EIGHTY-FOURTH SESSION

In re Swaroop

Judgment 1728

The Administrative Tribunal,

Considering the complaint filed by Mr. Narendre Swaroop against the World Health Organization (WHO) on 14 February 1997 and corrected on 28 February, the WHO's reply of 2 June, the complainant's rejoinder of 21 July and the Organization's surrejoinder of 10 October 1997;

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 citizen who was born in 1941, joined the staff of the WHO at headquarters in Geneva in 1966. At the material time he held a "career service appointment" and was a classifier at grade G.6 in the Registry Unit of the Division of Conference and General Services (CGS).

In a memorandum of 17 March 1995 the Director of the Personnel Division told him that, in line with a decision by the Executive Board, nine of the twelve posts for classifiers in his unit were to be abolished; but the reduction-in-force procedure set out in Staff Rule 1050 and paragraphs II.9.250 to 375 of the Manual would not go ahead until "every effort [had been] made to accommodate, as far as possible, the people concerned by arrangements satisfactory to all parties".

By a memorandum of 29 September the Director informed the complainant that his was one of the posts that would be abolished as from 1 January 1996. The Director of CGS told his staff in a memorandum of 23 October that to avoid terminating any appointments two dozen vacant full-time posts in the Division would be converted into four dozen half-time ones. The next day he offered the complainant a half-time appointment as an assistant at grade G.6 in the Records Management Services as from 1 February 1996. The complainant turned the offer down on 2 November 1995.

In answer to a memorandum from a personnel officer he applied for four vacant fixed-term posts. In a letter of 30 November the Director of Personnel told him that, in view of the Reduction-in-Force Committee's report, he could not be offered another post in his occupational group; but did he want to be considered for a different occupational group? On 4 December 1995 the complainant answered that he did, and he thereafter applied for six posts in other occupational groups. By a letter of 13 December the Director of Personnel told him that the Reduction-in-Force Committee had found that he was not - to quote paragraph II.9.360.1 of the Manual - "obviously well-suited" for the work of those groups and that the Director-General had therefore decided to end his appointment on 31 March 1996.

On 12 December 1995 the Organization published notices of vacancy for half-time posts. On 12 January 1996 the complainant applied for two of them which were at grade G.6. He asked that his applications be treated first "as a single application for one ... full-time post". A personnel officer told him in a letter of 2 February that he had been picked to fill one of the two posts as from 5 February. The complainant rejected the offer on 7 February. By a letter of 9 February the same officer told him that his application for the second post had been unsuccessful. He left the Organization on 31 May 1996.

He went to the headquarters Board of Appeal on 15 February 1996. In its report of 18 September 1996 the Board recommended that the Director-General dismiss his claim to the quashing of the decision of 13 December 1995 but go on trying to find him other work through the conversion of part-time posts to full-time posts in Registry, and award him costs not exceeding 2,000 Swiss francs.

In a letter of 20 November 1996 the Director-General rejected his appeal but granted him 300 francs in costs

and told him that "it has exceptionally been agreed to allow staff members [of CGS] to hold two part- time WHO posts". That is the decision he is impugning.

B. The complainant submits that the reduction-in-force procedure did not comply with the Staff Regulations and Rules and the Manual. The Administration discriminated against English-speaking staff, failed to explain its decision to end his appointment and was in breach of its duty to make him a reasonable offer of reassignment.

By appointing two staff members from outside to half-time posts in CGS the Organization disregarded the notice of vacancy, which stated that staff members whose posts were being abolished would get priority.

The decision to convert full-time to half-time posts was an abuse of the reduction-in-force procedure. In view of his age, seniority and good service he would have stood a reasonable chance of keeping his job through the "competition for retention" the holding of which was, he says, an essential condition of service. The Organization therefore infringed his acquired rights. His post was not really abolished since it was converted into two half-time posts. The reduction-in-force procedure offended against *audi alteram partem* since he was not given his say before the Reduction-in-Force Committee.

The notice of termination was null and void because it was not signed by the Director-General and the internal appeal procedure showed several flaws. He asks the Tribunal to order the WHO to produce many documents which he lists and which he says it refused to submit to the headquarters Board of Appeal.

He seeks the quashing of the Director-General's final decision of 20 November 1996 and the decision of 13 December 1995 terminating his appointment; reinstatement as a "career service appointee"; a declaration by the Tribunal that the conversion of full-time posts to half-time posts was unlawful; the quashing of the reduction-in-force procedure and its consequences; the quashing of the competition held as a result of the three notices of vacancy published on 12 December 1995; an award of 7,500 Swiss francs in costs; an award of 50,000 francs in moral damages and such other relief as the Tribunal deems "necessary, just and equitable".

