

The Administrative Tribunal,

Considering the application for execution of Judgment 2351 filed by Mr M.H. D. on 8 April 2005, the reply by the International Telecommunication Union (ITU) of 13 May and the letter of 8 June 2005 by which the complainant's counsel informed the Registrar of the Tribunal that the complainant did not wish to file a rejoinder;

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. In Judgment 2351, delivered on 14 July 2004, the Tribunal set aside the disciplinary sanction imposed on the complainant and the decision not to renew his contract. It further ordered the ITU to pay him compensation equivalent to the salary and allowances he would have received if his contract had been renewed on 1 November 2001, until such time as the ITU took a new decision concerning the renewal of his contract, as well as 3,000 Swiss francs in costs.

On 21 July 2004 the Secretary-General of the Union wrote to the complainant informing him that all the documents concerning the disciplinary sanction and the procedure leading up to it would be withdrawn from the Administration's files. Pursuant to Judgment 2351, he also informed him that the Union could no longer offer him a new appointment since "there [were] no longer [...] any requirements in the service concerned [...] to which a short-term contract would be suited". That being the case, he invited the complainant to send him, in addition to the details of his bank account for the payment of the sums owed by the ITU, the amount and evidence of any earnings received between 1 November 2001 and 21 July 2004 (the date of his letter) for the purpose of calculating the amount of compensation. In that regard, he referred "to the wording of the claim [...] filed with the Administrative Tribunal" (see paragraph 5 of the claims listed under B in Judgment 2351). On 5 August the complainant contested the deduction of what he had earned since leaving the ITU and requested full payment of the salary and allowances due. On 22 September the acting Chief of the Personnel and Social Protection Department replied that since the Tribunal had not seen fit to award moral damages, compensation would be restricted to material damages. However, such compensation, he added, should not constitute unjust enrichment. He also reminded the complainant that the method of calculation used was that advocated by him in his claims to the Tribunal. An exchange of correspondence followed, in which the Union maintained its position and explained how it had calculated the sums owed, whilst the complainant contested the deductions made in respect of earnings from other sources and of contributions to the Staff Health Insurance Fund and the United Nations Joint Staff Pension Fund.

On 27 December 2004 the complainant received the sum of 45,249 francs, corresponding to the 151,959 francs the ITU considered it owed him in remuneration from 1 November 2001 to 21 July 2004 (after applying three "mandatory [one-month] breaks" on the grounds that such a break in contract was the minimum required before a short-term contract, which could not exceed 12 months of uninterrupted service, was renewed), less 106,710 francs withheld for earnings received during that same period. On 24 March 2005 he received a further 21,028.70 francs in respect of paid leave which the organisation had omitted in its initial calculation. He had meanwhile been informed on 19 August 2004 that he would be paid the 3,000 francs he had been awarded for costs.

B. The complainant submits that the amounts he has received are merely down payments on what is owed to him and that there is nothing in Judgment 2351 to indicate that his earnings since leaving the ITU should be deducted from the compensation due. He also asserts that the Union was not entitled to deduct health insurance and pension fund contributions. In his view, such deductions would have been justified if he had received a benefit in return. That was not the case, however, since he was not readmitted either to the Staff Health Insurance Fund, which would have saved him the expense of the insurance premiums he incurred after his departure, or to the Pension Fund. With regard to the latter, he observes that those deductions are particularly unwarranted insofar as

any official leaving an organisation is entitled to recover all or part of his pension contributions. In other words, the ITU deducted from his reconstituted salary contributions it had not paid and which he cannot recover.

Assuming that, as he has argued in his reply to the ITU's application for interpretation of Judgment 2351 of 3 February 2005 (see Judgment 2481 also adopted this day), the said judgment is neither unclear nor ambiguous and is therefore final and enforceable, the complainant submits that the Union was late in executing the judgment since it did not do so within the 30-day time limit established by the Tribunal's case law. He therefore claims interest starting from the date of expiry of that time limit.

The complainant asks the Tribunal to find that the ITU has not properly executed Judgment 2351, to order it to comply immediately with the terms of that judgment by paying him full salary and allowances for the period concerned "without deductions of any kind" (including health insurance and pension fund contributions) and to pay him interest of 10 per cent per annum on sums outstanding from 16 August 2004, as well as costs for the present case.

C. In its reply the ITU argues that the wording of Judgment 2351 under 9 would seem to imply that the Tribunal intended to reconstitute fictitiously the complainant's career. Yet had the complainant's contract been renewed, he would have been paid a net basic salary, that is, subject to the deduction of health insurance and pension fund contributions. On the basis of that assumption of a fictitious reconstitution, it had agreed to pay the complainant for days of leave not taken during the period concerned. It points out that it has likewise received no services in return for the restituted remuneration and refers to the case law, in particular Judgments 507, 1110 and 1717, in support of its arguments.

It again relies on the case law in addressing the plea that the execution of Judgment 2351 was delayed; it recalls that an initial letter concerning execution was sent to the complainant seven days after the judgment was delivered and suggests that the delay in the payment of compensation occurred because of exchanges of correspondence between the parties, due to uncertainty as to the meaning and scope of the decision. It therefore could not be accused of either delay or bad faith in the performance of its obligations. It refers to its application for interpretation to answer the other matters raised by the complainant.

## CONSIDERATIONS

1. In Judgment 2351 delivered on 14 July 2004, the Tribunal decided as follows:

- "1. The disciplinary sanction and the decision not to renew the complainant's contract are set aside.
2. The Union shall pay the complainant compensation calculated as explained under 9 above.
3. It shall also pay him 3,000 Swiss francs in costs.
4. All other claims are dismissed."

Consideration 9 of that judgment reads as follows:

"The outcome is that the complainant is entitled to receive compensation equivalent to the salary and allowances he would have received if his contract had been renewed on 1 November 2001, until such time as the ITU takes a new decision concerning the renewal of his contract."

2. The complainant received notification of the judgment on 16 July 2004. On 21 July the Secretary-General of the ITU informed him, inter alia, that the Union was no longer able to offer him a new appointment and, in order to calculate the compensation he should be paid, asked him to indicate the amount of any earnings he had received between 1 November 2001 and 21 July 2004, and to provide appropriate evidence thereof.

In a letter of 5 August 2004 the complainant replied that, contrary to the method of calculation apparently preferred by the defendant, the Tribunal had decided that he was entitled to receive compensation equivalent to the full salary and allowances he would have received if his contract had been renewed on 1 November 2001, and that there was no question of the earnings received since his departure from the ITU being deducted from the said salary and allowances. He asked the Union to pay him the full compensation and costs without delay.

However, after an exchange of correspondence the parties were still unable to reach an agreement regarding the amount of compensation to be paid.

On 23 December 2004 the acting Chief of the Personnel and Social Protection Department wrote to the complainant informing him that the ITU had decided to pay him the sum of 45,249 Swiss francs, calculated as the difference between the sum of 151,959 francs, i.e. the net remuneration he would have received had he continued to work under short-term contracts from 1 November 2001 to 21 July 2004, and the sum of 106,710 francs, which in its understanding represented the income the complainant had earned during that period. The acting Chief of Personnel added that the ITU would file an application for interpretation with the Tribunal in order to determine the exact scope of Judgment 2351 under 9, and that it formally undertook to pay him the further sum of 106,710 francs should the complainant's interpretation be confirmed by the Tribunal. The Union would set aside a provision to that effect in accordance with its financial rules.

In a letter of 7 January 2005 the complainant acknowledged the ITU's decisions and informed it that he considered the sum of 45,249 francs as a mere down payment on the amounts he was still owed. He also asked for a detailed breakdown of the salaries and allowances the ITU used to arrive at the total of 151,959 francs. On 13 January 2005 the acting Chief of Personnel sent him the requested breakdown. The complainant acknowledged receipt on 25 January, but observed that it did not take account of salary increases or paid leave and that health insurance and pension fund contributions could not be deducted from his remuneration since they implied a benefit in return which he had not received and/or could not receive.

On 24 March the defendant paid him the sum of 21,028.70 francs which, according to its calculations, covered the paid leave which had not been included in the breakdown he had been sent. That sum was likewise viewed by the complainant as a down payment.

