

106th Session

Judgment No. 2776

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 2629 filed by the Organisation for the Prohibition of Chemical Weapons (OPCW) on 21 August 2007, the reply of Mr R.H. D. dated 19 December 2007, the OPCW's rejoinder of 4 February 2008 and Mr D.'s surrejoinder of 4 April 2008;

Considering Article II, paragraph 5, of the Statute of the Tribunal;
Having examined the written submissions;

CONSIDERATIONS

1. The OPCW applies for revision of Judgment 2629, delivered on 11 July 2007, by which the Tribunal ordered, amongst other things, to pay the complainant, the respondent in the present case, the sum of 1,500 euros as compensation for the capital loss sustained by him as a member of the OPCW Provident Fund. The compensation was awarded on the basis that the total contributions to the Fund were 201,449.61 euros less some small amount for administrative charges. That amount was calculated by reference to a statement from the Fund showing net contributions of 196,820.79 euros as at 30 June 2004, the further payment of 2,314.41 euros as shown by the respondent's

payslip for July 2004 and a presumption that the same amount had been paid at the end of August. In fact, no payment was made for that month. So much is now clear from the respondent's payslip for August 2004, which payslip was annexed to his complaint in the earlier proceedings.

2. The mistake made in Judgment 2629 was a mistake as to a material fact that affected the outcome of the proceedings. In this last regard, it is sufficient to note that the Tribunal would have awarded a significantly smaller amount of compensation had the error not occurred. The Tribunal's case law allows for the review of a judgment on grounds that include an omission to take account of particular facts and a material error involving no exercise of judgement, the latter being distinguishable from misappraisal of fact, which does not warrant review (see Judgments 442, 555, 649, 658 and 1252). Although the OPCW has established a proper ground for review, there remains the question whether the Tribunal should proceed to do so.

3. It was said in Judgment 570 that an error of the kind that permits review "constitutes a basis for the exercise of the power to review" but "does not necessarily mean that the jurisdiction will be exercised". The Tribunal went on to say that "there must be found some exceptional circumstance, such as accident or inadvertence, strong enough to justify the displacement of the principle of finality". It also pointed out in that judgment that an applicant for review should not only particularise the fact that was overlooked and demonstrate that a different conclusion would have been reached if the fact had been taken into account, but also "identify the passages in the dossier which show that the Organisation was relying upon the fact".

4. In its rejoinder the OPCW correctly identifies how the error occurred in Judgment 2629, it being said that the issue of the payment into the Provident Fund in August 2004 "had not been the subject of the pleadings between the parties" and that "the Tribunal probably assumed that there had been an omission in the information made available to it". Of more significance is the reason why the issue was

not dealt with in the pleadings. As appears from Judgment 2629, the respondent sought to establish that he had suffered a capital loss by comparing the contributions paid to the Fund until mid-2002 with the value of his interest in it at that time. The OPCW, on the other hand, successfully argued that a capital loss could only be demonstrated “at the point of separation”. However, it did not seek to quantify the loss but, instead, contented itself with the argument that the complainant had not discharged the onus of proving that he had sustained a loss.

5. Although the pleadings in the case leading to Judgment 2629 did not deal with the question whether a payment was made to the Provident Fund in August 2004, the OPCW suggested in its surrejoinder, in a paragraph dealing with a different issue, that a payment had been made. Thus in paragraph 7 of that document, it was said:

“the complainant ceased [to make] contributions to these accounts after 7 September 2004, which confirms that he was no longer a participant. This is demonstrated easily by a cursory glance at [his] salary statements prior to 7 September 2004, which clearly indicate that contributions to his Provident Fund administrative accounts were made each month [...]. In contrast, his salary statements for the four months between September and December [...] indicate clearly that deductions were not made after 7 September [...], for the simple reason that he had ceased to be a participant in the Provident Fund as of that date.”

6. Given that the OPCW did not rely on the fact that a payment had not been made to the Provident Fund in August 2004, and given also that it positively suggested in its pleadings that a payment had been made, this is not an appropriate case for the Tribunal to exercise its exceptional power to review a judgment. The application will therefore be dismissed. No order will be made for the payment of the costs incurred by the respondent in relation to this application.

DECISION

For the above reasons,
The application is dismissed.

In witness of this judgment, adopted on 30 October 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Mary G. Gaudron
Giuseppe Barbagallo
Catherine Comtet