

## EIGHTY-FIFTH SESSION

### *In re* Schmidtkunz

#### Judgment 1781

The Administrative Tribunal,

Considering the complaint filed by Mr. Hans-Walter Schmidtkunz against the World Health Organization (WHO) on 10 June 1997 and corrected on 17 June, the WHO's reply of 17 September, the complainant's rejoinder of 30 October 1997 and the Organization's surrejoinder of 30 January 1998;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a German who was born in 1939, joined the staff of the WHO in 1972 as a management officer at grade P.3 in the Administrative Management Unit. In July 1974 the Organization upgraded his post to P.4 and promoted him to that grade. In April 1978 it put him on a post, at the same grade, for a technical officer with its Staff Development and Training Programme. He got personal promotion to P.5 in January 1981.

At a meeting of the headquarters Management Development Committee in July 1995 the Director-General agreed to a proposal to merge the Staff Development Programme and the Management Development Office to form an Office of Staff and Management Development (SMD). On return from home leave, on 7 August 1995, he got notice from the Assistant Director-General both of the merger and of the Director-General's decision to appoint another official, without holding a competition, as chief of the new Office. He saw the Director-General on 15 August and stated his objections to the process of selection.

He then wrote a note which he put to the Assistant Director-General on 17 August. It was headed "Note regarding implementation of the agreement with the Director-General (on 15 August 1995) on Dr Schmidtkunz' future status in WHO". It said that his reassignment to an unnamed "priority programme" would take effect on 22 August 1995, when he would "be granted exceptionally three extra steps in his current grade".

By circular 71 of 18 August 1995 the Administration announced the merger as from 22 August 1995 and named the chief of the new unit.

In a memorandum of 21 August 1995 the Assistant Director-General told the complainant that "there may be a misunderstanding arising from your meetings with the Director-General and myself" and said that the Administration was studying the "possibility" of moving him to a new area in view of his "understandable disappointment" at not heading the new unit. By a "personnel action" of 9 April 1996 the Administration transferred him to the Office of the Director of the Division of Development of Human Resources for Health (HRH) under a fixed-term contract which was to run for 45 months, until he retired. But he got no additional steps in his grade and raised that matter with his new supervisor, the Assistant Director-General and the Ombudsman.

By a memorandum of 26 July 1996 he asked the Director-General for a final decision on "the fulfillment of an agreement" which he said they had reached on 15 August 1995 to grant him "personal promotion to P.6 or an equivalent increase in steps" within P.5. On 30 July 1996 he gave the headquarters Board of Appeal notice of his intent to challenge "failure on the part of the WHO Administration to abide by an agreement". In a memorandum dated 9 September 1996 the Director of Personnel conveyed to him the Director-General's view that "there was absolutely no commitment made to [him] on the issue of compensation or personal promotion".

In its report of 6 February 1997 the Board recommended rejecting his appeal. By a letter dated 11 March 1997 the Director-General did so. That is the decision he is impugning.

B. The complainant submits that the decision is unlawful. He alleges personal prejudice and breach of a valid and binding agreement with the Director-General to give him personal promotion, among other things, provided he

waived any challenge he had to the appointment of the chief of the new Office. The Director-General has not, he observes, denied the existence of that agreement. Indeed the defendant abided by the terms of it insofar as they required reassigning him and extending his appointment to the date of retirement. By denying him step increments it was in bad faith and obtained "unjust enrichment". Since he waived his right to challenge what he saw as an improper appointment the WHO is estopped from denying its obligation under the agreement to grant him personal promotion or step increments.

He asks the Tribunal to quash the impugned decision and order the grant to him of three in-grade steps as from 1 April 1996 and "complete restoration and award of all benefits, back pay, pension rights, and emoluments from the effective retroactive date of the judgment through the present". He claims 50,000 Swiss francs in moral damages, 7,500 francs in costs and any other relief the Tribunal sees fit.

C. In its reply the Organization submits that the only purpose of the complainant's meeting the Director-General on 15 August 1995 was to see whether he could be moved to another division. The "one-sided" note of agreement he drew up may reflect his own understanding of what was said but not that of the Director-General, who neither approved nor signed it. In any event the Assistant Director-General warned him as early as 21 August 1995 of the risk of "misunderstanding".

As for his not challenging the appointment of the chief of SMD, he alone chose to waive his right of appeal. That he did so does not bear out his charge of "unjust enrichment", there being no grounds in law or in fact for any challenge to the appointment.

D. In his rejoinder the complainant presses his pleas. As to the terms of his agreement with the Director-General, he urges the Tribunal to hear both parties to determine which is "asserting the truth". Even if the essential elements of agreement were not present, his complaint should succeed on the grounds of "promissory estoppel" since he changed his mind to his own detriment and in reliance on the Director-General's "representations".

E. In its surrejoinder the WHO points out that the only "essential" fact on which the parties concur is that the complainant had a meeting with the Director-General that led to his transfer to another division. It sees no need for hearings: the Director-General denied promising him promotion or increment as the Director of Personnel told him in the memorandum of 9 September 1996. Nor did the Director-General, as his pleas of unjust enrichment and estoppel mistakenly suggest, incite him to waive his right of appeal. In any event there can be no question of moral damages.

