L. and others

v.

ILO

(Application for execution)

B. and others

v.

ILO

(Application for interpretation filed by the ILO)

126th Session **Judgment No. 3985**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3883 filed by Mrs R. L., Mrs P. P. and Mrs C. W.; against the International Labour Organization (ILO) on 5 October 2017 and corrected on 2 November, the ILO's reply of 29 November 2017, the rejoinder filed by Mrs L., Mrs P. and Mrs W.; on 12 January 2018 and the ILO's surrejoinder of 22 January 2018;

Considering the applications to intervene filed on 13 November 2017 by Miss S. B., Mrs V. C., Miss A. C., Mrs K. H., Mrs W. I., Mrs K. K., Miss J. K., Mrs T. L., Miss D. M., Ms A. N., Mrs S. N., Miss N. P., Mr W. P., Miss M. P., Mrs T. P., Miss W. P., Miss S. P., Mrs I. R. M., Mrs S. R., Mrs C. S., Miss K. S., Miss A. S., Mrs M. S., Miss R. T., Miss S. T., Mrs C. U., Mr T. V., Miss C. V. and Mrs S. V. and the ILO's letter of 29 November 2017 indicating that it had no comment on the applications;

Considering the application for interpretation of Judgment 3883 filed by the ILO on 1 November 2017, the reply of 11 December

2017 filed by Miss S. B., Mrs V. C., Miss A. C., Mrs K. H., Mrs W. I., Mrs K. K., Miss J. K., Mrs R. L., Mrs T. L., Miss D. M., Ms A. N., Mrs S. N., Miss N. P., Mrs P. P., Mr W. P., Miss M. P., Mrs T. P., Miss W. P., Miss S. P., Miss I. R. M., Mrs S. R., Mrs C. S., Miss K. S., Miss A. S., Mrs M. S., Miss R. T., Miss S. T., Mrs C. U., Mr T. V., Miss C. V., Mrs S. V. and Mrs C. W., who were the complainants in the case leading to Judgment 3883 (hereinafter "the complainants"), the ILO's rejoinder of 12 January 2018 and the complainants' letter of 16 February 2018 informing the Registrar of the Tribunal that they did not wish to enter a surrejoinder;

Considering Articles II, paragraph 1, VI, paragraph 1, and VII of the Statute of the Tribunal and Article 13 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. On 28 June 2017, the Tribunal delivered in public Judgment 3883. That judgment concerned the approach the ILO had taken to the adjustment of the salaries of locally recruited staff at its Bangkok office. The Tribunal was satisfied that the approach was flawed and, in the circumstances of that case, made the following orders:

> "1. The ILO shall determine the complainants' salaries in accordance with consideration 26, above.
>
> 2. The ILO shall pay moral damages in the sum of 100 euros to each complainant.
>
> 3. The ILO shall pay the complainants collectively 2,000 euros costs.
>
> 4. All other claims are dismissed."

2. It can be seen that to comply with the first order, the ILO needed to adhere to what the Tribunal had said in consideration 26. That consideration reads:

> "The Tribunal is satisfied that, in these circumstances, it is not advisable to set aside the decisions applying the salary freeze to the complainants. However they are entitled to compensation. That will have two elements. One is the loss sustained by operation of the freeze that sounds in material damages. The other is moral damages. The Tribunal is not in a position to

> quantify the former in relation to each complainant. The ILO shall determine annual adjustments for the complainants' salaries in the same way as they would have been calculated had the new salary arrangements not been introduced, commencing with the salary on 1 March 2012 and thereafter on the anniversary of 1 March 2012, but only for the period in which each complainant continues working for the ILO. The ILO's future obligation to make these payments ceases at the time the frozen pay scales applicable to the complainants are no longer frozen or when a lawful decision involving consultation with the [Joint Negotiating Committee] is made by the Director-General to freeze existing salaries. [...]"

3. An issue has arisen about compliance with the first order. That has given rise to an application for execution of Judgment 3883 by three members of staff in the ILO's Bangkok office in which 29 other employees have sought to intervene and an application by the ILO for the interpretation of that judgment. It is appropriate that these two applications be joined and one judgment rendered.

4. It is unnecessary to set out at any length the background leading to Judgment 3883. Suffice it to note that apparently a decision was made before 1 March 2012 to create a new salary scale (the new scale) for locally recruited staff in the Bangkok office hired after that date and, in relation to existing locally recruited staff on an established salary scale in that office, to freeze their salaries until the new scale, with periodic adjustments, reached the level of the frozen pre-existing salaries.

5. In its application for interpretation, the ILO contends that giving effect to consideration 26 (namely, the determination of the complainants' salary in the same way as they would have been calculated had the new salary arrangements not been introduced) results in no annual increases, at least, the Tribunal infers, between 1 March 2012 and 1 March 2017. The ILO supports this contention with a Technical Memorandum prepared by the ILO's Human Resources Development Department which reached this conclusion and with the fact that the United Nations Office of Human Resources Management and the Secretary of the International Civil Service Commission have confirmed that, to date, the complainants' salaries would have received no adjustment even if the new salary arrangements had not been introduced.

6. The response of the complainants in their reply in the application for interpretation, is to draw attention to observations of the Tribunal in consideration 4 of Judgment 3883. The Tribunal said:

> "Staff of the ILO are part of the UN common system. The method of determining salaries and other conditions of employment differs between staff whose duty station is at headquarters in Geneva and locally recruited staff at other duty stations. The conditions of locally recruited staff, in relation to salaries, are established through comprehensive salary surveys approximately every five years to ascertain that salaries remain competitive enough amongst the best employers in the local market. This is to ensure adherence to the Flemming principle that requires that the conditions of service for locally recruited staff reflect the best prevailing conditions found locally for similar work. **Interim adjustments to salaries, normally annually, occur having regard to wage or consumer price index movements or changes in the salaries of the comparator employers.**" (Emphasis added.)

7. The complainants argue in both the application for interpretation and application for execution that the interim adjustments applied to the new scale should have been applied to calculate the amounts owed to them. In addition, they assert that increases in the consumer price index were relevant and that, in the period 2012 to 2017, that index had increased by 7.3 per cent. The fact that this was not taken into account meant that the real value of wages had decreased over that period. In its rejoinder in its application for interpretation, the ILO says: "in accordance with the procedure for interim adjustments established for Bangkok duty station, such adjustments are determined through interim surveys ('mini-surveys') of comparator employers and [...] the [consumer price index] is not, in Bangkok, 'one of the elements considered in interim adjustments [...]'". No surrejoinder was filed by the complainants in the application for interpretation and thus this contention of the ILO was not put in issue by them. In addition it was, in substance, a point made in the Technical Memorandum annexed to the ILO's application for interpretation and in its reply to the application for execution.

8. The reasoning in the Technical Memorandum has not been impeached in the pleas of the complainants either in the application for

interpretation or the application for execution. The conclusion that had the salary freeze not been imposed on existing staff members at 1 March 2012, they would, nonetheless, not have received a salary increase in the period 1 March 2012 to 1 March 2017 is well founded. Accordingly, the ILO has not failed, to date, to comply with the first order in Judgment 3883. However the ILO's obligation to make the payment is an ongoing one and will require an annual assessment by the ILO of whether the salaries of affected staff subject to the freeze would have, but for the freeze, received a salary increase. If the answer to that question is in the affirmative, the ILO is obliged to pay the increase.

9. There are two additional issues that need to be considered. The first additional issue is whether there was a delay in executing Judgment 3883 and, if so, whether damages should be awarded. At the time the application for execution was filed on 5 October 2017, no payment had been made by way of material damages nor had there been any formal communication with the complainants or their representatives as to why this was so. The former is explicable given the conclusions the ILO ultimately reached about its liability, as a practical matter, to make payment, but the latter is more problematic. It is true that a decision was ultimately taken, it appears in late September 2017, to pay the complainants 200 euros by way of moral damages rather than the 100 euros ordered by the Tribunal. In its reply dated 29 November 2017 in the application for execution, this is said by the ILO to have been additional compensation in view of the delay in the implementation of the judgment. This obviously involves, correctly, an acknowledgement that there had been a delay of a magnitude that required further compensation. This does not sit comfortably with a later submission in this reply that "since the difficulties encountered in implementing the Judgment [were] beyond the defendant's control, the defendant respectfully requests the Tribunal to dismiss the complainants' claims for moral damages as unfounded". However the Tribunal is satisfied that the payment of the further 100 euros is sufficient compensation for the delay. But it must be said that some of the criticisms about the lack of communication between the Administration and the complainants and their representatives concerning difficulties perceived by the

Administration in actually making payment to implement order 1 of the judgment, are of substance.

10. The second additional issue is a point raised by the complainants in their reply to the ILO's application for interpretation. They contend the application is not receivable. They say the meaning of Judgment 3883 is clear. In some senses it is. However, as the competing contentions on the question of execution illustrate, precisely how the first order should be given effect to is contestable. In any event, the application for execution requires the resolution of substantially the same set of issues.

11. In their reply in the application for interpretation, the complainants applied for the production of certain specified documents. However it is not apparent to the Tribunal how any of those documents would be relevant to the real issues raised in those proceedings. Accordingly that application for production is dismissed.

12. In the result, the application for execution should be dismissed, as must be the applications to intervene.

DECISION

For the above reasons,

1. The application for execution of Judgment 3883 is dismissed.

2. The applications to intervene are dismissed.

In witness of this judgment, adopted on 2 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