

117th Session

Judgment No. 3311

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms T. S. W. against the International Organization for Migration (IOM) on 25 January 2012, IOM's reply of 14 May, the complainant's rejoinder of 21 June and IOM's surrejoinder of 27 September 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a staff member of IOM who has served at its office in Canberra (Australia) since April 2004. This complaint stems from IOM's decision to cease paying the IOM child allowance which the complainant had received since January 2007, on the grounds that she was also receiving a Family Tax Benefit paid by the Australian Government, the amount of which rendered her ineligible for the IOM child allowance.

In an e-mail of 3 July 2009 addressed to the Human Resources Department (HRD), the complainant enquired whether IOM staff members were entitled to receive the IOM child allowance if they were also receiving a child allowance from an external source. That same day HRD replied that staff members would receive “the difference between the [United Nations] Dependent Child Allowance and the Australian Government Family Allowance” and referred the complainant to the relevant provisions of the Staff Regulations and Rules.

On 21 March 2011 the Regional Resource Management Officer sent an e-mail to all staff of the Canberra office informing them that those who were eligible for IOM family allowances but who were also receiving government benefits would receive from IOM only the difference between their government benefits and the IOM family allowances, and that staff applying for IOM family allowances were required to provide not only their spouse’s tax return, but also a statement from the Australian authorities indicating whether they were receiving government benefits and, if so, the amount of these benefits. The complainant responded to this message, stating that she had been receiving the IOM child allowance for four years already and that this “revised application/interpretation” of the eligibility criteria would dramatically affect her family’s income. She suggested that her salary ought to be adjusted to make up for the loss of income she would suffer.

On 2 June 2011 the complainant filed an “Action Prior to the Lodging of an Appeal”, in accordance with paragraph 4(iv) of Annex D to the Staff Rules, challenging the decision announced on 21 March. She contested the Administration’s interpretation of the relevant provisions and emphasised that she had always kept IOM informed of the fact that she was receiving government benefits. On 21 July she submitted her appeal to the Joint Administrative Review Board (JARB). In its report dated 3 November 2011 the JARB observed that the relevant provisions of the Staff Regulations and Rules were “ambiguously written” and that the information provided to staff at IOM Canberra since 2004 regarding family allowances had been

inconsistent, which might have led to misunderstandings as to their entitlements. It therefore recommended that the “double payment” of the IOM family allowance to the complainant should be discontinued, but that she should not be required to reimburse any amounts paid to her previously.

By a letter of 22 November 2011 the Director General informed the complainant that he accepted the JARB’s recommendation that she should cease to receive the IOM family allowance, not with effect from March 2011, as suggested by the JARB, but with effect from December 2011. He added that, although he did not share the JARB’s opinion as to the supposed ambiguity of the Staff Regulations and Rules, he accepted its recommendation not to seek reimbursement of any amounts that she had received previously. That is the impugned decision.

B. Referring to an e-mail exchange annexed to her complaint, the complainant asserts that the staff were informed by the Administration in August 2006 that they were eligible to receive IOM family allowances irrespective of whether they were receiving allowances from external sources. She contends that the Staff Regulations and Rules, on which IOM relied in withdrawing her entitlement to family allowances, were not provided to her until November 2009. In her view, the provisions governing family allowances are ambiguous and erroneous and cannot be relied on to deny the rights she acquired as a result of IOM’s long-standing practice of paying her family allowances.

The complainant also argues that the impugned decision is unlawful in that it does not comply with Australian contract law. She asks the Tribunal to reinstate the entitlement of Australian staff members engaged prior to March 2011 to family allowances, irrespective of their entitlement to allowances from external sources. Alternatively, she claims damages in an amount equal to the termination indemnity payable to a staff member whose contract is terminated without notice.

C. In its reply IOM submits that, in light of the Tribunal's case law, the complaint is irreceivable because the complainant's internal appeal was time-barred. It points out that although she was notified of the decision not to pay IOM family allowances concurrently with government benefits on 21 March 2011, she did not initiate her appeal against that decision within the 60-day time limit stipulated in paragraph 4(iv) of Annex D to the Staff Rules, because her "Action Prior to the lodging of an Appeal" was filed only on 2 June.

On the merits, IOM contends that the complainant had no acquired right to receive IOM family allowances concurrently with the government benefits, which is clearly excluded by the Staff Regulations and Rules. It points out that the e-mail exchange of 2006 on which the complainant relies has been quoted out of context, and that there is evidence to suggest that she was well aware that the double payment of the IOM family allowances and the government benefits was inconsistent with the applicable provisions. It considers that the decision to end the payment of the family allowances did not infringe the complainant's rights, and it emphasises that it not only abstained from recovering the overpaid amounts but also allowed her to continue receiving family allowances for several months after the decision of 21 March 2011 which put an end to the "erroneous practice" that existed at IOM Canberra.

D. In her rejoinder the complainant asserts that her complaint is receivable, as she took all reasonable steps to challenge the decision of 21 March 2011 without delay, and she was neither provided with nor directed to the Statutes of the JARB before 2 June. She presses her pleas on the merits.

E. In its surrejoinder IOM maintains its position in full.

CONSIDERATIONS

1. The complainant is an employee of the IOM. She resides in Australia and is an Australian national. She seeks to impugn a decision

of the Director General of IOM concerning her entitlement to a child allowance under the IOM Staff Regulations and Rules (in the face of receiving an Australian Government Family Tax Benefit) and concerning whether she should be required to repay (she was not) child allowance payments received before the impugned decision.

The impugned decision was in a letter from the Director General dated 22 November 2011. The letter was, in part, a response to a report dated 3 November 2011 submitted by the JARB to the Director General. It should be noted, at this point, that in its report, under the heading “On the receivability of the appeal” the JARB indicated that it had decided to “preliminarily receive the case” and this conditional or qualified decision was said to be “pending clarification and confirmation of queries raised by the JARB to the Administration”. The Tribunal is not aware whether any final decision was made by the JARB on the question of receivability.

IOM contends in these proceedings that the complaint to the Tribunal is irreceivable as the complainant has not exhausted internal means of redress. That is because, so the IOM argues, the complainant did not comply with time limits concerning internal appeals and, in particular, did not comply with a time limit to request a review of the impugned decision before filing an appeal to the JARB. As this is a threshold issue, it should be addressed at the outset.

2. The issue of receivability arises this way. Chapter 11 of the Staff Regulations and Annex D of the Staff Rules that applied to the complainant’s employment at IOM contained provisions concerning appeals to the JARB. Such appeals involved a four-step process embodied in Article 4 of Annex D. The first was that there had to be an administrative action, decision or omission infringing the rights (derived from a number of specified sources) of a staff member. Article 4(i) of Annex D required the staff member to submit a request for review of the decision before an appeal was lodged. In Annex D this was described as “action prior”. This was the second step and had to be taken within 60 days after the staff member received notification of the contested administrative action or decision or became aware of

the omission (Article 4(iv)). The Head of Administration was obliged, as the third step, to respond to the request within 30 days of receipt (Article 4(v)). The fourth step was found in Article 5(i). It involved the complainant filing an appeal to the JARB against the decision made in accordance with Article 4(v) (or if the Head of Administration failed to make a decision in relation to the request, within 30 days of the expiry of the 30-day time limit in Article 4(v)).

3. It is not in issue that the complainant received notice of the original decision of 21 March 2011 (that the IOM child allowance would not be paid, or would not be paid in full, if a staff member received an Australian Family Tax Benefit) on that day. Thus the complainant had 60 days in which to make a request for review under Article 4(i). At this time the complainant was on maternity leave but she returned to work on 4 April 2011. In May 2011 there were e-mail exchanges between the complainant and, amongst others, the Regional Resource Management Officer in which the complainant complained about the decision. However it was not until 2 June 2011 that the request for review was made under Article 4(i). The 60-day time limit for lodging such a request expired on 20 May 2011. The complainant does not argue that any of the e-mail exchanges in May 2011 constituted a request of the type contemplated by Article 4 and her argument about receivability proceeds on the same factual premise as the argument of IOM, namely that the request for review contemplated by Article 4(i) was not made until 2 June 2011. Rather the complainant argues that she took reasonable steps to contest and request a review of the decision and that the administration delayed in providing her with sufficient information to enable her to follow the appropriate formal steps within the prescribed time frame. This argument is considered shortly.

4. The underpinning of the argument of IOM about receivability is Article VII(1) of the Tribunal's Statute, which requires a complainant to have exhausted internal means of appeal. Many decisions of the Tribunal make clear the need for compliance with

this requirement. In Judgment 3222, delivered on 4 July 2013, the Tribunal said:

“9. Article VII(1) [...] serves several related purposes. One is to ensure that grievances are, before they are considered by the Tribunal, considered in internal appeals. It is commonplace for Staff Regulations to provide detailed procedures for the prosecution of internal appeals. Those procedures ordinarily serve a multiplicity of purposes. One is to provide a fair hearing process both for the benefit of a complainant and also the benefit of the organisation to resolve the dispute. Another is to ensure that the subject matter of the grievance and internal appeal is identified with some particularity. If the subject matter of the internal appeal is an administrative decision, the appellant would be required to identify the decision which would ordinarily include by whom it was made, when it was made and the content or effect of the decision. Yet another purpose is to ensure that the issues raised in the internal appeal are properly identified, relevant evidence concerning the issues presented and the issues and evidence appropriately addressed by the parties and properly considered by the internal appeal body. Yet another is to ensure that, in appropriate cases, the ultimate decision-maker will have the considered views of the internal appeal body that will have been informed by the coherent presentation of evidence and argument.

10. Another purpose of Article VII(1) of the Statute is to ensure that the Tribunal does not become, *de facto*, a trial court of staff grievances and to ensure it continues as a final appellate tribunal. The Tribunal is ill-equipped to act as a trial court and its workload could, potentially, become intolerable or unmanageable if its role was not confined in this way. From the perspective of the parties, Article VII(1) should ordinarily operate to protect the parties against the cost and administrative demands of litigating issues, for the first time, before the Tribunal.”

5. Time limits for internal appeal procedures and the time limits in the Tribunal’s Statute (see Article VII(2)) serve the important purposes of ensuring that disputes are dealt with in a timely way and that the rights of parties are known to be settled at a particular point of time. If strict adherence to time limits (which are generally quite generous) were not insisted upon by the Tribunal, the efficacy of the whole system of administrative and judicial review of decisions potentially adversely affecting the staff of international organisations would be put at risk. It is for this reason, and not for reasons of undue technicality or bare formalism, that in various ways, decisions of the Tribunal demand strict adherence to time limits.

6. In Judgment 2722, consideration 3, the Tribunal stated the general principle (and referred to several precedents to the same effect) that a complaint filed out of time should not be entertained. The Tribunal observed, in effect, that flexibility about time limits should not intrude into the Tribunal's decision-making even if it might be thought to be equitable or fair in a particular case to allow a measure of flexibility. To do otherwise, the Tribunal observed, would "impair the necessary stability of the parties' legal relations". This general principle applies in relation to internal appeals even if the internal appeal body considers the appeal on its merits notwithstanding that time limits have not been complied with by the complainant. As early as Judgment 775 (decided in 1986), the Tribunal decided that if an internal appeal was time-barred and the internal appeals body was wrong to hear it, the Tribunal would not entertain a complaint challenging the decision taken on a recommendation by that body.

This approach has been applied more recently in a number of decisions: they include Judgments 2297, consideration 13; 2543, consideration 5; 2675, consideration 6; and 2966, consideration 12. Time limits in relation to steps anterior to the actual filing of the appeal to the internal appeal body (but steps related to the appeal such as preliminary protests or "action prior") are subject to this approach (see Judgment 2297, consideration 12). There are a number of qualifications in the application of this general approach. One is that if the question of receivability was not raised by the organisation in the internal appeal then it cannot be raised in the Tribunal (see Judgment 3160). Another is if the defendant organisation has misled the complainant or concealed some paper from the complainant and thus deprived the complainant of the possibility of exercising his or her right of appeal, in breach of the principle of good faith (see, for example, Judgment 2722, consideration 3).

In the present case, IOM did raise the issue about the appeal being time-barred in its submissions to the JARB. As noted earlier, the complainant has argued that she was not informed of her rights in a timely way and was not provided with a copy of the applicable rules by an IOM legal officer until 2 June 2011. However the provision to

the complainant of the applicable rules had not been preceded by a clear request to the legal officer for them that was not responded to promptly. Rather the legal officer provided the Rules after the complainant said in an e-mail of 13 May 2011 that she was “unsure on the correct process to obtain the information and reasons and challenge an administrative decision”, having earlier approached the legal officer (in an e-mail of 14 April 2011 which was resent on 12 May 2011) about the interpretation and application of the “family allowances for local Australian staff”. The complainant contended the delay of 20 days (between 13 May and 2 June 2011) “suggest[ed] a more calculated intention to deliberately frustrate the [appeal] process in the interests of IOM”. This contention should be rejected. The e-mail explanation given by the legal officer on 2 June 2011 for the delay, which the Tribunal accepts, was that she only worked 50 per cent, her section was experiencing staff shortages and her children had been sick. The circumstances of this case do not fall within one of the qualifications referred to in the preceding paragraph.

7. In the result, the complaint is irreceivable for the reasons advanced by IOM and will not be considered on its merits.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Giuseppe Barbagallo, 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 28 April 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS
DRAŽEN PETROVIĆ