

## NINETY-FOURTH SESSION

(Application for execution)

Judgment No. 2169

The Administrative Tribunal,

Considering the application for execution of Judgment 2091 filed by Mr G. P. K. on 29 May 2002, the reply of 22 July from the European Southern Observatory (ESO), the complainant's rejoinder of 16 August, and the Observatory's surrejoinder of 7 October 2002;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Facts relevant to this case are to be found in Judgment 2091, delivered on 30 January 2002. In that judgment the Tribunal ordered ESO "to take the necessary measures, including payment of premium, to obtain health insurance coverage for the complainant".

On 5 March 2002 the Head of Administration informed the complainant that as from 1 April 2002 he would be insured with the group insurance policy of the insurance brokers Van Breda for ESO staff. With the exception that the premium would be paid by the Observatory, the conditions of coverage remained the same as had been offered to the complainant on 11 May 2000. His attention was also drawn to the fact that coverage applied only to him, and that ESO would assume payment of the premium only as long as the complainant received a total incapacity pension. That is the impugned decision.

B. The complainant asserts that ESO has not fully executed Judgment 2091. He submits that, by virtue of consideration 14, he is "entitled to benefit from the provisions of the Group Insurance Contract and its Addendum that are relevant to permanent disability", which he says means coverage under Article 3 B 3 of Addendum 1 to the Group Insurance Contract. But the coverage proposed by ESO in the letter of 5 March 2002 is a special arrangement under Article 5 B 3 of the Group Insurance Contract, which is in contradiction with the Tribunal's plain words. In addition, the proposed coverage excludes his wife and children, excludes certain treatments for him, and he is afraid that ESO may try to reduce his coverage in the future. Not only has the Observatory failed to provide him with a legal basis for its decision, but there are no provisions in the Group Insurance Contract or its Addendum 1 which justify the preclusion of his dependents or certain treatments. The complainant states that it has taken more than four years to get "no more than" what he is entitled to after suffering an accident while on duty, and consequently he has suffered moral injury.

He claims the quashing of the decision notified to him in the letter of 5 March 2002 and asks the Tribunal to order that the provisions of the Group Insurance Contract and its Addendum that are relevant to permanent disability be applied to him. In particular, he mentions Article 3 B 3 of Addendum 1 and Articles 16 and 18 of the Group Insurance Contract. He also claims moral damages and legal costs.

C. The Observatory replies that it has indeed fully executed Judgment 2091: it informed him that it would pay the premium under the Group Insurance Contract. It notes that the complainant has not made an application for interpretation, but one for execution; the judgment carries the weight of *res judicata* and is not open to being challenged. Furthermore, Judgment 2091 does not confer on the complainant the rights he is claiming. The mere fact that the Tribunal referred to Article 3 B 3 of Addendum 1 of the Group Insurance Contract does not mean that

its ruling can be understood as ordering ESO to grant the full benefit of this proviso.

D. In his rejoinder the complainant notes that the Observatory did not contest the moral injury that he has suffered as a result of the impugned decision. He presses his other pleas.

E. In its surrejoinder ESO submits that the complainant has wrongly presumed that it did not contest the existence of moral injury suffered by him. On the contrary, it contends that it has properly executed the judgment, thus, the complainant has suffered no injury. In his submissions to the Tribunal leading to Judgment 2091, the complainant did not explicitly ask for the insurance coverage that he is now requesting, but only for "free health insurance". Judgment 2091 did not order ESO to apply the provisions of the Group Insurance Contract and Article 3 B 3 of its Addendum, and in the letter of 5 March 2002 it told him that it would assume payment of his insurance premiums.

