

SEVENTY-SECOND SESSION

In re MANAKTALA

Judgment 1133

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Kishore Chand Manaktala against the World Health Organization (WHO) on 19 December 1990, the WHO's reply of 27 February 1991, the complainant's rejoinder of 25 April and the Organization's surrejoinder of 15 May 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Staff Rules 110.8, 1075.2, 1110 and 1120;

Having examined the written evidence and decided not to order oral proceedings, 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, an Indian citizen who was born in Lahore in 1938, joined the WHO's Regional Office for South East Asia (SEARO) in New Delhi in 1964 at grade ND.3. In February 1985 he was made an assistant at grade ND.6 in the Office of the Organization's Representative in India, who is known as the WR.

Dr. Ajit Acharyya, Assistant Commissioner in the Indian Ministry of Health and Family Welfare, wanted to hold three regional meetings about primary health care, family planning and maternal and child health at an estimated cost of 114,175 Indian rupees each, at the time the equivalent of some 8,000 United States dollars. SEARO authorised the transfer of funds to Dr. Acharyya for that purpose.

One of the meetings was to be held in Jaipur in March 1987 and a cheque was sent to the Ministry through the WR's Office to cover the cost of it. But it was postponed and Dr. Acharyya sent the cheque back to SEARO through the WR's Office for cancellation.

On 9 May 1987 a savings account was opened in Dr. Acharyya's name with the Bank of India at its branch in Vikaspuri, New Delhi, by an initial cash deposit of 200 rupees.

On 9 June the WR's Office forwarded to SEARO a letter bearing that date, purporting to come from Dr. Acharyya, saying that the Jaipur meeting was to be held from 29 June to 1 July and asking the WR to "release the funds to us at an early date". On 15 June SEARO made out a cheque drawn on Grindlay's Bank in the sum of 114,175 rupees and the complainant picked it up in the office of the Budget and Finance Officer (BFO) in SEARO.

On 21 June a cheque for 114,175 rupees was presented at the Vikaspuri branch of the Bank of India for deposit in the account opened in May in Dr. Acharyya's name. The Bank accepted the deposit. The next day, however, the manager of the branch telephoned Dr. Acharyya and learned that he had not opened an account there. Dr. Acharyya went to the WR's Office and there told the complainant of his conversation with the bank manager. The complainant wrote the manager a letter citing that conversation, asking that the cheque be "returned to us immediately and not sent for clearing", saying that the matter would be looked into and signing as "Acting Administrative Officer".

Having heard of the attempt to deposit the cheque, the BFO asked Grindlay's to stop payment and the complainant to explain how it had passed out of his possession. In a memorandum of 22 June to the WR the complainant said that after picking up the cheque he had drafted a letter to send it to Dr. Acharyya but, having heard from Dr. Acharyya that he was to retire in July and that the meeting was therefore cancelled, he had kept the letter and the cheque among his papers. Later, when "going through" his papers, he had failed to find either letter or cheque.

On 23 June the bank manager accompanied another bank officer and Dr. Acharyya to the WR's Office and there met the complainant. The same day he wrote a report to the Vikaspuri police which read in part as follows:

"On 22.6.87 I gave a telephone call to Dr. A.K. Acharya [sic] under Tel. No. listed in the Tel. Directory. To my surprise I was told that Dr. Acharya has never visited our branch nor has opened any account with our Bank. ... Further inquiry was made and it was found that no such person was residing at the address given in the account opening card. ... Today on 23.6.87 I went to the office of Dr. A.K. Acharya at the Nirmal Bhawan and along with him I went to the branch office of W.H.O. on the 5th floor of Nirmal Bhawan to meet Mr. K.C. Manaktala. But to my surprise I found that he is the man who came to the Bank to deposit the cheque. Shri A. Kalra, officer working at our branch was also with me and he also recognized him as the account was opened in his presence. ... We are reporting this matter for your investigation."

On 24 June Dr. Acharyya wrote to the Director of Support Services of SEARO stating that he had no account at the Vikaspuri branch and branding as a forgery the letter of 9 June purporting to be a request from him for release of the funds.

The same day the police arrested the complainant on charges of fraud and misrepresentation under the Indian Penal Code.

By a letter of 26 June a personnel officer of SEARO charged him with serious misconduct under Staff Rule 110.8.3 ("'Misconduct' means ... any improper use [by a staff member] ... of his position as an official for his personal advantage") and warned that he might be dismissed under Rules 1075.2 ("A staff member may be summarily dismissed for serious misconduct") and 1110. The specific charges were forging the letter of 9 June 1987, opening the bank account in Dr. Acharyya's name and attempting to present the cheque to the bank for payment and thereby to defraud the Organization. He was given eight days in which to answer and suspended from duty without pay under Rule 1120 ("Suspension pending investigation"). He denied the charges in letters of 3 and 8 July.

By an order of 24 December 1987 the metropolitan magistrate, Delhi, discharged the complainant, declaring the file to be "consigned as untraced". The complainant gave SEARO a copy of the order on 28 December and, at SEARO's request, a certified copy on 7 February 1988.

On 3 March 1988 the personnel officer wrote to him to say that the Organization "considers that the evidence so far available to it shows overwhelmingly" the truth of the charges. "You indicated yourself as being the person concerned or one of them by attempting to cover the misplacement of the cheque", which, "even if you were not involved in the fraud ... constitutes misconduct within the meaning of Staff Rules 110.8.1, 110.8.3 and 110.8.4". The letter set out six findings of fact as evidence of gross negligence and asked him to answer within eight days.

The complainant answered in a letter of 14 March 1988 that the Organization could not bring the same charges as those on which the Indian court had acquitted him; he claimed payment of his salary as from the date of his suspension. On 8 April SEARO wrote giving him another eight days in which to answer its letter of 3 March in detail. In a letter of 18 April he pleaded not guilty of the charge of negligence and claimed reinstatement with back-pay.

By a letter of 26 May the personnel officer informed him that the Director-General dismissed him at 1 June under Rule 1075.2. On 6 July he filed notice of appeal with the Regional Board of Appeal.

In its report of 31 March 1989 the Regional Board recommended rejecting his appeal and the Regional Director did so in a letter of 4 April to the complainant. In June 1989 he appealed to the headquarters Board of Appeal.

The headquarters Board reported on 15 January 1990. It did not see why the complainant would have risked his career for the sum at stake. It regarded as dubious the bank's evidence as to the identity of the person who had opened the account and found it odd that the bank had not pressed criminal charges against the complainant. Though he had been remiss in looking after the cheque and ought to have reported the loss of it to his supervisors he had not been proved guilty of dishonesty. Though some sanction was warranted for negligence it should, under Rule 1110.1, have been determined "according to the gravity of the offence"; dismissal was too severe. The charges of dishonesty not being sustained, the Organization should, in accordance with Rule 1110, have paid him back his salary. The Regional Director should be asked to reopen the matter.

SEARO submitted "clarifications" in a memorandum of 23 July 1990 and the complainant commented thereon in one of 28 August.

By a letter of 18 September 1990 the Director-General declared himself "satisfied beyond reasonable doubt" of the

complainant's attempt to defraud, upheld his dismissal as legally correct and rejected his appeal. That is the decision he impugns.

B. The complainant gives his own account of the case and submits the following pleas.

(1) The Staff Rules allow dismissal for misconduct only on the strength of facts established after proper inquiry. On the WHO's own admission in the personnel officer's letter to him of 26 June 1987 it "had been conducting its own investigation" into the case. By basing its conclusions on evidence from witnesses whom it had given him no opportunity to question it committed a gross breach of his right to a hearing and of due process. The charges against him were so grave that it needed irrefutable evidence in support: it offers none. It has not sought to show that he forged Dr. Acharyya's signature, or opened the bank account, or impersonated Dr. Acharyya when the cheque was deposited. Since it cannot find the real culprit it has merely presumed that it was he.

(2) Rule 1075.2 is about summary dismissal. SEARO purported in its letter of 26 May 1988 to apply that provision in dismissing him. Since his suspension lasted a year, from 26 June 1987 to 31 May 1988, it misapplied that rule.

(3) There was incomplete consideration of the facts. What the Director-General based the dismissal on was not admissible evidence but mere hearsay. The Organization did not keep an open mind but was prejudiced against him from the start. It overlooked his exemplary record: he had before handled cheques worth "crores of rupees" in the WR's Office. He had no reason to suspect or even to notice Dr. Acharyya's signature. The bank manager, whose motives for denouncing him are suspect, later backed down and was never cross-examined. The complainant acted in good faith. He refrained from reporting the disappearance of the cheque because it was of no value to anyone but Dr. Acharyya and he hoped to find it, thinking it was simply mislaid among his papers.

(4) The WHO drew mistaken conclusions from his failure to detect the forgery and to report the loss of the cheque and from the bank manager's identification of him as the person who had opened the account.

He seeks the quashing of the impugned decision, reinstatement, payment of salary and other emoluments and restoration of seniority as from 26 June 1987 and awards of \$30,000 in damages for material and moral injury and \$10,000 in costs.

C. The WHO gives its own version of the facts of the dispute. It observes that it has little power to conduct inquiries or to seek evidence beyond the material in its own files. It may not summon witnesses or punish them if they fail to appear, order the production of documents or search premises. It must take care not to offend local authorities and sentiment. To its surprise the criminal case against the complainant collapsed, and the magistrate did not explain the discharge beyond a phrase which suggested that the prosecution had lost the file - "consigned as untraced" - and could not proceed. Though the headquarters Board had serious doubts about his guilt it is hard to see what more the WHO could have done, short of usurping police authority, to prove its case against him.

Though the burden of proof is on the Organization the Tribunal will not require absolute proof but will be satisfied with a set of precise and concurring presumptions. In the Organization's submission the circumstances of the case raise such presumptions.

(1) The forgery, the opening of the account and the presentation of the cheque presuppose familiarity, such as the complainant had, with the WHO's methods of working and funding. (2) He was identified by the bank manager, who confirmed his earlier statement in a letter of 1 August 1990 to the Organization, though he asked that it be treated as confidential. (3) The typescript of the forged letter suggests that it was probably typed on the complainant's typewriter. (4) The WHO has reason to believe that on 17 June 1987 Dr. Acharyya told the complainant that since he would be retiring there would be no meeting in Jaipur. So it is odd, assuming that the complainant had not forged the letter of 9 June, that he did not thereupon mention that letter, which did ask for funds. The cheque could then have been cancelled. (5) The cheque should have been kept under lock and key, not mixed up with his papers. (6) When the attempt to deposit it had failed his whole behaviour suggested he wanted to conceal the loss of it from SEARO staff. It is a lame excuse that he feared rebuke for the loss.

All those circumstances taken together constitute proof of intent, complicity and negligence amounting to misconduct warranting dismissal.

There was no breach of due process, of the complainant's right to a hearing or of the WHO's own rules. The evidence consists in part of papers that were already in its records or were communicated to it. Since some written

statements provided by witnesses were unsolicited there was no question of cross-examination. Others were made, in July 1987, after the complainant's arrest, and at that time there was no need to have him present; besides, for the most part their contents are not challenged.

The WHO cannot show, because it cannot make police inquiries, that the complainant forged the letter, stole the cheque or tried to deposit it. Though it has never said that the complainant must be the culprit because it cannot find anyone else, there is a concatenation of circumstances affording cogent evidence of his guilt as principal agent or abettor.

There was no breach of 1075.2, which the complainant misconstrues. The distinction between dismissal and summary dismissal is not the lapse of time but the gravity of the offence. In the event of summary dismissal, which fraud and misrepresentation warrant, there are no end-of-service entitlements and no requirement of notice.

The consideration of the facts was complete. The evidence was not hearsay but direct: the bank manager identified the complainant in Dr. Acharyya's presence, and there is no reason to doubt the identification, which was unsolicited. The Director-General took account of the complainant's record of service, as the text of the impugned decision shows. Since the amount at stake was the equivalent of one-and-a-half years' salary for the complainant it was foolish of him to yield to temptation, but the supposition that he did so is not absurd.

The WHO maintains that it committed no mistake in concluding from the evidence that the complainant was not fit to remain in its employ.

Even if the Tribunal held that he had lost the cheque and that an unknown thief had presented it to the bank, his negligence and furtiveness show him to be quite unsuitable for service in the WHO in any capacity whatever. On that hypothesis the proper remedy would be, not reinstatement, but an award of token damages.

D. In his rejoinder the complainant dwells on several issues of fact, enlarges on his earlier pleas and seeks to refute the WHO's pleas in its reply. He maintains in particular that he was on duty on 9 May 1987, when the account was opened, and on 21 June 1987, the day on which he is alleged to have presented the cheque to the bank, and his absences from the WR's Office could not have gone unnoticed.

The Organization did not abide by the general principle that no evidence to the complainant's detriment should have been recorded without his knowledge and in his absence. There was no proper inquiry, whatever restrictions there may be on the Organization's authority. At worst he was guilty of omitting to report the mislaying of the cheque, and that did not amount to misconduct. Anyone familiar with the WR's Office could have filched the cheque. He denies outright ever opening the bank account. Another typewriter like his could have been used to forge the letter: there is no independent evidence as to the typescript and the WHO's comments on the subject are inadmissible. Evidence from the bank manager is inadmissible so long as he insists on its being treated as confidential.

The WHO having failed to discharge the burden of proof and to abide by general principles of law or its own rules, he presses his claims.

E. In its surrejoinder the Organization says it addresses only the few issues of fact and of law on which the complainant's rejoinder does not merely repeat his original pleas. It maintains the pleas in its reply and in particular that his actions following the disappearance of the cheque were calculated to hide what had happened. His absences from the office on 9 May and 21 June 1987 could easily have gone unnoticed. It is impossible that someone unknown should have hatched the whole scheme in the expectation of being able to steal the cheque from the complainant's desk. The peculiarities in the typescript of the forged letter are obvious to anyone: no expert evidence is needed.

CONSIDERATIONS:

The material facts

1. The complainant joined SEARO in October 1964 and on 26 June 1987, when he was suspended from duty, was serving as an assistant at grade ND.6 in the Office of the WHO's Representative in India.

On 23 June 1987 the manager of a branch of the Bank of India on the outskirts of New Delhi, some fifteen miles from that Office, had lodged what is called a "first investigation report" at the local police station. In that report he

alleged that the complainant had attempted to cheat the bank by impersonation; that on 9 May 1987 a savings account had been opened at the branch office of the Bank in the name of Dr. Ajit Acharyya with a deposit of 200 Indian rupees; and that on 21 June a cheque for 114,175 rupees - worth at the time some 8,000 United States dollars - drawn in favour of Dr. Acharyya had been tendered for payment into the account. The manager had become suspicious and, having got in touch with Dr. Acharyya on 22 June, who was Assistant Commissioner in the Indian Ministry of Health and Family Welfare, discovered that he had neither opened any account at the branch nor authorised the opening of one. On the following day, 23 June - the report went on - he and Dr. Acharyya had gone to the WHO Representative's Office, where he had recognised the complainant as the person who had come to the branch office of the Bank to deposit the cheque.

The complainant was arrested on 24 June 1987. The case was brought for trial before a metropolitan magistrate in Delhi. It is not clear whether any evidence was led at the trial; certainly no WHO official was called. At all events the upshot was that on 24 December 1987 the magistrate ordered the complainant's discharge and the police issued a certificate declaring that no case was pending against him.

The internal proceedings

2. The WHO's letter of 26 June 1987 informing the complainant of his suspension without pay under Rule 1120 gave him eight days in which to answer three charges: (i) forging a letter purporting to come from Dr. Acharyya; (ii) opening a bank account in Dr. Acharyya's name; and (iii) attempting to defraud the Organization in the amount of 114,175 rupees. The complainant denied the charges.

By agreement between the WHO and the complainant internal proceedings were postponed pending the outcome of the trial. Having refused to reinstate the complainant on his discharge by the magistrate, the Organization wrote him a letter on 3 March 1988 repeating the charges in its earlier letter and requiring him to comment within eight days on six findings under the heads of gross negligence, withholding information, dereliction of duty and acting without authority. Deeming his explanations unacceptable, it dismissed him as from 1 June 1988.

