

EIGHTY-SECOND SESSION

In re Malhotra (Kashmiri Lal) (No. 6)

Judgment 1565

The Administrative Tribunal,

Considering the sixth complaint filed by Mr. Kashmiri Lal Malhotra against the World Health Organization (WHO) on 15 April 1996, the WHO's reply of 19 July, the complainant's rejoinder of 12 August and the Organization's surrejoinder of 19 September 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 served on the staff of the Organization's Regional Office for South East Asia (SEARO), at New Delhi, from January 1964 until 31 January 1996, when he retired. He entered a competition to fill a post, No. 5.1519, for a programme assistant at grade ND.7. Another internal candidate, Mr. S.K. Madanpotra, having been appointed to the post, he appealed in October 1992 against the outcome of the competition.

Judgment 1372 ruled on his first complaint, which was about another competition. In it the Tribunal declared that the regional and headquarters Boards of Appeal should have access to the full records of the selection committee's proceedings. Having decided to apply that ruling to the appeal about post 5.1519 too, the Administration sent the regional Board documents which it had not had at its disposal at its original hearing of the case, and invited it to report again.

In its second report, dated 12 April 1995, the regional Board held that the process of selection had been flawed, and it recommended granting the complainant promotion to grade ND.7 as from the date at which the successful candidate had been promoted to that grade. By a letter of 25 May 1995 the Regional Director rejected his appeal. He then went to the headquarters Board, which, on 12 February 1996, recommended rejection. In a letter of 28 March 1996, the decision he is now impugning, the Director-General endorsed the Board's recommendation.

B. The complainant submits that the selection of another candidate was unlawful. He has three main pleas: bias, failure to take account of material facts and breach of the rules on selection.

He seeks the quashing of the decision to appoint Mr. Madanpotra to post 5.1519, his own retroactive appointment to it, awards of 50,000 United States dollars in moral damages and \$5,000 in costs, and "any other costs to compensate" him.

C. In its reply the WHO denies the charges and contends that the impugned decision complied with its rules, practice and the case law.

D. In his rejoinder the complainant disputes several points of law and of fact in the reply.

E. In its surrejoinder the Organization discusses substantive issues raised in the rejoinder and presses its earlier pleas.

CONSIDERATIONS

1. In 1964 the complainant joined the General Service category of staff of the WHO's Regional Office for South East Asia in New Delhi. His grade was then ND.4. He was later promoted within his category. On 1 December 1994 his post was reclassified ND.7 and he was promoted to that grade. He retired on 31 January 1996.

2. In September 1992, when his post and grade were still at ND.6, he applied for a post at ND.7, No. 5.1519, for a programme assistant. He was not selected. He appealed to the regional Board of Appeal in October 1992. His

appeal was dismissed by the Regional Director and he went to the headquarters Board of Appeal. Before that Board heard his appeal the Tribunal delivered Judgment 1372, which is summed up in A above. Consequently the case was again submitted to the regional Board for reconsideration so that it might have before it the record of the ad hoc selection committee's proceedings.

3. In its report dated 12 April 1995 the regional Board found no evidence to support the complainant's allegations that the Administration had shown him personal prejudice for his having served for several years as a staff representative on the Regional Classification Committee, on the committee of the Staff Association and on the regional Board of Appeal. In regard to his objections to the composition of the selection committee, the Board considered that the absence of a representative of the Staff Association had been an irregularity, but it stopped short of saying that on that account no selection at all could be made. It observed that the "interviewing officer" had put a staff member at grade ND.6 on the short list though doubting his eligibility. The Board could find no reason why the committee had preferred that staff member to the complainant, who had over seven years' more experience and was just as well qualified, or why it had not put the complainant on the list, even though he too was considered to be of "doubtful" eligibility. It pointed out that there were five candidates with greater seniority and experience than the successful one. It concluded that the complainant, having a greater number of years of service and "being an active staff member with good knowledge of rules, etc. ought to have been the next appropriate choice"; that "an error of fact and arbitrariness [had] crept into the selection"; and that there had been incomplete consideration of the facts within the meaning of Rule 1230.1.2 and failure to apply correctly the provisions of the Staff Regulations and Staff Rules within the meaning of Rule 1230.1.3. So it recommended promoting the complainant to grade ND.7 as from the date at which the successful candidate had himself had such promotion.

