

EIGHTY-NINTH SESSION

In re Behl (No. 2) and others

Judgment No. 1992

The Administrative Tribunal,

Considering the complaints filed against the World Health Organization (WHO) on 31 August 1999 and corrected on 4 October 1999 by:

Madan Lal Behl (n° 2)

Bimal Kapoor

Ranjit Kathuria

Kewal Krishan Khattar

Virender Kumar Malhotra

Rajinder Singh Pahwa

S. Ragupathi

Ramachandran Rajagopalan

Raj Kumar Sabharwal

Amod Kumar Sharma (n° 2)

Man Mohan Singh

Radha Srinivasaratnam

Radha Swaminathan

Considering the WHO's single reply of 7 January 2000, the complainants' rejoinder of 7 February and the Organization's surrejoinder of 7 April 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The thirteen complainants are present or former staff members of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. At the material time they all held posts in the General Service category.

By information circular IC-95-16 issued to staff at SEARO on 15 May 1995 the Organization announced a revision of the local salary scale - Revision 37 - for General Service staff serving in New Delhi, which was to be implemented retroactively from 1 July 1994. Judgments 1838 (*in re Grover and others*) and 1839 (*in re Battra No. 3 and others*) delivered on 28 January 1999 contain further details thereon. The number of grades in the new scale was reduced from eight to seven. To reflect the results of the comprehensive survey that led to Revision 37 the new scale contained "staggered increases" in salary with each grade. Progressively higher percentage increases

were granted at each grade level. These ranged from 6.3 per cent at the ND.1 level to 59.3 per cent at the ND.X level.

The complainants were all promoted between 1 July 1994 and 15 May 1995 and following promotion held grades ranging from ND.5, step 3 to ND.X, step 8. Following the implementation of Revision 37 the steps the complainants had received on promotion were recalculated to take into account the new scale and their grades then ranged from ND. 4, step 1 to ND.X, step 7.

On 21 June 1995 the complainants challenged their June pay slips which showed that in the restructuring all except one held a lower grade and they had each lost between one and six steps. After reviewing the matter the Organization informed each complainant in a memorandum of 17 February 1997 that their grades and steps had been properly established in the new scale. They appealed to the regional Board of Appeal against the way their steps had been calculated. One of its members was of the view that to "mitigate the hardship" of the complainants the matter should be completely re-examined. In a majority opinion the Board recommended that the Organization should restore to the complainants the steps they had held before the introduction of the new scale by applying a "straight conversion". The Regional Director reviewed the matter but in a decision dated 6 January 1998 he informed the complainants that he could not comply with the majority opinion of the Board.

The complainants appealed to the headquarters Board of Appeal, which recommended that they be granted "the restoration of salary steps ... as fixed before the introduction of the revised scale". The Director-General did not endorse that view and in a decision of 31 May 1999 rejected their appeal. That is the decision the complainants now impugn.

B. The complainants each object to the step they were given following the implementation of Revision 37 and say they suffered huge financial loss as their earnings and future pension benefits were affected. Because the revised scale came into force retroactively and staggered increases were introduced, they lost acquired steps and were disadvantaged in relation to colleagues who were promoted before 1 July 1994 and who retained their steps.

The complainants contend that, as was upheld by both Boards of Appeal, the WHO should have fixed their salaries in the revised scale at the same steps as they had held on promotion in the previous scale. In implementing Revision 37 other United Nations agencies in New Delhi applied a "straight conversion of steps" irrespective of the date of promotion of staff members and it would have been fair for the WHO to do the same. Citing the findings of the report of the headquarters Board of Appeal they say that such a straight conversion was carried out as a result of the comprehensive salary survey in 1990. They hold therefore that they had a legitimate expectation that the same procedure would be applied following the comprehensive survey in 1995, which is relevant to this case. They advocate applying a practice they say is recognised in "legal/administrative jurisprudence" whereby, in implementing a general rule, provision is made to "remedy hardship cases" by introducing a suitable clause in the general rule. The Organization showed bad faith as it failed to compensate their hardship either by opting for a "parallel conversion" of their steps or by making an exception to the general rule in their case.

