

**EIGHTY-FIFTH SESSION**

***In re Malhotra (Ramesh Kumar) (No. 5)***

**Judgment 1767**

The Administrative Tribunal,

Considering the fifth complaint filed by Mr. Ramesh Kumar Malhotra against the World Health Organization (WHO) on 10 March 1997 and corrected on 24 April, the WHO's reply of 25 July, the complainant's rejoinder of 28 August and the Organization's surrejoinder of 1 December 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 who was born in 1935, joined the staff of the WHO's Regional Office for South East Asia (SEARO) at New Delhi in 1967. He retired on 30 November 1995. Facts relevant to this case and information on his career in the Organization are set out, under A, in Judgment 1471 of 1 February 1996 on his first complaint. In that judgment the Tribunal sent the case back to the WHO for the regional Board of Appeal and, if need be, the headquarters Board to take the matter up again, the process of appeal having been "set at nought" for want of information on the procedure of selection for a vacant post, No. 5.0013, for an "assistant III".

On 21 February 1996 a personnel officer at SEARO sent the material documents to the chairman of the regional Board and invited it to review the case. In a report of 2 April 1996 to the Regional Director it recommended rejection. The Regional Director told the complainant by a letter of 17 April that he had endorsed the Board's recommendation. On 5 June he appealed to the headquarters Board. In its report of 14 November the Board found no evidence of personal prejudice or breach of the rules and it too recommended rejection. By a letter of 13 December 1996, the decision under challenge, the Director-General endorsed the Board's recommendation.

B. The complainant submits that he was discriminated against. He was, he says, better qualified to carry out the duties of an assistant III than the successful candidate and had greater seniority. The process of selection was not competitive, that candidate having won by "favouritism". He pleads procedural flaws, one being that there was nobody on the Selection Committee to represent the Staff Association. He alleges delay in processing his appeal.

He wants the Tribunal to set aside the appointment of another official to post 5.0013, declare him appointed instead and grant him 60,000 United States dollars in moral damages. He claims costs and such sum in damages "as may be admissible".

C. In its reply the WHO submits that the complaint is devoid of merit. It rebuts the charge of prejudice and observes that promotion is at the Director-General's discretion. Although the complainant had greater seniority than the successful candidate, he did not have greater experience in the right areas, and that is why his candidature was unsuccessful. The Organization scrupulously abided by the rules on selection. The Tribunal will not rule on the merits of candidates and will set aside an appointment only if it finds one of the flaws that precedent treats as fatal. In this case there was none.

D. In his rejoinder the complainant enlarges on his pleas and presses his claims. In his submission the WHO was wrong to put on the short list an official who did not have the right sort of experience and whose grade was below that of the vacancy. The complainant did have such experience. In any event the Administration should have tested the candidates before making the appointment.

E. In its surrejoinder the WHO observes that nothing in his rejoinder helps his case. It confines comment to brief clarifications of issues he has touched on. SEARO's policy was, it says, to put on the short list the qualified staff member "with the longest service" in the grade of the post or in the grade just below. In fact the complainant did not have the right experience. As is plain from the terms of the notice, the Organization was under no duty to have the candidates take tests.

## CONSIDERATIONS

1. The complainant is challenging a decision by the World Health Organization not to appoint him to a post, No. 5.0013, for an assistant III at grade ND.8 in its Regional Office for South East Asia (SEARO).

2. In Judgment 1471 the Tribunal set aside the Director-General's decision of 24 March 1994 and sent the case back to the WHO for the regional Board of Appeal and the headquarters Board, if need be, to reconsider his appeal. Both Boards did so. By a letter of 13 December 1996 the Director-General told the complainant he was rejecting that appeal. In impugning that decision he pleads personal prejudice, mistaken appraisal of the facts and a flaw in the process of selection.

### *Personal prejudice*

3. The complainant submits that he should have been on the short list of candidates for the post because he was better qualified and had greater experience and seniority than the others. Though the best candidate, he was utterly ignored. The complainant points out that the regional Board had found no adverse comment or information about him in the material provided by the WHO, and he infers that out of sheer partiality his candidature was passed over.

4. The complainant offers not a jot of evidence of partiality against him on the part of anyone in the Organization. The plea fails.

### *Misappraisal of the facts*

5. The complainant pleads that the Selection Committee failed to take account of all the material facts, namely his experience, qualifications and seniority. He charges the WHO with breach of good faith on the grounds of discrepancies between two versions that were made of the short list of candidates. In his submission the successful candidate was no better qualified than he. The notice of vacancy called for "thorough knowledge of the customs, excise and finance laws of India and of the Indian public administration structure". He says it was he, not the successful candidate, who met all the stated requirements, yet he was branded "doubtful" and kept off the short list because an administrative officer disliked him. He says he had served the Organization for longer than the successful candidate and that his record, his experience of logistics and his grade afforded reason enough to put him on the short list. Yet the Administration overlooked all those facts, even if his qualifications and experience had been no greater than the other candidates', he argues, he should have been short-listed on the grounds of seniority alone.

6. The Selection Committee took a different view. It did not put all the candidates on a par. Even after making proper allowance for the complainant's seniority it ranked the successful candidate more highly. Beyond mere allegations, the complainant again offers not a shred of evidence to bear out his claim.

7. The conclusion is that there is no merit in his allegation that the Selection Committee ignored material facts. The Tribunal is satisfied on the evidence that the Committee duly considered the qualifications, experience and seniority of the candidates on the short list before deciding which was the best and gave due weight to the complainant's fine record.

8. According to consistent precedent seniority, though of course it matters, is not the overriding criterion: see for example Judgments 564 (*in re* Ali Khan), under 8; 1137 (*in re* West No. 11), under 3; and 1697, under 22.

9. The complainant observes that, though the regional Board found discrepancies between two versions of a letter that an administrative services officer sent on 11 February 1992 to the personnel unit containing the short list of candidates, it failed to charge the Administration with breach of good faith. That he argues, was contrary to Rule 1230.1.3.

10. The discrepancies between the two versions of the short list do not help the complainant's case since his name

did not appear on either of them.

11. The Tribunal will not replace the Selection Committee's assessment with its own. Firm precedent has it that it will interfere with the ranking of candidates only if there is a mistake of fact or of law, or an obviously wrong reading of the evidence, or a formal or procedural defect, or misuse of authority, or if some material fact has been overlooked: see, for example, Judgments 1137 under 2 and 1436 (*in re* Sala No. 2), under 6. Here no such flaw can be shown.

*Procedural flaw*

12. The complainant submits that it was a fatal flaw in the procedure that no representative of the Staff Association sat on the Selection Committee. According to SEARO's "Recruitment and Selection Procedures", as set out in a memorandum of 27 December 1990, the Committee "will be composed" of five members, one of whom must be the "Staff Association's President or his nominee".

13. The plea fails. Here the Staff Association refused to take part in the selection. Although a representative of the Association is free to take part, his refusal to do so cannot make the Committee's choice void. If that were so, the Staff Association's representative would have a veto: see Judgment 1565 (*in re* Kashmiri Lal Malhotra No. 6) under 8.

14. The conclusion is that the plea of personal prejudice is not borne out by the evidence; there is no merit in the plea about misappraisal of evidence by the Selection Committee; and there is no fatal procedural flaw. So the complainant's main claim must fail, and so too must the others.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

*(Signed)*

Michel Gentot  
Julio Barberis  
James K. Hugessen

A.B. Gardner