

NINETY-FOURTH SESSION

(Application for execution)

Judgment No. 2178

The Administrative Tribunal,

Considering the application for execution of Judgment 2090 filed by Mr M. L. M. on 27 March 2002, the reply of the International Federation of Red Cross and Red Crescent Societies (hereinafter "the Federation") dated 6 May, the letter of 13 June by which counsel for the complainant informed the Registrar of the Tribunal that the complainant did not wish to enter a rejoinder but submitted a set of appendices to be added to the file, and the Federation's comments of 18 July 2002 on these additional appendices;

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. The relevant facts of the present case are set out in Judgment 2090. It may be recalled that the complainant joined the Federation in October 1998 under a five-year fixed-term appointment. On 18 August 2000 the Director of the Human Resources Department informed him that his post would be abolished on 30 September, that his contract would end on 30 November and that he would be paid an indemnity equal to two months' base salary in respect of the abolition of his post. On 29 November he had produced a medical certificate establishing that he had been unfit for work since 14 November 2000, which entitled him initially to the payment of two months' full salary, and subsequently to 80 per cent of his salary from the Federation's insurance system. In Judgment 2090, which was delivered on 30 January 2002, the Tribunal set aside the decision of 18 August 2000 and ordered the Federation to pay the complainant compensation equivalent to the salary, allowances and other benefits to which he would have been entitled had he remained in his post until the expiry of his contract on 18 October 2003. The Tribunal also stated that:

"The Federation may deduct from the above the sums it has paid pursuant to its decision of 18 August 2000 for the period after 30 November 2000, and the amount the complainant has received in loss of earnings from the Federation's insurance system, and any professional earnings he may have received."

Lastly, the Tribunal awarded the complainant 10,000 Swiss francs in moral damages and 10,000 francs in costs.

By a letter of 5 February 2002, the complainant requested the calculation of the compensation due to him pursuant to the above-mentioned judgment. He indicated that he had received no professional earnings since the expiry of his contract with the Federation. Since between 1 December 2000 and 31 January 2002 he had received 20 [*recte* 80] per cent of his basic salary through the insurance system, he asked the Federation to pay him the remaining 20 per cent of each salary for that fourteen-month period. He sought full payment of each salary over the period from 1 February 2002 to 18 October 2003, less two months' salary corresponding to the amount of the statutory indemnity received from the Federation. For the period from 1 December 2000 to 18 October 2003 he requested the payment of family allowances, education allowance, "travel allowances for himself and his family", the difference between his actual health insurance contributions and those which he would have paid had he remained in the employ of the Federation, the contributions payable by the Federation to the pension fund and compensation in respect of the fact that, having lost his diplomatic status, he no longer enjoyed certain tax exemptions, particularly with regard to income tax.

On 13 March 2002 the Federation provided the complainant with a draft calculation of compensation applying only to the period ending on 31 January 2002. It asserted that he had already received the salary to which he would have been entitled had he remained in his post. It considered itself under no obligation to pay the remaining 20 per cent of his salary since that payment was not provided for in the applicable texts. It did, however, propose to treat his unfitness for work since 14 November 2000 as a new case of incapacity and to pay the said 20 per cent until 13 January 2001, plus four days' full salary, which together amounted to 6,441.30 francs. It also offered to pay him 11,410 francs in family allowances, 8,016 francs representing the balance due to him in education allowance and 9,839.70 francs to compensate for the additional health insurance costs he had incurred. The Federation also indicated that it would pay the moral damages and legal costs awarded by the Tribunal in its Judgment 2090, as well as its share of the pension scheme contributions, provided that the complainant agreed to pay his. It emphasised that it was not responsible for the taxation of his income and that it was impossible to restore his diplomatic privileges since the Tribunal had not ordered his reinstatement. With regard to the period from 1 February 2002 to 18 October 2003, the Federation first wished to be informed of the complainant's state of health in order to determine whether he remained unfit for work and whether he was still receiving insurance payments.