C. In its reply the WHO explains that in a reduction-in-force competition the main criterion is the staff member's performance, not length of service. The Reduction-in-Force Committee took due account of the complainant's qualifications and experience and considered his case impartially.

Although the deliberations of the Reduction-in-Force Committee are confidential, the Board of Appeal and the Tribunal have access to the records. The Organization substantiated all its decisions about him. According to the Manual the Reduction-in-Force Committee was under no obligation to hear candidates for "retention". In fact it interviewed none of them.

Citing the case law, the WHO asserts that it did take suitable steps to find him alternative employment. But precedent did not require it to assign him to a post for which he was not qualified, whatever the length of his service. It submits that the notice of termination did not need to bear the Director-General's signature.

The creation of half-time posts out of vacant full-time ones had no effect on the reduction-in-force procedure. At the material time the Manual did not allow staff members to hold two part-time posts simultaneously. The internal appeal procedure was not flawed.

D. In his rejoinder the complainant maintains that the reduction-in-force procedure was in breach of WHO rules and the principles of international civil service law.

He contends that he was given no "valid reason or adequate explana- tion" as to why other staff members were found to be better qualified; so he was not given the opportunity of exercising his right of defence. That is contrary to the case law and amounts to diminishing the rights of staff members who are "dismissed *en masse*" rather than one by one.

He submits that the Manual allowed the creation of new half-time posts and not the conversion of full-time to half-time posts. He maintains that that lessened his chances of success in the reduction-in-force competition.

In his submission the WHO could quite well have allowed him access to the documents he wanted without breach of confidentiality. However, since it refused, he asks the Tribunal to base its decision on his allegations alone. He contends that the Organization has continued to abuse his rights and dignity. He therefore alters his claims and asks for 100,000 Swiss francs in moral damages plus interest as from 31 May 1996.

E. In its surrejoinder the WHO submits that the decision to convert full-time into half-time posts was taken by the Director-General in the interests of both the Organization and its staff and in accordance with the Manual.

Had the complainant not declined the two offers of a half-time appoint- ment, he might have benefited from the Director-General's exceptional decision to let staff hold two half-time posts.

His application for access to documents was addressed to the Tribunal. Since the Tribunal has ordered no disclosure the Organization has not failed to comply. Indeed it has provided some of the information of its own accord. The complainant may not make new claims in his rejoinder, and his claim to moral damages is irreceivable because he did not include it in his internal appeal.

CONSIDERATIONS

1. The complainant joined the WHO as a clerk in 1966. On 1 June 1968 it appointed him as a trainee classifier at grade G.3. Having completed his training period and received several promotions, he was awarded on 1 July 1985 a "career service appointment" at grade G.6. At the material time he was working in the Registry Unit of the Division of Conference and General Services (CGS) as a classifier. His duties included sorting correspondence, identifying important correspondence for coding, filing, and retrieving information for programmes.

2. Because of financial constraints the WHO decided in 1995 to abolish a total of 167 posts at headquarters with effect from 1 January 1996. Ninety of them were in CGS and they included nine out of the twelve posts for classifiers: the three to be retained were of indefinite duration, one at grade G.7, one at G.6, and one at G.5.

3. The decision to abolish the 167 posts was conveyed to CGS staff by the Director of the division on 17 July 1995. The Administration issued two circulars in that month explaining the procedure to be followed for the reduction in force. By a memorandum of 29 September 1995 the Director of the Personnel Division informed the complainant that his post would be abolished.

4. Before implementing the reduction-in-force procedure the WHO made efforts in accordance with paragraph II.9.265 of the Manual to reduce the number of terminations of appointment. First, it encouraged voluntary separation. Secondly, it gave staff the opportunity of applying for vacant fixed-term posts on the basis that those whose posts were being abolished would have priority. The complainant applied, but unsuccessfully, for four such posts. Thirdly, the Organization converted 24 vacant full-time CGS posts into 48 half-time ones as from 1 January 1996 and offered a half-time post to CGS staff members whose posts were being abolished, including the complainant. Twenty-six accepted, the complainant declined. None of the 24 vacant posts would have been open for competition in a reduction-in-force exercise because they were either vacant posts funded from extra-budgetary sources or posts - other than those being abolished - which had become vacant as a result of voluntary separation. Only occupied posts would have been open for competition in a reduction-in-force procedure.

