

Registry's translation, the French text alone being authoritative.

FIFTY-SIXTH ORDINARY SESSION

In re DUTTA

Judgment No. 665

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the World Health Organization (WHO) by Mr. Vijay Kumar Dutta on 13 August 1984, the WHO's reply of 24 October, the complainant's application of 3 November 1984 and the WHO's observations thereon of 11 January 1985 and the appended material, the complainant's rejoinder of 28 January and the WHO's surrejoinder of 6 March 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 530.2, 1040 and 1070 and WHO Manual provisions II.9.240, 460 and 550;

Considering that the material facts of the case are as follows:

A. In November 1968 the complainant, an Indian, joined the WHO's Regional Office for South East Asia, known as SEARO, in New Delhi. He was given a series of fixed-term, usually two-year, appointments. At the material time he held a post as secretarial assistant at grade ND.4. His performance appraisal report for 1981, completed on 2 August 1982, contained adverse comments by his supervisors: he was said to be slow, careless and unwilling. The complainant added his objections. His report for 1982, signed by his first-level supervisor on 7 September 1982, was also bad and, though acknowledging some improvement, said there was room for much more. On 24 September his supervisors recommended against renewing his contract on its expiry at the end of 1982, and the Regional Director agreed on 29 September. The Regional Personnel Officer informed him by a minute of 30 September that his appointment would expire on 31 December under Staff Rule 1040 ("Completion of temporary appointments"). He asked why, and his first-level supervisor told him orally on 5 October that the reason was unsatisfactory performance. His request for review was turned down, and on 26 November he appealed to the Regional Board of Inquiry and Appeal. In their report signed on 5 August 1983 the majority of the board recommended rejecting the appeal, the Regional Director accepted the recommendation on 10 August, the case went to the headquarters Board of Inquiry and Appeal, on 1 May 1984 the headquarters board recommended dismissal, and by a letter of 21 May 1984, the impugned decision, the Director-General informed the complainant that his appeal was rejected.

B. The complainant believes he got no real opportunity to bring his performance up to standard. He alleges procedural flaws in the processing of his performance reports. The report for 1981 came over eighteen months after the report for 1980, in breach of Staff Rule 530.2, which requires evaluation "in no case less frequently than once a year". The report for 1982 was completed by someone who was not his first-level supervisor and who was unfamiliar with his work: it did not constitute a proper report under the rules. It was drawn up hastily and prematurely, being written before the period it covered was over and too soon after the report for 1981. His service was found satisfactory for thirteen years, and the reports falsely accused him of shortcomings. A plot was rapidly contrived, which affords evidence of his supervisors' hostility. The way in which he was got rid of was in breach of Staff Rule 1070, Manual provisions II.9.460 and 550, which set out the procedure for termination of appointment for unsatisfactory performance, and the principles of natural justice. In particular the WHO failed to act, as required by II.9.460.2, on his request for reassignment to a post better suited to his qualifications. He alleges a procedural flaw in the submission of the regional board's report. He and his family have suffered financial hardship and emotional distress. He seeks the quashing of the decision not to renew his appointment, reinstatement as from 19 January 1983, with full pay and other benefits and without detriment to his career prospects, damages amounting to 80,000 United States dollars for material and moral injury, and costs.

C. The WHO replies that, when the services of someone on a fixed-term contract prove unsatisfactory, it may either terminate him under Staff Rule 1070, by giving him a written warning and time to improve, or else, as it did in this case, just let the contract expire under Staff Rule 1040: it must then give three months' notice if the contract is for one year or more, and, if the official asks, the reasons for non-renewal as required by Manual provision II.9.240. Since it applied 1040 in this case, the WHO did not need to observe 1070. Nor is there any flaw which warrants

setting the decision aside. The delay in filling up the report for 1981 was due to the mislaying of the report form. The report for 1982 -- which related only to the first eight months of the year -- was completed by an official under whose day-to-day supervision the complainant had to work; the regional board found no breach of the rules in this respect. Nor was any mistaken conclusion drawn from the evidence. Over the years his record of service was often mediocre, only four of his reports being satisfactory: he was careless, indifferent and capable only of mechanical tasks. He was kept on only in the hope that he would improve. There is no evidence of any plot to delay the 1981 report in order to get rid of him: it was he who gained from the delay, not the Organization. At its discretion the Administration decided that the WHO's interests would not be served by transferring him. There were no flaws in the regional board's proceedings. Even if the Tribunal allowed the complaint, reinstatement would be inadvisable and the amount of damages he claims is excessive.

D. In his rejoinder the complainant seeks to correct several assertions of fact and answers in detail the arguments in the reply. The WHO itself has conceded that the signatory of the 1982 report was not his first-level supervisor. That report ought not to have been begun only eight days after the completion of the 1981 report. Besides, how can it be treated as unfavourable if it acknowledges improvement in his performance? His performance had for years been found satisfactory. He fell foul of hostile supervisors, Rule 1040 being applied, arbitrarily and in bad faith, instead of 1070. He presses his claims. Failing reinstatement, he claims payment up to the age of 60 of the salary and other benefits he would have been entitled to had he been kept on.

E. In its surrejoinder the WHO discusses the facts further and observes that it has dealt with the relevant points in its reply. It develops its submissions in the light of the rejoinder and again invites the Tribunal to dismiss the complaint as devoid of merit. It objects in any event to payment of damages equivalent to full salary and benefits up to the age of retirement, pointing out that the question at issue was no more than renewal of contract for two years.

CONSIDERATIONS:

The conditions for applying Staff Rule 1040

1. The complainant joined the WHO on 28 November 1968 His appointments were regularly renewed, the last one in 1980 for two years, up to 31 December 1982. On 30 September 1982 he was told that his appointment would terminate on 31 December 1982 under Staff Rule 1040.

The rule reads: "Temporary appointments, both fixed-term and short-term, shall terminate automatically on the completion of the agreed period of service in the absence of any offer and acceptance of extension". The holder of a fixed-term appointment for one year or more must be given not less than three months' notice of its expiry. Renewal of an appointment is a discretionary decision.

Although the rule provides for automatic expiry in the absence of offer and acceptance of an extension of contract, the decision is still subject to review by the Tribunal, which will set it aside if there was a formal or procedural flaw, or a mistake of fact or of law, or if essential facts were over-looked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

The relationship between Rules 1040 and 1070

2. The reason given for not renewing the complainant's appointment was unsatisfactory performance. His plea is that the only rule under which his appointment could be terminated was 1070, on termination for unsatisfactory performance or unsuitability for international service, and that where 1070 applies 1040 does not.

The WHO's answer is that where the conditions for applying both 1040 and 1070 are fulfilled it may terminate under either and that it was entitled under 1040 not to renew the complainant's appointment even though it could have achieved the same purpose by resorting to 1070.

There is no need to settle the point. Even if the WHO is right and 1040 is applied, the decision must be set aside for the reasons set out below.

The application of Rule 1040

3. Staff Rule 530.2 requires supervisors to make evaluation reports "in no case less frequently than once a year" on

the "performance, conduct and potentialities for greater usefulness of each staff member under their supervision". The complainant's report for 1980 was signed by his supervisors in January 1981, his report for 1981 on 24 June, 2 August and 3 August 1982. So over 12 months went by between the two, and as to the report for 1981 the WHO failed to observe the one-year time limit in 530.2. As for the 1982 report, the processing of it began on 16 August 1982 and ended in September, and only a few weeks elapsed between the completion of the report for 1981 and that of the report for 1982.

The Tribunal holds that the impugned decision took no account of the fact that between the complainant's two last performance reports he was not given time to show he could come up to expectation. The decision overlooked an essential fact and drew clearly mistaken conclusions from the evidence, and these are flaws which warrant setting it aside.

The Tribunal need not take up the complainant's other submissions: the absence of evaluation by his first-level supervisor, the failure to answer his applications for transfer, irregularities in the Regional Board proceedings, prejudice on the part of those who signed his final reports, and inconsistency between the withholding of his salary increment and the non-renewal.

The Tribunal's decision

4. It appears from the foregoing that the complaint must be allowed. Since the complainant left the WHO over two years ago reinstatement would be inadvisable, but he is entitled to damages. In the particular circumstances, including his length of service and the temporary nature of his appointments, the Tribunal will award him 10,000 United States dollars. It also awards him 2,000 dollars in costs.

Oral proceedings

5. There is no need for oral proceedings. The complainant has pleaded at length in his briefs, and the opinions of the witnesses he wishes to call appear from the evidence already before the Tribunal.

DECISION:

For the above reasons,

The WHO shall pay the complainant:

1. US\$10,000 in damages;
2. US\$2,000 in costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner