(Application for execution)

100th Session **Judgment No. 2518**

The Administrative Tribunal,

Considering the application for execution of Judgment 2370 filed by Mrs M.H.L.d.M. on 4 April 2005, the reply submitted by the International Labour Organization (ILO) on 29 April, the complainant's rejoinder of 3 June and the ILO's surrejoinder of 6 July 2005;

Considering Articles II, paragraph 1, and VII 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. Facts relevant to this case are set out in Judgment 2370, delivered on 14 July 2004, concerning the complainant's first complaint. Suffice it to recall that by a letter of 18 November 2002 the complainant was informed that the Director-General had decided not to allow the "harassment claim" she had brought against her supervisor, in view of the Joint Panel's conclusion that "the various aspects of [her] supervisor's conduct [did] not constitute harassment". She challenged that decision before the Tribunal, which found in Judgment 2370 that the Joint Panel's conclusions were not based on all the circumstances which should have been taken into consideration in order to enable the Director-General to take a decision in full knowledge of the facts. For that reason, the Tribunal decided that the impugned decision of 18 November 2002 should be set aside and that the case should be sent back to the Organization and referred again to the Joint Panel, unless a settlement was reached between the complainant and the International Labour Office – the secretariat of the ILO. The Tribunal exceptionally referred to the possibility of a settlement, because it considered that the complainant had not been shown the respect or allowed the dignity to which international civil servants are entitled, and that in any event she deserved compensation for the injury she had suffered. The Tribunal also awarded the complainant 7,000 Swiss francs in costs.

On 16 August 2004 the complainant's counsel sent an offer of settlement to the Director-General. She proposed that the Organization pay the complainant the sum of 653,882.73 United States dollars in settlement of all the latter's claims, broken down as follows: 60,000 dollars in moral damages for harassment, 60,000 dollars for injury to professional and personal reputation, 138,100 dollars representing the minimum amount the complainant would have received in respect of the employer's contribution to the pension fund had she not been dismissed, 357,014 dollars for loss of income, 1,568.73 dollars for medical expenses, 7,200 dollars for counselling and 30,000 dollars for legal fees. The complainant's counsel also indicated that she was "simultaneously requesting a new hearing date before the Joint Panel (under the rules and members in existence at the time of [the complainant's] original hearing before the [Panel]) in the event that the parties [were] unable to reach an amicable resolution".

The Office's Legal Adviser acknowledged receipt of this offer by a letter of 27 August 2004, in which he informed the complainant's counsel that the Director-General would not be able to communicate his decision until 14 September. The complainant's counsel replied on 2 September that, pursuant to consideration 18 of Judgment 2370, the complainant's case had to be either settled or heard again by the Joint Panel.

The Director-General's decision on the offer of settlement was conveyed to the complainant's counsel in a letter of 15 September from the Director of the Human Resources Development Department (HRD), who began by stating that, as a matter of principle, and since it had not yet been clearly established whether there had been harassment, the Office would prefer that the case be referred again to the Joint Panel. Nevertheless, he said, the Office was willing to consider the possibility of a settlement, if that was the complainant's preferred option, though not on the basis indicated in her offer of settlement, which referred to "injuries suffered by the complainant due to harassment and due to the [ILO's] failure to respond to her request for transfer", since these were matters on which the Tribunal had not yet reached any conclusion. He invited the complainant's counsel to submit a revised offer of

settlement on the basis indicated in consideration 18 of Judgment 2370, including express confirmation that settlement was the complainant's preferred option and an undertaking by the latter to maintain confidentiality.

The complainant's counsel considered that this amounted to asking the complainant to bargain against herself. In a letter of 28 September 2004 to the Director of HRD, she stated that the complainant would make no further offer until the Office had made "a counter-offer, in writing, including any accompanying conditions, which [would] form a part of the counter-offer".

As from 1 October 2004, certain changes to the Organization's internal appeals procedure were implemented by amendment of the relevant provisions of the Staff Regulations. In particular, the Joint Panel was replaced by a body called the Joint Advisory Appeals Board. By an e-mail of 21 October 2004 to the Secretary of the former Joint Panel, the complainant's counsel enquired whether the Panel had "an extended mandate to finish any legal cases which require hearing or re-trial". The Secretary replied that the Panel was dealing with cases which had been referred to it prior to 30 September 2004, but that in order for the Panel to have jurisdiction over a case filed after the 1 October 2004 deadline, the authorisation of both the Administration and the Staff Union would be required.

On 4 April 2005 the complainant filed her application for execution of Judgment 2370.

B. The complainant contends that despite a series of requests by her counsel, the Organization has taken no action to give effect to the Tribunal's ruling in Judgment 2370, and that she therefore has no alternative than to apply to the Tribunal for execution of that judgment. She points out that she has received no correspondence from the Organization in relation to this matter since 28 September 2004, when her counsel wrote to it requesting a counter-offer.

The complainant also submits that, since the delivery of Judgment 2370, she has suffered ongoing harassment and defamation by the supervisor against whom her harassment grievance was directed. In particular, she asserts that the supervisor in question has made public statements to the effect that she lied in relation to the substance of her grievance, and that he had been "found innocent".

The complainant claims 357,014 dollars for loss of income, representing the salary and emoluments she would have received had she remained in her post for a further 48 months, less the income from her current employment over that same period. In addition, she claims 40,000 dollars in damages for "the total loss of earnings she suffered as [a] result of her displacement to Geneva in reliance upon the representations of [her former supervisor] that her post would be long-term and secure, including without limitation all her lost earnings due to unpublished work"; 1,568.73 dollars for medical expenses incurred in Geneva "due to harassment suffered"; 9,600 dollars for psychological counselling in Brazil; 60,000 dollars in moral damages for "previous and ongoing harassment"; 60,000 dollars in compensation for "injury sustained to her professional and personal reputation"; costs and legal fees associated with the present proceedings; interest "at the market rate" on all amounts awarded to her; and "any other relief that the Tribunal deems necessary, equitable and just".

C. The Organization objects to the receivability of the complainant's application for execution, which it views as an abuse of procedure, in that the complainant is attempting to convert the judgment referring the case back to the Organization into "a decision capable of being executed in the form of an award of compensation". It points out that she is not only claiming monetary relief in connection with the complaint ruled on in Judgment 2370, but is also including amongst her present claims items of relief requested in another complaint, on which the Tribunal ruled in Judgment 2402.* In the defendant's view, to the extent that the complainant is seeking to have her original harassment complaint reviewed, she is barred by *res judicata*. Referring to the Tribunal's case law and, in particular, to Judgments 649 and 2270, it submits that she has not demonstrated any exceptional circumstances, such as material error or the discovery of new material facts, warranting a review of Judgment 2370.

According to the Organization, the application is without merit, because the complainant is responsible for the lack of progress in implementing Judgment 2370. It considers that she ought to have returned to the internal appeals body if she deemed settlement efforts to have failed, and that it was reasonable for it to rely on the assertion she made in her offer of settlement, that she was "simultaneously requesting a new hearing date before the Joint Panel". It asserts that under Article 13.3, paragraph 3, of the Staff Regulations, it is the complainant's responsibility to follow up with the internal appeals body, and that whilst certain modifications to the internal appeals procedure were made in 2004, on this point there was no change. It emphasises that Judgment 2370 contains no instruction

aimed at departing from the Organization's general rules of procedure for addressing the internal appeals body, whereas on previous occasions when cases have been referred back to an organisation by the Tribunal, the latter has explicitly indicated any specific action that it intended the organisation to take.

In the defendant's view, it is the complainant who obstructed the settlement negotiations by declining to respond to its specific requests for confirmation that settlement was her preferred option and that she would maintain confidentiality. She could have referred the case back to the internal appeals body at any time, but is seeking to avoid that course of action by filing her application for execution.

