

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

V. (No. 5)

v.

OPCW

(Application for interpretation and execution)

123rd Session

Judgment No. 3731

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for interpretation and execution of Judgment 3235 filed by Mr R. G. M. V. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 21 November 2013 and corrected on 11 February 2014, the OPCW's reply of 23 May, the complainant's rejoinder of 29 August and the OPCW's surrejoinder of 9 December 2014;

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;

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

Facts relevant to this case are set out in Judgment 3235, delivered in public on 4 July 2013, concerning the complainant's first complaint. Suffice it to recall that by a letter of 20 October 2009 the complainant was notified of the Director-General's decision to terminate his contract, with effect from 18 November 2009, on the grounds that his services had proved unsatisfactory. Following an internal appeal, on 19 November 2010 the complainant was informed that the Director-General confirmed his decision of 20 October 2009 and that he would not reconsider the basis for that decision. The complainant impugned that decision in his first complaint.

In Judgment 3235 the Tribunal set aside the Director-General's decision of 19 November 2010, remitted the matter to the OPCW for further consideration, awarded the complainant moral damages and costs, and dismissed his remaining claims.

Shortly after the delivery of Judgment 3235 the OPCW remitted 11,500 euros to the complainant. The parties subsequently entered into settlement negotiations but they were unable to reach an agreement. By a letter dated 1 October 2013 the complainant was informed that the Director-General had reviewed his earlier decision. Based on the reasons set out in the aforementioned letter, he had decided that the complainant's failure to report to work upon exhaustion of his statutory sick leave entitlements followed by special leave with full pay remained a valid basis for the termination of his contract.

By a letter of 15 November 2013 the complainant challenged the decision of 1 October 2013 and stated that, in his view, the OPCW had not implemented Judgment 3235. By a letter of 3 December from the Administration the complainant was invited to bring his concerns regarding the execution of Judgment 3235 directly to the attention of the Tribunal.

It is noted that on 18 December 2013 the complainant filed his sixth complaint with the Tribunal, in which he impugns the decision of 1 October 2013 and seeks various forms of relief. On 22 December 2015 he filed his seventh complaint with the Tribunal in which he impugns a decision of 13 November 2015 whereby the Director-General accepted the recommendation of the Advisory Board on Compensation Claims to reject his claim that he suffered a service-incurred disability.

The complainant asks the Tribunal to clarify whether Judgment 3235 requires the OPCW to pay further material damages, and to order such payments if required. He further requests the Tribunal to clarify other aspects of that judgment, in particular with respect to its *res judicata* effect and its application to the issue of his reinstatement. He also seeks moral damages and costs.

The OPCW asks the Tribunal to dismiss the complainant's application in its entirety and to deny the relief he seeks.

CONSIDERATIONS

1. On 4 July 2013, the Tribunal delivered in public Judgment 3235 dealing with a complaint filed by the complainant on 2 February 2011. In the proceedings which led to Judgment 3235, the complainant impugned a decision of the Director-General of the OPCW of 19 November 2010. By that decision, the Director-General confirmed an earlier decision of 20 October 2009 to terminate the complainant's employment with the OPCW. The significant events surrounding the complainant's termination are set out in the Tribunal's reasons for judgment.

2. In those reasons, the Tribunal explained that the Director-General had not indicated whether he had considered and acted on a recommendation of the Appeals Council in its report of 21 October 2010 to re-examine the grounds of the termination of the complainant's employment in light of information provided by Dr R. (who was the Senior Medical Officer of the Health and Safety Branch) in an e-mail of 15 October 2010. The Director-General's failure to provide adequate reasons on this important matter provided the legal foundation for the order setting aside the impugned decision. The orders actually made by the Tribunal were:

- “1. The decision of the Director-General of 19 November 2010 is set aside.
2. The matter is remitted to the OPCW for further consideration.
3. The OPCW shall pay the complainant moral damages in the amount of 8,000 euros.
4. It shall also pay him costs in the amount of 3,500 euros.
5. All other claims are dismissed.”

3. In consideration 22 of its reasons, the Tribunal observed:

“The Tribunal appreciates that this conclusion [that the Director-General had not provided adequate reasons and on that basis the impugned decision should be set aside] does not deal with many aspects of the complainant's arguments otherwise challenging the impugned decision to terminate nor addresses the relief sought. **It is open to the Director-General's discretion, when reviewing his reasons, to consider resolving the matter on a final and agreed basis** and also reconsider whether, in all the circumstances, it is appropriate to reject the opinion of the Senior Medical Officer of the OPCW's

Health and Safety Branch, who was also treating the complainant and, in so doing, prefer the opinion of a medical practitioner retained for a different purpose.” (Emphasis added.)

4. On 21 November 2013 the complainant filed what is seemingly both an application for interpretation as well as an application for execution of Judgment 3235.

5. In his present application the complainant asks the Tribunal to clarify whether Judgment 3235 requires the OPCW to pay further material damages, to order such payment if required and to clarify other aspects of its judgment and to award costs. In his brief the complainant advances three contentions.

6. The first contention is that the OPCW did not enter into *bona fide* settlement discussions in circumstances where the Tribunal had encouraged such discussions in consideration 22 of Judgment 3235 in the passage emphasised in consideration 3 above. Two points can be made about this contention.

7. One point is that the observations of the Tribunal about settlement discussions were no more than words of encouragement. They were not intended to create a legal obligation on the OPCW to negotiate or negotiate in a particular way. That said, the Tribunal’s observations were made in the expectation that they would be given earnest and serious consideration. It is now almost universally recognised that the settlement of legal disputes is, in many cases, a preferable outcome than the full ventilation of legal and factual issues in contested litigation to be resolved by the adjudication of a court of justice. Some cases, by their very nature, will take that path. However, many others are more appropriately resolved by discussion and agreement. The parties control the terms of an agreed outcome even if, as is almost always the case, it involves some reciprocated compromise. There appears to be a regrettable attitude amongst some parties before the Tribunal, both individual complainants and defendant organisations alike, not to entertain the possibility of settlement by agreement. It should be otherwise.

8. The second point is that, as far as the Tribunal can discern, the OPCW did engage in *bona fide* attempts to settle the claims of the complainant notwithstanding that it did not make an offer of settlement in response to the initial offer of settlement made by the complainant. It is conceivable that the OPCW may have perceived the complainant's offer as indicating that the prospects of settlement were remote. In such a situation the involvement of a third party as a mediator can sometimes, if not often, reduce the gap if not entirely eliminate it. The Tribunal rejects the complainant's contention on this issue.

9. The second contention is that, properly interpreted, the order setting aside the decision of the Director-General of 19 November 2010 had the effect of reinstating the complainant and reference is made to a decision of the United Nations Dispute Tribunal. While there may be some variability in this Tribunal's jurisprudence, an order which merely sets aside a decision dismissing an appeal against a decision terminating an official's employment does not, of itself and, in particular, without an order expressly reinstating the official, constitute an order which does reinstate the official. That is obviously so when, as in this case, the reason for setting aside the decision was that the decision was not adequately or properly motivated. Reinstatement was certainly not what the Tribunal intended in this case and it was also not the legal effect of the orders actually made.

