United Nations AT/DEC/1255

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1255

Case No. 1184 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis, Vice-President; Ms. Brigitte Stern;

Whereas, on 10 June 2004, a staff member of the United Nations filed an application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision and interpretation of Judgement No. 1132 rendered by the Tribunal on 25 July 2003;

Whereas the Application contained pleas which read as follows:

"8. The Applicant requests that the Tribunal order that:

a) in paragraph XXIII … of [J]udgement [No.] 1132, the term 'salaire' … does not mean net base salary but rather salary or gross salary. Consequently, the staff assessment amount of $20,051.28, which was deducted from the Applicant's compensation, should be paid to him;

b) the term 'avec toutes les indemnités' includes 'all allowances' and the Applicant's compensation should therefore include education grant for the nine-month period;

c) to make good the shortfall in pension that the Applicant will not receive in the amount of $2,141 for his estimated life expectancy after retirement of 20 years amounting to $42,820 (at current value). If the Tribunal considers this to be a benefit not covered under 'avec toutes les indemnités', an alternative payment to the Applicant of the employers' pension contribution for 9 months has to be considered.

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d) for the delay in the execution of the Judgement and the bad faith shown by the Respondent, the Applicant should be compensated with some form of interest payment."

Whereas, at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2004 and periodically thereafter until 31 January 2005;

Whereas the Respondent filed his Answer on 31 January 2005;

Whereas, on 24 February 2005, the Applicant filed Written Observations amending his pleas as follows:

"27. … The Applicant requests that the Tribunal order the Respondent to pay a penalty for undue delay in implementing Judgement [No.] 1132 and in this respect order the Respondent to pay the Applicant the amount of [$] 1,000 … per month from the date of the Judgement until such time that the Judgement is fully implemented.

28. The Applicant requests the Tribunal to order that his records be amended to show that his break in service should be counted as continuous service for mobility and hardship allowance purposes."

Whereas the facts in the case were set forth in Judgement No. 1132.

Whereas the Applicant's principal contentions are:

1. Judgement No. 1132 has not been fully implemented.

2. The Respondent erred in deducting the staff assessment from the Applicant's award.

3. The Applicant was entitled to receive education grant.

4. The Respondent failed to factor into his calculations the long-term effect on the Applicant's future pension, as well as the pension contributions he would have paid, had the Applicant been in continued employment.

5. The Applicant has not been notified of the steps taken, if any, with respect to removing adverse material from his official status file.

6. The Applicant is entitled to compensatory interest for the Respondent's bad faith and delay in implementing Judgement No. 1132.

Whereas the Respondent's principal contentions are:

1. The Applicant's entitlement to compensation under the Judgement did not include the amount deducted by the Respondent for staff assessment.

2. The Applicant was not entitled to receive the post adjustment as part of the compensation under the Judgement; such payment was made in error and is subject to recovery.

3. The Applicant's claim for speculative, future pension benefits is not receivable.

4. The Applicant has never demonstrated an entitlement to receive an education grant beyond the payment that he received.

5. The adverse material was removed from the Applicant's official status file in March 2001. The Applicant was advised accordingly on 26 January 2005.

6. The Applicant's claim for additional compensation in the form of interest is not receivable.

The Tribunal, having deliberated from 28 October to 23 November 2005, now pronounces the following judgement:

I. The Applicant has submitted to the Tribunal a request for interpretation of Judgement No. 1132 (2003), of the United Nations Administrative Tribunal.

II. The Tribunal therefore intends to focus on the issue of interpreting the order of its Judgement concerning the scope of the compensation awarded to the Applicant. It is useful to recall here the terms of the order of the above-mentioned Judgement:

"XXIII. For the above reasons, the Tribunal:

1. Declares that the termination of the Applicant must be regarded as null and void, having been decided by an authority that was acting *ultra vires* and in a particularly arbitrary manner;

2. Notes that reinstatement of the Applicant would be meaningless in view of the circumstances;

3. Orders payment to the Applicant of the termination indemnity payments to which he is entitled under the relevant rules;

4. Orders the Administration to pay the Applicant compensation for his termination in the amount of nine months' salary with all allowances at the rate in effect on the date of the judgement;

5. Orders payment to the Applicant of compensation in the amount of $5,000 for all the irregularities noted in the treatment of his case in this Judgement;

6. Orders the removal from the Applicant's personnel file of any adverse material contained therein, including the anonymous undated note, and orders the Administration to send the Applicant written confirmation that it has actually done so, with the precise list of the documents concerned, within six months;

7. Rejects all other pleas."

III. The Applicant considers that the Administration misinterpreted several of the provisions of the Judgement rendered in his favour. Specifically, the Applicant contests the interpretation given by the Administration to subparagraph 4 of the order, which relates to the payment to the Applicant of nine months' *salary with all allowances* (neuf mois de *salaire avec toutes les indemnités*). He considers that the Administration misinterpreted the scope of that award, first, by deducting staff assessment, whereas the compensation awarded by the Tribunal was not subject to staff assessment; second, by not including in the compensation paid the loss of income that would result from the reduction of his pension because contributions to the pension fund were not paid in for the nine months that he was not employed; and, third, by not including in the compensation the education grant that he was receiving on behalf of his children prior to his termination. On this question of the scope of compensation, although the Administration did include the post adjustment in the amount paid to the Applicant, the Respondent maintains in his pleadings that the Applicant was not entitled to receive the post adjustment as part of the compensation awarded to him by the Judgement, and the Administration is therefore seeking recovery of that amount.