D. In her rejoinder the complainant states that she made it clear to the Organization that she would only be able to pursue the proceedings before the Joint Panel if it was reconstituted according to the same rules and procedures that previously governed it, rather than the new rules governing proceedings before the Joint Advisory Appeals Board, which exclude external legal representation. She was told by the Secretary of the Joint Panel that in order for the Panel to have jurisdiction to hear a case referred to it after 1 October 2004, the agreement of both the Administration and the Staff Union would be required. However, given that the Administration had previously refused to allow any extension of time limits to enable the case to be heard, and that she felt unable, in view of her state of health, to appear without a representative before the Panel, she approached the Tribunal for directions. Relying on the case law, the complainant asserts that these circumstances constitute a serious difficulty, within the meaning of Judgment 2178, justifying her application for execution. She submits that her application is in no sense barred by *res judicata*, since the aforementioned circumstances, and particularly the change in the internal appeals procedure, could not have been foreseen by either party.

E. In its surrejoinder the Organization states that the complainant has failed to demonstrate any legitimate reason why she cannot refer the case back to the internal appeals body. It denies the existence of any serious difficulty justifying her application for execution, and maintains that there are no exceptional circumstances warranting a review of Judgment 2370. It also reiterates the view that some of the complainant's claims are the subject of the Tribunal's final and binding ruling in Judgment 2402 and that, as such, they are barred by *res judicata*.

CONSIDERATIONS

1. The complainant seeks the enforcement of the following paragraph of Judgment 2370:

"18. It appears from the above that the Joint Panel's conclusions were not based on all the circumstances which should have been taken into consideration in order to enable the deciding authority to take a decision in full knowledge of the facts. The Director-General's decision of 18 November 2002, informing the complainant that, since the Joint Panel had reached the conclusion 'that the various aspects of [her] supervisor's conduct [did] not constitute harassment' the Office could not allow her 'harassment claim', must therefore be set aside and the case must be sent back to the Organization and referred again to the Joint Panel, unless a settlement is reached between the complainant and the Office. The Tribunal exceptionally refers to the possibility of a settlement, since there is no doubt that the complainant has not been shown the respect or allowed the dignity to which international civil servants are entitled, and because in any event she deserves compensation for the injury she has suffered."

2. The complainant has not received an offer of settlement from the ILO, despite a number of attempts and offers on her part. The correspondence exchanged by her counsel and the ILO prior to 1 October 2004 is as follows:

(a) 16 August 2004, a letter was sent by the complainant's counsel to the Administration setting out the amount required for full and final settlement of her claims and indicating that the complainant was simultaneously requesting the convening of the Joint Panel;

(b) 27 August 2004, the Office provided a response but no offer;

(c) 2 September 2004, complainant's counsel reminded the Office's Legal Adviser that the matter must either be re-heard by the Joint Panel (not the new Joint Advisory Appeals Board) or settled, in compliance with the orders made by the Tribunal;

(d) 15 September 2004, a response was received which again made no offer;

(e) 28 September 2004, the complainant's counsel responded to the Office, requesting a counter-offer.

3. The complainant claims that she is unable to deal with her harassment claim through the internal mechanisms now available at the ILO. She argues that, since the Joint Panel was restructured and replaced effective 1 October 2004, the terms and conditions governing the new Joint Advisory Appeals Board (JAAB) specifically exclude external legal representation. She submits that, given the nature of the charges, and her current fragility due to her alleged mobbing and psychological harassment, in combination with her expressed view that she does not wish to act as her own counsel, it would be unethical at this stage to ask her to comply with the rules of the new Joint Advisory Appeals Board.

4. The complainant essentially submits that she has no available remedy, due to the restructured internal appeals process, along with the ILO's refusal to make an offer for final settlement of the matter. She gives the full details of her monetary claim and asks the Tribunal to make an appropriate order.

5. The ILO argues that the application is at best premature if not irreceivable, since paragraph 18 of Judgment 2370 is not executory. The point is without merit: the Tribunal's case law has it that whenever a serious difficulty arises in the execution of a judgment an application for execution is the proper remedy (see Judgments 732 and 2178).

6. As relief, the complainant requests that the Tribunal make such orders as it sees fit for "ongoing harassment and defamation". In an addendum to her application she sets out the various amounts she claims in damages.

7. The ILO argues that, in its letter of 15 September 2004, it informed the complainant that it preferred to have the matter dealt with through the internal appeal mechanism, the Joint Panel. It also claims that the complainant failed to address two concerns expressed in that letter: the question of whether she preferred consensual settlement or the internal appeal process, and the requirement that she agree in advance to the confidentiality of any settlement. Finally, the ILO appears to claim that it was the complainant's responsibility to refer the matter to the Joint Panel if she wished that body to hear the case.

8. These arguments are far from being compelling. At the time of the ILO's letter the new JAAB had not yet come into existence and the Joint Panel was still competent to hear the complainant's case. While negotiations towards settlement are always without prejudice and it is normal and proper to make confidentiality a term of any final settlement agreement, it was wrong for the ILO to insist on confidentiality as a condition precedent before even starting to negotiate or responding to the complainant's offer. It was simple obfuscation to pretend that settlement and recourse to the internal appeal process are mutually exclusive; the terms of the Tribunal's order make it plain that the matter must be referred to the Joint Panel if not settled. Finally, it is enough to read the terms of Judgment 2370 to understand that the order to refer the matter back to the Joint Panel is addressed to the ILO and not to the complainant, and that order could and should have been carried out by the Organization prior to 1 October 2004, while the Joint Panel was still receiving cases.

9. The ILO's strongest argument is that the application is, in actuality, an attempt to convert the judgment referring the case back to the Organization into a decision capable of being executed in the form of an award of compensation, which it manifestly is not. It remains, however, that it is the ILO which has blocked the implementation of the judgment so far by refusing to make any counter-offer of settlement and by not immediately referring the case to the Joint Panel as it had been ordered to do. The Tribunal does not exclude the possibility of its making a final order for compensation of the complainant in due course if the ILO continues its obstructive tactics and fails to deal with the complainant in good faith. Having made an offer of settlement and having received no counter-offer, the complainant is justified in treating the ILO's demand that she make another offer as an invitation to "bargain against herself" and the equivalent of a refusal to negotiate.

10. The Tribunal holds that the failure of the ILO immediately to refer the matter to the Joint Panel while the latter still existed and the subsequent change in the applicable regulations, coupled with the ILO's refusal to date to enter into good faith negotiations aimed toward a settlement, have created a serious difficulty in the execution of Judgment 2370. The application is properly receivable.

11. Furthermore, the complainant had a legitimate expectation that the Joint Panel, as it existed at the outset of the circumstances giving rise to this matter, at the date of delivery of Judgment 2370, and at relevant times prior to

1 October 2004, would be available throughout the matter, and that she could be represented by counsel of her choice before the internal appeals body. Without commenting directly on the validity of the ILO's new practice of eliminating external legal representation from JAAB proceedings, the complainant's legitimate expectations have been violated and that violation must supersede the restructuring of the internal appeals body, even assuming the new provisions to be valid. The Tribunal will order the ILO to reconstitute the Joint Panel as that body existed prior to 1 October 2004, and in accordance with the Staff Regulations as they then existed.

12. The ILO's tactics of obstruction and delay in the face of a clear order from the Tribunal have caused the complainant moral damage quite apart from the damage she suffered in the events giving rise to Judgment 2370. The Tribunal assesses such damage at 10,000 Swiss francs, which the ILO must pay to the complainant. It will also order the ILO to refer the complainant's case to the Joint Panel and simultaneously to make a good faith offer of settlement to the complainant. It shall pay the complainant's costs in the amount of 5,000 francs. It is not clear from the record whether the award of costs in Judgment 2370 has been paid; if not, it must be paid forthwith with interest.

DECISION

For the above reasons,

1. The ILO shall forthwith refer the complainant's claim for compensation to the Joint Panel in accordance with the Staff Regulations as they stood immediately prior to 1 October 2004, and shall simultaneously make a good faith offer of settlement to the complainant.

2. It shall also pay 10,000 Swiss francs to the complainant as moral damages for its conduct subsequent to the delivery of Judgment 2370.

3. It shall pay her costs in the amount of 5,000 Swiss francs.

In witness of this judgment, adopted on 3 November 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

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* Judgment 2402, delivered on 2 February 2005, concerned the complainant's second complaint.

Updated by PFR. Approved by CC. Last update: 15 February 2006.