They submit that their steps were fixed in the revised scale in breach of their acquired rights derived from Staff Rule 550.1 and 550.2.1 relating to within-grade increases. As a result of established practice they also have an acquired right to the "method of fixation of their salaries on promotion" following a retroactive revision of their grade.

The complainants seek the quashing of the impugned decision and ask that their salaries be set by "straight fixation" at the same step as they had attained on promotion before the retroactive coming into force of the revised scales. They claim damages for material and moral injury, and costs.

C. In its reply, as a preliminary observation, the WHO points out that in Judgments 1838 and 1839 the Tribunal upheld the validity of Revision 37. Although the complainants suggest that the decision to apply that revision through staggered increases has led to an anomalous situation, in Judgment 1838 the Tribunal rejected the plea that the staggered increases breached the rules, and so the matter is *res judicata*.

The Organization maintains that the reduction in steps did not breach any rules. At the time of the complainants' promotion, in accordance with Staff Rule 320.2, their net base salary was fixed at the lowest step in the new grade that provided an increase in salary at least equal to the grant of two steps in the previously held grade. In implementing the new scales the Organization took into account the salary scale in force at the time of their

respective promotions (Revision 36) and calculated their new grade and step by applying Rule 320.2 to Revision 37.

It rejects the complainants' plea that they suffered loss of salary and pension benefits. On the contrary they received a higher salary following the implementation of Revision 37, even after the recalculation of their steps. They also received an increase in pay by way of a lump sum covering arrears of salary for the period from 1 July 1994 to 15 May 1995. They seem to infer that Revision 37 could determine their salaries with retroactive effect, but not the steps received on promotion. Since they benefited from the retrospective application of the new scales there was no breach of the rule against retroactivity.

The complainants were not in the same situation in fact and in law as their colleagues at SEARO who were promoted before 1 July 1994. Revision 37 was introduced by way of staggered increases, with progressively higher percentage increases being introduced per grade. The

differences in increase and the corresponding steps given resulted from administrative reasons. There was no breach of the principle of equal treatment. Nor was there any breach of their acquired rights since, contrary to what they claim, they did not lose the benefit of the accrued within-grade increases provided for in Rules 550.1 and 550.2.

The Organization sees no basis for making an exception to the rules as a remedy to their situation. Action taken by other United Nations agencies to recalculate steps can be of no consequence as the WHO is bound by its own rules, and the complainants' argument on that score is without merit. It did not give them any grounds for assuming that they had a legitimate expectation that there would be no reduction in steps.

D. In their rejoinder the complainants point out that the Organization's assumption that the issue is *res judicata* is of no relevance as they are not challenging the validity of the survey leading to Revision 37.

They enlarge on their plea that the WHO should apply the method of straight conversion so that they would suffer no loss of steps. Although the Organization holds that their income increased when Revision 37 was introduced, they are still of the view that they have lost earnings and pension benefits because of its refusal to set their salaries at the previously acquired step. When promotion occurs before the retroactive coming into force of a salary scale, it has been the practice to allow a straight conversion of steps instead of applying Staff Rule 320.2. Furthermore, they argue that subsequent to the comprehensive surveys and several mini surveys carried out since 1985 staff have retained their steps even though the salary scales were implemented retroactively.

In suggesting that the Organization should follow the practice of other United Nations agencies, they were trying to propose a remedy for an anomalous situation. Since the salary scale is common to all agencies in New Delhi it is only appropriate that a uniform application of rules is ensured.

E. In its surrejoinder the Organization reiterates its arguments. It says that there has been no "practice" of straight conversion of steps in applying retrospective salary revisions. Some revisions in the past have given rise to negligible variations in grade and it has not been necessary to recalculate steps; that does not mean that a practice evolved of disregarding the correct application of Staff Rule 320.2. The complainant's argument that Rule 320.2 can be disregarded is without merit. That Rule determines the salary received on promotion and the Organization complied with its terms. The complainants received an increase in salary in the amount prescribed in the Rule both at the time of their promotion and again when Revision 37 was applied to them.

It rejects the allegation that the Organization was not in step with the United Nations common system. Instructions for proceeding to the recalculation of steps were issued by at least two other United Nations agencies in New Delhi.

