

SEVENTY-SEVENTH SESSION

In re MUSSNIG

Judgment 1376

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Gabriele Mussnig against the World Health Organization (WHO) on 31 May 1993, the WHO's reply of 18 August, the complainant's rejoinder of 10 November and the Organization's surrejoinder of 10 December 1993;

Considering Article II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, WHO Staff Rule 530.2 1040 and 1230, WHO Manual paragraphs II.4.230.2 and 240 and the rules of Procedure of the headquarters Board of Appeal;

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, a German citizen born in 1957, joined the staff of the WHO in 1987 as an associate expert at grade P.2. She worked on several programmes under short-term contracts until April 1988. From May 1988 until April 1989 she served as assistant at grade P.3 to a task force on "behavioural and social determinants of fertility regulation".

In May 1989 she began a two-year appointment up to 30 April 1990, also at P.3, as a technical officer with the Global Programme on AIDS (GPA) and was assigned to Luanda, in Angola. In an annual appraisal report her supervisor, the WHO's Representative in that country, described her performance during the first year as "satisfactory".

At the beginning of her second year that supervisor was transferred elsewhere. The WHO's new Representative, Dr. Emmanuel Eben-Moussi, took up duty in June or July 1990.

By a letter of 14 August 1990 the Director of the National Programme on AIDS, at the Angolan Ministry of Health, informed the Director of Public Health that the complainant had notified her intention of taking 30 days' home leave in September as long as the authorities did not object.

On 12 September, in answer to a request from the Director of the National Programme, she reported on financing and the availability of medical supplies.

In a letter of 21 September 1990 the Director of Public Health asked the WHO's Representative to have the complainant recalled alleging that she was incompetent, discourteous and - because "she went on holiday" without permission from the Director of the National Programme - in dereliction of duty.

While she was on home leave in Germany the Director of the National Programme on AIDS alleged in a letter of 2 October to the Director of Public Health that the complainant was to blame for a break in the supply of reagents needed for medical tests and showed a "lack of responsibility and respect". The Director of Public Health appended the letter of 2 October to one dated 3 October in which he asked the WHO's Representative to have the reagents sent from headquarters himself.

She reported back for duty in Luanda on 22 October.

By a telex of 31 October 1990 from headquarters the Chief of the Office of Cooperation with National Programmes of the Global Programme on AIDS asked her supervisor, Dr. Eben-Moussi, to discuss with her the letter of 2 October, seek written comments from her and arrange if necessary for her to come to Geneva for consultations. He did not discuss the charges against her.

She went to Geneva for consultations on 17 November and learned there of the charges in the letter of 2 October.

In a report of 26 November to the Director of GPA she denied them. The Administration referred her report to an ad hoc commission.

In a telex of 25 January 1991 the Chief of the Office of Cooperation with National Programmes under the GPA informed her supervisor that she was returning to Luanda to settle her affairs and asked him to give her "all support during her stay".

Before she left Geneva, in a letter of 28 January 1991 the Chief of Contract Administration in the Division of Personnel gave her three months' notice of termination under Staff Rule 1040 on the grounds of the Angolan Government's "unwillingness to have [her] remain in the position of WHO/GPA Technical Officer"; her appointment would expire at 30 April 1991; and the Organization would try to find another assignment for her.

She entrusted a memorandum of appeal to the Ombudsman of the WHO, asking him to wait for instructions from her before submitting it to the headquarters Board of Appeal.

She was in Luanda from 6 February until 8 April.

On 8 February she asked Dr. Eben-Moussi for the text of a report dated 17 January 1991 which he had sent about her case to headquarters and of which he had sent a copy to the Resident Representative of the United Nations Development Programme (UNDP); he refused on the grounds that he owed her no explanation.

By a telex of 10 February, which she confirmed in another of 6 March, the complainant asked the Ombudsman to file her appeal on her behalf. On 7 March he sent her appeal to the Secretary of the Board of Appeal.

In a letter of 19 March the Secretary asked her to submit "at your earliest convenience the details required" under the Board's Rules of Procedure.

She returned in April 1991 to Geneva, where she looked for work and tried to obtain copies of documents to support her appeal.

In a letter of 10 April 1992 to the Legal Counsel she referred to three refusals from the Administration - between 8 February and 16 July 1991 - to let her see her supervisor's report of 17 January 1991.

In a letter of 26 June 1992 the Legal Counsel informed her that the Director of Personnel was willing to file her supervisor's report of 17 January 1991 in a sealed confidential envelope along with signed statements from the Director of Personnel and the Legal Counsel himself denying the truth of allegations by her supervisor in his report.

On 19 September 1992 she filed a second appeal objecting to the WHO's failure to draw up a "final" appraisal report and claiming disclosure of several items of evidence and reinstatement.

In its report of 12 February 1993 the Board recommended rejecting "Ms Mussnig's appeal" as time-barred. In a letter of 23 March 1993, which she impugns, the Director-General told her that he was endorsing the Board's recommendation but had instructed the Director of Personnel to destroy the document dated 17 January 1991 "purporting to be" an appraisal of her.

B. The complainant argues that her complaint is receivable. Her first appeal, against non-renewal of appointment, mistakenly dated 17 January 1991 but which the Ombudsman filed on her behalf on 7 March 1991, was still pending. The Board never warned her that failure to pursue it might lead to rejection; nor had she withdrawn it. She filed her second appeal, against the WHO's failure to produce documents in her personal file, within sixty days of receiving the Legal Counsel's letter of 26 June 1992. In any event the Administration's refusal of access to documents in her personal file and its failure to draw up a report appraising her performance in the last year of her employment are in continuing breach of the rules, and so appeal will lie at any time.

On the merits she contends that the non-renewal of her appointment was tainted with prejudice on the part of her supervisor, Dr. Eben-Moussi. That is plain, she says, from his vexatious treatment of her after she had spurned his sexual advances.

She alleges that soon after he had taken up duty at Luanda he invited her into his private quarters after working

hours to put through an international telephone call. There he sought sexual favours from her. Having failed, he later began humiliating her in front of others and in private assuming "a humorous and bantering manner". That he was dissatisfied with her "in a distinctly personal sense" was plain from his reminding her "several times" that "there is no way to get through to you".

But his harassment of her did not stop, she says, at "cajolery". In October 1990 he ordered her "not to get in touch with the government services" and denied her access to the AIDS programme office and to "all normal facilities" including the use of official vehicles. When she had finally settled her own affairs and arranged to leave Angola in April 1991 he saw to it that she was stranded with her luggage at the WHO office without means of conveyance. Since it was "too late" to make other arrangements she had to wait another five days to leave.

So damaging was Dr. Eben-Moussi's appraisal of her work that it prompted the Director of Personnel and the Legal Counsel to deny some of his allegations in writing. After the WHO had established that he, and not she, was to blame for the problems that beset the AIDS programme in Angola it had a duty to set the record straight with the authorities. But it failed to do so and left a damaging report in her file for over two years to thwart her search for lasting employment in the WHO or in some other international organisation.

She points out that under WHO Manual paragraph II.4.240 "staff members are entitled to know of, and have access to, any non-privileged material in their Personnel files" and that such material, according to paragraph II.4.230.2, includes "performance appraisal reports ... and any other document related to the staff member's performance and conduct". By failing to let her see her supervisor's comments on her performance the Administration was in breach of the rules.

She alleges breach of Staff Rule 530.2, which provides for evaluation of a staff member's work at least once a year for officials at grade D.2 and below. The Organization's failure to report on her work in her last year in its employ is a fatal flaw.

She claims the production of various documents. She seeks reinstatement on a suitable post with payment of salary and other benefits from the date of termination and awards of material and moral damages and of 6,000 Swiss francs in costs.

C. In its reply the WHO submits that her complaint is irreceivable. Although her first appeal was timely, she failed to supply the further details the Secretary of the Appeal Board had asked for. Her second appeal, of 19 September 1992, in which she applied for the production of documents, and indeed her claim to an appraisal report, were just an attempt to reopen "the expired time limits". She ought to have made that application and that claim part of her original appeal. She allowed her appeal to lapse.

The WHO is disclosing all but two of the documents she wants: of the two one has been destroyed and the other - if it exists - is about another official and disclosing it would be improper.

On the merits the Organization explains its preoccupation with keeping some documents secret: by not disclosing adverse comments on her performance from her supervisor and the Angolan authorities it sought to deprive them of legal effect. No doubt it should have made its views plain at the time of non-renewal; but it believed that to fulfil its obligations towards her it need only give her such temporary appointments as it could offer and help her to find work elsewhere. Any "inconsistency" or "lack of coordination" in its handling of her case sprang from the problems that beset the AIDS project in Angola.

If her complaint were declared receivable, her case should, since the Board of Appeal did not go into the merits, be sent back for the purpose. As for her claim to reinstatement, such relief in the present financial climate would not be advisable. The WHO does not have "strong views" as to whether it would now serve any purpose to write an appraisal report for 1990-91.

D. In her rejoinder the complainant observes that the WHO does not dispute any of the facts she set out, among them her supervisor's unfair treatment of her and the injury it caused her.

As to receivability she observes that her original appeal was filed on 7 March 1991, within sixty days of notice of non-renewal. It clearly identified the decision she was challenging; she never withdrew her claim to the quashing of the decision despite suggestions from senior officials in the Personnel Division that her appeal might harm her prospects of re-employment; and the WHO is wrong to treat the appeal as having been filed in September 1992. It

is disingenuous to contend that she should have filed her claim about the performance appraisal with the first appeal: at that time the material period had not lapsed; she did not have written notice of the WHO's refusal to give her a report; and she had yet to exhaust the administrative means of redress.

On the merits she submits that by denying her access to documents which other officials had seen the Administration infringed her right to defend her case. What is more, its silence about charges it considered unfounded made the injury to her feelings and reputation the greater.

She presses her claims and seeks the production of further documents. It would not, she submits, be proper to remit her case to the WHO: since the Organization does not dispute the facts of her case referral to the Board of Appeal would only cause delay.

E. In its surrejoinder the WHO, while acknowledging that she lodged her first appeal in March 1991, maintains that her complaint is time-barred. She had only herself to blame for lack of diligence in prosecuting that appeal. Inasmuch as the documents she now wants form part of a selection process, which must remain secret, the WHO refuses to produce them.

CONSIDERATIONS:

1. The complainant entered the service of the World Health Organization in January 1987 at grade P.2. After serving under short-term contracts she was employed as from May 1989 as a technical officer at grade P.3 under the Organization's Global Programme on AIDS (GPA) and assigned to Luanda, in Angola.
2. The complainant's duties as technical officer included "planning, implementing and co-ordinating activities" in support of the national AIDS control programme and financial management of that programme in co-ordination with the Government of Angola. The WHO's team in Luanda consisted of its Representative in Angola, the technical officer and an epidemiologist. Although Luanda was a difficult duty station the complainant seems to have worked well with those who were involved in the National Programme. Indeed in her performance appraisal report for the period from May 1989 to April 1990 her first-level supervisor, the then Representative, affirmed on 23 March 1990 that she had adjusted "successfully" to expatriation and her second-level supervisor, the Chief of National Programme Support under GPA wrote on 19 April that her "performances have been satisfactory, particularly when the circumstances under which she had to work and start a new programme are considered".
3. Relations in the office soured, however, with the arrival in Luanda in June or July 1990 of a new Representative, Dr. Emmanuel Eben-Moussi. The complainant has indeed made serious allegations against Dr. Eben-Moussi of sexual harassment and victimisation. Those allegations are summed up in B above.
4. By a memorandum of 22 January 1991 to the Chief of Contract Administration (ADM/PER) at headquarters the Chief of Administrative Support Services of GPA started action to terminate the complainant's appointment on the grounds that the Angolan Government officials had informed the Organization through its Representative of their unwillingness to have the complainant stay on as technical officer. While the complainant was on a visit to Geneva for consultations the Chief of ADM/PER gave her, by a letter dated 28 January 1991, notice under Staff Rule 1040 that because of the Government's position her contract would not be renewed but would end on its expiry, at 30 April 1991.
5. She sought help from the WHO's Ombudsman, gave him a memorandum appealing against the non-renewal of her contract and asked him not to forward it to the Secretary of the headquarters Board of Appeal until she told him to do so. She went back to Luanda. From there she sent telexes on 10 February and 6 March to the Ombudsman telling him to file the appeal. He did so on 7 March. The Secretary of the headquarters Board wrote her a letter on 19 March enclosing the Board's Rules of Procedure and requiring her to submit as soon as she could "the details required".
6. The complainant went back to Geneva in April 1991 and was then employed under two further short-term contracts with the Organization and under two more with other United Nations agencies.
7. Staff Rule 1230.8.3 reads:

"A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal specifying the action

against which appeal is made and the subsection or sections of Rule 1230.1 under which the appeal is filed. The Board shall open its proceedings at the earliest possible moment after receipt of the appellant's full statement of his case."

8. In her appeal, which was sent on 7 and received on 8 March 1991, the complainant gave notice of appeal against the decision not to renew her appointment. She alleged material, moral and professional injury from the treatment of her at the WHO's office in Luanda. She accused the Representative of "heavy involvement in what looks on the surface as Government decision", namely that she should not be kept on as technical officer after the expiry of her contract on 30 April 1991. She wanted certain statements by WHO officials to be put into writing.

9. On 19 September 1992 she lodged a second appeal against the Organization's refusal on the ground of privilege to release to her certain texts in its possession and against its failure to make a performance appraisal report for the period 1990-91.

10. The Board met on 5 February 1993. After taking oral submissions - which it restricted to a duration of five minutes - from the complainant's representative it concluded in a report dated 12 February 1993 that neither of her appeals complied with its Rules of Procedure. It did not specify what provisions of its Rules had not been observed or why such infringement prevented it from hearing her appeals on the merits; but it declared the appeals time-barred and recommended rejecting them as irreceivable. The Director-General accepted the Board's recommendations and so informed the complainant by a letter of 23 March 1993. That is the decision she is impugning.

Receivability

11. Article VII(1) of the Tribunal's Statute declares that "a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him in the applicable Staff Regulations". The headquarters Board and the Director-General rejected the complainant's appeals as time-barred and therefore irreceivable. If that view is right the complaint will be irreceivable under VII(1) because the complainant has failed to follow the internal appeal procedure properly.

12. The WHO pleads that "taking the date of 8 March as the starting point, the formal appeal to the Board was not lodged until 19 September 1992, that is to say eighteen months after the date on which she was asked to correct the original submission".

13. That plea is beside the point. The complainant's first appeal was lodged on 7 March 1991. What it appealed against was the decision of 28 January 1991 not to renew her appointment. It consisted of a detailed brief which contained all the information that the Board of Appeal needed to enable it to report on the appeal. What she lodged on 19 September 1992 was her second appeal, which was aimed at obtaining texts the Organization had refused to produce. As for the letter of 19 March 1991 from the Secretary of the Board, it simply told her to supply "the details required"; it did not specify which further details the Board required and the absence of which would prevent it from making recommendations to the Director-General. According to the case law - see for example Judgment 607 (in re Verron) under 8 - though the rules on internal appeals must be respected because proper administration so requires, "they are not supposed to be a trap or a means of catching out a staff member who acts in good faith". As for the Board's Rules of Procedure, their purpose is to promote the expeditious and orderly hearing of appeals, not to deprive appellants of any right of appeal conferred on them by the Staff Rules.

14. In accordance with Rule 1230.8.3 the complainant's first appeal was lodged "within sixty calendar days". Her second appeal, lodged on 19 September 1992, challenged the Organization's decision of 26 June 1992; because of her absence from Geneva, which the Organization does not deny, that decision came to her notice on 1 August 1992; so again she observed the sixty-day time limit. Both appeals were therefore properly before the Board. The conclusion is that the complainant has exhausted the internal means of redress even though the Board failed to go into the merits. Her complaint is therefore receivable.

The merits

15. The Organization has asked that if its objections to receivability are not upheld the Tribunal send the case back to the headquarters Board of Appeal. The Tribunal will not do so. The Board has already had the opportunity to go into the merits but declined to do so, and there is no call to afford it the opportunity again. The Tribunal is able to

rule on the merits and will do so.

16. The Organization does not contest the complainant's account of the facts on which she founds her case. In particular it does not seek to refute her allegations against Dr. Eben-Moussi. It might, for example, have submitted a written denial by him if he had made one; but it has not done so. What emerges from the evidence is a campaign of victimisation of the complainant by the WHO's Representative after she had rejected his sexual advances. He sent headquarters a highly adverse report dated 17 January 1991 about her which both he and the Organization refused to show her. By a letter of 26 June 1992 the Organization's Legal Counsel informed her that he and the Director of Personnel had signed statements refuting the Representative's allegations. The WHO itself admits that it should have formally stated that it regarded as "without foundation" the Angolan Government's allegations against her of unsatisfactory performance and that that view should have been communicated to all the parties concerned.

17. The WHO eventually decided, on 23 March 1993, to destroy the Representative's report of 17 January 1991 on the grounds that it did not comply with the rules on the appraisal of performance. Only then was the complainant given a copy of the report. According to her, however, it was already known to officials whose support was indispensable if she was to be offered further employment.

18. In point of fact she did have difficulty in getting employment because of the false impressions that had been given about her performance in Luanda. Of the examples of such difficulty that she cites one is that the Chief of the WHO's Office of International Co-operation "contacted the Division of Personnel concerning the complainant", but went no further on receiving "written information [from the Chief of Contract Administration] which referred to difficulties encountered in Angola". The other example she gives is that she was interviewed in December 1991 for a post as consultant on a project financed by the WHO with the International Trade Centre in Geneva but someone else was appointed.

19. Be that as it may, in the two years preceding the filing of the complaint the complainant was able to obtain only short-term employment for a total of less than six months. The upshot is that her career is in ruins and, at least on the evidence before the Tribunal, the official who is the cause of her troubles has been left unscathed. Any organisation that is serious about deterring sexual harassment and consequential abuse of authority by a superior officer must be seen to take proper action. In particular victims of such behaviour must feel confident that it will take their allegations seriously and not let them be victimised on that account. In this case the WHO has utterly failed to protect the complainant's rights.

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.

(4) She is also entitled to 6,000 Swiss francs in costs, the amount she claims.

21. Since she has succeeded in her main claims there is no need to entertain her claim to the production of further evidence.

22. Lastly, she claims the establishment of a performance appraisal report for the period from May 1990 to April 1991. The Organization says that it "does not have strong views on the matter of the appraisal and would reinstate the necessary procedures for the establishment of a report, should the Tribunal so order". The Tribunal will so order.

DECISION:

For the above reasons,

1. The Director-General's decision of 23 March 1993 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.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner