

NINETY-SEVENTH SESSION

(Application by OPCW for review)

Judgment No. 2328

The Administrative Tribunal,

Considering the application filed by the Organisation for the Prohibition of Chemical Weapons (OPCW) on 8 December 2003 for review of Judgment 2232 and corrected on 17 December 2003, Mr J. M. B.'s reply of 24 February 2004, the OPCW's rejoinder of 23 April, and Mr B.'s surrejoinder of 4 May 2004;

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

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 2232 the Tribunal set aside the dismissal of Mr B. (hereinafter the complainant) by the defendant Organisation and ordered the latter to pay damages. The relevant parts of the Tribunal's order read as follows:

“2. The OPCW shall pay the complainant material damages calculated as per consideration 17 of the present judgment.

3. The Organisation shall also pay him 50,000 euros in moral damages.”

2. Paragraph 17 of the considerations supporting this decision reads as follows:

“17. Consequently, the impugned decision must be set aside and the complainant's further pleas need not be examined by the Tribunal. The complainant, who does not seek reinstatement, is entitled to compensation in respect of the injury caused by his unlawful dismissal. The Tribunal considers that his material injury may be properly assessed by determining the amount he would have received in salaries and emoluments (excluding representation allowance) between the date of his dismissal and 12 May 2005, subject to the deduction of any sums paid to him in connection with the cessation of his functions. As regards compensation for the moral injury undoubtedly suffered by the complainant, the Tribunal shall award him 50,000 euros in moral damages, which he shall be free to dispose of as he sees fit.”

3. The Organisation alleges that since the delivery of that judgment it has learned that the complainant has obtained other remunerative employment and has in fact been reintegrated into the diplomatic service of his country as Brazilian ambassador to the Court of St James in London. It also alleges that the Tribunal inadvertently erred in failing to include in the judgment a provision requiring the complainant to account for his subsequent earnings. It says that to allow the complainant to keep both the damages awarded and his salary from his new post would amount to unjust enrichment.

4. The complainant, for his part, alleges that there is no error or omission in Judgment 2232. He says that his diplomatic appointment was public knowledge and was specifically notified to the Organisation when the Brazilian Government had informed the defendant on 5 March 2003 of his appointment, in the context of arrangements to be made for the transfer of his personal property to London. He pleads that the conditions for a claim of unjust enrichment have not been met. The complainant claims 30,000 euros in moral damages arising out of the present proceedings before the Tribunal.

5. The Tribunal finds that both parties have displayed a most regrettable lack of candour and good faith in their dealings both with each other and, more importantly, with the Tribunal itself. This is a very grave matter. In

the case of the complainant, he most certainly knew of his appointment long before the pleadings were closed. Being represented by experienced counsel, he also must have known that that fact would be relevant to the Tribunal's determination of his damages.

6. For its part, the Organisation, by its pleadings in the present case, has not been frank and open with the Tribunal in asserting that it did not know of the complainant's appointment until after Judgment 2232 was rendered; the documentary evidence demonstrates this to be a false and misleading representation knowingly or recklessly made in the course of pleadings, a matter which the Tribunal views very seriously.

7. It is clear from reading consideration 17 and the relevant parts of the order of Judgment 2232 quoted above, that the Tribunal awarded two sorts of damages, moral and material. In that context, the award of material damages was clearly intended to be purely compensatory and not punitive. Only the complainant's actual out of pocket loss was to be paid because that is the only alleged damage which can properly be qualified as "material". The Tribunal took the precaution of specifying that all sums of which it had knowledge and payment of which would not be purely compensatory for the complainant must be deducted. Injury to the complainant's reputation and feelings, as well as any award in relation to sanctioning the Organisation for its misconduct are compendiously included in the very substantial award of moral damages.

8. While the Tribunal did not include in that judgment a provision requiring the complainant to account for his subsequent earnings, because it did not appear necessary to do so and neither party saw fit to disabuse the Tribunal of the normal and natural impression that the complainant was now unemployed even though both knew that this was not the case, such a provision is implicit in the oft repeated use of the word "material" and the separate award of moral damages. Material damages are never intended to be other than compensation for loss actually suffered and cannot be treated as a lucky windfall or pot of gold at the end of the rainbow.

9. Thus, while no amendment to Judgment 2232 is strictly speaking necessary, but since both parties appear to be incapable of acting in good faith and like adults, the Tribunal will order that, in executing Judgment 2232, the material damages are to be considered as being awarded on a monthly basis, payable on the last day of each month, from the date thereof to 12 May 2005; the complainant shall account, each month, for his net earnings from other sources for the previous month which amount shall be deducted from the next payment.

10. The complainant's claim for additional moral damages, apart from being irreceivable, is without merit and must be dismissed. Each party must bear its own costs.

DECISION

For the above reasons,

1. In executing Judgment 2232, the material damages are to be considered as being awarded on a monthly basis as specified under 9, above.
2. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.