The following day the complainant informed the Federation that he did not consider it necessary to answer these proposals and that he was preparing to bring the matter before the Tribunal. In a letter of 18 March the Federation indicated that, in the absence of any comment, it considered its calculations to be correct and that it would pay the corresponding amount, which was 35,707 francs. Regarding the period beginning on 1 February 2002, it regretted that it had received no information as to the complainant's fitness for work. It stated that it was willing to perform the necessary calculations on the basis of the information he might provide and to effect the resulting payments on a quarterly basis. The complainant replied on that same day, stating that the insurance company had stopped paying him in January 2002 and that his state of health was of no concern to the Federation. By a letter of 29 March, the Federation enquired as to the reasons for the cessation of the said payments. The complainant replied on 3 April 2002 that an exchange of correspondence seemed to him to be pointless and that he had appealed to the Tribunal.

B. The complainant argues that the Federation should pay him all the salary, allowances and other benefits to which he considers himself entitled until 18 October 2003, with interest at an annual rate of 10 per cent calculated from 30 January 2002, irrespective of his state of health. Thus, he asks the Tribunal to order payment of the remaining 20 per cent of his salary for the period from 1 December 2000 to 31 January 2002, and his full salary for the period from 1 February 2002 to 18 October 2003, which amounts to a total of 349,072 francs.

For the period from 1 December 2000 to 18 October 2003 he claims 28,183 francs in family allowances, 8,016 francs in education allowance, 2,000 francs in "travel allowances" and 113,775 francs representing the contributions which the Federation ought to have paid into the pension scheme. Regarding health insurance premiums, he evaluates his additional expenditure at 27,505 francs and requests the payment of that amount. He claims 43,225 francs in compensation for the fact that he has been liable to pay customs duties and value-added tax (VAT), and 318,731 francs in compensation for loss of income-tax exemption. He points out that the 35,707 francs paid to him by the Federation at the end of March 2002 should be deducted from all the above-mentioned amounts, and acknowledges receipt of the moral damages awarded by the Tribunal.

Since the Federation has, in his view, shown bad faith, the complainant also seeks compensation for moral injury. Lastly, he seeks an award of costs.

C. In its reply, the Federation considers that some of the complainant's claims, and particularly those concerning customs duties, VAT and income tax, go beyond the scope of Judgment 2090. The latter claim and his claim for "travel allowances" are new and hence also irreceivable. As far as the allowances are concerned, the complainant has provided no evidence.

The Federation states that it is willing to execute Judgment 2090 in full but that it will not pay compensation in excess of that which was awarded by the Tribunal. That, however, is precisely the kind of compensation that the complainant seeks. For the period running to the end of January 2002 he has received that to which he was entitled, namely 80 per cent of his salary. On this issue, the Federation points out that it has already made an additional payment of 6,441.30 francs. For the subsequent period, it has yet to receive the necessary documents and is therefore unable to calculate the compensation due. If the complainant is still unfit for work, the Federation should be entitled to deduct the amounts paid by the insurance company from the compensation awarded in Judgment 2090. Since the complainant has refused to disclose the reasons for the cessation of insurance payments, the Federation suspects that he has waived his right to such payments in order to claim his full salary from the

Federation instead. If he is now fit for work, the Federation should be entitled to deduct his professional earnings, if any. That is why it proposed to pay the amounts due on a quarterly basis.

The Federation also points out that it paid the complainant 55,707 francs before he even appealed to the Tribunal. As evidence of its good faith, it emphasises that it has not deducted from that amount the redundancy indemnity due in respect of the abolition of his post, although it was entitled to do so under Judgment 2090. Regarding family allowances, it considers that it is up to date with its payments, having paid his allowances for the period from February to April 2002. It states that the complainant is no longer entitled to any allowance for school fees.

The Federation takes the view that the contributions which it pays into the pension scheme are not included in the "benefits" to which Judgment 2090 refers. It considers that it is not required to pay the complainant the claimed 113,775 francs because, had he remained in his post until the expiry of his contract, that sum would have been paid not to him but to the pension scheme. Although the said judgment placed it under no obligation to compensate the complainant in respect of the increased cost of his health insurance contributions, the Federation nevertheless agreed to pay him 9,839.70 francs for the period ending on 31 January 2002. It also paid him for the period from February to April 2002. Before the complainant had indicated his intention to appeal to the Tribunal again, the Federation had stated that it would pay the difference in contributions on a quarterly basis until October 2003. Consequently, he has no grounds for demanding a lump-sum payment.

The Federation explains that tax exemptions are not a "benefit"; they result from a headquarters agreement with the Swiss government. His claims under this head are unfounded and the amount claimed in respect of customs duties and VAT (1,250 francs per month) is excessive. If all these claims were granted the complainant would benefit from unjust enrichment.

Lastly, the Federation points out that it has neither refused to execute Judgment 2090 nor disputed the compensation awarded to the complainant by the Tribunal. It merely enquired as to whether the complainant was still receiving payments from the insurance company and whether he was now fit for work. The complainant refused to provide that information. Consequently, his claim for moral damages must be rejected. The present application, which is premature, must be dismissed. The Federation asks the Tribunal to order the complainant to contribute to the costs it has incurred.

D. On 13 June 2002 the complainant submitted several appendices to the Tribunal. A letter of 4 June shows that he was paid by the insurance company for February 2002. Referring to Judgment 2090, he stated in a letter of 13 June that he considered himself entitled to the salary owed by the Federation, rather than the insurance payments. In order to avoid having to reimburse the insurance company in respect of payments to which he might not have been entitled, he had decided not to claim any further insurance payments with effect from the date of the said judgment. He also submitted a medical certificate dated 26 May 2002 evidencing his total incapacity for work since 14 November 2000 for an unspecified duration.

E. In its comments, the Federation submits that the complainant could have continued to receive payments from the insurance company after 1 February 2002 but that he chose not to in order to "make the Federation pay".

CONSIDERATIONS

1. In Judgment 2090, which was delivered on 30 January 2002, the Tribunal set aside a decision of the Secretary General of the International Federation of Red Cross and Red Crescent Societies terminating the complainant's employment and ordered the Federation to pay the complainant compensation representing the "salary, allowances and all benefits to which he would have been entitled had he stayed in the organisation until 18 October 2003", as well as 10,000 Swiss francs in moral damages and 10,000 francs in costs. The judgment stated that the Federation could deduct from that compensation the sums paid to the complainant after 30 November 2000 and "the amount the complainant has received in loss of earnings from the Federation's insurance system, and any professional earnings he may have received".

2. Following that judgment, an exchange of correspondence occurred between the Federation and the complainant. In particular, the complainant sent a letter to the Federation on 5 February 2002 showing the amounts to which he considered himself entitled. The complainant considered that the Federation was late in honouring its obligations

and less than two months after the delivery of Judgment 2090 he filed an application for execution with the Tribunal on 27 March 2002 seeking payment of the following:

- 45,716 francs, representing 20 per cent of his salary for the period from 1 December 2000 to 31 January 2002, to supplement the insurance payments due in respect of his medically-certified incapacity for work, which amounted to 80 per cent of his base salary;
- 303,356 francs representing his full salary for the period from 1 February 2002 to 18 October 2003;
- 28,183 francs in family allowances,
- 8,016 francs in education allowance;
- 2,000 francs in "travel allowances";
- 113,775 francs representing the contributions which the Federation ought to have paid into the pension fund;
- 27,505 francs representing the additional costs he incurred for health insurance premiums;
- 43,225 francs to compensate for the fact that he became liable to pay customs duties and VAT as a result of the loss of his former tax immunities; and
- 318,731 francs to compensate for the loss of his income tax exemption.

The complainant requests that all these amounts carry interest at an annual rate of 10 per cent with effect from 30 January 2002. He does, however, agree that the 35,707 francs already paid to him should be deducted from the total amount to which he considers himself entitled. He seeks compensation for the moral injury he claims to have suffered as a result of the Federation's failure to execute the Tribunal's judgment, and also claims costs.

3. The haste with which he came to the Tribunal is all the more regrettable for the fact that the discussions taking place between the parties could have enabled them, if not to reach an agreement, then at least to clarify certain aspects of the case which remain uncertain. These discussions were prematurely halted by a letter of 14 March 2002 in which the complainant's counsel indicated that she saw "no use in replying" to a letter of 13 March, which contained a number of proposals as well as requests for explanations which could have proved useful, particularly regarding the complainant's state of health.

4. The Federation raises the question of whether under these circumstances the application for execution is receivable. However, the Tribunal's case law shows a constant line of precedent on this issue: any serious difficulty concerning the execution of a judgment can validly be brought before the Tribunal by means of an application for execution. In the present case, it is to be regretted that the difficulties could not be overcome by the parties through discussion in good faith, but the Federation may not object to the receivability of the complainant's application. The relevance of his claims must therefore be examined.

5. First, the parties' submissions show that there is no disagreement as to the amount due in respect of education allowance, which is evaluated at 8,016 francs. The Federation states in its reply that it paid this amount before the complainant even filed his application for execution with the Tribunal. The Federation also states in its reply that there is likewise no disagreement as to the calculation of the amount due in family allowances, and the complainant does not dispute that statement. The only point on which the parties may yet differ concerns the timing of the payments, but the Federation proposes to pay them on a quarterly basis and this common sense approach does not appear to be challenged.

6. Secondly, with regard to the "travel allowances" that the complainant claims from the Federation, the latter rightly points out that the complainant, who had never made this request beforehand, has produced no receipt nor any evidence that he actually incurred travel expenses. This claim must therefore be rejected at the present time, although in the event that he and his family did return to the United Kingdom, the cost of repatriating them would have to be borne by the Federation.

7. Thirdly, regarding the issue of membership of a health insurance scheme, the Federation offered to reinstate the complainant and his family as members of its group health insurance scheme if that were technically possible, but

in any case it appears to have agreed to compensate the complainant in respect of the extra costs he incurred on his premiums up until 31 January 2002. The Federation's most recent submissions indicate that it has agreed to pay those additional costs until October 2003 on a quarterly basis, which seems reasonable.

8. Fourthly, the complainant seeks compensation in respect of the loss of the tax immunities he enjoyed by virtue of the agreement between the Swiss authorities and the Federation. The privileges and immunities conferred on staff of the Federation cannot be considered to be "benefits" owed to the complainant pursuant to Judgment 2090. Their sole purpose, which is clearly stated in the agreement signed on 29 November 1996 by the Federation and the Swiss Federal Council, is "to ensure, in all circumstances, the freedom of action of the International Federation and the complete independence of its employees". Since the complainant has not been reinstated in his post, he is no longer entitled to those immunities. Nor is he entitled to compensation for the loss thereof: the tax regime governing the exemptions he may claim is solely a matter for the competent authorities of the host state, and the Federation cannot be held liable for direct or indirect taxes owed by the complainant.

9. Fifth, in response to the complainant's claims concerning payment of an amount equivalent to the contributions which the Federation would have had to pay into the pension scheme, the Federation has expressly agreed to pay the contributions due until October 2003, but to the pension scheme and not to the complainant, and only on condition that the complainant pays his share of the contributions, which is logical. It is only if the Board of the pension scheme were to refuse to recognise the fictional reconstitution of his career resulting from the judgment that the complainant would be entitled to request the payment of the sums which the Federation was to have paid.

10. Lastly, the parties differ as to how to calculate the compensation owed to the complainant in respect of the "salary" to which he would have been entitled had he remained in his post until 18 October 2003, subject to the deduction of the "amount the complainant has received in loss of earnings from the Federation's insurance system, and any professional earnings he may have received". As a result of the contradictory statements made by the complainant, there is considerable uncertainty as to the date on which the insurance company stopped its payments to the complainant in respect of his medical incapacity. What is clear, however, is that had he remained in his post, as long as he continued to be paid the equivalent of 80 per cent of his salary in respect of his incapacity, under Article 860.3 of the Staff Regulations he would not have been entitled to receive the remaining 20 per cent from his employer, which he now claims. The Federation rightly considers that he cannot enjoy more rights than he would have done had he remained in his post. Indeed, the judgment is clear on this point and its execution cannot result in unjust enrichment of the complainant. The fact remains that the date on which the complainant ceased to be entitled to insurance payments for incapacity cannot be established with certainty on the basis of the evidence submitted. Likewise, the Tribunal obviously cannot determine what professional earnings, if any, the complainant will receive up to October 2003. The balance of the amounts which may be due can only be determined gradually, following periodic joint assessment of the complainant's situation by the parties.

11. There is no evidence of bad faith on the part of the Federation, which, on the contrary, appears to have tried to resolve the matter as quickly as possible and to pay the amounts not disputed by the complainant. The complainant's claim for moral damages, and likewise his various claims for interest payments, must therefore be rejected.

By way of a counterclaim, the Federation seeks an award of costs against the complainant. Taking into account all the circumstances of the case, the Tribunal has decided not to grant this request.

DECISION

For the above reasons,

1. The application is dismissed.
2. The Federation's counterclaim is also dismissed.

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

Updated by PFR. Approved by CC. Last update: 13 February 2003.