

## **EIGHTY-FIFTH SESSION**

### ***In re* Mussnig (No. 4)**

#### **Judgment 1759**

The Administrative Tribunal,

Considering the fourth complaint filed by Mrs. Gabriele Mussnig against the World Health Organization (WHO) on 28 July 1997, the WHO's reply of 30 October, the complainant's rejoinder of 12 January 1998 and the Organization's surrejoinder of 8 April 1998;

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. Information on the complainant's career in the WHO is set out, under A, in Judgment 1376 of 13 July 1994. That judgment ordered, among other things, her reinstatement as from the date of termination of her appointment and the grant to her of a contract for two years from the date of that judgment. By a "personnel action" form dated 2 December 1994 the Organization reinstated her in her former post as from 1 May 1991 under a fixed-term appointment to expire on 12 July 1994. In a letter of 13 December 1994 the Director of the Division of Personnel told her that the Director-General had decided to grant her, in line with the judgment, a two-year extension of appointment with promotion to grade P.4 as from 13 July 1994. She was to be put on a "time-limited" post for a technical officer in the Office of Global and Integrated Environmental Health (EHG). The Director asked her to sign the letter if she agreed to the appointment, but she refused.

In a letter of 21 March 1996 the Director of Personnel informed her that the WHO was not going to renew her contract beyond the date of expiry, 12 July 1996. It had, he said, four reasons for not doing so: she had refused to sign the "contract letter" of 13 December 1994 or complete her performance report, failed to do the work assigned to her, her performance was poor and she got on badly with other staff. The Director put her on special leave with full pay as from 1 April to 12 July 1996 on the grounds that her presence was "proving to be disruptive to the work operations of the unit in view of [her] refusal to perform any sort of work assigned". By a letter of 17 May 1996 she told the secretary of the headquarters Board of Appeal that she intended to appeal against the decisions of 21 March, namely the non-renewal and the special leave.

In a report dated 12 March 1997 the Board concluded that she had "failed ... to prove her worth" in her new position and recommended rejecting her appeal. By a letter of 21 April 1997 the Director-General endorsed the Board's recommendation. That is the decision she impugns.

B. The complainant submits that it was unlawful not to renew her contract. She argues that the WHO never had any intention of extending her appointment beyond the two-year period of the contract awarded to her in Judgment 1376. It put her on a fictitious post, which could not be funded, and either kept her idle or gave her work that was not "suitable". How could she show her mettle when the Administration denied her proper supervision and trimmed her appointment by three months? She sees a procedural flaw in the Organization's failure to warn her of its "vexatious" decision to put her on special leave. She contends that her former post in the Global Programme on AIDS (GPA) was of "indefinite" duration and "challenges" the Organization to produce "authentic GPA vacancy notices" that might show that, as it has made out, such posts were time-limited. She objects to delays in granting her promotion and processing her appeal. Lastly, she dwells on the damage to her reputation from adverse publicity given to a report by the ad hoc grievance panel that the Director-General set up to look into her charges of sexual harassment.

She wants the Tribunal to set aside the impugned decision and have "all documents of compromising nature" struck from her personal record. She claims reinstatement "on secondment basis into another international organization" and awards of moral damages and of 10,000 Swiss francs in costs.

C. In its reply the WHO contends that her complaint is devoid of merit. The decisions not to extend her appointment and to put her on special leave with pay were taken in the proper exercise of discretion and were wholly warranted under the circumstances. She had no right to extension and the Manual stipulates that a "satisfactory appraisal report", which she did not have, is a prior condition anyway. It was her own persistence in treating her assignment as "a fiction" and her refusal to cooperate with her supervisors and to do her work that led to the decision not to renew her contract. She herself had contributed to the description of her post, and her duties were "responsible and demanding" and such as befitted a P.4 official, who is expected to work largely without supervision. But her supervisor described her output as "very limited" and said she was unable to carry out the tasks in her post description. Her second-level supervisor tried to help and encourage her but found that she spent "inordinate" time on personal problems and objections to "perceived ill-treatment". There was ample scope for her to do work of a quality that would have warranted keeping her on.

Other reasons for the impugned decision were her refusal to sign her contract or complete her performance report. Although the WHO's practice is to get a staff member's written agreement to any reassignment that involves a change of duty station or grade, she refused it on the grounds of objections to the title and duration of her new post. The reasons she gave for refusing to complete the performance report - the report by the ad hoc grievance panel and absence of a proper post - were irrelevant. The delays in her appeal were as much of her own making as the Administration's.

D. In her rejoinder the complainant presses her claims and enlarges on her pleas. She maintains, chiefly, that her post was fictitious, that the Organization should not have put her on a post of limited duration and failed to warn her that her performance was below par, though it concocted evidence of such warnings *ex post facto* to back up its case. She alleges that the decision not to extend her appointment was a disciplinary measure to punish her for filing her original complaint and implement the panel's recommendation. She urges the Tribunal to assess her work on the strength of documentary evidence of her output over the years.

E. In its surrejoinder the WHO observes that the rejoinder consists largely of irrelevant comment and of pleas the Tribunal has already ruled on. It points out that Judgment 1731, on her second complaint, declared that the post offered to her was "not a fictitious one" and that offering her one of limited duration was in line with Judgment 1376. The Organization denies her other allegations and insists that despite its efforts to encourage her "professional development" she preferred to "deny" that her job was one at all and to protest that many of the duties were either "too difficult" or "not worth doing".

## CONSIDERATIONS

1. In Judgment 1376 of 13 July 1994 the Tribunal ruled on Mrs. Mussnig's first complaint against the World Health Organization. Points 2, 3 and 4 of the decision read:

"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."

The WHO reinstated the complainant as from 1 May 1991 and up to 12 July 1994. It put her on a post, No. 1-3991, in the Office of Global and Integrated Environmental Health. It granted her a contract from 13 July 1994 to 12 July 1996 and promoted her to grade P.4.

2. On 21 March 1996 the Director of the Division of Personnel told her that the WHO would not be renewing her appointment and was putting her on special leave from 1 April 1996 until the date of its expiry, 12 July. The reasons for the decision not to renew her appointment were: (a) her refusal to sign her contract or complete her performance report; (b) her failure to do her work; (c) poor performance; and (d) her inability to get on with others. The Director also explained that the special leave was in her own and the Organization's interests: she was

disrupting the work of the Office by refusing to sign her contract and do her work.

3. On 9 September 1996 she filed an application with the Tribunal for the execution of Judgment 1376 on the grounds that the Organization had failed to give effect to points 2, 3 and 4 of the Tribunal's decision. She contended that the Organization had -

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

(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 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."

4. On 17 May 1996 she had filed an appeal with the headquarters Board of Appeal against the Director's decision of 21 March 1996. The Board recommended rejecting the appeal and the Director-General did so on 21 April 1997.

5. That is the decision she is impugning in this complaint, which she filed on 28 July 1997. She seeks:

(a) the quashing of the Director-General's decision of 21 April 1997 and the removal from her personal records of any documents "likely to affect her career", such as the text of the decision of 21 March 1996 not to renew her contract and the report of the ad hoc grievance panel;

(b) reinstatement, preferably on secondment to another international organization;

(c) damages for the moral injury she suffered and continues to suffer as a result of the adverse publicity about her during her reinstatement, the failure to execute Judgment 1376, the "vexatious measure" of special leave, the "anguish" she endured throughout that time, the complex legal procedures she had to undertake and the halt of her career; and

(d) 10,000 Swiss francs in costs.

6. The decision of 21 March 1996 bore on two issues: the non-renewal of the complainant's appointment, and the special leave. It did not rule on her claims to the removal of documents from her personal file and to moral damages for bad publicity. So the Tribunal will not entertain them.

7. In Judgment 1731 of 29 January 1998 the Tribunal dismissed the complainant's application of 9 September 1996 for execution of Judgment 1376 and some of its conclusions are material to this case too. It held:

"(a) 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,

(b) 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,

(c) the delay in making that offer was not unreasonable in the circumstances,

(d) the post offered to the complainant was not a fictitious one,

(e) she may not properly object to the failure to complete her performance appraisal report."

Those conclusions are *res judicata* and not open to discussion in the present context. So her refusal to sign her contract and her contentions that the Organization gave her nothing to do and that her post was fictitious are no longer tenable: those issues are closed.

8. There are only two material issues still pending: the lawfulness of the non-renewal, and the lawfulness of the special leave.

9. WHO Staff Rule 1040 says that a fixed-term appointment carries no entitlement to renewal. According to a firm line of precedent a decision not to renew an appointment is a discretionary one and may be set aside only if it is

*ultra vires* or shows a formal or procedural flaw or an error of fact or of law, or if a material fact has been overlooked or a plainly wrong conclusion drawn from the evidence, or if there has been abuse of authority.

So an organisation enjoys wide discretion in deciding whether or not to renew an appointment. The exercise of such discretion is subject to review only on the limited grounds set out above and the Tribunal will respect the organisation's freedom to determine its own requirements and the career prospects of its staff: see, for example, Judgment 1349 (*in re Zago*).

10. The reasons stated for the non-renewal of the complainant's appointment are those set out in 2 above, namely she refused to sign her contract and to complete her performance report; she was unwilling or unable to perform her duties; and she got on badly with others at work. She blames the WHO for having misread Judgment 1376 and repeats some of the pleas she put forward in support of her application for execution of that judgment. She further contends that the Organization gave her no proper work, that some of the tasks it assigned her were scientifically impossible and that most of the time her supervisors were on mission or on leave.

11. The Organization rebuts her arguments, maintaining that the decision of 21 March 1996 is lawful and appending to its reply appraisals in memoranda from her supervisors, who agree that her work was poor. Though she challenges their views, she produces not a single favourable comment by any senior officer of the WHO on the quality of her work. Besides, she admits that she refused to sign her contract and complete her performance report, and she offers no proof of willingness or ability to perform her duties.

12. On the evidence the conclusion is that the decision not to renew her appointment fell within the bounds of the Organization's discretion. She fails to show any of the flaws, set out in 9 above, that would warrant quashing it.

13. She was on special leave, with full pay, from 1 April to 12 July 1996. The grounds for the decision were that she was disrupting work by refusing to sign her contract and to do what she was told to do, and the WHO says that it took the decision in the interests of both sides.

14. She acknowledges her refusal to sign her contract and offers no evidence to suggest that she did do her work. Special leave is something an organisation may order in the exercise of its administrative authority, and again its decision is one that is subject to review only on the limited grounds set out in 9 above. The WHO properly exercised its discretion in putting the complainant on special leave.

15. For the foregoing reasons the complaint must fail in its entirety.

## 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