoinder the WHO explains that its case rests not on its original suspicions of the complainant's dishonesty but on his efforts to cover up short delivery. The difficulty was that Jyoti's agents were loth to provide evidence of their own collusion with him and that the way in which the inspection was carried out gave him a chance to hide his offence by making up what was missing and altering the records to show a "larger throughput" in the preceding months. In sum the WHO's case rests on three facts: (1) the rolls were of two brands, though Jyoti supplied only one; (2) the complainant altered earlier order slips so as to increase the number of quantities supposedly delivered and so let him draw on stocks to make up the short delivery; and (3) he certified full delivery of napkins when he knew it was short. It was because checking the stocks of rolls of paper was treated as less important that he thought he stood a better chance of defrauding the WHO over them. On his own admission his performance was unsatisfactory. The fact that the charges first appeared in his report for 1985-86 was not to his detriment. Reinstatement is neither possible nor desirable since he lacks the honesty and competence any post at his level of education and experience demands.

#### CONSIDERATIONS:

1. The Regional Board of Appeal of the WHO submitted a report on 3 March 1988 on the complainant's appeal against dismissal. One charge had been that, though only 2,000 rolls of lavatory paper had been received in WHO

stores on 29 August 1986, he had signed for 3,000. The Board found that that charge was not established. Neither, in the Board's view, were the charges that he had manipulated earlier indents to cover up short delivery of the rolls and the charges of forgery of signatures on stock cards. The Board upheld the charge that he had signed, though not in bad faith, for delivery of 500 sanitary napkins when only 300 had actually been delivered. The Board held that, for whatever reason, he had altered the indents, and that was inconsistent with the standards of performance required of a storekeeper. The certification of full delivery of sanitary napkins had been an "honest mistake", but he should have checked the stocks and made a note on the invoice of the actual quantity delivered. The Board's conclusion was that the complainant had failed to carry out his duties satisfactorily. The Board therefore recommended that the Regional Director reverse the dismissal and instead impose on the complainant the sanction of reduction by one grade as from the date of dismissal.

2. On 8 April 1988 the Regional Director wrote to the chairman of the Board questioning some aspects of the Board's report and asking for further inquiry into certain facts.

The chairman of the Board wrote to the Regional Director in reply on 26 April giving further explanation. He referred to a meeting which had been held in the Regional Director's office to clarify points arising out of a written statement by a Mr. Virinder Singh Bisht, whose signature had allegedly been forged. The complainant had not been invited to attend that meeting.

The chairman also reported in his letter on a meeting he had had in the Regional Office with Mr. Praveen Gupta, an agent of Jyoti Chemist who had signed the quotation for the supplies on behalf of his brother, Mr. Promod Gupta. The complainant had not been present at that meeting either.

3. Having first learned from the WHO's reply of those two meetings the complainant in his rejoinder objects to what he calls "the grave error" committed in the questioning of the witnesses. Neither he nor his representative had been asked to be present at the questioning, and he maintains:

"Prima facie, these parleys influenced the mind of the Regional Director and therefore constitute serious violation of Service Rule 1230.3.2, as well as the general laws which require that no evidence be recorded at the back of the complainant without allowing him a chance to cross-examine the witnesses. This is a fatal lapse on the part of the Administration and renders the entire proceedings and the final decision as unlawful."

The WHO answers that the error of procedure was not fatal: the statements by Mr. Bisht were, it submits, inconclusive and if anything in the complainant's favour: the general conclusion by the chairman of the Regional Board was that since "no new material evidence was forthcoming regarding these issues, I have not reconvened the Board".

4. Whoever makes inquiries of the kind that were made in this case must be scrupulous in not taking evidence from one party without the other's knowledge. Whether or not the evidence did work to the complainant's prejudice is irrelevant: it is sufficient that it might have done so, and it is not the likelihood but the risk of prejudice that is fatal. There can be no certainty that justice will be done if evidence is taken in the absence of one of the parties.

5. The proceedings in the appeal the complainant lodged against the decision of 21 July 1987 to dismiss him show a breach of due process.

According to WHO Staff Rule 1240.2, however, the Tribunal may rule on a claim by a staff member only if he has exhausted the internal means of redress and the decision he impugns is final.

The appeal proceedings provided for in section 12 of the WHO Staff Rules form part of the final decision of 5 January 1989 by the appointing authority the Tribunal has to review. Breach of the Staff Regulations and of general principles, including breach of due process, is a flaw in the appeal proceedings which also taints the impugned decision, and for that reason the decision cannot stand. What does stand, however, since it is only the appeal proceedings that were improper, is the prior decision of 21 July 1987.

The complainant duly filed his internal appeal with the Regional Board, and the Organization shall resume the internal appeal proceedings. The competent authorities shall reconsider the internal appeal in the light of the submissions already made by the WHO and by the complainant and any further submissions the parties may make in adversarial proceedings, no account being taken of the breach of due process.

6. Since the breach of due process in the internal appeal proceedings has held up the final determination of the matter and caused the complainant injury whatever the outcome may eventually be, the Tribunal orders the Organization to pay him lump-sum damages in the amount of 500 United States dollars.

DECISION:

For the above reasons,

1. The decision of 5 January 1989 is set aside.
2. The case is sent back to the WHO for reconsideration of the complainant's internal appeal.
3. The Organization shall pay him 500 United States dollars in damages.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

(Signed)

Jacques Ducoux  
Mohamed Suffian  
Mella Carroll  
A.B. Gardner