3. On appeal the Regional Board of Appeal held that "The substance of the appeal, in essence, relates to the six charges levelled by the Administration" and it therefore did not go into the charges of forgery, impersonation and attempt to defraud. But it upheld four of the findings against him - failure to pass on the cheque, withholding information, failure to inform his superiors, and acting without authority - and it held that they constituted misconduct warranting his summary dismissal.

4. The headquarters Board of Appeal, on the complainant's further appeal, concluded that the evidence relating to identification was unreliable and that the lapse of the penal proceedings left the matter in doubt. It held that though some disciplinary sanction was justified dismissal was inappropriate. It recommended asking the Regional Director to re-open the case to shed light on the issue of the complainant's guilt by pursuing the matter with the Bank and the police and to review the question of his reinstatement.

Referral to the Regional Director merely elicited further argument in favour of rejecting his appeal, and in a letter of 18 September 1990 the Director-General stated that he was satisfied beyond reasonable doubt that the complainant had attempted to defraud the WHO, that dismissal was correct in law and appropriate, and that the appeal failed.

The merits

5. The complainant contends that the Staff Rules were not correctly applied, that he was excluded from the taking of evidence and that he was not allowed to cross-examine the witnesses.

The Organization admits that the statements to the Personnel Department by the WHO Representative, by Dr. Acharyya and by staff of the WHO Representative's Office were made in his absence but explains that they were subsequent to his arrest and prompted by its own investigation into the incident. It saw no need to have the complainant present since penal proceedings had been instigated. In any event, it submits, for the most part the statements are not contradicted, and it cites evidence to show that the loss of the cheque was not immediately reported and that the complainant signed his letter to the Bank under an unauthorised title.

6. The WHO Representative stated that he had not been informed of the loss of the cheque until 22 June 1987 and that the complainant had no authority to sign correspondence as Acting Administrative Officer; indeed even the

Administrative Officer signed, not as such, but on the WHO Representative's behalf. As for Dr. Acharyya's statement, it related to the identification of the complainant by the bank manager and to discussions with the complainant about the holding and the cancellation of the meeting that was to have been financed by the amount the cheque was made out for. Dr. Acharyya made the further damaging statement that the complainant had never indicated to him the loss or misplacing of the cheque but had instead said it might have been issued by SEARO and he would find out the facts and report.

7. The failure by the WHO to afford the complainant an opportunity to be present at the Personnel Department's taking of statements and to put questions to the witnesses amounts to breach of due process. The Tribunal stated the material principle in Judgment 999 (in re Sharma): 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.

In summing up the facts in its report the Regional Board of Appeal cited the evidence on identification by the bank manager "As witnessed by Dr. Acharya" and it must have taken the statements by both of them into account in considering the complainant's conduct. There was therefore breach of due process in the internal appeal proceedings and the decision of 18 September 1990 cannot stand.

8. The complainant further accuses the Organization of incomplete consideration of the facts and of admitting mere hearsay as evidence. The WHO's answer is that Dr. Acharyya's evidence as to the identification of the complainant by the bank manager is not hearsay since the bank manager identified him in Dr. Acharyya's presence.

The Organization is mistaken: quite plainly Dr. Acharyya's evidence on that score was mere hearsay and therefore of no probative value. That is a further flaw in the impugned decision.

9. The case must be remitted to the Organization for review of the complainant's position in the light of the foregoing. Pending the outcome of such review he is granted a provisional award of 1,500 United States dollars. He is also awarded 200 dollars in costs. His other claims must fail.

DECISION:

For the above reasons,

1. The decision of 18 September 1990 is quashed.
2. The case is remitted to the WHO, which may either resume the disciplinary proceedings in accordance with due process or pay the complainant financial compensation. Whichever course it follows, the complainant may file a further complaint with the Tribunal.
3. The Organization shall pay the complainant a provisional amount of 1,500 United States dollars.
4. It shall pay him 200 dollars in costs.
5. His other claims are dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mohamed Suffian
William Douglas
A.B. Gardner