In addition to his requests regarding the interpretation of subparagraph 4, the Applicant adds another concerning subparagraph 6 of the order, stating that in his view "the Respondent has failed to comply with paragraph XXIII[, subparagraph] 6 of the Judgement, in that the Applicant has not been notified in writing, or in any other form, that all adverse material has been removed from his personnel file". The Tribunal also notes that the Applicant is asking the Tribunal to pay him some form of interest to compensate him for the "bad faith" shown by the Administration and the delay in the execution of the Judgement. The Tribunal points out that most of these issues were addressed and resolved in Judgement No. 1225 (2005). In order to clarify the situation, the Tribunal will begin by citing and applying the same

reasoning it applied in [that] case and will then proceed to consider the issue of the education grant.

IV. The Tribunal notes, in the first place, that, although its Statute makes no reference to its power of interpretation, it has always held itself to be competent to interpret one of its own judgements, should either party find such judgement unclear. It may be recalled that the International Court of Justice, in its advisory opinion of 13 July 1954, recognized that the Tribunal performed functions of a judicial character. The power to interpret should be considered inherent in its judicial function, as the Tribunal recognized in the *Crawford* case, noting that "the competence of national and international courts to interpret their own judgements is generally recognized" (Judgement No. 61 (1955), para. I). The Tribunal recalled this inherent power of interpretation more recently in its Judgement No. 1164, *Al-Ansari at al.* (2004), para. III:

> "... in accordance with both the advisory opinion of the International Court of Justice of 13 July 1954 and its own jurisprudence, the Tribunal will consider applications for interpretation of judgement, where there is dispute as to the meaning or scope of the judgement".

V. The Tribunal notes that, although the Applicant presents his Application as a request for interpretation, in it he invokes the "failure to comply with the Tribunal's judgement", which would be more in keeping with a request for implementation. Having carefully examined the content of the Applicant's various pleas, the Tribunal concludes that the main issues raised do in fact relate to diverging interpretations of Judgement No. 1132. Since the only plea that relates to implementation is no longer relevant, as will be explained in paragraph X, it is appropriate to treat the entire case as a matter of interpretation.

VI. The Tribunal will therefore examine this request for interpretation and analyse the differences in interpretation between the Applicant and the Administration. First of all, with regard to the question of staff assessment, the Tribunal refers to paragraph XV of its Judgement [No. 1225]:

> "With respect to the deduction of staff assessment, the Applicant challenges the Administration's decision, contending that the Tribunal's unqualified use of the term 'salary' instead of 'net salary' indicates that its intended meaning was 'gross salary'. Obviously, however, one could also, with as much — or as little! — conviction, reverse this inference and say that the Tribunal's unqualified use of the term 'salary' instead of 'gross salary' indicates that its intended meaning was 'net salary'! It is abundantly clear that since the Tribunal intended to give the Applicant what he would have received if he had

been employed for an additional two years, it could not have been referring to gross salary because this amount is never received by any staff member, as is clear from regulations 3.1 and 3.3 of the Staff Regulations:

> ‘Article III ...
>
> *Regulation 3.1*
>
> Salaries of staff members shall be fixed by the Secretary-General in accordance with the provisions of annex I to the present Regulations.
>
> ...
>
> *Regulation 3.3*
>
> (a) An assessment at the rates and under the conditions specified below shall be applied to the salaries and such other emoluments of staff members as are computed on the basis of salary, excluding post adjustments ...’.

The Administration therefore acted correctly in paying the Applicant his net salary; i.e., gross salary minus staff assessment.”

Since the same reasoning applies here to the nine months that the Applicant was not employed, the Applicant’s claim that the staff assessment should be added to the compensation payable to him is unfounded.

VII. Secondly, the Tribunal will consider the issue of the Applicant’s shortfall in pension. Here again, the Tribunal’s reasoning in its Judgement [No. 1225] can be applied to respond to the Applicant’s claims. Paragraph XVI sets forth the Tribunal’s position on that point:

> “With respect to the Organization’s contributions to benefit schemes in respect of the Applicant, the Tribunal cannot accept the Applicant’s contention that ‘[t]here is no question that such contributions are part of the staff member’s allowances and that they must not be deducted from the calculations’. The Tribunal does not see how these amounts can be called allowances, since they are never paid to United Nations staff members. On this point, the Applicant refers to the aforementioned translation, in which the French expression ‘deux ans de salaires avec toutes les indemnités’ was rendered as ‘net base salary, allowances and other entitlements’, which could indeed leave room for ambiguity. Even if the English version can be interpreted to allow the salary to be inflated through the inclusion of contributions paid into health insurance and pension schemes (an issue on which the Tribunal will give no opinion), the Tribunal indicated at the beginning of the present judgement that in no case can an applicant justifiably take advantage of an approximation or error in a translation. The simple fact that the word ‘entitlements’ was added in the translation does not mean that the ‘allowances’ should be supplemented with other amounts representing the equivalent of potential or future material benefits such as access to health care or to a retirement pension. While the sums in question are indeed paid out by the Administration, they are contributions to special funds and are not defined as part of the allowances received by international civil servants. This is clearly apparent from the pay

> statements issued to staff members, which include three headings: 'Earnings', 'Deductions' and 'Organization's Contribution'. The items 'Medical Insurance Subsidy' and 'Organization's Pension Contribution' come under this last heading."

Inasmuch as the purpose of the compensation awarded to the Applicant was to enable him to receive the sums he would have received if he had been employed during that nine-month period, he has no claim to the staff assessment amounts, for they are not paid to staff members in any case and cannot be considered allowances. The Tribunal is therefore satisfied with the Administration's interpretation on that point. Moreover, since the Tribunal did not order the reinstatement of the Applicant with retroactive effect, the request that those nine months should not be considered a break in service cannot be considered a request for interpretation giving rise to compensation. The Tribunal therefore finds that the Administration properly implemented the Judgement in that respect in calculating the amount of compensation.

VIII. On a further point, as the Tribunal stated in [Judgement No. 1225], post adjustment is part of a staff member's remuneration; it was therefore included in the compensation awarded by the Tribunal. Paragraphs XI and XII of that Judgement explain the matter very clearly:

> "XI. The salary received by United Nations staff is made up of two main elements: the net base salary and the post adjustment. The Tribunal's use of the term 'salary' was intended to refer to both of these two elements. The International Civil Service Commission has indicated that:
>
> > 'Post adjustment is an amount paid in addition to net base salary, which is designed to ensure that no matter where United Nations common system staff work, their *net remuneration* has a purchasing power equivalent to that at the base of the system, New York' (emphasis added by the Tribunal).
>
> The Tribunal cannot accept the interpretation which the Administration applies to this text in its answer — '[a]ccordingly, post adjustment constitutes neither salary nor an allowance, but rather is an amount paid in addition to salary to equalize standards of living among staff members' — and which it uses as a pretext for claiming that the post adjustment should not have been included in the calculation of the compensation payable to the Applicant and that this alleged overpayment is subject to recovery. While it is true that the post adjustment, unlike gross salary, is not subject to the deduction of staff assessment, it is also clear that the post adjustment, though not a component of base salary, is nonetheless an element of remuneration that enables the staff members receiving it to maintain a certain standard of living.

> XII. .... There are thus no grounds for granting the Administration's counterclaim for the recovery of part of this amount."

The Tribunal therefore concludes that the Administration does not have the right to recover the amount in question.

IX. Lastly, the Tribunal must consider the Respondent's refusal to pay the Applicant education grant. The issue was not addressed per se in [Judgement No. 1225], but the solution is implicit in the reasoning set forth in that case. The Tribunal is surprised by the Administration's position. By refusing to acknowledge the claim on the grounds that the Applicant has not provided any evidence of payments made for his children's education, even though in principle the education grant has never been called into question, the Administration clearly misinterpreted the Judgement that was handed down. As the Tribunal indicated in [Judgement No. 1225], the term "all allowances" was meant to include all the allowances to which the Applicant might be entitled by reason of family or professional circumstances. It is clear to the Tribunal that the education grant accorded to the Applicant for his children falls within the definition of that term. The purpose of the compensation is to award the Applicant the amount of money that he would have received if he had been employed during the nine months in question, and it is obvious that education grant is part of that amount.

X. With regard to the Applicant's request to have any adverse material removed from his file, the Tribunal notes that the request is no longer relevant, since it is clear that the Administration has already complied with that obligation, as evidenced by its letter dated 26 January 2005:

> "A fax dated 29 March 2001 confirming the removal of the said documents was sent ... in order to inform you as well as the Appeals Board on the action taken by the ICTR Administration on the subject ..."

Attached to the letter is a list of the six documents removed from the Applicant's file. The Tribunal is therefore satisfied with the action that the Administration has taken on this matter.

XI. The Applicant also considers that he is entitled to interest in view of the Administration's delay in the execution of the Judgement and its "bad faith". The Tribunal does not find that the Administration's errors in interpretation can be characterized as "bad faith" sufficient to justify the awarding of interest. By communicating to the Applicant the list of documents removed from his file the

Administration has, on the contrary, shown its willingness to cooperate with the Tribunal. Interest is by no means justified in this case.

XII. For the above reasons, the Tribunal:

1. Finds that, except in the matter of the education grant, the Administration has correctly interpreted paragraph 4 of the order in Judgement No. 1132 and has, consequently, properly calculated the amount of compensation payable to the Applicant;

2. Orders the Administration to pay the amounts corresponding to education grant in compliance with paragraph 4 of the order in Judgement No. 1132;

3. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Spyridon **Flogaitis**
Vice-President

Brigitte **Stern**
Member

New York, 23 November 2005

Maritza **Struyvenberg**
Executive Secretary