

NINETIETH SESSION

In re Rana (No. 2)

Judgment No. 2030

The Administrative Tribunal,

Considering the second complaint filed by Mr Kishan Chand Rana against the World Health Organization (WHO) on 19 January 2000, the WHO's reply of 18 April, the complainant's rejoinder of 2 June and the Organization's surrejoinder of 4 September 2000;

Considering Articles II, paragraph 5, and VII 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 was employed in the General Service category of staff at the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. He retired on 31 March 1998. Salary scales in that category are reviewed regularly on the strength of comprehensive surveys of local practice; between such surveys there may be adjustments based on the results of "mini-surveys". Brief details about the rules and method governing such surveys can be found, under A, in Judgment 1160 (*in re Banota and others*).

A comprehensive salary survey was to take place in May 1994, but was postponed to March 1995. A mini-survey, to be undertaken by the Local Salary Survey Committee (LSSC), was therefore initiated in August 1994 and completed in March 1995. The results of the mini-survey and the LSSC's recommendation were then forwarded to WHO headquarters. The LSSC recommended that there should be two revisions of the salary scale, on 1 November 1993 and on 1 May 1994. The comprehensive salary survey then took place in March and April 1995 and a new salary scale - Revision 37 - was announced to staff on 15 May 1995 and took effect retroactively from 1 July 1994.

Since the new scale was promulgated before WHO headquarters had reviewed the results of the mini-survey, it was decided to implement the results of the mini-survey by granting a lump-sum payment. Accordingly, by a memorandum dated 4 October 1995, SEARO informed the General Service staff that the Chief of the Policies and Recruitment Service at WHO headquarters had approved a salary increase of 18.4 per cent, covering the period from 1 November 1993 to 30 June 1994. It was to be paid in the form of a non-pensionable one-off lump-sum bonus equivalent to 147.2 per cent of a month's salary as at 1 November 1993. The payment was reflected in pay slips of October 1995.

Twenty-nine staff members, including the complainant, appealed to the Regional Board of Appeal against the decision to implement the results of the mini-survey by way of a non-pensionable lump-sum payment. The Board recommended that the case be dealt with by the Headquarters Board of Appeal. In its report of 19 May 1999 the Headquarters Board concluded that, in granting a benefit other than that recommended by the LSSC, the Administration had not acted in breach of the salary survey manual of the United Nations' Consultative Committee on Administrative Questions (CCAQ), neither had it breached the methodology for implementing surveys that was drawn up by the International Civil Service Commission (ICSC). It nevertheless recommended paying the complainant a lump sum, in compensation for loss of pension rights, based on the life expectancy tables used for calculation purposes by the United Nations Joint Staff Pension Fund. In a letter of 27 September 1999, the impugned decision, the Director-General did not uphold the Board's recommendation.

B. The complainant objects to the fact that the Organization has implemented mini-survey results by paying a non-pensionable lump-sum, instead of introducing two revisions of the salary scales, as recommended by the LSSC.

He submits that WHO headquarters, the "responsible agency", ignored the recommendations of the LSSC and "violated the letter and spirit of the whole salary ... survey process". While acknowledging that under the terms of

step F.3.5 of Part IV of the CCAQ manual the "responsible agency" may "introduce modifications to the survey results which it considers justified", he says the Administration has interpreted the word "modification" in too wide a manner, giving the impression that it can "do as it pleases". It cannot "turn upside down" the LSSC's recommendations. He cites step F.3.6 of the CCAQ manual, which states that "the revision concludes with the approval by the responsible agency of the salary scale and other allowances". Although WHO headquarters can make adjustments to salary scales, it cannot choose to grant a "bonus" instead of instituting salary increases, particularly since the bonus in question was non-pensionable.

While other staff may not have objected to such a payment, he emphasizes that he was particularly affected because he retired at the end of March 1998 and his pension rights were impaired. He says it caused him "a perpetual loss of pensionary benefits". The Organization's action was therefore "neither justified nor equitable".

He seeks compensation for the loss of pension rights, an award of moral damages and costs, as well as any other relief deemed justified by the Tribunal.

C. The Organization replies that, although it chose not to follow the LSSC's recommendation to implement the mini-survey results through two revisions of the salary scale, that does not mean that its decision to pay the lump sum was unlawful. It carefully considered the recommendation of the LSSC. It made the changes that it thought were justified, both in the amount of the salary increase and in the manner of implementing the increase. The role of the LSSC in the survey process is advisory in nature, and rejection of its recommendations cannot be construed as evidence of a flaw in the Organization's decision.