CONSIDERATIONS

1. This case raises the question of the effect of a retroactive salary increase upon the within grade steps of staff members promoted between the date upon which such retroactive increase took effect and the date upon which it was announced.

2. The relevant Staff Rule of the defendant, the World Health Organization, is 320.2 and reads as follows:

"On promotion to a higher grade the net base salary of a staff member shall be fixed at the lowest step in the new

grade that will provide an increase in net base salary for promotion within the same salary scale or total net remuneration for promotion from the general service to the professional category, at least equal to that which would have resulted from the granting of two steps within the staff member's present grade. However, on restoration to a higher grade formerly held, the staff member's net base salary shall not exceed that which would have been attained had the staff member remained in the higher grade."

3. The complainants are General Service staff members and all of them received promotions between 1 July 1994 and 15 May 1995. At the time of each one's promotion, his or her new grade and step were calculated in accordance with Staff Rule 320.2 as applied to the salary scale then in force (Revision 36). That salary scale was revised on 15 May 1995 with retroactive effect to 1 July 1994. When Revision 37 was implemented the number of grades was reduced from eight to seven. "Staggered" increases were granted so that the percentage rises in the lower grades were less substantial than those in the higher grades. The Organization recalculated the grades and steps to which each of the complainants should have been promoted in accordance with the new salary scale with the result that, after the salary revision, twelve of them were at a lower grade and step than he or she had held at the time of promotion and prior to the announcement of the revised scale; one complainant moved down one step in the highest grade. Notwithstanding this fact, however, the complainants each received a salary increase as a result of the implementation of the revised scale over and above what they had already received at the time of promotion.

4. Although the complainants received some measure of satisfaction from their appeals to the regional and headquarters Boards of Appeal, the recommendations of those Boards were not accepted by the Regional Director and the Director-General respectively and the present complaints impugn the decision of the Director-General confirming the original administrative decision to recalculate the complainants' grades and steps with retroactive effect in accordance with the revised salary scale.

5. The complainants claim that they suffered financial loss as a result of the impugned decision. This is manifestly wrong. Without exception, each of the complainants received two salary increases during the period 1 July 1994 to 15 May 1995; the first, on the date when each complainant was respectively promoted and the second, upon the implementation of the new salary scale. It is true, of course, that the complainants have not received as much money as they would have liked, but that is not the same thing as saying that they have suffered a loss.

6. Next, the complainants argue that the Organization did not follow the same practice in implementing its new salary scale as that followed by other United Nations agencies in New Delhi; they say that this has caused them to lose standing with their colleagues. Apart from the fact that the complainants have not produced persuasive evidence as to the practice of other agencies (such evidence as there is, in fact, appears to be to the contrary) the practice of other agencies is irrelevant. If the Organization has acted properly and in accordance with the applicable staff rules, the fact that others who may be governed by different rules may have acted differently, is beside the point.

7. The complainants stress that they have suffered a loss of "acquired steps". This argument misapprehends the nature of a step which is simply a convenient method of determining an individual's salary entitlement. No one can acquire "a right to a step" but only to a benefit which may flow from such step. As already indicated, the complainants did not lose any benefits; on the contrary, they obtained a substantial increase in benefits in the form of increased salary as a result of the implementation of the revised salary scale. While there is no doubt a general rule against retroactivity, the complainants cannot be heard to complain of the retroactive implementation of a salary increase, the net result of which was to improve their economic situation. The fact that after the increase most of them were at a lower grade and all at a lower step than they had been prior to the increase is, in the circumstances, simply irrelevant.

8. The complainants argue that they have been treated unequally by comparison with those of their colleagues who received promotions prior to 1 July 1994. It is trite to remark that equal treatment is only due to those who are similarly situated. The complainants are not similarly situated to their colleagues who were promoted prior to 1 July 1994 since their colleagues' promotions were governed by the old salary scale whereas the complainants' promotions came in due course to be governed by the new one.

9. Finally, the complainants' argument that they should receive special treatment has no foundation in law or in equity.

10. The complaints therefore fail.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet