

G. (No. 3)

v.

CTBTO PrepCom
(Application for execution)

124th Session

Judgment No. 3825

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3565 filed by Mr H. C. G. on 8 June 2016, the reply of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter “the Commission”) of 22 September, the complainant’s rejoinder of 21 November 2016 and the Commission’s surrejoinder of 18 January 2017;

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

Having examined the written submissions;

CONSIDERATIONS

1. This application for execution of Judgment 3565, delivered in public on 3 February 2016, has its origins in Judgment 3162, delivered on 6 February 2013. In Judgment 3162, in addition to material damages and other relief, the Tribunal ordered the Commission to “remove and destroy any adverse material from the complainant’s personnel file”. Subsequently, the complainant applied for execution of that judgment. The calculation of the material damages was the main issue in that application. In addition to ruling on the correct calculation of the material damages, in Judgment 3565, at point 2 of the decision, the Tribunal

ordered the Commission “under the signature of the Executive Secretary, [to] confirm in writing to the complainant that all adverse materials in the complainant’s personnel file have been removed and destroyed and the date on which this was done”. The present application for execution concerns this latter order. The complainant requests that the Commission be ordered to execute it within seven days of the delivery of the Tribunal’s judgment in the present case or, otherwise, that it be ordered to pay a penalty. He also requests 10,000 euros in moral damages, costs, and any other relief deemed appropriate by the Tribunal.

2. In a 2 March 2016 e-mail to the Commission’s Chief of Legal Services (Legal Adviser), the complainant’s counsel acknowledged receipt of the funds representing the additional material damages and costs awarded under points 1 and 3 of the decision in Judgment 3565. Counsel also noted that he had not received the letter from the Executive Secretary, as ordered in point 2 of the decision. Counsel asked that the letter be sent to him at his office address. On 3 March, the Legal Adviser sent the following letter to the complainant’s counsel:

“RE: ILOAT Judgment No. 3565

On behalf of the Commission, I have reviewed the Complainant’s personnel file on 4 February 2016 and the file did not contain any adverse material. There is no documentary evidence as to which documents were destroyed and when. Furthermore, staff members involved with this matter at the time, are no longer with the Commission and are not available to advise which documents were destroyed and when. The personnel file is available for inspection by [the complainant].”

3. In a 9 March letter to the Executive Secretary, the complainant’s counsel claimed that the Commission had not complied with point 2 of the Tribunal’s decision, as the letter from the Legal Adviser was not “under” his signature. The Legal Adviser wrote to the complainant’s counsel on the same day in which she extended an invitation to him and his client to attend at the Commission’s offices to review the latter’s personnel file. She added that this would give the complainant an opportunity to confirm the current contents of the file. A series of e-mails between the complainant’s counsel and the Legal Adviser ensued. In summary, the complainant’s counsel took the position that a review

of the personnel file was unnecessary and it was incumbent upon the Commission to execute the judgment by sending the letter under the Executive Secretary's signature. The Legal Adviser reiterated that there was no record of documents that were destroyed or when they were destroyed, that the staff members who could provide this information were no longer with the Commission, and that the complainant together with his counsel could review the personnel file at her office. Additionally, she indicated that the Executive Secretary was not in a position to certify whether a document was adverse to the complainant's interests or that such a confirmation would bring the matter to a close. The Legal Adviser proposed that the complainant "could review his file and confirm in writing there are no materials in the file that he considers adverse" which "would assist [the Commission] in meeting the terms of the order and enable [it] to settle this issue".

Ultimately, the complainant's counsel proposed that the Executive Secretary send to the complainant a letter under his signature with the following wording:

"After consulting with the Chief, Legal Services, I confirm that there are no adverse materials in your personnel file. While the Commission has no record of the dates when the materials were removed and destroyed, I further confirm that any such documents were removed immediately after the issuance of Judgment No. 3162 delivered on 6 February 2013."

The asserted fact in the letter that the documents were removed immediately after the issuance of Judgment 3162 was agreed to by the Commission in its pleadings. In response to the proposal by the complainant's counsel, the Legal Adviser reiterated the earlier invitation that would assist the Commission in bringing the matter to an end in accordance with the Tribunal's order. The complainant then filed the present application for execution.

4. The complainant claims that the Commission failed to comply with the Tribunal's order in two respects. First, the 3 March 2016 letter was not signed by the Executive Secretary and, second, the letter was not addressed to him. The complainant submits that Judgment 3565 is a final judgment without appeal and, therefore, as stated in Judgment 3566, consideration 6, it was immediately operative and must be executed as

ruled. He maintains that the Commission's refusal to fully execute the judgment without valid reasons constitutes contempt of court and has caused him significant stress for which he seeks moral damages in the amount of 10,000 euros and costs.

5. At the outset, a consideration of the Commission's receivability argument is necessary. The Commission submits that because the execution of the order was impossible, as will be discussed below, the complainant has no grounds on which to seek additional damages. Thus, there is no actionable matter before the Tribunal and the Tribunal should consider the "complaint irreceivable". This argument is rejected.

6. The Commission acknowledges that the Tribunal's judgments are final and must be executed as ruled. However, relying on the exception to this requirement articulated in Judgment 2889, consideration 7, the Commission takes the position that execution was impossible due to facts of which the Tribunal had no knowledge when it adopted the decision in Judgment 3565. That is, the Tribunal was not aware that the Commission did not have a record of the documents destroyed or the date on which they were destroyed.

7. Before dealing with the Commission's argument, some preliminary observations are required. In stating that the Tribunal was unaware that it did not have "a record of documents destroyed" which, in part, made the execution of the order impossible, the Commission has misstated the terms of the order. There is nothing in the order requiring the Commission to provide the complainant with a list or an accounting of the documents removed and destroyed. The order only required the Executive Secretary's written confirmation to the complainant that "all adverse materials in the complainant's personnel file ha[d] been removed and destroyed" and the date this was done. The terms of the order are clear. The only term in the order that made its execution impossible was that the Commission did not know the date the adverse materials were removed and destroyed. An additional comment is required. The Commission, in its reply in this proceeding, added that execution of the order was also impossible because it could not identify

with “absolute certainty” whether a document in the personnel file was adverse or not from the complainant’s perspective. The Legal Adviser’s confirmation in the 3 March letter that there were no adverse materials in the personnel file tends to compromise the contention that this was one of the facts that made execution of the decision impossible.

8. The Commission submits that in its 3 March letter it materially and substantively complied in full with the Tribunal’s decision. In effect, the Commission is taking the view that if the execution of a decision is impossible for the reason provided in the exception, then material and substantive compliance is sufficient. This submission is rejected for two reasons. First, it fails to have regard to the purpose of the exception and the Tribunal’s competence to address the situation where execution of its order is impossible because of the existence of facts of which the Tribunal was unaware. Pursuant to Article VI of the Tribunal’s Statute, the Tribunal is competent to review its decisions. Such review, however, may only take place in exceptional circumstances. One of the exceptional circumstances articulated in the case law is where there has been a failure to take into account particular facts that would have led to a different result. In relation to the execution of a judgment, this has been further refined to limit review to those cases where the Tribunal was unaware of the fact or facts that make execution of the decision impossible. If the execution of an order is impossible for this reason, it is incumbent on the party whose duty it is to execute the order to bring an application for review to resolve the matter.

Second, to permit material and substantive compliance would bring into play irrelevant considerations in relation to the impossibility of executing a Tribunal’s decision. For example, in the present application, the Commission contends that the stance it took in relation to the complainant’s review of his file recognises the intent of the Tribunal’s order, meets the complainant’s need to ensure that no adverse materials remain in the file, and was essential to bring the matter to an end. It is noted that in the context of the execution of the decision these concerns had no bearing on the Commission’s ability to execute the decision.

9. The Commission also submits that contrary to the complainant's assertion, the Executive Secretary's personal signature on the 3 March letter was unnecessary, given that it was signed by the Legal Advisor acting pursuant to the Executive Secretary's delegated authority. The Commission points out that the Legal Adviser is the Executive Secretary's representative before the Tribunal with the authority to sign documents on his behalf in the context of litigation and to take any ancillary actions for the execution of an order. The Commission also contends that because the Executive Secretary's signature was not a condition set by the Tribunal in Judgment 3162 it can be dispensed with by the Commission at this stage.

10. As the Tribunal specifically ordered that the written confirmation regarding the removal and destruction of materials was to be signed by the Executive Secretary personally, the signing of the confirmation could not lawfully be delegated to another person. The Commission's submission that the Executive Secretary's signature could be dispensed with overlooks the clear language of the order that it was obliged to execute.

11. As noted above, the complainant claims that the Commission failed to comply with the Tribunal's order by not addressing the 3 March letter to him. Having regard to the language of the order that simply required confirmation "in writing to the complainant" and that on 2 March the complainant's counsel, the complainant's lawful representative, specifically requested that the confirmation be sent to him, this claim is rejected.

12. The complainant also alleges that the Commission's statement that the staff members involved in the matter were no longer in the employ of the Commission was false. The complainant claims that many of the staff involved in the circumstances leading to the termination of his employment were still employed at the Commission. This claim is without merit. The point made in the 3 March letter was that the staff members directly involved in the removal and destruction of adverse materials were no longer available. There is no evidence that any of the three individuals the complainant identified or any other

individuals still with the Commission had any involvement with the removal and destruction of materials.

13. The Commission's breach of its obligation to execute the order – which continues notwithstanding this judgment – entitles the complainant to an award of moral damages in the amount of 2,000 euros and costs in the amount of 5,000 euros.

DECISION

For the above reasons,

1. The Commission shall, within 30 days of the public delivery of this judgment, comply with point 2 of the decision made in Judgment 3565, save for the requirement to identify the date on which all adverse materials in the complainant's personnel file were removed and destroyed.
2. The Commission shall pay the complainant moral damages in the amount of 2,000 euros.
3. It shall pay the complainant costs in the amount of 5,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 11 May 2017, 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 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