

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

C. (No. 2), D. (No. 2), F. (No. 2), G. (No. 2) and K. (No. 2)

v.

CDE

(Applications for execution)

122nd Session

Judgment No. 3635

THE ADMINISTRATIVE TRIBUNAL,

Considering the applications for execution of Judgment 3238 filed by Ms M.-J. C., Ms P. D., Mr M. F., Ms C. G. and Ms D. K. on 26 June 2014 and corrected on 5 September, the reply of the Centre for the Development of Enterprise (CDE) of 26 December 2014, the complainants' rejoinder of 26 February 2015 and the CDE's surrejoinder of 30 April 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

The complainants, all of whom held a contract for an indefinite period of time, were informed by letters of 2 December 2009 that their posts had been abolished. These letters, which in substance indicated that their appointment was consequently terminated, explained that they were exempted from having to serve their notice period – they in fact received an indemnity in lieu of notice – and that they would receive compensation for redundancy. The complainants challenged

their dismissal, but their joint internal complaint was rejected by a decision of 26 March 2010.

In Judgment 3238, delivered on 4 July 2013, the Tribunal found that the CDE had not made the necessary efforts to offer other posts to the complainants before it terminated their appointments and that their dismissal had breached their right to be heard. For these reasons, the Tribunal set aside the decisions of 2 December 2009 and of 26 March 2010 and, in point 3 of the decision, ordered the CDE, should it consider that the complainants' reinstatement was impossible, to pay the complainants material damages and interest thereon calculated as indicated in consideration 20. That consideration reads in relevant part as follows:

“The CDE will [...] be ordered to pay the complainants the equivalent of the salary and allowances of all kinds which they would have received had their contract remained in force for a period of five years as from 4 December 2009 – or, as appropriate, until they reached retirement age, if this would have occurred prior to the expiry of that period – less the compensation they received on dismissal and any remuneration they may have received during this period. The Centre must also pay the complainants the equivalent of the contributions to pension, provident or social security schemes which it would have had to bear during the same period. All these sums shall bear interest at the rate of 5 per cent per annum as from the date on which they fell due until their date of payment.”

The Tribunal further ordered the CDE to pay each complainant moral damages and costs. These sums were paid during the summer of 2013.

As regards material damages, in November 2013 the CDE paid each complainant a sum corresponding to ten months' gross salary as an advance and then, at the end of December 2013, an “indemnity for net remuneration” for a period of five years, from which the CDE had deducted the above-mentioned advance, the compensation that had been paid to the complainants on their dismissal and, where relevant, the remuneration that they had since received. In January 2014 the complainants received amounts equivalent to the sum total of the parties' contributions to the provident fund. In March and June 2014, the CDE made a payment in lieu of family allowances to the complainants who were entitled to that benefit.

On 26 June 2014 the complainants filed applications for execution of Judgment 3238 with the Tribunal. They asked the Tribunal to order the CDE to pay the sums which they considered to be still due to them, with interest for late payment, moral damages of 50,000 euros each and costs, all within a time limit of 30 days from the delivery of this judgment. If the CDE failed to make those payments within that time limit, they asked that it should be ordered to pay each of them a penalty of 25,000 euros for every month of delay in executing this judgment.

In July 2014 the CDE paid the Belgian National Social Security Office (NSSO) an amount corresponding to the parties' social security contributions. In August 2014 the CDE paid the complainants various additional sums in execution of Judgment 3238, namely, their supplementary insurance premiums, the travel costs for home leave which were owed to Ms G. and Ms K., and interest on all the sums that had already been paid.

In its reply the CDE submits that the applications should be dismissed and asks the Tribunal to order the complainants to pay costs.

In their rejoinder the complainants indicate that, in view of the sums that they received in August 2014, the dispute now concerns only the payment, with interest, of an amount equivalent to the parties' social security contributions and the reimbursement of the excess baggage charges incurred during the home leave defrayed by the CDE, with interest for late payment on all these amounts calculated as from 13 November 2013.

In its surrejoinder the CDE maintains its position.

CONSIDERATIONS

1. The complainants are asking the Tribunal, by means of applications for execution, to order the CDE to pay them the additional compensation to which they consider themselves entitled pursuant to Judgment 3238, delivered on 4 July 2013, and to further order the CDE to pay them various additional sums on the grounds that it has failed to execute Judgment 3238 promptly.

2. The five applications seek the execution of the same judgment and rest on largely the same pleadings. It is therefore appropriate that they be joined to form the subject of a single judgment.

3. In view of the parties' most recent submissions, and given that some payments have been made during the proceedings, the dispute now essentially concerns only the payment, with interest, of a sum equivalent to the social security contributions that would have been borne by the CDE had the complainants' contracts remained in force for a period of five years as from their dismissal on 4 December 2009, or, as appropriate, until they reached retirement age, if this would have occurred prior to the expiry of that period.

4. The Tribunal recalls that its judgments, which according to Article VI of its Statute are "final and without appeal" and which also carry *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).

5. Point 3 of the decision in Judgment 3238 provided that if the CDE considered it impossible to reinstate the complainants following the setting aside of the decisions to terminate their appointment – as was indeed the case – it was to pay them "material damages and the interest thereupon calculated as indicated in consideration 20 [of the judgment]".

That consideration stated that "[t]he CDE [would] be ordered to pay the complainants the equivalent of the salary and allowances of all kinds which they would have received had their contract remained in force" for the above-mentioned maximum period of five years, less certain deductions; that "[t]he Centre [was to] also pay the complainants the equivalent of the contributions to pension, provident or social security schemes which it would have had to bear during the same

period”; and that “[a]ll these sums [were to] bear interest at the rate of 5 per cent per annum as from the date on which they fell due until their date of payment”.

6. It is clear from the wording of that consideration 20, to which, as stated above, point 3 of the decision in Judgment 3238 refers, that the sums equivalent to the various social contributions listed therein were to be paid directly to the complainants, and not to the institutions which normally receive such contributions. Indeed, this is the approach usually taken by the Tribunal where, as in the present case, staff members whose dismissal has been set aside are not reinstated in the employer organisation, because the social contributions that are due to such institutions by virtue of an employment relationship are devoid of any basis once this relationship ends.

7. However, the CDE refused to pay the sums specifically corresponding to social security contributions because, in its opinion, that would breach the terms of its Headquarters Agreement with Belgium.

The Centre contends that, as regards staff members who in this matter are covered by the “Belgian system”, which is the case of all of the complainants, under article 20 of the Headquarters Agreement it is bound to “apply Belgian social security legislation”, which requires such contributions to be paid to the NSSO.

The CDE therefore paid the amounts corresponding to the contributions in question to the NSSO, as a document in the file establishes.

8. However, the Tribunal finds that in so doing, the CDE breached its duty to execute Judgment 3238 in full.

As recalled in consideration 4, above, the Tribunal’s judgments must be executed as ruled. Thus, an organisation may not depart from a judgment’s orders when executing it.

If the CDE considered that it was impossible to execute Judgment 3238 in accordance with its terms, it should have filed an

application for interpretation, or even an application for review, with the Tribunal, which it failed to do.

9. Moreover, the position taken by the CDE is based on a misapprehension as to what the coexistence of the above-mentioned provisions of Article 20 of its Headquarters Agreement and the Tribunal's powers implies.

It is true that, had the complainants been reinstated, the Centre would have been required under those provisions to resume paying social security contributions to the NSSO on account of its employment relationship with the complainants. However, in the absence of such reinstatement, these provisions have neither the aim nor the effect of preventing the Tribunal from making an award of damages in compensation for the injury resulting from the unlawful termination of their employment and from determining the amount of and method for calculating these damages as it sees fit. It is indeed such damages that are at issue here and these cannot, by definition, be paid to a third party.

It must also be underscored that, contrary to the CDE's apparently mistaken belief, the Centre was not ordered in Judgment 3238 to pay social security contributions but, as consideration 20 states, "the equivalent" of those contributions, which is not to be confused with the latter and is entirely different from a legal standpoint. This sum is in fact an integral part of the lump-sum damages mentioned above. It must further be recalled that one of the justifications for this award was the legitimate desire to remedy the financial loss that the complainants would suffer if they enrolled in a private social insurance scheme at their own expense after their dismissal, for which the payment of contributions to the NSSO does not compensate in any way.

10. The CDE was hence wrong to refuse to pay the complainants the compensation due on this account and the present applications for execution must therefore be allowed on this point, on the understanding that it is for the CDE, if it sees fit, to approach the NSSO for a reimbursement of the contributions paid to the latter.

11. The complainants seek an additional award of interest on the sums which the CDE has not yet paid to them. However, the Tribunal notes that they have already been awarded interest for late payment by Judgment 3238 and considers that this is sufficient to remedy the injury caused by the delay in paying these sums. This claim will therefore be rejected.

12. The complaints ask for an award of moral damages on the grounds of the CDE's conduct with regard to the execution of Judgment 3238.

Regardless of the error identified above that adversely affected the complainants, the Tribunal observes that the CDE has plainly taken an unacceptable length of time to make certain payments.

It is true, as the CDE points out, that these delays do not stem from patent bad faith on its part and that they are partly attributable to the rather uncooperative attitude of the complainants when it came to producing supporting documentation.

Nevertheless, it is plain from the file that, as the CDE itself emphasises in its submissions, most of these delays were caused by the fact that, before paying these sums, it had to wait for the requisite funds to be "released" by the European Union and that this expenditure also had to be approved by the Centre's Executive Board. These reasons cannot be accepted as a legitimate explanation for the slowness in executing the aforementioned judgment.

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, the aforementioned Judgment 3152, under 11, and Judgment 3566, under 17). It would be a serious breach of the CDE's obligations if the execution of such an order were rendered contingent on the availability of the requisite budgetary appropriations, should no due provision have been made for them beforehand, or on the Executive Board's approval, with the inevitable corollary that, should these conditions not be met, CDE would consider itself released from this obligation, or authorised

simply to delay the performance thereof until such time as they were met.

In view of these last considerations in particular, the Tribunal considers it appropriate to award each complainant moral damages in the amount of 3,000 euros.

13. In the rejoinder, one of the complainants, Ms K., requested the reimbursement of the excess baggage charges incurred during the home leave defrayed by the CDE. As there is no evidence on the file supporting this claim, the Tribunal will dismiss it.

14. The complainants, who had to engage a lawyer in their attempt to obtain the full execution of Judgment 3238 on an amicable basis and then to defend their interests in these proceedings, are each entitled to 2,000 euros in costs.

15. In light of the lack of speed which the CDE has displayed so far in dealing with this case, it is appropriate to order it to pay each complainant a penalty of 3,000 euros per month of delay if it does not honour its obligations in full within 30 days of the delivery in public of this judgment.

16. The CDE has entered a counterclaim that the complainants should be ordered to pay costs. It follows from the foregoing that this claim must obviously be dismissed.

DECISION

For the above reasons,

1. The case is remitted to the CDE in order that it execute Judgment 3238 in full by paying the complainants the outstanding amounts due to them in settlement of the equivalent of the social security contributions to which reference is made in consideration 20 of that judgment, together with the applicable interest.

2. The CDE shall pay each complainant moral damages in the amount of 3,000 euros.
3. The CDE shall also pay each complainant 2,000 euros in costs.
4. If the CDE does not settle the full amount of the awards referred to in points 1 to 3, above, within 30 days of the public delivery of this judgment, it shall pay each complainant a penalty of 3,000 euros per month of delay.
5. All other claims are dismissed, as is the CDE's counterclaim.

In witness of this judgment, adopted on 26 April 2016, 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 6 July 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