A. (No. 2)

v.

WMO

(Application for execution)

123rd Session **Judgment No. 3723**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3348 filed by Mr M.-K. A. on 20 April 2015 and corrected on 27 April, the reply of 3 July from the World Meteorological Organization (WMO), the complainant's rejoinder of 19 October and WMO's surrejoinder of 18 December 2015;

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

Having examined the written submissions;

CONSIDERATIONS

1. On 9 July 2014 the Tribunal delivered in public a judgment determining a complaint that had been filed on 8 November 2011. The complainant had impugned a decision of 16 August 2011 of the Secretary-General of WMO, maintaining a decision communicated to him on 14 January 2011, summarily dismissing him. For reasons given in that judgment (Judgment 3348), the Tribunal made the following orders:

> "1. The impugned decision of 16 August 2011 is set aside.
>
> 2. The Tribunal orders that the complainant be reinstated to the former position he held at the time of his dismissal.

3. The complainant shall be paid the salary and other emoluments that he would have been paid between the time of his dismissal and the time of his reinstatement, less any amounts he has, in that time, received by way of salary and emoluments from any other employment.
4. WMO shall pay the complainant 20,000 Swiss francs as moral damages.
5. WMO shall pay the complainant 7,000 Swiss francs in costs.
6. All other claims are dismissed."

2. On 20 April 2015 the complainant filed an application for execution of the judgment. In his brief, the complainant alleges that WMO has failed to comply with these orders in several respects. WMO contests this contention in its reply and argues, additionally, that the application is irreceivable because the judgment had been fully satisfied. This argument concerning receivability is unfounded and should be rejected. An application for execution of a judgment is, by definition, premised on the contention that the judgment in question has not been properly executed. Determining whether or not that contention is correct plainly involves an examination of the merits of the application. Hence the receivability of an application for execution cannot be challenged by the defendant organisation on that basis. The parties continue to join issue in their rejoinder and surrejoinder as to whether the above orders have been complied with though, in addition, WMO argues that the rejoinder should not be entertained as it was filed out of time and that the pleadings should be treated as closed after the reply, having regard to Article 9, paragraph 2, of the Tribunal's Rules. This latter argument should be rejected as the time for the filing of the rejoinder had been extended in accordance with Article 14 of the Rules.

3. The principal issues raised by the complainant may be conveniently summarised as follows. Firstly, the order of reinstatement was intended to have retroactive effect and, accordingly, the complainant should have resumed participation in the United Nations Joint Staff Pension Fund (UNJSPF) effective from the date of his dismissal in January 2011. Secondly, and a related point, the complainant should, for the same reason, have resumed membership of the health insurance scheme effective from the date of his dismissal. Thirdly, WMO should

have, but did not, reinstate him into his former post and, in particular, should have conferred on him the same network administration access rights as he had enjoyed before his dismissal but the Organization did not do so. Fourthly, WMO wrongly deducted, in purported reliance on order 3 set out above, unemployment benefits and "rental fees" received by the complainant. Fifthly, WMO wrongly failed to take into account taxes the complainant had paid and had, wrongly, offset gross salary earned from outside sources in purported reliance on order 3 set out above. Sixthly, WMO should have, but did not, pay interest on amounts due to the complainant under the judgment. Lastly, the complainant was entitled to moral and exemplary damages for the delay in fully executing Judgment 3348.

4. A convenient starting point in considering these issues is to note that the effective date of reinstatement, if ordered, is the end of the employment (see Judgments 1193, consideration 13, 1384, consideration 18, 1447, consideration 17, 1525, consideration 4, 3238, considerations 19 and 20). It is possible for the Tribunal to order reinstatement effective from the date of judgment (see Judgment 1238, considerations 4 and 5, confirmed by Judgment 1313). However, that did not occur in this case and the order was not limited to operate only from the date of judgment. The order operated retroactively and the complainant was entitled to be reinstated from the date on which his employment ended, namely 17 January 2011. The reference to "the time of his dismissal" and "the time of his reinstatement" in order 3 was not intended to suggest, and this was not its legal effect, that the reinstatement was not retroactive.

5. Thus there arises the issue of whether the complainant is entitled to benefits under both the UNJSPF and the health insurance scheme as if he had remained covered by both from the date of termination of his contract in January 2011 to the date of the reinstatement order. WMO points to the Tribunal's case law to support its position he was not entitled to those benefits. The Organization refers, in particular, to Judgment 2718 (as well as Judgments 3437 and 2621), concerning an application for interpretation of Judgment 2592,

where an order for material damages was made requiring the payment of an amount "equivalent to the amounts of salary and related emoluments" that the complainant would have received in a specified period after the unlawful termination. The import of that judgment is that this expression did not include amounts payable into a pension fund. However, in the present case, WMO's obligation in this regard flows from its obligation to reinstate the complainant retroactively. Thus, WMO's argument that it was not obliged to reinstate the complainant's benefits in relation to both the UNJSPF and the health insurance scheme operative from 17 January 2011 should be rejected. WMO is under such an obligation by operation of the order made by the Tribunal.

6. There are two matters of detail addressed in the pleas concerning the complainant's pension entitlements. The first relates to the complainant's retirement age. The complainant contends that under pension arrangements existing at the time of the termination of his contract, his statutory retirement age would have been 62 years having regard to when he first commenced employment with WMO, namely December 2006. In reply, WMO argues that having regard to the UNJSPF Rules and Regulations, the termination of the complainant's contract in January 2011 and reinstatement by operation of the Tribunal's orders in 2014 had two consequences. The first was that, for the purposes of Article 21(b), the complainant separated from the Organization in January 2011 and did not resume contributory service within 36 months after separation. Accordingly, and this is the second consequence, by operation of the definition of "Normal retirement age" in Article 1(n), the complainant's normal retirement age was 65 because the complainant recommenced participation after 1 January 2014. However this argument fails to recognise the full legal effect to the Tribunal's order. That is because, as a matter of law, the complainant should not be treated as having separated from WMO in January 2011. Thus there is no question of when he recommenced participation in the pension scheme and, in particular, there can be no suggestion he recommenced participation after 1 January 2014. The complainant's normal retirement age is 62.

7. The second issue of detail about the complainant's pension entitlements concerns an amount of interest, in the sum of 1,028.56 United States dollars, payable by the complainant to restore his prior contributory service. The amount is interest on the money paid by the UNJSPF to the complainant by way of withdrawal settlement in the sum of 31,358.63 United States dollars. The complainant seeks the payment of this interest by WMO because the "interest charge was incurred as a direct result of his irregular separation set aside by Judgment 3348". However, this argument fails to recognise that the complainant has had the benefit of the amount paid by the withdrawal settlement, regardless of how it has been used and, at least notionally, the complainant could have been earning interest on that sum himself. The complainant is not entitled to payment of this amount pursuant to the orders made by the Tribunal in 2014.

8. As to the issue of whether the complainant was reinstated into the position he formerly occupied, the Tribunal is satisfied that the steps taken by WMO to place the complainant in the position he formerly occupied constituted compliance with the order. Ordinarily an employee who has the benefit of an order of reinstatement must be placed in the position she or he held at the time of the unlawful termination. This would mean that the employee would continue, once reinstated, to perform the duties that were being performed at the time of termination. Indeed, in the present case, the Tribunal's order expressly required WMO to reinstate the complainant to his former position. But if, as in this case, a material period had passed between the termination and the order of reinstatement, organisational changes may have had the result that the full range of duties is no longer required. That is not a licence to underutilise any employee, as the complainant alleges in this case in relation to himself, who has the benefit of a reinstatement order. Underutilisation can have a stultifying and negative effect on an employee. However the Tribunal is not satisfied that the complainant has been underutilised in any material or sustained way.

9. The complainant also alleges he has been the subject of a disguised disciplinary sanction. However the Tribunal is not persuaded in relation, specifically, to the exercise of administration access rights that is the focus of this allegation that the conduct of WMO is inappropriate. It is to be recalled that the Tribunal made findings (see considerations 14 and 21 of Judgment 3348) that exercising such rights was not of the essence of the work the complainant had been employed to perform and might continue to perform. Accordingly, the reinstatement order did not oblige WMO to put the complainant in a position of being able to exercise those rights in the future. However the Tribunal notes that the WMO says in its reply: "the Administration is in the process of reviewing the Complainant's administrative access privileges." Desirably, that review will result in a mutually acceptable outcome.

10. The next issue concerns the offsetting by WMO of unemployment benefits and "rental fees" for technical equipment against the salary and other emoluments it was required to pay to the complainant pursuant to Judgment 3348 and whether the Organization was entitled to make these adjustments. As to unemployment benefits, the short answer is that the order set out above in consideration 1 enabled "salaries and emoluments from any other employment" to be deducted from amounts otherwise payable to the complainant. These unemployment benefits are not of that character. Indeed, unlike earnings from other employment, these benefits may well have to be reimbursed by the complainant to the national authorities as a consequence of his retroactive reinstatement. Thus the deduction referable to these benefits, in the sum of approximately 80,000 Swiss francs, was not authorised by the order made and is unjustified.

11. The issue concerning "rental fees" arises in the following way. Including during the period following his dismissal, the complainant provided at a weekly social event (indirectly related to a faith group of which the complainant is a member) his computer, lighting and other technical equipment to facilitate the conduct of the social event. The aggregate amount he was paid in the relevant period was approximately 18,000 Swiss francs paid as a monthly amount. The

complainant seeks to characterise these payments as "rental fees" for the use of his equipment and this is coupled with an argument that his personal exertion or work to, presumably, set up and operate this equipment was performed as a volunteer. Thus, the complainant argues, these payments were not "salary […] from any other employment" which could be offset for the purposes of order 3 set out above. This argument should be rejected. When the payments were made they were described as "salary" and a certificate furnished by the complainant from the organizers of the social events concerned characterises the payment as "salary".

12. The next issue is whether WMO could use the gross income earned by the complainant (that is, before taxes were paid) when offsetting salary earned from other employment. Again the short answer is provided by the terms of the order. WMO could deduct from amounts payable to the complainant under order 3 above, amounts received by the complainant as "salary and emoluments from any other employment". That is plainly a reference to gross salary. The fact that the complainant was obliged to pay tax on that salary is an incidence of the national taxation law. While there are arguments in support of and against this approach, as a matter of equity and fairness, the particular order in the present case was clear.

13. The complainant contends he is entitled to moral and exemplary damages for WMO's delay in implementing Judgment 3348. The primary focus of this submission is the amount of time and the steps taken by WMO between when the Judgment was delivered in public in July 2014 and the time at which monies were paid to the complainant under the Judgment on 31 January 2015. Steps were taken by WMO during this period to ascertain and verify what amounts had been paid to the complainant "by way of salary and the emoluments from any other employment" for the purposes of order 3. The steps taken by WMO during that period do not appear, in the Tribunal's opinion, to have been unreasonable. While they may have involved a high level of caution and scepticism, such an approach was not entirely unjustified having regard to the position being adopted by the complainant in

relation to the "rental fees" discussed in consideration 11 above. The complainant's position in this regard was, in the circumstances, extremely tenuous and would have justified overall caution on the part of WMO.

14. However, it was unnecessary for WMO to have delayed payment of the amounts due under orders 4 (20,000 Swiss francs as moral damages) and 5 (7,000 Swiss francs in costs) until 31 January 2015. The amounts were specified in the orders, there were no conditions subsequent operating in relation to the obligation to pay (such as a right to offset calculable amounts) and no action was required by WMO beyond actually making the payments. Nevertheless, while there was some mention of payment of these amounts by the lawyer representing the complainant in correspondence in August 2014, no unambiguously express demand was made for the immediate payment of these amounts in the many exchanges between the complainant's lawyer and the legal representatives of WMO. Thus it was not unreasonable for WMO to have proceeded on the basis that the complainant was content for the payment of these amounts to await resolution of the entire amount payable under all of the orders of the Tribunal. In these circumstances, no moral or exemplary damages are warranted. That is not to say the complainant is not entitled to some additional amount because orders 4 and 5 were not complied with immediately. He is, in the form of interest.

15. As just discussed, the complainant is entitled to interest calculated at 5 per cent per annum on the amount of 27,000 Swiss francs for the period 9 July 2014 to 31 January 2015. He is also entitled to interest on the sum of 80,305 Swiss francs (an amount identified by the complainant in his brief and not contested by WMO) deducted from the amount paid under order 3 in the mistaken belief that unemployment benefits were offsetting salary which could be deducted. Interest on this sum should be paid at the rate of 5 per cent per annum from the time the deduction was made on 31 January 2015 until the date of payment pursuant to the orders the Tribunal makes in these execution proceedings.

16. The complainant is entitled to costs because these execution proceedings were necessary to achieve compliance with the Tribunal's orders. Those costs are assessed in the sum of 7,000 Swiss francs.

DECISION

For the above reasons,

1. WMO shall pay the complainant interest calculated at 5 per cent per annum on the amount of 27,000 Swiss francs for the period 9 July 2014 to 31 January 2015, within 14 days of the date of public delivery of this judgment.
2. WMO shall pay the complainant 80,305 Swiss francs plus interest calculated at 5 per cent per annum from 31 January 2015 until the date of payment pursuant to this order, within 14 days of the date of public delivery of this judgment.
3. WMO shall pay the complainant 7,000 Swiss francs as costs, within 14 days of the date of public delivery of this judgment.
4. All other claims are dismissed.

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

Delivered in public in Geneva on 30 November 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