## CONSIDERATIONS

1. The complainant joined the WHO on 16 January 1972 at grade P.3. On 1 July 1974 it promoted him to P.4 and on 1 January 1981 granted him personal promotion to P.5. He says that the WHO failed to honour an oral agreement he reached with the Director-General in August 1995 for the grant of three step increments at that grade. He asks the Tribunal to quash the Director-General's final decision dated 11 March 1997 rejecting his internal appeal, to direct the WHO to grant him those steps as from 1 April 1996, and to award him moral damages and costs.

2. At the material time the complainant was employed under the Staff Development Programme (SDP). Because of financial constraint the WHO decided in July 1995 to merge it and the Management Development Office (MDO) into a new unit, the Office of Staff and Management Development (SMD).

3. The complainant says that on return from leave on 7 August 1995 he learnt that an Austrian citizen, a management officer in MDO who had been promoted to P.5 only in 1993, had been appointed by the Director-General to the new post of chief of SMD without following the normal procedure of holding a competition provided for in Staff Rule 410.4.

4. Being dissatisfied with that appointment the complainant discussed the matter on 8 August 1995 with the Assistant Director-General, who said that he could do nothing about it but suggested he ask the Director-General why he himself had not been chosen.

5. In his statement of facts the complainant says that he saw the Director-General on 15 August 1995; that the only reason the Director-General gave was that there was no Austrian on a post of head of unit, whereas "the Germans are represented at that level"; that the Director-General himself expressly offered him personal promotion to grade

P.6 or equivalent step increments at grade P.5 "in consolation for his non-selection"; and that the Director-General agreed to transfer him to a "priority programme" within the Organization. The complainant says that at the beginning of October he "made an affirmative decision" to waive his right to appeal against the appointment of the new chief of SMD, even though he had been neither reassigned nor promoted by then. He said nothing to the Director-General or to anyone else about such waiver: it was, he explains, implied in his agreement with the Director-General, and an appeal would have jeopardized the fulfilment of that agreement.

6. Only in April 1996 was he transferred, to another P.5 post, and he is not objecting to the transfer as such. But, having exhausted his internal remedies, he offers three arguments in support of his claim to the grant of three step increments at grade P.5.

(a) The WHO broke the oral agreement to grant him those steps.

(b) It is estopped from denying the "representations" made by the Director-General, because he relied on them; they caused him "to change his position to his detriment" by forgoing his right to appeal against the appointment of the new chief of SMD; and so the WHO must now abide by them.

(c) The WHO was "unjustly enriched" at his expense by failing to grant him the three steps.

7. All three of his arguments turn on whether the Director-General did promise him three in-grade steps, the foundation of his case is his own account of the meeting, backed by a contemporaneous "Note regarding implementation of the agreement with the Director-General" which he himself wrote on 17 August 1995. After recording five alleged decisions on his "reassignment", point 6 of the note says:

"Upon reassignment [he] will be granted exceptionally three extra steps in his current grade."

8. On 17 August 1995 the complainant had a discussion with the Assistant Director-General, and handed him a copy of his note. He sent him a memorandum dated 18 August 1995 which makes it quite clear that the main subject of discussion had been his reassignment and which contains just the following passing comment of relevance to point 6 of the note:

"Regarding the *question* of a salary increment (item 6 of my note), I reported to you *the positive remark* the Director-General made in the course of my discussion with him. But this is obviously a matter which can wait until you have been able to consult with him." (emphasis added)

9. The Assistant Director-General replied in a memorandum of 21 August:

"I am afraid that there may be a misunderstanding arising from your meetings with the Director-General and myself. We are looking now at the possibility of your moving to a new area of work, following your understandable disappointment at not being appointed to the senior position in the new merged unit. We are not acting because we feel that there was any discrimination against you in that process."

The complainant sent a memorandum dated 22 August in reply, enclosing another copy of the note. He also then sent a copy of the note to the Director-General.

10. The Organization submits:

"Three days after his meeting with the Director-General, the complainant himself referred only to the Director-General's 'positive remark' concerning a step increase, noting that it was a matter that required further discussion between the Director-General and [the] Assistant Director-General ... Thus, the complainant's own words contradict the contention that the Director-General made a binding oral promise to grant him the increase."

11. Yet the complainant's comment in his memorandum of 18 August 1995 is quite compatible with point 6 of his note, even though it does not echo the very words. What is more, the reply of 21 August 1995 from the Assistant Director-General did not deny point 6 of the note, nor did the Director-General do so after getting the copy of the note that the complainant sent him on 22 August 1995.

12. Consistent precedent has it - for example, Judgment 782 (*in re Gieser*) - that an international official has the right to the fulfilment of a promise by the organisation that employs him subject to certain conditions, though there

must be "an unquestioned and unqualified concordance of will on all the terms" of the contract: see Judgment 803 (*in re Grover*), under 3.

13. In this case there is an affirmation by the complainant that is supported by his contemporaneous note. At no stage in the proceedings, either in its reply or in its surrejoinder, has the WHO entered any direct denial by the Director-General, who was the only other person present at the discussion on 15 August 1995. While the Director-General may communicate within the Organization through others acting on his behalf, the best evidence available must be offered in proceedings before the Tribunal. In this instance it would have been direct denial by the Director-General himself.

14. The conclusion is that the complainant has proved the promise he is relying on, and the Organization must grant him three step increments at his grade as from 1 April 1996. He is also entitled to an award of costs.

## DECISION

For the above reasons,

1. The Organization shall grant him three step increments at grade P.5 as from 1 April 1996.
2. It shall pay him 7,500 Swiss francs in costs.
3. His other claims are dismissed.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Mella Carroll  
Mark Fernando  
James K. Hugessen

A.B. Gardner