5. As a result of those efforts there were by 15 November 1995 only 29 staff members in the General Service category who were to take part in the reduction-in-force competition. In that competition, says Manual paragraph II.9.340.3:

"... suitability for retention is assessed essentially by reference to the staff members' respective performance, including suitability for the international civil service, as evidenced by their various appraisal reports and other records; only if this comparison is not decisive should the precise periods of service be taken into account."

The Reduction-in-Force Committee reviewed the candidacy of the com- plainant, who, along with four other colleagues in the Registry Unit, was competing for two full-time posts within the same occupational

group. But it did not find him more "suitable for retention" than the others, and he was therefore not offered a post.

6. Manual paragraph II.9.360.1 provides:

"... if the candidate has received no offer of another post, he or she may request the committee to allow him or her to compete for posts in a different occupational group: Such a request is only accepted if, having regard to qualifications and experience, the candidate is obviously well-suited for work corresponding to that group. He or she will be presumed to be well-suited if he or she has held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the preceding fifteen years."

That did not, however, preclude the Reduction-in-Force Committee from considering, case by case, whether candidates were suited for different occupational groups.

7. The complainant applied unsuccessfully for posts in four occupa- tional groups: the library, accounting, health records, and archives. The Reduction-in-Force Committee found that he was not obviously suited for work in any of them.

8. Since he had been unsuccessful in the competition for retention the complainant was informed by a letter dated 13 December 1995 and signed by the Director of Personnel that the Director-General had decided to terminate his appointment at 31 March 1996. The Organization later postponed the termination to 31 May 1996.

9. Of the full-time posts in CGS that had been converted into half-time ones and offered to CGS staff a few remained unfilled. The Organization issued notices of vacancy in December 1995 for six half-time posts, stating that staff whose posts were being abolished would have priority. Of the six posts four were for assistants in Registry at grade G.6, and although the duties were identical two notices were issued because two - covered by notice LR/95/30 - were of limited duration while the other two covered by notice LR/95/31 - were not. The duties were also similar to those of classifiers. The complainant applied in answer to both notices and on 2 February 1996 he was selected for one of the posts covered by LR/95/31 - which he declined - but not for either of the posts covered by LR/95/30.

10. On appeal the headquarters Board of Appeal recommended reject- ing his request for reversal of the notice of termination, but it expressed dissatisfaction with the efforts made to find a suitable reassignment for him:

"At the time of writing their report, the Board noted that 3 persons were employed on a part-time (50%) basis in registry as Assistants (Registry), while the equivalent of one and a half part-time (50%) posts remained vacant."

"... further vacancies had arisen in Registry after the Reduction-in-force procedure was formally concluded, thus affording another opportunity for a reasonable offer of reassignment in the form of a full-time post to be made to the Appellant."

The Board recommended that the Administration should continue its efforts to find alternative employment for the complainant and reimburse his "certifiable legal expenses" up to 2,000 Swiss francs.

11. In a letter of 20 November 1996 to the complainant the Director-General said that he accepted the first recommendation. In regard to the second, he told the complainant that, because of the particular situation of CGS, staff members would be allowed to hold two part-time posts. As for the third recommendation, he granted 300 francs in costs.

12. The complainant's contentions before the Tribunal may be con- veniently considered under the following heads;

(a) the reduction-in-force procedure;

(b) the conversion of full-time into half-time posts; and

(c) the failure to make him an offer of reassignment.

(a) The reduction-in-force procedure

13. The complainant alleges that the reduction-in-force procedure shows bias because the WHO conducted it in strict secrecy; because it gave a "verbal warning" to one of the twelve classifiers that his post would not be abolished while the complainant and others were told only that nine out of the twelve existing posts would be abolished; because the one classifier who kept his position, although he had five years' less service than the complainant, was the husband of the administrative assistant to an Assistant Director-General; because it retained an unusually higher number of French-speaking staff; and because only 20 per cent of Registry staff stayed on as against 58 per cent in the General Service category at large.

14. All those are mere insinuations. There is, for example, no evidence of any "verbal warning" to one of the classifiers. It would have been of little benefit to that staff member anyway because even if his post had not been abolished he would not have been any better shielded from termination than the others. The Tribunal rejects the complainant's allegations under this head as speculative and unsubstantiated.

15. His next objection is that the records of the Reduction-in-Force Committee were not disclosed to him; that no valid reason or explanation was given for the decision not to retain him within or outside his occupational group; and that he was denied an opportunity of stating his case before termination. So, in his submission, a staff member threatened with termination through no fault of his own because of a reduction-in-force has fewer procedural safeguards than one who faces disciplinary proceedings on account of, say, wilful misconduct.

16. The functions of a Reduction-in-Force Committee are similar to those of selection committees which deal with appointments, promotions and the like. While it is true that the records of selection committees must be made available to appellate bodies, yet, insofar as they relate to staff other than the appellants themselves, they are confidential, and there is no general requirement of disclosure to such appellants. The same rule must apply to a Reduction-in-Force Committee, and the circumstances of this case warrant no exception. Likewise, the Staff Rules and the Manual impose no duty on a Reduction-in-Force Committee or selection committee to give the staff member a detailed explanation for its conclusions. As for the right to be heard before termination, it must of course be respected where there is a proposal to terminate an appointment for disciplinary reasons or for unsatisfactory performance. A Reduction-in-Force Committee does not, however, make findings of that kind but performs very different functions. That is clear from Manual paragraph II.9.340.3, which requires assessment "essentially" on the basis of appraisal reports and other written records of performance and service. The Tribunal holds that there has been no denial of the complainant's rights to equal treatment and to a fair procedure.

17. He pleads flaws in the procedure. Citing Manual paragraph II.9.280, he observes that the Organization failed to identify him as a candidate for retention, thereby prejudicing his chances for retention in the competition. Citing Manual paragraphs II.9.530 to 550, he further submits that the notice conveying the Director-General's decision to terminate his appointment, signed by the Director of Personnel, was void because it was not initialled by the Director-General.

18. The Tribunal holds that Manual paragraph II.9.280 does not require that the incumbent of a post that is to be abolished be specifically described or designated as a "candidate for retention", but only that he be told of his "rights and obligations". And Manual paragraph II.9.530 requires that notification of termination be signed by someone "authorized to sign personnel actions [and] initialled by the supervisor who initiated the action". Since the notice of termination, duly signed by the Director of Personnel, conveyed the decision of the Director-General, it was unneces- sary for the latter to authenticate it further with his own initials.

(b) The conversion of full-time into half-time posts

19. The complainant submits that the decision to convert 24 existing full-time posts in CGS, after abolition, into half-time ones was irregular and *ultra vires* and deprived him of his acquired right to secure one of the full-time posts through a reduction-in-force competition.

20. Manual paragraph III.3.160 provides that a post in a unit may be abolished and the funds used to establish a new one in the same unit. Paragraph II.18.30 says that a part-time post may be created in the same way as a full-time one. The Tribunal holds that the decision to create half-time posts in order to reduce the hardship to staff members faced with termination was neither irregular nor *ultra vires*. In any event, as was said in 4 above, none of the 24 full-time posts would have been available for a reduction-in-

force competition.

(c) Failure to make the complainant an offer of reassignment

21. The complainant contends that the WHO failed to take suitable steps to find him alternative employment and to make him a reasonable offer of reassignment before termination although such reassignment would have been "immediately possible". It thereby broke Staff Rule 1050.2.5, which reads:

"a staff member's appointment shall not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible."

22. In reply the WHO refers to the efforts to reassign the complain-ant which it made before, during and even after the reduction-in-force procedure. It points out that he himself acknowledges that it even interviewed him for a post for which he had not applied.

23. Yet the WHO has neither denied nor explained the observations which the Board of Appeal made about the availability of full and half-time posts and which are quoted in 10 above. It is quite clear that four half-time posts of Registry assistants remained unfilled in December 1995, and it is reasonable to infer that they were posts which had been created by converting two full-time ones for which the complainant must have been eligible. Further, he was found suitable for the half-time posts covered by notice LR/95/31, and the Organization offers no explanation as to why he was not considered suitable for the identical, but time-limited, half-time posts covered by notice LR/95/30. It may well be, as the WHO contends, that a staff member may not usually hold two half-time posts, but the impugned decision shows that the Director-General does have discretion to appoint a staff member to two such posts.

24. The conclusion is that the WHO was in a position to offer the complainant either a full-time post or two half-time posts but failed to do so, and that he is entitled to an award of material damages for its failure to make him a reasonable offer of reassignment. In determining the amount of the award the Tribunal notes that the complainant could without prejudice to his claim have mitigated his loss by accepting a half-time post. It sets the amount at 25,000 Swiss francs.

25. Having so decided, it need not entertain the complainant's pleas of irregularities in the proceedings of the Board of Appeal. But he is entitled to an award of costs.

DECISION

For the above reasons,

1. The WHO shall pay the complainant 25,000 Swiss francs in material damages.

2. It shall pay him 5,000 francs in costs.

3. His other claims are dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll
Mark fernando
James K. Hugessen

A.B. Gardner

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