

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**G. (No. 2)**

**v.**

**WHO**

(Application for execution)

**127th Session**

**Judgment No. 4092**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3871 filed by Mr M. G. G. on 22 February 2018 and corrected on 2 March, the reply of the World Health Organization (WHO) of 5 April, the complainant's rejoinder of 18 April, WHO's surrejoinder of 23 July, the documents supplied by the complainant on 7 September and 22 October, and the email of 24 October 2018 whereby the Registrar of the Tribunal sent copies of the aforementioned documents to WHO;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

#### CONSIDERATIONS

1. By a decision of 4 February 2010 of the WHO Regional Director for Africa, which took effect on 8 March 2010, the complainant, who held the post of Administrative Officer in the WHO Country Office in Chad under a continuing appointment, was dismissed for misconduct. This decision was set aside on 24 December 2014 by the Director-General, who found that it contained a number of flaws. However, she refused to reinstate the complainant and merely awarded him compensation for the material and moral injury suffered.

2. In Judgment 3871, delivered in public on 28 June 2017, the Tribunal set aside the main provisions of the above-mentioned decision of 24 December 2014 on the grounds that the Director-General had breached her duties because, after having set aside the complainant's dismissal, she had made no attempt to reinstate him, as she had a duty to do unless she provided proof that such reinstatement was impossible.

Under point 2 of the decision in Judgment 3871, the Tribunal therefore decided that "[t]he complainant shall, as far as possible, be reinstated in WHO as from 8 March 2010, with all the legal consequences that this entails".

However, point 3 of the decision provided that "[i]f WHO deems reinstatement to be impossible, it shall pay the complainant material damages", which, according to the method of calculation set out in consideration 17 of the judgment, corresponded to the equivalent – less some deductions but plus interest at the rate of 5 per cent per annum – of the salary and other financial benefits of all kinds which the complainant would have received if the execution of his contract had continued for three years from 8 March 2010.

Consideration 15 of the judgment further indicated that, in determining whether reinstatement of the complainant under the above-mentioned conditions was actually possible or not, WHO should take into account other things, "in view of its staff complement and the availability of budgetary funds".

3. Although the compensation of 15,000 euros for moral injury which WHO had also been ordered to grant under the judgment was paid promptly to the complainant, the conditions of reinstatement which WHO proposed to him were the source of disagreement between the parties, as regards both the choice of proposed post and the determination of the financial consequences of the reinstatement.

The complainant considers that he has been treated unfairly and asks the Tribunal, by means of an application for execution, to order WHO to comply with its obligations resulting from Judgment 3871, and in particular from the above-mentioned point 2 of the decision in the judgment.

4. It should be recalled that the Tribunal's judgments, which according to Article VI of its Statute are "final and without appeal" and which have *res judicata* authority, are immediately operative (see, for example, Judgments 3003, consideration 12, and 3152, consideration 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 (see, for example, Judgments 3566, consideration 6, and 3635, consideration 4). The parties must work together in good faith to execute the judgment (see, for example, Judgments 2684, consideration 6, and 3823, consideration 4).

5. In the present case, in accordance with the terms of Judgment 3871, WHO must endeavour, as far as possible, to reinstate the complainant by offering him a post corresponding to his abilities and grade, and backdating the reinstatement to 8 March 2010, with all the legal consequences that this entails.

6. As regards the choice of post offered to the complainant, the Tribunal notes that the initial disagreement between the parties on this issue was resolved during the proceedings.

By a letter of 20 November 2017, the Regional Director for Africa had initially offered the complainant the post of real estate assets administrator, which was classified at the level corresponding to his grade, namely P-3, but, according to the complainant, did not correspond to his abilities since the duties of this post required university qualifications and experience in civil engineering and construction work management, which he did not possess.

The Tribunal shares the complainant's view that this job offer was unsuitable. Furthermore, WHO itself acknowledges in its submissions that the offer, at least in the form presented, was the result of an "administrative error".

However, on 29 March 2018 WHO offered a new grade P-3 post to the complainant, namely that of quality assurance team leader at the WHO Country Office in Congo, which did correspond to the complainant's qualifications and which the latter indicated his willingness to accept.

7. Hence the only remaining point at issue is to determine the effects of the reinstatement order, with all the legal consequences that this entails, effective from the date of his unlawful dismissal.

WHO argues that the requirements of the above-mentioned point 2 of the decision in Judgment 3871 would be satisfied by considering the period from that date – namely 8 March 2010 – to the date of the complainant’s actual reinstatement in his new post as a period of special leave without pay. In this respect, WHO submits that this is an adequate means to restore the complainant’s former status as a staff member holding a continuing appointment, thereby exempting him from the requirement of a probationary period in his new post and enabling him to be regarded as having maintained uninterrupted employment with WHO since his unlawful dismissal, as a period of special leave is regarded under the regulations as a period of service. Moreover, WHO emphasizes that, under the terms of this solution, it would pay the contributions to the United Nations Joint Staff Pension Fund and the sickness and accident insurance scheme corresponding to the complainant’s employment for this period.

However, the Tribunal cannot accept WHO’s line of argument. As the Tribunal has stated on many occasions in its case law, when a reinstatement order is applied retroactively to the date when the official’s employment was unlawfully terminated, this implies that the official is considered as having remained in service after that date under the same conditions as before and is therefore entitled to the salary and other financial benefits that he would have received if this had actually been the case (see, for example, Judgments 1384, consideration 18(a), 1447, consideration 17, 2261, consideration 16, 2468, consideration 19, and 3723, consideration 8). The reinstatement “with all legal consequences that this entails” referred to in point 2 of the decision in Judgment 3871 can therefore only be construed as having such effects. Moreover, the Tribunal’s intention in this regard was made all the more clear by the fact that it also recalled, in consideration 3 of the judgment, that, since the decision to dismiss him had been set aside, the complainant was entitled in principle to the restoration of the *status quo ante*, which

included payment of the remuneration to which he would have been entitled if he had continued to perform his duties.

Furthermore, if WHO considered that the decision in Judgment 3871 presented any uncertainty or ambiguity on this point, it ought to have filed with the Tribunal an application for interpretation of the judgment, but it did not do this.

8. Far from thus enabling WHO to consider the complainant as being on special leave without pay from 8 March 2010 to the date when he was actually reinstated, the reinstatement with all legal consequences referred to in Judgment 3871 implies in the present case that WHO must pay the complainant the equivalent of the salary and benefits of all kinds which he would have received if the execution of his contract had continued under normal conditions during this period, less the amounts already awarded to him pursuant to the Director-General's decision of 24 December 2014 (except those awarded as compensation for the undue length of the internal appeal proceedings and as costs relating to those proceedings) and any earnings received from other sources during that period. WHO must also ensure that the complainant's pension rights and his affiliation to the provident or social security schemes are maintained for the same period.

9. WHO observes that, in view of the time that has elapsed since 8 March 2010, the calculation of compensation in this way means that it will be required to pay a significantly larger amount, should the complainant be reinstated as provided for in point 2 of the decision in Judgment 3871, than it would have to pay if it opted for the alternative form of redress provided for in point 3 of the decision – namely, as previously stated, the equivalent in substance of three years' remuneration. It considers that there is thus an unjustified disproportion in the effects of the two possible choices of redress for the same injury.

It is correct that the overall amount of the sums due to the complainant, in the event of reinstatement with all the legal consequences as from the date of his dismissal, is significantly larger, in the present case, than that fixed by the judgment in the event of reinstatement being

impossible, on account of the marked difference in length of the respective compensation periods taken into account in these two cases.

However, apart from the fact that this disparity in amounts is somewhat alleviated by the fact that the Tribunal has not ordered the addition of interest to the sums owed to the complainant in the event of reinstatement, contrary to what it decided regarding those to be paid in the absence of reinstatement, the observation made by WHO in this respect would only be valid if Judgment 3871 gave it the freedom to choose whether or not to reinstate the complainant. In this case, it must be emphasized that WHO does not really have such freedom since point 2 of the decision in Judgment 3871 requires it to reinstate the complainant “as far as possible”.

Nevertheless, the Tribunal recalls that if WHO considered in good faith that, having regard to the cost of reinstatement as discussed in consideration 8 above, it was impossible to reinstate the complainant, particularly in light of the availability of budgetary funds, it would be entitled to redress the injury to the complainant by the means specified in point 3 of the decision in Judgment 3871.

10. The complainant presents, for the first time in his rejoinder, various claims for compensation for injuries that he considers he has suffered as a result of WHO’s conduct. However, according to the Tribunal’s case law, a complainant may not, in her or his rejoinder, enter new claims not contained in the original complaint (see, for example, Judgments 960, consideration 8, 1768, consideration 5, and 2996, consideration 6). This case law also applies to applications for execution (see Judgment 3207, consideration 6). These new claims must therefore be dismissed.

DECISION

For the above reasons,

1. If WHO considers it possible, in accordance with point 2 of the decision in Judgment 3871, to reinstate the complainant in WHO, it shall fulfil the obligations set out in consideration 8, above.
2. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 November 2018.

*(Signed)*

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