

I. (No. 2)

v.

ESO

(Application for execution)

122nd Session

Judgment No. 3636

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3282 filed by Mr H. G. I. on 7 November 2014, the reply of the European Southern Observatory (ESO) of 4 March 2015, corrected on 23 March, the complainant's rejoinder of 8 June and ESO's surrejoinder of 7 September 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 neither party has applied;

CONSIDERATIONS

1. In Judgment 3282, under consideration 9, the Tribunal held that "[a]s the complainant 'lost a valuable chance of having the contract renewed' for a further three-year extension which would have brought him to his retirement age, the Tribunal orders ESO to pay the complainant material damages in the amount equivalent to two years' salary, including all benefits, entitlements and emoluments plus interest at a rate of 5 per cent per annum, less any amounts he has earned in that

period (see Judgments 972 and 2306, under 10 and 11). He is also entitled to moral damages in the amount of 20,000 euros and costs in the amount of 5,000 euros.”

The Tribunal decided as follows:

- “1. The decisions of 27 June and 30 August 2011 are set aside.
2. ESO shall pay the complainant material damages in the amount equivalent to two years’ salary, including all benefits, entitlements and emoluments plus interest at a rate of 5 per cent per annum, less any amounts he has earned in that period.
3. It shall pay him moral damages in the amount of 20,000 euros.
4. It shall also pay him costs in the amount of 5,000 euros.
5. All other claims are dismissed.”

2. In the present application for execution of Judgment 3282, the complainant impugns the decision of 13 August 2014 regarding the calculation of material damages. He contends that ESO should have included in the calculation contributions to the Health Insurance and Long Term Care Schemes; contributions to the CERN Pension Fund; and unemployment benefits and children’s allowances, as well as payment of an indemnity for termination of contract. The complainant contests that the pensions he received from the German pension system and from the CERN Pension Fund for the year 2013, could lawfully be deducted as “earnings”. The complainant makes two alternative requests asking that ESO be ordered to pay him the employer’s contributions for his Health Insurance and Long Term Care Insurance Schemes in the amount of 6,169.08 euros for the year 2013, or that ESO be ordered to provide him with accounts and pay him the respective amount. The complainant makes the same alternative claims for the year 2014. He also requests moral damages, costs, and a monthly penalty in case of late payments.

3. The Tribunal did not order the complainant’s reinstatement in Judgment 3282, nor did it order ESO to grant him a “notional reinstatement”, i.e. to pay the amounts the complainant would have earned if he had had his contract renewed. As the Tribunal did not order his reinstatement, his contract expired on 31 December 2011. As noted above, the Tribunal limited the award of compensation to “material

damages in the amount equivalent to two years' salary, including all benefits, entitlements and emoluments plus interest at a rate of 5 per cent per annum, less any amounts he has earned in that period". Had it been its intent, the Tribunal would have specifically awarded payment of the amount equivalent to the contributions for the complainant's pension and Health Insurance and Long Term Care Schemes. See, for example, Judgment 2621, consideration 5, where the Tribunal held that:

"The complainant also places emphasis on the expression 'full salary', arguing that it 'implies an entitlement to payment of all components of a salary' and that '[s]ocial benefit contributions [are] an important part of [...] salary'. Further, it is put that, had it been intended to exclude pension fund contributions, the Tribunal 'would have specifically awarded net salary, or just salary'.

Contrary to that argument, had it been its intent the Tribunal would have specifically ordered the payment of an amount equivalent to the pension fund contributions that would otherwise have been paid by the ITU. As pointed out in Judgment 1904, upon separation from service, 'the right to participation in the Pension Fund [...] no longer existed' (see also Judgments 1338 and 1797). The Tribunal declined to order the complainant's reinstatement and, thus, he has no right that would oblige the ITU either to pay contributions to the UNJSPF or to pay the equivalent amount to him. Nor did the Tribunal proceed on the basis of a 'notional reinstatement' which would have required the complainant to give credit for the termination indemnity paid to him on separation. In that context, the expression 'full salary' merely indicated, as was the case in Judgment 1338, that the complainant was to receive an amount, by way of damages, that included allowances and other entitlements that he would have received directly in the usual course of his employment, but not the benefits accruing from reinstatement or an amount equivalent to those benefits."

Moreover, considering that access to the CERN Pension Fund requires a staff member to have a valid contract of employment, and that as of 1 January 2012 the complainant no longer had that status, it follows that he was not entitled to any contributions to the Pension Fund after the end of his contract on 31 December 2011.

4. The complainant claims that the pension benefits he received from the CERN Pension Fund for the year 2013 and from the German pension system should not have been deducted as earnings from the material damages awarded to him. This claim is well founded. It is true

that the concurrent payment of a sum equivalent to salary and an anticipated retirement pension could, in certain circumstances, render an award of material damages redundant. However, as noted above, in Judgment 3282 the Tribunal did not order ESO to grant the complainant a notional reinstatement; it decided to award material damages for loss of a valuable opportunity by reference to “an amount equivalent to two years’ salary, including all benefits, entitlements and emoluments”. In so doing, the Tribunal intended to provide a criterion for determining the amount of money to be paid as material damages. As stated in consideration 3 above, it did not intend to award the complainant the amounts he would have earned if his contract had been renewed for two years. In these circumstances, ESO’s argument that the amounts received by the complainant in pension benefits would render the award of material damages redundant is irrelevant, as no concurrent payment of salary and pension arises. It is also at odds with the Tribunal’s reasoning in this case, which does not involve notional reinstatement. ESO must therefore pay the complainant the relevant deducted amounts, together with interest at an annual rate of 15 per cent (covering damages for moral injury) from the date on which the material damages awarded in Judgment 3282 were paid until the date of the final payment.

5. The complainant’s claims requesting payment of the indemnity on termination of contract and unemployment benefits, children’s allowance and contributions to the Health Insurance and Long Term Care Schemes for the years 2013 and 2014 are unfounded. According to the Staff Regulations (Annex R D 3 “Unemployment Benefits”), the complainant was entitled to payment of unemployment benefits, children’s allowance and contributions to the Health Insurance and Long Term Care for a maximum period of 12 months (R D 3.04) after the expiration of his contract. R D 3.05 stipulates that:

“[t]he first unemployment benefit will be paid by ESO when the total amount of any indemnities and grants paid on departure (excluding reinstatement or Pension Fund payments or compensation for leave not taken) has been exhausted at the rate of the monthly unemployment insurance benefit that would be payable under Annex R D 3.03, up to the maximum defined in Annex R D 3.04, starting from the day following the last day of the contract of employment at ESO.

For the duration of the period of unemployment, up to the maximum defined in Annex R D 3.04, ESO will pay the children's allowance that would be due if the claimant were still a member of personnel. If the former member of personnel remains a member of the health insurance scheme and long term care insurance scheme to which he was affiliated under his contract with ESO, ESO shall pay the total contribution for the duration of the period.

The claimant will not be eligible for payment of any other allowances, indemnities or reimbursements, nor the repayment of any taxes that may be levied on his unemployment benefit."

In accordance with the above provisions, the Tribunal finds that the complainant is not entitled to any extension of payments of unemployment benefits, children's allowance, or contributions to the Health Insurance and Long Term Care Schemes beyond 31 December 2012, the date on which his entitlement to such benefits expired. The Tribunal also notes that the complainant is not entitled to an indemnity on termination of contract in addition to 12 months of unemployment benefits. It should be highlighted that that indemnity overlaps with the 12 months of unemployment benefits in accordance with R D 3.05 and Annex R A 11.01 on "Indemnities or Grants on Termination of Contract". As noted above, R D 3.05 provides that the unemployment payments will begin after indemnities have been paid and the expiration of the unemployment benefits will occur 12 months after the expiration of the complainant's contract.

6. As he succeeds in part, the complainant is entitled to an award of costs in the amount of 1,000 euros.

DECISION

For the above reasons,

1. ESO shall pay to the complainant the amounts deducted in respect of pension benefits from the material damages awarded in Judgment 3282, together with interest as indicated in consideration 4, above.
2. ESO shall pay the complainant 1,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 17 May 2016, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

ANDREW BUTLER