10. The third contention concerns what is said to be "the *res judicata* effect of the judgment". It is to be recalled that the decision dismissing the complainant's internal appeal against the decision to terminate his employment was set aside. That was coupled with an order remitting the matter to the OPCW for further consideration. The clear import of these two orders, which could have been expressed in a variety of ways, was that, amongst other things, the Director-General had to make a fresh decision about whether to dismiss the internal appeal or allow it in whole or in part. It is true that an order was made that all other claims were dismissed and that, correctly, the Tribunal noted in its reasoning (in the passage set out in consideration 3, above) that much of the relief sought by the complainant in those proceedings, and the reasons for it,

had not been addressed in the Tribunal's considerations. However what the Tribunal intended was that when a fresh decision was made in relation to the internal appeal, and if that decision was again to dismiss the appeal, all other arguments raised by the complainant in those proceedings (which gave rise to Judgment 3235) and the relief sought in consequence of those arguments could be raised afresh in any future challenge to the new decision dismissing the internal appeal in the Tribunal. It was certainly not the Tribunal's intention to extinguish such enforceable rights as the complainant may have had in relation to his employment and its termination and the orders made did not have that legal effect.

11. As it turns out, a letter was provided to the complainant dated 1 October 2013 setting out, in detail, the justification for the decision to terminate his employment concluding with the observation that "the Director-General has decided that your failure to report to work upon exhaustion of your statutory sick leave entitlements [...] followed by your Special Leave with Full Pay remains a valid basis for your contract's termination". It is tolerably clear that at least implicitly this involved, again, the rejection of the internal appeal against the decision of 19 November 2010 which confirmed the decision of 20 October 2009 to terminate the complainant's employment.

12. In a sixth complaint filed with the Tribunal on 18 December 2013, the complainant impugns the decision in the letter dated 1 October 2013 communicating what, in substance, is a decision of the Director-General affirming the decision to terminate the complainant's employment. At a level of generality, that letter of 1 October 2013 has the appearance of explaining, as the decision of 19 November 2010 failed to do, the attitude and response of the Director-General to the information provided by Dr R. in an e-mail of 15 October 2010. Thus the decision of 1 October 2013 has the appearance of remedying the deficiency in the decision of 19 November 2010 that had resulted in the latter decision being set aside. The Tribunal uses this tentative or qualified language because the lawfulness of the 1 October 2013 decision is challenged in the complainant's sixth complaint and the Tribunal is

certainly not expressing, in this judgment, any concluded view about the contents and legality of the 1 October 2013 decision.

13. In its reply to the complainant's sixth complaint the OPCW seeks the joinder of all of the complainant's outstanding complaints, including the present application together with his sixth complaint. That request probably includes yet another complaint before the Tribunal filed by the complainant on 22 December 2015 (his seventh) challenging what is said by the complainant in his brief to be a decision of 13 November 2015 denying the complainant compensation for a service-incurred disability. The Tribunal notes that the complainant's second, third and fourth complaints have already been dealt with in Judgment 3442, delivered in public on 11 February 2015.

14. The pleadings in the complainant's seventh complaint were finalised when the OPCW filed its surrejoinder on 19 October 2016, after the 123rd Session of the Tribunal had commenced. Regrettably, it is not practicable for the Tribunal to address the factual and legal issues raised in the pleas in the complainant's seventh complaint in the 123rd Session. Moreover, while the legal issues raised in the complainant's sixth complaint appear to differ, with no overlap, from those raised in his seventh complaint, there appears to be much in common in the broad factual matrix underlying the two unresolved complaints. Indeed on future closer analysis there may be an overlap in relation to the legal issues. Accordingly it is desirable that those two complaints should be dealt with concurrently. Whether they should be formally joined is a matter the Tribunal can address in due course. In the result it is inappropriate to make an order joining the present application, to which this judgment relates, with the other outstanding proceedings concerning the complainant and the OPCW.

15. The complainant has partially succeeded in the arguments he advanced in the present application. Costs in the sum of 5,000 euros should be awarded.

DECISION

For the above reasons,

1. Properly interpreted, the orders made in Judgment 3235:
 - (i) do not preclude the complainant challenging the legality of the decision to terminate his employment and, if successful, being afforded relief by way of material and/or moral damages or otherwise;
 - (ii) did not reinstate the complainant.
2. The OPCW shall pay the complainant costs in the sum of 5,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