SIXTY-SIXTH SESSION

In re VICTOR

Judgment 952

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Mahendra Victor against the World Health Organization (WHO) on 23 September 1988, the WHO's reply of 4 November, the complainant's rejoinder of 12 December and the WHO's surrejoinder of 19 January 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 020 and 310.5.2 and WHO Manual provision II.2.430.2;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, an Indian of the Christian faith who was born in 1929, joined the WHO's Regional Office for South-East Asia (SEARO), in New Delhi, in 1980. In February 1984 the wife of his son Sushil Kumar gave birth to a boy, Tushar Kumar. On 1 January 1986 the boy's parents signed a paper purporting to provide for his adoption by his grandfather, the complainant. The paper was registered with the Sub-registrar of the New Delhi District on 2 January. On 21 January the complainant submitted it to SEARO in support of an application for recognition of Tushar Kumar's status as his dependant under Staff Rule 310.5.2 and for the consequent entitlements, namely payment of the dependant's allowance and medical insurance coverage. At the time WHO Manual provision II.2.430.2 provided for recognition as a staff member's dependant of "a child legally adopted under the adoption laws of a state by means of a Court Order or by other process recognized under the laws of the country concerned". After consulting headquarters SEARO recognised Tushar Kumar as the complainant's dependant as from 1 January 1986.

Three other staff members then asked SEARO to recognise adopted grandchildren as dependants. In a memorandum of 11 August 1986 the Chief of Personnel at headquarters refused their claims on the grounds that adoption of a grandchild should be recognised only if the natural parents were dead or unable to look after the child; the status of the complainant's grandchild should also be reviewed and, unless he produced satisfactory evidence of such adoption, would be withdrawn. In a memorandum of 20 November 1986 to the Regional Director the Personnel Division said that since the complainant had not produced such evidence recognition was withdrawn as from 1 December. On 20 January 1987 the complainant asked that Tushar Kumar's status as his dependant be restored, but the refusal was confirmed in a memorandum of 5 March, and on 2 April he appealed to the Regional Board of Appeal.

Manual provision II.2.430.2 was amended as from 12 May 1987 by the addition of the following passage:

"In countries where legal adoption of blood relatives is allowed, the dependency of any such legally adopted relatives is normally only recognised for the purposes of Staff Regulation 310.5.2 if either both natural parents of the child(ren) are deceased, or ... permanently incapacitated and unemployable."

In its report of 11 September 1987 the Regional Board recommended recognising Tushar Kumar as a dependant up to 12 May 1987. The Regional Director accepted that recommendation on 29 October, adding that to obtain recognition after 12 May 1987 the complainant must produce a certificate of legal adoption from the Indian courts and satisfy the requirements of the new text of II.2.430.2.

On 30 December 1987 the complainant appealed to the headquarters Board of Appeal. In its report of 1 June 1988 the Board made the same recommendation as the Regional Board and by a letter of 27 June, the decision under challenge, the Director-General told the complainant that he endorsed it.

B. The complainant submits that his adoption of Tushar Kumar, which was in the interests of the boy's own

welfare, respected Christian custom in India, was properly executed and was therefore lawful. The WHO admitted as much in recognising the boy as his dependant and accordingly granted him benefits which it is estopped from withdrawing unless an Indian court declares the adoption invalid. Though empowered under Staff Rule 020 to change the rules on the subject, the Director-General may do so only "without prejudice to the acquired rights of staff members" under the Staff Regulations. The complainant alleges breach of the principle of equal treatment in that two retired SEARO staff members whom he names have grandchildren recognised as dependants. The headquarters Board ignored those cases. He contends that the new text of II.2.430.2 would apply to him only if he had not adopted Tushar Kumar before 12 May 1987.

He asks the Tribunal to order the WHO to restore to him the benefits of Tushar Kumar's status as his dependant and to amend the Manual provision. He claims 5,000 United States dollars in damages and costs.

C. In its reply the Organization denies that the complain- ant properly adopted Tushar Kumar: legal adoption ordinarily requires judicial approval, not mere registration of an agreement concluded with the natural parents. But to test the alleged adoption would call for a ruling from the Indian courts, and the WHO can neither require the complainant to seek nor itself seek such a ruling. Its case therefore rests, not on the invalidity of the adoption, but on the interpretation of its own rules. As the Tribunal has held, it will not review criteria laid down in national law, the only material rules being those that apply to the international civil service.

The Organization took the reasonable view that to allow the claims founded by the complainant and by other staff members on the adoption of grandchildren would put an unexpected and unacceptable burden on the budget. In any event the complainant was free to ensure Tushar Kumar's welfare without adopting him.

In restoring the complainant's rights up to 12 May 1987 the Organization recognised that it had been wrong to set conditions for the recognition of dependent status which until that date had not been stated in the rules. After that date, however, the complainant did not qualify for recognition under the amended rules.

His allegation of breach of an acquired right is mis- taken. It was never the intent of the Manual provision to enable staff to adopt kin so as to get dependant's benefits, and the purpose of the amendment was to make that explicit. The Director- General has authority under Rule 020 to amend the conditions of recognition of adopted children, and according to the Tribunal's case law such amendment does not amount to breach of any acquired right since it does not touch on an essential term of the complainant's conditions of service. Nor was the complainant caused any undue or unnecessary injury.

As to his charge of breach of equal treatment, one of the two cases he cites is beyond review, the staff member having retired in 1985, and the other is under review.

D. In his rejoinder the complainant develops his pleas that the adoption fully complied with Indian law and Christian custom; that the WHO was wrong both to demand further evidence in the first place and then to go back on its recognition of Tushar Kumar as a dependant; that such breach of an acquired right is unlawful, besides making for disorderly management; and that the WHO's failure to review the case it says is beyond review is unfair and inexplicable. The complainant presses his claims.

E. In its surrejoinder the Organization again observes that its case rests, not on any flaw in the adoption under Indian law and custom, but on its own rules. Its review of its policy in a matter of obvious public interest can hardly be branded unlawful or even unfair: what would be unfair would be to let some members of the staff draw financial benefit from a loophole in the rules. The impugned decision did not have retroactive effect; nor was there any breach of an acquired right since the matter does not constitute an essential condition of appointment.

CONSIDERATIONS:

1. The complainant, an employee of the WHO's Regional Office for South East Asia, known as SEARO, purported to adopt his son's son by signing an officially stamped paper headed "Adoption deed" and dated 1 January 1986, which he later registered with the Sub-registrar of the New Delhi District. At the date of signature of that paper the boy's natural parents were alive and the relevant provision of the WHO Manual, II.2.430.2, allowed recognition as a staff member's dependant of "a child legally adopted under the adoption laws of a state by means of a Court Order or by other process recognized under the laws of the country concerned".

After consulting headquarters SEARO recognised the complainant's grandson as his dependant as from 1 January

1986.

2. Three other members of the SEARO staff thereupon applied for recognition of their adopted grandchildren as dependants. In a memorandum of 11 August 1986 the Chief of Personnel refused on the grounds that adoption of a blood relative such as a grandchild should be recognised only if the natural parents were either dead or permanently incapacitated and unemployable. The complainant was also told that the status of his grandson was under review and that unless he produced satisfactory evidence of adoption recognition would be withdrawn. A memorandum of 20 November 1986 told him that since he had failed to produce such evidence recognition would be withdrawn as from 1 December.

3. On 2 April 1987 he appealed to the Regional Board of Appeal. By the time the Board heard his appeal Manual provision II.2.430.2 had been amended as from 12 May 1987 by the insertion of the passage reproduced in A above. The Board recommended recognising his grandson as a dependant up to 12 May 1987. In a letter to him dated 29 October the Regional Director accepted that recommendation but added that to obtain recognition after 12 May he must produce a certificate of adoption from the Indian courts and meet the new requirement in II.2.430.2 as amended.

His further appeal to the headquarters Board of Appeal proved unsuccessful.

4. After the other staff members had applied to have adopted grandchildren treated as dependants there was doubt in SEARO as to whether a Christian Indian could legally adopt a blood relative as the complainant had, the feeling being that adoption ordinarily requires court approval and that registration of an agreement between the natural parents is not sufficient. An opinion given by his Indian lawyer contended that the adoption had been lawful, whereas an Indian lawyer consulted by the Organization stated that adoption law in India was codified only for Hindus, Sikhs, Jains and Buddhists, not for Christians; that the adoption of Indian Christians was governed by local customs and usage; and that under Indian law a Christian could validly adopt only by filing suit with the courts.

The burden is on the complainant to satisfy the Organization that the adoption was lawful, and he has failed to discharge it. It was only reasonable that the Organization should decline to waive its legal immunity and to ask the Indian courts for a ruling.

5. The complainant has not met the further requirement that he must satisfy the Organization that at the date of the adoption the parents of his grandson were deceased or permanently incapacitated and unemployable.

6. In the circumstances it was reasonable of the Organization to amend II.2.430.2 so as to restrict the possibility of having adopted children treated as dependants. If a grandson might be adopted, so too, presumably, might other blood relatives, and the adoption of such relatives, not so much for family reasons as to obtain a benefit from the Organization, would have been an abusive practice.

7. The complainant does not deny that the Organization had power to amend the provision: his case is that amendment of the rules must be "without prejudice to the acquired rights of staff members" and that the amendment took away his acquired right.

The plea is mistaken. It was never the intention of the Manual provisions to allow staff to adopt blood relatives so as to get dependant's benefits, and the purpose of the amendment was to make that quite explicit.

In any event the right which the amendment removed cannot be deemed to have constituted any essential part of the complainant's terms of appointment, and the allegation of breach of an acquired right is therefore unsound.

8. Lastly, as to the complainant's contention that he has been discriminated against, one of the two cases he cites is beyond review because the staff member concerned retired in 1985, while the other is said to be still under review: at any rate no further information is given as to the outcome. The discrimination is therefore not proven.

9. The impugned decision being sound, the complainant's claims fail in their entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.