Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

G. G. (No. 2)

v.

CDE

(Application for execution)

121st Session **Judgment No. 3566**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3239 filed by Ms B. G. G. on 23 January 2014 and corrected on 4 March, the reply of the Centre for the Development of Enterprise (CDE) of 23 June, the complainant's rejoinder of 14 August and the CDE's surrejoinder of 24 October 2014;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 8, paragraph 3, of its Rules;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

On 2 December 2009 the complainant was informed that her contract for an indefinite period of time would be terminated for unsatisfactory performance with effect from 4 December 2009. As she was exempted from serving her notice period, she received nine months' salary in lieu of notice. The complainant's internal complaint challenging the termination of her contract was dismissed by a decision of 31 March 2010.

In Judgment 3239 delivered on 4 July 2013, the Tribunal found that the complainant's assessment reports for 2007 and 2008 were

tainted with irregularity and that, consequently, the decision based on them to terminate the complainant's contract for unsatisfactory performance was unlawful. As a result, the Tribunal quashed the decisions of 2 December 2009 and 31 March 2010 and, in point 2 of its decision, ordered the CDE to pay material damages to the complainant calculated as indicated in consideration 20 of the judgment, which read as follows:

> "The complainant does not request reinstatement at the Centre, but she does seek an award of damages equivalent to five years of her last salary in compensation for the material injury which she suffered on account of her unlawful removal from her post. As at the time of her dismissal the complainant held a contract for an indefinite period of time, the Tribunal will accede to this request in full. It will therefore award the complainant a sum equivalent to the total amount of the salary, allowances and other financial benefits of all kinds which she would have received if the execution of her contract had continued, at the same level of emoluments, for five years as from 4 December 2009."

On 23 August 2013 the complainant pointed out to the CDE that pursuant to point 2 of the decision in Judgment 3239, it owed her 488,164.41 euros. On 30 October the CDE informed her that the nine months of salary that she had already received in lieu of notice had to be deducted from the amount owed to her. On 6 November the complainant objected that the Tribunal had not stated anywhere that any amount was to be deducted from the sum awarded.

In November 2013 the CDE paid the complainant an amount equivalent to 10 months of gross salary as an advance. On 22 November it asked her to submit supporting documents so that it could verify that she fulfilled the conditions for entitlement to the dependent child allowance and the education allowance. On 3 December the complainant replied that this request was groundless given that the Tribunal had ordered the CDE to pay her an amount equivalent to five years of her last salary.

On 13 December 2013 the CDE paid the complainant a sum of 152,912.69 euros, which was equivalent to 60 months of salary (not including the dependent child allowance and the education allowance) less the nine months of salary that she had already received in lieu of notice and the 10 months of gross salary that had been paid to her

as an advance. The complainant subsequently received a sum of 97,108.48 euros, corresponding to the parties' contributions to the pension fund.

On 23 January 2014 the complainant filed an application for execution of Judgment 3239. She asks that the CDE be ordered to pay the amounts still owed to her, with interest, within 30 days. She also claims moral damages in the amount of 50,000 euros and 4,000 euros in costs. Lastly, she asks that the CDE be ordered to pay a penalty of 25,000 euros per month of delay in executing the present judgment.

In its reply of 23 June 2014, the CDE submits that the application should be dismissed and asks the Tribunal to order the complainant to pay costs. It also requests that the complainant be ordered to provide the supporting documents requested on 22 November 2013 "without delay".

In her rejoinder the complainant contends that the CDE's reply is time-barred and hence irreceivable. The CDE explains that, as 21 June 2014 was a Saturday, a non-working day at the Centre, it had assumed that the time limit was extended until the next working day, i.e. Monday 23 June.

CONSIDERATIONS

1. The complainant asks the Tribunal, by means of an application for execution, to order the CDE to pay her an additional amount of compensation to which she considers herself entitled pursuant to Judgment 3239, delivered in public on 4 July 2013, and to order the CDE to pay her various amounts for failure to execute that judgment in full.

2. In her rejoinder the complainant contends that the Centre's reply, which was sent to the Tribunal on 23 June 2014, is time-barred as the time limit for filing it – which had, furthermore, already been extended by 45 days – expired on 21 June. Relying on Article 8, paragraph 3, of the Rules of the Tribunal, which states that "[i]f [the defendant organisation] files no reply within the time limit the written

pleadings shall close", she argues that the reply must hence be disregarded.

The defendant organisation responds to this argument by explaining that, as 21 June 2014 was a Saturday, a non-working day at the CDE, it had understood that it was entitled not to file its reply until the following Monday.

3. The Tribunal has consistently held that when the time limit for taking a procedural step expires on a Sunday or a public holiday, this time limit is *ipso facto* extended to the first following working day (see, for example, with regard to Sunday, Judgments 306, 517 and 3034, under 14, and with regard to a public holiday, Judgments 890, under 4, and 2250, under 8).

As regards the submission of complaints and briefs to the Tribunal itself, for which the date of filing is the date on which they are sent and not the date on which they are received by the Registry, this case law is based on the fact that the postal services of most States do not usually operate on Sundays and public holidays.

However, in view of the reason underpinning it, this solution is not applicable where the deadline for submitting a complaint or a brief expires, as in the present case, on a Saturday. On the contrary, it is ordinarily the rule in most States that postal services operate on this day of the week, albeit under particular conditions.

4. It is true that the Tribunal has ruled, with respect to an internal appeal filed by an official, that a time limit expiring on a Saturday was automatically extended to the following Monday if Saturday was a non-working day in the organisation concerned (see Judgment 2831, under 3). However, this solution may be explained by the circumstance that appeals of this type are usually deposited with the administrative services of organisations and forwarded to the competent body through the internal mail, so that the closure of these services on non-working days justifies such an extension. As it is usual practice to file submissions with the Tribunal by post, there is no reason to transpose this particular precedent to the filing of complaints or briefs with the Tribunal, since

this filing is not hindered by a deadline falling on a Saturday, even if Saturday is not a working day in the organisation concerned.

5. However, the Tribunal considers that since it has until now never had occasion to rule explicitly on this issue, the defendant organisation, in this instance, may have been honestly mistaken in believing that it could file its reply up until the Monday following Saturday 21 June 2014. In order to ensure that the legal uncertainty that has prevailed on this point until now will not trap one of the parties unfairly, the Tribunal will exceptionally agree to consider this brief and, in consequence, the complainant's rejoinder and the CDE's surrejoinder filed subsequently.

6. The Tribunal recalls that its judgments, which, according to Article VI of its Statute, are "final and without appeal" and which also have *res judicata* authority, are immediately operative (see, for example, Judgments 3003, under 12, and 3152, under 11). As they may not later be called into question except when an application for review is allowed, they must be executed by the parties as ruled. They may form the subject of an application for interpretation by the Tribunal only if a party considers that the decision is deficient or insufficiently clear (see, for example, Judgments 1887, under 8, and 3394, under 9).

7. It is apparent from the file that the application for execution filed by the complainant essentially concerns two points, both relating to the implications of consideration 20 of Judgment 3239, to which point 2 of the decision in that judgment referred.

8. First, the complainant contends that the CDE has wrongly deducted from the amount of damages, equivalent to five years of salary, that were awarded by the Tribunal in compensation for the material injury suffered as a result of her unlawful removal from her post, a sum corresponding to the nine months of salary paid to her upon termination of her contract as an indemnity in lieu of notice.

9. The application is clearly well-founded on this point. Consideration 20, under which the complainant was awarded "a sum equivalent to the total amount of the salary, allowances and other financial benefits of all kinds which she would have received if the execution of her contract had continued, at the same level of emoluments, for five years as from 4 December 2009" plainly does not stipulate that the indemnity in lieu of notice paid to the complainant is to be deducted from this award. The CDE was hence not entitled to make such a deduction.

Moreover, and as the Tribunal's Registrar, in a letter dated 7 October 2013, explained informally to the defendant organisation at its request, the Tribunal decided quite deliberately in Judgment 3239 not to reduce the damages awarded to the complainant by the amount of that indemnity. In contrast to its rulings in Judgments 3169 and 3238, by which it quashed the decisions to terminate the contracts of other CDE staff members for budgetary reasons and in which it did stipulate such a deduction, the Tribunal decided that a different line of reasoning should be followed in this case. As the complainant's contract had been terminated on grounds of unsatisfactory performance, it considered that she was entitled to receive an indemnity in the form of a lump sum, which it did indeed define in terms of reimbursement of years of salary, in keeping with the wording of the complainant's claims, but which could equally have been expressed as a specific amount in the judgment itself. A deduction of the indemnity in lieu of notice paid upon termination was not a logical consequence of this line of reasoning.

10. Nevertheless, the defendant organisation attempts to justify the deduction by submitting that the quashing of the termination decision of 2 December 2009 of itself entails the restitution of the indemnity in question, as the decision must be deemed to have removed retroactively the legal basis for its payment.

However, apart from the fact that it conflicts with the terms of Judgment 3239, which in any case renders it invalid, this argument wrongly overlooks the fact that the retroactive effect of the quashing

of an administrative decision may, for various reasons, be subject to limitations. Indeed, disputes regarding termination decisions provide another prime example of such a limitation, as when the Tribunal cancels decisions of this type, it frequently does not order the official's reinstatement in his or her post, even if reinstatement is requested by the person concerned. Moreover, it should be noted in this case that the complainant, who did not seek reinstatement, did in fact ultimately lose her job, despite the fact that she held a contract for an indefinite period of time and that the termination of her contract was unlawful, which are circumstances justifying her retention of the indemnity paid to her in lieu of notice.

Furthermore, the Tribunal observes that even if the payment of this indemnity could have been regarded as an overpayment, the CDE would not have been entitled to recover this sum, as it believed it could, by offsetting it on the basis of Article 54 of the CDE's Staff Regulations. This provision, according to which "[a]ny sum overpaid shall be recovered if the recipient had knowledge of the irregularity of the payment or if such irregularity was so obvious that he could not fail to have knowledge of it", allows such recovery only if the staff member concerned was aware of the irregular nature of the payment of the sum in question at the time when it was made (on the application of an almost identical provision in force in another organisation, see Judgments 2847, under 16 and 17, and 3201, under 13 to 19). However, this is plainly not the case here, where the payment of the disputed indemnity in lieu of notice was completely legitimate at the time when the complainant's contract was terminated.

11. Lastly, the Tribunal observes that if the CDE wished, despite the Registrar's informal opinion that it had obtained on this matter, to continue in the belief that it was entitled to deduct the nine months of salary in question from the damages owed to the complainant, clearly it should have filed an application for interpretation of Judgment 3239 with the Tribunal, which it did not.

12. Second, the complainant reproaches the CDE for having made the payment of several benefits linked to her family situation, namely dependent child allowances, education allowances and coverage of expenses incurred for home leave, subject to the production of information and supporting documentation relating to changes in this situation over the five years following the termination of her contract. She considers that these benefits were automatically due to her for the whole of this period on the sole grounds that she was entitled to claim as at 4 December 2009, when the termination became effective.

On this point, however, her arguments are completely unfounded.

13. Contrary to what the complainant states incorrectly in her submissions, in consideration 20 of Judgment 3239 the Tribunal did not award her an amount equivalent to "five years of her last salary", but rather the salary "which she would have received if the execution of her contract had continued […] for five years as from 4 December 2009." The CDE therefore had to reconstruct the salary that the complainant would have received had she actually continued her employment during that period, subject to the sole condition that, as the consideration stipulates, this reconstruction should be performed "at the same level of emoluments", i.e. disregarding any salary increases – resulting, for example, from a promotion – which the complainant might have received during that period.

However, the allowances and other financial benefits linked to the complainant's family situation, which formed one element of her salary, were naturally subject under the applicable internal rules to conditions relating to, inter alia, the age and educational arrangements of her dependent children which, by definition, might have been fulfilled for only part of the five years in question.

It was hence correct, in particular, for the CDE to ask the complainant about her children's enrolment in educational establishments with a view to ascertaining whether they should still be regarded as dependent from the point of view of her entitlement to the said allowances and to payment of home leave expenses. As regards the latter benefit, which is not included in staff members' monthly salary

but is granted only at the end of each 18-month period of continuous service, it is surprising, to say the least, that the complainant considered herself entitled to claim it merely because she had two dependent children on the date when her contract was terminated.

14. It follows from the foregoing that the complainant, who has a duty to cooperate in good faith in the execution of the judgment in question, could not, as she did, refuse to provide the CDE with the information and supporting documents that she was asked to produce (see Judgment 2684, under 6).

If she wished to challenge the validity of this request, she had only to lodge an application for interpretation of Judgment 3239 with the Tribunal, which she did not do either.

15. As to the other points regarding payment of the sum owed by the CDE, the Tribunal notes that these are no longer the subject of substantive dispute between the parties in their most recent submissions. It suffices to observe that when the amount of that sum is finally established, the Centre must recalculate the amount of internal tax charged to the complainant accordingly.

16. It is plainly unacceptable that Judgment 3239 has not yet been executed in full and – even disregarding what has been said above with regard to the erroneous deduction of nine months' salary from the sum owed to the complainant – this situation is partly attributable to the CDE, which has not dealt with this case with the necessary celerity.

17. In this regard, the Tribunal wishes to emphasise that, contrary to what the CDE appears to believe, it cannot legitimately cite the need to submit its every expense to its Executive Board for approval to exonerate it from its duty to execute the judgment in question promptly.

International organisations that have recognised the Tribunal's jurisdiction are bound to take whatever action a judgment may require and, in particular, should the Tribunal order payment of a sum of money,

to effect this payment without delay (see, inter alia, Judgment 82, under 5, and aforementioned Judgment 3152, under 11). It would be a serious breach of the CDE's obligations if the execution of such an order were rendered contingent on the Executive Board's approval, with the inevitable corollary that, should the Board refuse, the CDE would consider itself released from the obligation under which it is placed, or if the execution of the order were simply delayed pending a meeting of the Board, even if the Board's approval were merely a formality.

18. However, the Tribunal notes that the CDE's lack of celerity has not had any practical implications for the complainant. In fact, the conduct of the complainant, who, as mentioned above, refused to submit certain information and documents that were necessary for payment of the sum owed to her, in any case prevented the judgment from being executed more rapidly.

19. Furthermore, it is clear from the file that the CDE has already endeavoured to pay the greater part of the award against it, despite its major financial difficulties.

20. In these conditions, and considering the parties' shared responsibility, explained above, for the errors in the interpretation of Judgment 3239 from which this dispute arises, the Tribunal finds there is no reason to award the amounts claimed by the complainant by way of interest for delay, compensation for moral injury and costs.

21. In the circumstances of the case, neither is it appropriate to order that the obligation to execute the judgment in question be accompanied by a penalty for default.

22. The complainant will be required to provide to the CDE without delay, as the CDE rightly requests, the information and supporting documents necessary to determine her entitlement to dependent child allowances, education allowances and coverage of home leave expenses.

23. Lastly, as the application for execution filed by the complainant is not, however, vexatious, the CDE's counterclaim seeking an award of costs will be dismissed.

DECISION

For the above reasons,

1. The case is remitted to the CDE in order that it execute Judgment 3239 in full and as soon as possible, having regard in particular to the information and supporting documents to be provided by the complainant, as indicated above in considerations 7 to 17 and 22.

2. All other claims are dismissed.

In witness of this judgment, adopted on 12 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