4. In a letter of 25 May 1995 to the complainant the Regional Director rejected the recommendation and, as required, gave reasons for doing so. He said that the Board had "focused on the seniority of the applicants" and on the complainant's exclusion from the short list and had seen such exclusion as an error. On that score he observed that it was entirely within the interviewing officer's discretion, provided he acted from no improper motive, to decide who was to be put on the list. The Regional Director found no evidence of failure to consider any essential fact of relevance to the complainant's candidature or to observe and apply "the correct interview and short listing procedures".

5. The complainant appealed on 29 June 1995 to the headquarters Board. In its report of 12 February 1996 that Board agreed that there was no evidence of personal prejudice against the complainant. But neither did it find evidence of failure to respect proper procedures. It expressed the view that, "while seniority was an important factor in selection for a post, it could not be considered as the sole criterion", and that the selection committee had not been unlawfully constituted. It recommended rejecting the appeal. By a letter dated 28 March 1996 the Director-General informed the complainant that he did so, and that is the decision he is impugning.

6. The complainant contends that as the candidate with the longest service he should have been included on the short list; that the selection committee was not properly constituted; and that he should have been given "a chance for computer testing".

7. The Recruitment and Selection Procedures, which replaced the factor rating system as from January 1991, require that the short list comprise not fewer than three and not more than five candidates, including "at least one qualified staff member with the longest service in the grade of the post or one grade below". The complainant contends that his entire period of service, in which he was sometimes at higher grades than were other candidates, should be taken into account. But according to the rules the only relevant periods of service are either at the grade of the vacant post, here ND.7, or at one grade below, here ND.6. He was in the same position as two other candidates, one of whom was assessed as "unsuitable" and the other, who was short listed, was assessed, like the complainant, as being of "doubtful" eligibility but had a marginally higher score in the rating exercise. Thus the omission of the complainant from the short list was justified.

8. The complainant argues that since it was unlawful to have no staff representative on the selection committee its recommendation too was unlawful. The committee "normally" consists of five members, including the president of the Staff Association or his nominee. It is true that, though invited by letter to attend the meeting of the selection committee, the president failed, in pursuance of the Staff Association's policy, both to attend and to send a nominee in his stead. But since the provisions on the membership of the committee are not binding, and if no staff representative chooses to attend, that cannot have the effect of invalidating its recommendations.

9. The complainant further pleads in his original brief that he was deprived of "a chance for computer testing" because the electricity was cut off at the very moment when he was to be tested and the equipment would not work. He says that the interviewing officer promised to call him back for the purpose when power was restored but failed to do so. In his rejoinder he explains that it was because of the power failure that he was unable to complete the test and that he so informed the interviewing officer. It was not before the regional Board of Appeal but only before the headquarters Board that he raised this issue. For its part the Organization states that the complainant did take the computer test but was unable to complete some parts of it satisfactorily and that he was given a mark of only 7 out of 15. On the pleadings and evidence before it the Tribunal cannot accept either that the complainant had no opportunity at all to take the computer test or that he was not allowed to complete it.

10. In Judgment 1137 (*in re* West No. 11) -- to cite but one -- the Tribunal declared -

"Only on the limited grounds often stated in the case law will the Tribunal interfere with discretionary decisions such as one to promote an official. Such grounds are lack of authority, a formal or procedural flaw, disregard of an essential fact, a mistaken deduction from the evidence, a mistake of fact or law, and abuse of authority."

Unless it finds a flaw of that kind the Tribunal will not interfere in the comparison of candidates in a competition and in the exercise of discretion by the Regional Director. The complainant having failed to prove any such flaw, his complaint must fail.

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