3. In his application for execution of 8 April 2005 the complainant asks the Tribunal to:

“1) Find that the [...] Union has not properly executed Judgment 2351 and order it to comply immediately with the terms of that judgment.

2) Find and declare that the compensation which the ITU must pay [him] pursuant to Judgment 2351 comprises all the salary and allowances he would have received if his contract with the ITU had been renewed on 1 November 2001, subject to no deductions whatever.

3) Find and declare that the compensation consisting of the salary and allowances owed to [him] by the ITU shall not be subject to the deduction of health insurance and pension fund contributions.

4) Find and declare that the compensation which the ITU was ordered to pay [him] in Judgment 2351 shall bear interest of 10 per cent [per annum] as from 16 August 2004.

5) Award [him] a fair sum in costs.”

4. With regard to the compensation the defendant must pay the complainant, the Tribunal, in Judgment 2481 concerning the ITU's application for interpretation, also adopted this day, has confirmed that it should amount to full compensation including all salary and allowances the complainant would have received if his contract had been renewed on 1 November 2001, without deducting his earnings subsequent to that date.

The defendant must therefore, as it undertook formally in its letter of 23 December 2004, settle the balance of the sums due.

5. The complainant argues that the health insurance and pension fund contributions should not be deducted from the compensation to which he is entitled. He submits that since the defendant did not readmit him to the health insurance fund, the sums deducted on that account from his salary brought him no benefit in return. He puts forward the same argument with regard to the deduction of pension fund contributions, which in his view are all the less justified since he is “entitled when leaving the organisation to recover all or at least part of the contributions paid in that respect”. The Union has deducted pension fund contributions from his salary even though he is no longer a member of the Fund and cannot be reimbursed if, as is the case, his contract has not been renewed.

In granting the complainant an overall compensation equivalent to the salary and allowances he would have received if his contract had been renewed on 1 November 2001, it was not the Tribunal's intention that contributions designed to entitle the complainant to benefits which were no longer available to him owing to the fact that his contract was not renewed should be deducted from the compensation. Consequently, the defendant may not deduct from the compensation owed to the complainant either the pension fund contributions or those which would have been paid in to the health insurance fund on behalf of the complainant.

6. The complainant asks the Tribunal to rule that the compensation the Union has been ordered to pay him shall bear interest at the rate of 10 per cent per annum as from 16 August 2004. He argues that, according to the Tribunal's case law, the defendant should have given effect to the judgment within 30 days of notification, which was obviously not the case. It is therefore right, in his view, that the amount of compensation it was to pay him should bear interest starting from the expiry of that 30-day time limit.

The defendant replies that the payment was delayed because exchanges of correspondence occurred between the two parties, owing to uncertainty as to the meaning and scope of the decision in the judgment of which execution has been requested.

Firm precedent has it that where a specific sum has been awarded, an organisation must indemnify the complainant "if it takes more than one month to pay after the judgment was notified, save that if [...] the Tribunal does not put a figure on the amount due, the need to work out the figure warrants allowing additional time" (see in particular Judgment 1338, under 11).

In the present case, the amount of the compensation was not set by the Tribunal, which merely indicated how it should be calculated. Given that there was a disagreement between the parties with regard to the meaning and scope of paragraph 2 of the decision, which led to an application for interpretation, the defendant cannot be suspected of any reluctance to execute the judgment, particularly since it had met without difficulty the other obligations flowing from that decision within a time which may be considered reasonable.

The Tribunal will therefore only award interest at 8 per cent per annum starting from the date of delivery of the present judgment.

7. The complainant is entitled to costs which the Tribunal sets at 3,000 francs.

## DECISION

For the above reasons,

1. The ITU shall pay the complainant the compensation provided for in Judgment 2351 equivalent to the salary and allowances he would have received if his contract had been renewed from 1 November 2001 to 21 July 2004, without deduction of his earnings during that period, or of health insurance or pension fund contributions.
2. The compensation due shall bear interest at the rate of 8 per cent per annum starting from the date on which the present judgment is delivered.
3. The Union shall pay the complainant 3,000 Swiss francs in costs.

In witness of this judgment, adopted on 4 November 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.