

## EIGHTY-FIRST SESSION

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

(Application by the WHO for review)

#### Judgment 1504

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by the World Health Organization (WHO) on 1 September 1995 for review of Judgment 1376, the reply of Mrs. Gabriele Mussnig of 20 December 1995, the WHO's rejoinder of 29 March 1996 and the complainant's surrejoinder of 16 April 1996;

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

Having examined the written submissions;

#### CONSIDERATIONS:

1. In the complaint on which the Tribunal ruled in Judgment 1376 on 13 July 1994 Mrs. Mussnig challenged the decision of the Director-General of the WHO not to renew her appointment, on the grounds, among others, that the decision was tainted with personal prejudice arising out of sexual harassment by her supervisor, Dr. Emmanuel Eben-Moussi.

2. The Organization did not contest the complainant's account of the facts and in particular did not seek to refute her allegations against her supervisor. As the Tribunal observed in the judgment under 16, it might have submitted a written denial by Dr. Eben-Moussi but had not done so. The Tribunal held that it was able to rule on the merits of Mrs. Mussnig's complaint and it did so. It treated the complainant's uncontested allegations as proven, ruled in her favour, quashed the decision she was impugning and made ancillary orders including an award to her of 25,000 Swiss francs in moral damages. The matter thereby became *res judicata*.

3. In November 1994 the Organization appointed an "ad hoc grievance panel" to investigate the complainant's allegations of sexual harassment by Dr. Eben-Moussi. Its terms of reference were to -

"submit a written report on its investigation directly to the Director-General, normally within two months from its establishment, recommending that:

(a) Should the facts appear to indicate that sexual harassment occurred, or that Mrs. Mussnig knowingly made a false accusation against Dr. Eben-Moussi, and thereby committed an act of misconduct, the appropriate action should be taken, indicating the details and severity of the case.

(b) Should the facts, as a result of the initial investigation, appear to indicate that sexual harassment has not occurred, and that Mrs. Mussnig has not committed an act of misconduct as described in a), the case should be closed."

4. The complainant refused to put written submissions to the panel or to appear before it. In a letter dated 8 December 1994 to the Director of the Personnel Division she said:

"I fully reindorse [sic] the substance of my initial submissions to the Headquarters Board of Appeal as well as of my two submissions to the [Tribunal] ... I would wish to express serious doubts about the legitimacy of opening up the case to a second judgment, that refers the case from a higher instance, i.e. the ILO Administrative Tribunal, back to a lower instance, i.e. an ad hoc Panel constituted from the WHO Headquarters Board of Appeal."

The panel nonetheless went ahead.

5. On 8 June 1995 the panel submitted its report to the Director-General. In a statement in response, of which he sent copies to Mrs. Mussnig and to Dr. Eben-Moussi on 10 July 1995, he said that he "noted that there are

significant contradictions between the Panel's conclusions and the allegation of sexual harassment, and that the Panel's findings could support the view that Dr. Eben-Moussi did not commit sexual harassment".

6. The WHO's present application invites the Tribunal to consider further its judgment in relation to the alleged sexual harassment of the complainant by Dr. Eben-Moussi. In its original brief the Organization does not indicate the grounds on which it is asking the Tribunal to review its judgment. In its rejoinder, however, it says: "a reliance of the finality of Judgment 1376 would be unjust, particularly in respect of Dr. Eben-Moussi who, although not a party to the case, was named by the Tribunal as being a perpetrator of sexual harassment". It comments:

"By considering Judgment 1376 further, the Tribunal would have an opportunity to consider the Panel's report as it relates to Dr. Eben-Moussi. Mrs. Mussnig would also have an opportunity to comment on or rebut the report in the proper forum."

7. That is tantamount to asking the Tribunal to ignore its earlier findings of fact and reconsider the allegations of sexual harassment on which it has already ruled, and in the complainant's favour.

8. The Tribunal has stated many times that it will review a judgment only in exceptional cases and then only on limited grounds. Pleas which may be admitted are failure to take account of specific facts, material error - i.e. a mistake in finding of fact which does not involve any value judgment and is therefore distinguishable from misappraisal of the evidence - failure to rule on a claim and the discovery of some new fact - i.e. a fact which one of the parties was not able to rely on in the proceedings that culminated in the judgment.

9. Pleas about failure to take account of specific facts, material error and failure to rule on a claim have no relevance to the Organization's application. Neither has discovery of a new fact. For a plea alleging such discovery to succeed the fact must be one that the Organization could not reasonably have been expected to discover in time and plead in the original case. The report of the WHO's ad hoc grievance panel cannot be treated as such a fact. There was nothing to prevent the Organization from getting in touch with Dr. Eben-Moussi in the course of the pleadings on that case to ask for his own account; and it offers no explanation as to why it did not do so. The Organization was vicariously liable for his actions. It was up to the Organization as defendant to present its case as best it could in refutation of the complainant's claim. If it failed to approach Dr. Eben-Moussi it must bear responsibility for such failure. As far as the complainant is concerned, she succeeded in her claim on the evidence as presented to the Tribunal. It would be sheer negation of justice to reopen the case as the Organization now asks.

10. Judgment 1376 said under 19:

"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."

The WHO argues that the very purpose of setting up its panel was to give full effect to the judgment. It is beyond comprehension how the Organization could interpret that general observation, which holds good for all international organisations and refers to what they should do in the first instance, as justification for the WHO's opening investigation into matters which had already been adjudicated and offering the result in purported contradiction of the Tribunal's own findings. It thereby betrays utter ignorance of the res judicata rule.

11. The conclusion is that the Tribunal will not review Judgment 1376: it made its ruling on the evidence presented to it and there are no valid grounds for any review.

12. In her surrejoinder the complainant claims an award of moral damages for what she describes as the Organization's continuing persecution of her and for the damages to her good name due to rumours arising out of publicity given to the panel's report. She also claims costs.

13. It is not appropriate for her to make a counterclaim to damages in the context of her submissions on an application by the Organization for review of Judgment 1376. The claim arises out of a separate cause of action and is one that she should pursue separately. She is, however, entitled to an award of costs for answering the Organization's case, and the Tribunal set them at 3,000 Swiss francs.

DECISION:

For the above reasons,

1. The application is dismissed.
2. The Organization shall pay the complainant 3,000 Swiss francs in costs.

In witness of this judgment Sir William Douglas, 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 11 July 1996.

William Douglas  
Mella Carroll  
Mark Fernando  
A.B. Gardner