

## EIGHTY-SECOND SESSION

### *In re* Malhotra (Kashmiri Lal) (No. 5)

#### Judgment 1564

The Administrative Tribunal,

Considering the fifth complaint filed by Mr. Kashmiri Lal Malhotra against the World Health Organization (WHO) on 21 November 1995, the WHO's reply of 26 February 1996, the complainant's rejoinder of 21 March and the Organization's surrejoinder of 25 June 1996;

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. The complainant, an Indian born in 1936, was on the staff of the WHO's Regional Office for South East Asia (SEARO), at New Delhi, from January 1964 until 31 January 1996 when he retired. Information relevant to this case appears under A in Judgment 1372 on his first complaint. Like that complaint this one is about his unsuccessful application in 1990 for a post, No. 5.0343, for an assistant at grade ND.7. The successful candidate was Mr. V.K. Malhotra.

In execution of Judgment 1372 the Administration disclosed to the regional Board of Appeal the record of the ad hoc selection committee's deliberations. In a report dated 18 January 1995 the Board recommended allowing the complainant's appeal but the Regional Director rejected its recommendation by a letter of 15 February 1995. The complainant then went to the headquarters Board. In a report of 4 October 1995 it recommended rejection. By a letter dated 27 October 1995, which the complainant is impugning, the Director-General told him of the rejection of his claims.

B. The complainant submits that the appointment of Mr. V.K. Malhotra to the post was unlawful. The Administration failed to follow the proper procedure of selection and discriminated against him. He pleads breach of Staff Regulation 4.2 on standards of recruitment and Staff Rule 410.4 on competitions.

He seeks the quashing of the decision to appoint his namesake to post 5.0343; his own retroactive appointment to it; awards of 50,000 United States dollars in moral damages and \$5,000 in costs and "any other cost to compensate" him.

C. In its reply the WHO denies the complainant's allegations and contends that the impugned decision complied with the rules, practice and case law. Recommendations by the regional Board of Appeal are not binding. The Director-General's decision not to promote the complainant is a discretionary one that shows no fatal flaw.

D. In his rejoinder the complainant seeks to refute the Administration's reply, relying mainly on the report of the regional Board, whose findings the WHO has, he says, not seen fit "to consider or contradict".

E. In its surrejoinder the Organization answers several arguments in the rejoinder and maintains that there was nothing improper about the challenged decision.

#### CONSIDERATIONS

1. In Judgment 1372 the Tribunal sent the complainant's case back to the Organization so that its regional Board and, if need be, its headquarters Board of Appeal might take up his appeal anew. The Organization was to make available to the boards the full records of the ad hoc selection committee's proceedings. The Tribunal held that only from those documents could it be determined whether the complainant was right in contending that the committee had improperly "stretched" the short list to favour the successful candidate,

that it had not given due weight to seniority, performance and experience in comparing the complainant with that candidate and that one of its members had dissented.

2. In its report dated 18 January 1995 the regional Board stated that the committee's minutes disclosed bias against the complainant and breach of Staff Rules 1230.1.1 (personal prejudice on the part of the Administration), 1230.1.2 (incomplete consideration of the facts), 1230.1.3 (failure to observe and apply correctly the provisions of the Staff Regulations and Staff Rules) and the procedures for recruitment to the General Service category of staff. The Board found that the complainant ranked first in seniority and his namesake seventh; thought it illogical to place the "cut-off" point so as to include over half the candidates; and considered it strange that the selection committee should have recommended two candidates. The Board recommended such "corrective steps" as the Regional Director should "deem fit". But the Regional Director disagreed with the Board's conclusions and dismissed the appeal in a letter of 15 February 1995.

3. The headquarters Board, to which the complainant then appealed, found evidence neither of personal prejudice against him on the part of the Administration, nor of incomplete consideration of the facts, nor of improper application of Staff Regulations and Staff Rules in the selection process. On the strength of the headquarters Board's findings the Director-General dismissed his appeal in a letter of 27 October 1995.

4. Contending that his seniority was not given due consideration, the complainant points out that at the time of the selection he had served for 26 years as a secretary while the selected candidate had completed only 5 years as such. But his plea is mistaken. Under the "factor rating system" that the Organization used for short-listing inside candidates seniority was only one of several relevant factors. The system allowed up to 35 points for seniority, 40 for the quality of performance, 16 for education and 9 for experience, to make a maximum total of 100. The selection committee rated the complainant's performance below that of seven other candidates. Moreover, under the rules it was not required to recommend the candidate with the top mark, the system being no more than a tool to facilitate short-listing. According to Staff Regulation 4.2:

"The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. ..."

So in emphasising the complainant's seniority the regional Board failed to take into consideration the other relevant factors of selection.

5. The complainant argues that the short list was stretched to include the candidate who proved successful. The answer to that lies in clause 3 of the factor rating system:

"The Ad Hoc Selection Committee will select its own cut off point in arriving at a short list for each vacancy ... taking into consideration the 'clustering' of candidates when such occurs."

That is just what the committee did in this instance.

6. The complainant pleads breach of former Manual provision I.3.340, which stipulated:

"Before a meeting of a selection committee, all applications are reviewed by the unit concerned and a short list of those candidates who seem to be the most suitable for the post is drawn up."

He maintains that that was not done. He is mistaken. The administrative officer to the Regional Director reviewed the applications of all 14 candidates on behalf of the "receiving unit", and the necessary documents were provided to the selection committee three days before it met. Having taken 60 points for the "cut-off", the committee compared seven candidates on merit. There is no rule that says that the receiving unit should short-list no more than three candidates; nor is there any to prevent the committee from recommending two candidates for appointment as it did in this case. Nor was there any dissenting statement by any member of the committee.

7. Lastly, the complainant submits that he should be allowed to see all the documents of the selection committee. Judgment 1372 explained under 11 and 12 for what reasons the regional and headquarters Boards should be able to review such documents and what the purpose of such review should be. But it stated no requirement that such confidential documents should always be disclosed to the complainant, and there is none.

**8. The firm case law has it that the Tribunal will not interfere with the comparison of entrants in a competition. Only when it appears that the choice of candidate may rest on some mistake of fact or law or there may have been misuse of authority will the Tribunal order the production of evidence so that it may review such comparison and will the complainant be entitled to see such evidence. In the instant case the review of the selection procedure reveals neither a breach of the Organization's Staff Regulations or other rules, nor any mistake of fact or law, nor misuse of authority.**

## **DECISION**

**For the above reasons,**

**The complaint is dismissed.**

**In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.**

**Delivered in public in Geneva on 30 January 1997.**

**William Douglas  
Mella Carroll  
Mark Fernando  
A.B. Gardner**