It points out that the ICSC methodology and the CCAQ manual do not prohibit payment of a non-pensionable lump sum. The Organization chose that way to implement the results of the mini-survey for objective reasons and did not breach any rules. The manner of payment was warranted because of the situation that prevailed at the time. It would have been "unsound" to implement the mini-survey by revising the salary scale when the comprehensive survey had just been carried out and the results implemented. That procedure could have led to "administrative anomalies". It explains that, in 1992, the ICSC decided that interim adjustments should not be made during a six-month period prior to the "reference date" of a comprehensive survey. However, the Organization approved the holding of the mini-survey at issue expecting it to have been completed well before the comprehensive survey began. Implementation of the results by way of a lump sum was not "out of the ordinary" in the United Nations common system in the particular case of a mini-survey being almost concomitant with a comprehensive survey. It names another United Nations agency that has paid such a one-off non-pensionable sum to its staff.

The Organization questions the receivability of the complainant's plea that he suffered loss of pension benefits. In his internal appeal he sought the quashing of the decision to pay the lump sum. It is only as a result of the recommendation of the Headquarters Board that he is now claiming compensation for loss of pension rights. The WHO views his claim for moral damages as irreceivable: he does not substantiate his claim and it was not put to the Board either.

D. In his rejoinder the complainant contends that, in paying the lump sum, the Organization violated his expectation that, following the mini-survey, his pensionable remuneration would increase from 1 November 1993. Since the CCAQ manual and the ICSC methodology allow payment of a lump sum only in the rarest of cases, he believes there was insufficient reason to substitute a revision of the pay scales by such a payment. In making the lump sum non-pensionable the WHO also violated the "letter and spirit" of the terms of his employment.

Since the WHO cites only one instance of an organisation paying a lump sum following a mini-survey, it has failed to show that such a "practice" exists within the United Nations common system. He questions the relevance of the defendant's contention that the six-month rule applying to interim surveys warranted payment by lump sum. In his view, since the results of the mini-survey were effective retroactively to 1 November 1993, and the reference date of the comprehensive survey was not until 1 July 1994, the six-month rule is not applicable and the Organization's argument is misleading.

The complainant points out that, although in his internal appeal he sought the quashing of the WHO's decision to make a lump-sum payment, he has dropped that claim as being without purpose because he has since retired. He contends that even if his claim to compensation for loss of pension benefits arose from the recommendation made by the Headquarters Board, the Tribunal is nonetheless competent to rule on it pursuant to Articles VII and VIII of its Statute. Moreover, his claim to damages is justified by the "blatantly" unlawful action of the defendant

Organization which has caused him both moral and material injury.

E. In its surrejoinder the Organization maintains that it did not breach any right deriving from the complainant's terms of appointment. Since surveys do not necessarily result in salary increases no "expectation" can arise from them.

The purpose of mentioning the ICSC's decision of 1992 regarding the six-month rule was merely to show that the ICSC was aware that "administrative anomalies" could occur if a mini-survey was conducted too close to the date of a comprehensive survey. It did not rely on that rule in the present case, since the 1992 decision applied to headquarters duty stations. It points out that the reference date of the comprehensive survey was March 1995 and not July 1994 as stated by the complainant.

CONSIDERATIONS

1. The complainant was a locally recruited staff member in the General Service category at the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. He retired on 31 March 1998.

2. The salary scales of locally recruited General Service staff are reviewed every three to five years on the basis of comprehensive surveys of prevailing local practice. Interim adjustments are normally made on the basis of "mini-surveys". The manner of conducting salary surveys is governed by a "general methodology" produced by the International Civil Service Commission (ICSC). A manual about the application of the methodology has been prepared by the United Nations' Consultative Committee on Administrative Questions (CCAQ). As part of the process, a Local Salary Survey Committee (LSSC) composed of representatives of local staff and the local administration of the WHO, and other agencies, carries out the surveys, submits reports to the "designated agency" (in this case SEARO) which in turn sends reports and recommendations to the "responsible agency" (in this case WHO headquarters) for review and final decision.

3. The previous comprehensive survey having been carried out in January 1990, WHO headquarters decided in December 1993 to carry out a comprehensive survey in May 1994. This was later postponed to July 1994 and then had to be further postponed. Since a suggested date of October 1994 was not feasible it was rescheduled for March 1995.

4. When it became known that the comprehensive survey would be carried out in the first quarter of 1995 the Federation of United Nations Staff Associations requested SEARO in July 1994 to carry out a mini-survey immediately. It was started in August 1994 but not completed until March 1995. The results of the survey were sent to WHO headquarters on 10 March 1995. The LSSC recommended two revisions of the salary scales, the first representing an overall weighted average increase of 129.93 per cent with effect from 1 November 1993 and the other representing an across-the-board increase of 6.39 per cent with effect from 1 May 1994.

5. The comprehensive survey was carried out from 27 March to 6 April 1995 and as a result a new salary scale - Revision 37 - was announced to the staff on 15 May 1995 with retroactive effect from 1 July 1994.

6. By the time WHO headquarters had reviewed the results of the mini-survey, Revision 37 had been promulgated. So the decision was taken to implement the results of the mini-survey in the form of a non-pensionable lump-sum payment equal to 147.2 per cent of one month's salary as at 1 November 1993. This was equal to an increase of 18.4 per cent per month from 1 November 1993, the earlier date recommended by the LSSC, to 30 June 1994, after which Revision 37 became effective. The decision was announced to the staff on 4 October 1995. The complainant appealed.

7. Owing to delays at the Regional Board of Appeal level, the complainant's appeal was considered by the Headquarters Board of Appeal. In a report of 19 May 1999 the Board found that the Organization had not acted in violation of the CCAQ manual and ICSC methodology in "implementing a benefit other than one which the LSSC had recommended". It concluded that only the complainant (and one other staff member) had suffered any real loss and recommended paying them a lump sum in compensation, together with costs.

8. The Director-General did not accept that recommendation and so informed the complainant in a letter of 27 September 1999. This is the decision impugned.

9. The complainant claims that while the "responsible agency" can make adjustments to salary scales, it cannot choose instead to pay a "lump sum non-pensionable bonus" which, he claims, resulted in a 12 per cent difference in his annual pension benefit.

10. The Organization did not contend that the lump-sum payment conformed to the LSSC's recommendation. It did contend, however, that under step F.3.5 of Part IV of the CCAQ manual it may "introduce modifications to the survey results which it considers justified". The comprehensive survey took into account the salary changes recommended following the mini-survey, so only the period prior to July 1994 was involved. The WHO states that payment of a lump sum is neither provided for nor precluded by the methodology or the manual. Since the mini-survey had taken far longer than was usual and was overtaken by the comprehensive survey, the Organization considered it was justified in paying a lump sum.

11. Step F.3 in Part IV of the CCAQ manual deals with the review of the survey results by the headquarters of the designated agency (in this case, SEARO) and the approval by the responsible agency (WHO headquarters).

According to step F.3.4, after reviewing the data and analysis, the designated agency either confirms the results as submitted, or proposes changes. It also reviews the recommended salary scale and proposes appropriate modifications if they are required.

At step F.3.5 the designated agency reports to the responsible agency. In completing its review the "responsible agency may introduce modifications to the survey results which it considers justified".

Step F.3.6 states: "The review concludes with the approval by the responsible agency of the salary scale and other allowances."

The Organization has interpreted the provision in step F.3.5, which enables it to introduce modifications to the survey results, as entitling it not to introduce the salary scale referred to in step F.3.6 but to substitute a lump sum instead. In the opinion of the Tribunal this is not permissible. The words of step F.3.6 clearly stipulate that "the review concludes with the approval by the responsible agency of the salary scale ...". Payment of a lump sum is not equivalent to the approval of a salary scale. The decision of the Director-General must therefore be quashed.

12. Because the complainant received a non-pensionable lump sum instead of a salary increase, his pensionable remuneration was affected. According to a memorandum of 15 April 1999 sent to the Headquarters Board of Appeal, if there had been an "across-the-board" salary increase from 1 November 1993 of 18.4 per cent, the difference in his "annual pension benefit" would have amounted to 12 per cent.

13. The Organization shall pay compensation to the complainant for loss of pension benefits resulting from the payment of a lump sum rather than an increase in salary. As requested by the Organization in the event of the Tribunal ruling against it, the life expectancy table used by the United Nations Joint Staff Pension Fund shall serve as a basis for calculating the amount of the pension the complainant would have received if there had been a salary increase from 1 November 1993 to 30 June 1994 of 18.4 per cent. The complainant is not entitled to moral damages but is entitled to 1,500 United States dollars in costs.

DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The Organization shall pay compensation to the complainant as provided under 13.
3. It shall pay him 1,500 United States dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Florida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

Mella Carroll

Florida Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 February 2001.