## CONSIDERATIONS

1. In Judgment 2091 the Tribunal ordered ESO to take all necessary measures, including payment of the premium, to ensure that the complainant - a former staff member who had an accident while on duty in October 1997 and whose contract was not renewed after 30 April 1998 - would obtain health insurance coverage. The dispute on which the Tribunal ruled concerned the execution of a Settlement agreement signed on 19 April 2000 by the CERN Pension Fund, ESO and the complainant. Under the terms of that agreement ESO would replace the reason for the non-renewal of the complainant's contract with "dismissal owing to disability" with effect from 1 May 1998, and the CERN Pension Fund would pay the complainant retroactively, as from 1 December 1999, "a total incapacity pension following chapter II, section 3, of the Rules of the CERN Pension Fund". By that agreement, ESO undertook to take "the necessary measures" to enable the complainant to be insured by the Observatory's health insurance company, Van Breda. Following the Settlement, ESO contacted Van Breda, which agreed to a special arrangement to insure the complainant, subject to the payment of a premium equal to 10.8 per cent of his final monthly base salary, but refused to exempt him from payment of that premium on the grounds that he was not insured under the ESO's Group Insurance Contract on the date when his pension took effect. The complainant having filed a complaint to compel ESO to provide him and his family with continuous insurance coverage free of charge, the Tribunal decided, in the above-mentioned judgment, to allow his complaint: the complainant should be considered as having been dismissed because of his disability, and the provisions of Article 3 B 3 of Addendum 1 of the Group Insurance Contract, which stipulate that persons receiving a permanent disability pension benefit from a waiver of premiums, should apply to him.

2. On 5 March 2002 the complainant received a letter from the ESO's Head of Administration informing him that he would be covered by the ESO's group insurance policy with effect from 1 April 2002 and that the premium would be paid by the Observatory, but that the coverage would remain as defined in the letter of 11 May 2000, in which he was offered a special arrangement under Article 5 B 3 of the Group Insurance Contract. That letter stipulated, inter alia, that certain medical expenses, such as dental prosthesis, glasses and health cures, were excluded. In addition, the letter of 5 March 2002 stated that the coverage applied only to the complainant and not to his family.

3. The complainant considers that the Observatory has not properly executed Judgment 2091; he has filed an application for execution and claims damages for the injury he has suffered.

4. In its reply to the application for execution, the Observatory submits that the dispute ruled on by the Tribunal concerned only the exemption from paying premiums and not the extent of the insurance coverage granted to the complainant. It argues that the Tribunal did not intend to grant the complainant the benefit of all the provisions of Article 3 B 3 of Addendum 1, and that, in rejecting the complainant's remaining claims, it rejected *ipso facto* his claims concerning the extension of health insurance coverage to his family. The Observatory considers that it has fully complied with the decision of the Tribunal, which ordered ESO to take the necessary measures to ensure that the complainant himself would obtain health insurance without having to pay a premium and rejected his other claims.

5. The Tribunal cannot endorse that point of view: Judgment 2091 clearly indicated that the complainant must be considered as having been dismissed because of his disability and that, since he is entitled to a permanent disability pension, he "is entitled to benefit from the provisions of the Group Insurance Contract and its Addendum that are

relevant to permanent disability". This statement necessarily implies that the insurance coverage available to the complainant, for himself and his family, as expressly requested by him, cannot be different from that to which he would have been entitled had he qualified immediately for a disability pension. The claims which were rejected in Judgment 2091 are those pertaining to compensation for moral injury.

6. Consequently, the complainant rightly asserts that the Observatory has failed to execute the Tribunal's ruling in full, since it has refused to pay the premium which would have enabled the complainant, as well as his spouse and children, to have the same insurance coverage as that which is granted to staff members who qualify for a disability pension.

7. The complainant seeks compensation for the injury he claims to have suffered. He describes the injury regarding the lack of proper insurance coverage but provides no details justifying an award of damages for material injury. However, as a result of the difficulties he has encountered in obtaining the proper execution of Judgment 2091 he has suffered a moral injury which the Tribunal fixes in the amount of 2,000 euros.

8. Since his claims succeed, the complainant is entitled to an award of costs, which the Tribunal sets at 1,000 euros.

## DECISION

For the above reasons,

1. The matter is referred to the Observatory for proper execution of Judgment 2091 in accordance with consideration 6 of the present judgment.
2. The Observatory shall pay the complainant 2,000 euros in moral damages.
3. It shall pay him 1,000 euros in costs.

In witness of this judgment, adopted on 5 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

*(Signed)*

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet