

## EIGHTY-FOURTH SESSION

### *In re Mussnig* (No. 2)

(Application for execution)

Judgment 1731

The Administrative Tribunal,

Considering the application filed by Mrs. Gabriele Mussnig on 9 September 1996 for the execution of Judgment 1376, the reply of 19 February 1997 from the World Health Organization (WHO), the complainant's rejoinder of 23 May and the Organization's surrejoinder of 25 August 1997;

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

Having examined the written submissions;

### CONSIDERATIONS

1. This is an application for the execution of Judgment 1376, which the Tribunal delivered on 13 July 1994, on Mrs. Mussnig's first complaint. In that complaint she challenged the decision of the WHO not to renew her contract after 30 April 1991.

2. The Tribunal concluded under 20:

"The damage caused to the complainant's career and reputation is so grave that no form of redress short of reinstatement and the grant of a further contract of employment will suffice.

(1) She must be put in the same position as if her contract had never terminated and be reinstated as from the date of termination and up to the date of this judgment. Her salary, allowances and any other benefits are to be reckoned at the rates applicable at WHO Headquarters in Geneva. The assumption is that since her performance was without reproach it would have continued to be so; she is therefore further entitled to any annual within-grade step increments she would ordinarily have been granted. Any indemnities or occupational earnings she may have received since termination may be deducted from the amounts due, but she is entitled to payment of interest on all arrears at the rate of 10 per cent a year as from the dates at which they fell due.

(2) She must be granted a contract of employment for a period of two years from the date of this judgment at the appropriate grade and step and in a post matching her qualifications and experience.

(3) She is entitled to an award of damages for the moral injury she has suffered, and the amount is set at 25,000 Swiss francs."

3. The decision of the Tribunal was:

"1. The Director-General's decision [not to renew her contract] is quashed.

2. The Organization shall reinstate the complainant, as provided in 20(1) above, as from the date of termination of her appointment.

3. It shall grant her a contract of employment for two years, as provided in 20(2) above, from the date of this judgment.

4. It shall establish a report appraising her performance from May 1990 to April 1991.

5. It shall pay her 25,000 Swiss francs in moral damages.

6. It shall pay her 6,000 Swiss francs in costs."

4. The complainant acknowledges that the WHO has fully executed points 1, 5 and 6. But she contends that it has -

(a) failed "to do its utmost to successfully reinstate" her; and

(b) refused "to fully reintegrate [her] under a normal fixed-term contract, carrying expectations of

renewal", and has instead offered her a fixed-term contract for two years from 13 July 1994 to 12 July 1996 and thus "did not comply either with the substance or the spirit of Judgment 1376"; and

(c) failed to give her a performance appraisal report for the period from May 1990 to April 1991.

### *Reinstatement*

5. The complainant's principal submission is that the WHO, having paid her an advance of 80,000 United States dollars on account of salary, allowances and benefits due from 1 May 1991 to 12 July 1994, failed to pay her the balance, insisting that she should first disclose any occupational earnings she had received during that period so that the amounts could be deducted. She refused on the grounds that the "deduction of earnings from sources outside the WHO is totally unacceptable". She also objects to the WHO's recovering a payment which it had made to her on separation on account of 41 days' unused annual leave and to its making deductions for health and accident insurance in that period.

6. The Tribunal made the complainant an award of damages for moral injury. The order for reinstatement was distinct, being intended to make good the financial loss which she had suffered. Under that order she was entitled to recover an amount equivalent to all the sums which, had she remained in service, she would have received by way of salary, allowances, within-grade increments and other benefits: no more, no less. If, therefore, she did not account for what she had earned during the relevant period she would recover more than her actual loss. The Tribunal rules that the complainant must disclose all her occupational earnings for that period, and the WHO may deduct those amounts.

7. As for her unused annual leave, payment under that head was due only on separation. Reinstating her meant that she had to be treated as if there had been no separation and, consequently, the WHO was entitled to recover that payment. In fact she suffered no prejudice because the WHO immediately credited her with another 41 days' leave.

8. The WHO conceded that the deductions made for insurance were wrong and it cancelled them in March 1995.

9. The Tribunal holds that the WHO has duly executed its decision in regard to reinstatement, subject only to its paying the balance due to the complainant, which it must pay immediately upon the disclosure and deduction of earnings as set out in 6 above.

### *The grant of the two-year contract*

10. The complainant alleges that the post she previously held, for a technical officer at grade P.3, step 8, was one of indefinite duration. She contends that she should have been given an appropriate post in the same category within one month of the date of delivery of Judgment 1376; what the WHO offered her instead was a post of limited duration at grade P.4, step 2, and that, too, only on 13 December 1994. She admits, however, that the argument as to the duration of her post did not arise in the original proceedings.

11. The WHO replies that what the Tribunal ordered was the grant of a two-year contract on an appropriate post and at an appropriate grade and step: it did not stipulate that the post must be one of indefinite duration. As for the delay, the WHO pleads that there was no suitable vacancy for her in July 1994 and that it took immediate steps to create and finance a post. It completed the procedural formalities in December 1994 and made a formal offer in that month, retroactive to 13 July 1994. In fact the complainant had already begun to work on 4 October 1994 on the basis of a job description which she admits was drawn up with some input from her. Although she did not accept and sign the contract offered to her, she received the corresponding salary and other benefits.

12. The Tribunal holds that the offer to the complainant of the two-year contract on a post of limited duration was in compliance with Judgment 1376, which did not deal with the question of the duration of the post she was to be put on. Furthermore, the delay in making that offer was not unreasonable in the circumstances.

13. The complainant further argues that the post offered to her was fictitious; "as early as of beginning of February 1995 her job with the corresponding job description (of which she obtained a copy only on 20

December 1994) did not formally exist"; and there was a "sudden and perhaps calculated disappearance of her post". She refers to two memoranda sent by the Director of her unit to the Director of the Personnel Division, one in March and the other in May 1995, requesting her reassignment. Two reasons were given for the request. First, of the funds expected in October 1994 contributions from Germany, Japan and Sweden had been cut in November and December 1994, and funds expected from the World Bank in January 1995 were delayed. Secondly, the staff member who was to be her supervisor had been ill since February 1994, and although in October 1994 it was hoped that he would be back at work by February 1995 he was not, and the lack of supervision made it difficult to employ her efficiently.

14. The Tribunal holds that the post offered to the complainant was not a fictitious one.

15. The complainant makes several other allegations: that the delay in giving her a contract resulted in failure to appraise her performance and consequently she was not given due within-grade increments; and that she did not get an identity card from the Swiss authorities. Those allegations do not relate to the grant of a contract in accordance with Judgment 1376 but to the proper implementation of that contract. They are quite outside the scope of this application for execution of the judgment.

*The appraisal of the complainant's performance*

16. In order to execute point 4 of the decision in Judgment 1376 the WHO sent the complainant a performance appraisal form for her to complete and return so that it could be forwarded to her first-level supervisor. She protested, quite justifiably, in a letter of 28 November 1994 that the appraisal should not be made by her former supervisor as he had been the cause of the problems which had prompted her first complaint. Despite the Director of Personnel's assurance in a letter dated 9 January 1995 that another staff member would make the appraisal she omitted to complete and return the form.

17. The conclusion is that she may not properly object to the failure to complete her performance appraisal report.

## DECISION

For the above reasons,

Subject only to what is said in 9 above, the application is 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