

106th Session

Judgment No. 2783

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J. Y. against the International Atomic Energy Agency (IAEA) on 12 July 2007 and corrected on 2 August, the Agency's reply of 20 November 2007, the complainant's rejoinder of 1 February 2008 and the Agency's surrejoinder of 9 May 2008;

Considering the applications to intervene filed by:

A., R.

A., O.

A., M.

A., K.M.

A., F.

A. V., Y.

B., C.

B., E.

B., R.

B., A.

B., J.C.

B., M.T.M.

B., A.

B.-K., V.

B., M.

B., P.

B., V.

C., F.X.

C.-Z., J.A.

C., C.

C., L.

C., A.

C., M.T.

C., G.S.

D., M.

D., N.

D.-S., D.

D., J.

D. C., M.

D., D.

D., H.	L., J.
D. M., M.d.J.	M., T.
D., D.	M., A.W.
D., H.	M., A.S.
D.-H., N.	N., B.
D., L.M.	N., P.
E., D.	N., D.H.
E., A.	O., N.C.
F., M.A.	O., L.
F., M.	O., A.
F., J.	P., D.
G. d. Z., M.C.	P., V.
G., Z.	P., E.
G., G.	P., H.
H., E.	P., A.
H., H.	R., N.
H., W.	R., R.
H., G.	S., H.
J., V.	S., H.
J., M.J.	S., K.R.
K., A.	S., S.K.
K., V.	S., N.
K., D.	S., O.
K., S.	S., I.
K., V.K.	S., A.
K., B.K.	T., J.
K., R.	T., A.
K., A.	T., C.
K., J.	U., B.
K., I.	V., J.M.
K., M.	W., S.M.
K., R.	Y., S.
K., S.	Z., N.
L., V.	Z., W.

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

Having examined the written submissions and decided not to order hearings, 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, a British national born in 1961, joined the IAEA in 1982 and is currently employed in the Mail Processing Unit at grade G-6.

The Vienna International Centre (VIC), in Austria, houses several Vienna-based international organisations, including the United Nations Office at Vienna (UNOV) and the headquarters of the IAEA, the United Nations Industrial Development Organization (UNIDO), and the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO).

According to the Parking Rules of the Vienna International Centre Garage Operation (hereinafter “the Parking Rules”), the parking facilities available at the Centre are managed by the VIC Garage Administration, a self-supporting, non-profit-making service that has no legal personality of its own but is placed under the authority of the Director-General of UNOV. The Parking Rules of 22 October 1982 established the Joint Advisory Group on Garage Operations (hereinafter “the Joint Advisory Group”), a joint body in which the staff and the Administration of the organisations located at the VIC are represented. Pursuant to its terms of reference, the Joint Advisory Group shall provide advice to the Garage Administration on all matters of policy or principle, including the most efficient operation of the VIC garage on a self-supporting and non-profit basis. In particular, it shall review the standard and cost of services provided to the staff and give guidance to the Garage Administration on “fee structure”, and the Garage Administration shall make every effort to accommodate its advice. Paragraph 12 of the Parking Rules, as issued on 28 March 2003, provides that parking fees are fixed by agreement between UNOV, UNIDO and the IAEA in such

a manner as to ensure that the garage is operated on a self-supporting and non-profit basis. It also provides that as the fees are based on expenditure for the maintenance and operation of the garage, they are subject to revision.

The Consultative Committee on Common Services (hereinafter “the Consultative Committee”) is a committee composed of senior officials of UNOV, the IAEA, UNIDO and CTBTO PrepCom. Its purpose is to consider and make recommendations on all matters concerning the provision of common services at the VIC and part of its responsibility is to set the parking fees for the VIC garage. At its meeting of 9 October 2006 the Consultative Committee decided to increase the monthly fee from five to ten euros with effect from 1 January 2007.

IAEA staff members were informed of this decision by staff notice STA/NOT/68, which was issued on 19 December 2006. On 3 January 2007 the Agency issued staff notice STA/NOT/77, providing an electronic link to a Garage Registration Form which was to be completed by all staff members who wanted to park in the VIC garage for the period 2007-2008. Later that month the complainant completed an Application Form for Parking Permit, thereby agreeing that the Agency should deduct the parking fee from his salary.

On 27 March 2007 the complainant wrote to the Director General requesting that he reverse the decision to deduct an additional five euros per month from his salary for parking fees, “desist from making any further deductions” and make “appropriate refunds”. He stated that he had not consented to either the deduction of an additional five euros per month from his pay or the increase in parking fee. In his view, the decision to increase the fees violated his terms of employment and it was taken without lawful authority and without appropriate consultation. He asked permission to file a complaint directly with the Tribunal if the Director General refused his request.

In his reply dated 18 April 2007, which is the impugned decision, the Director General informed the complainant that the Agency would continue to deduct the parking fee until he made alternate arrangements with the Garage Administration for payment or ceased

using the service. He noted that there had not been any non-observance of his terms of appointment and that he would not review the decision to increase the parking fee because the complainant's request for review did not fall within the terms of Staff Regulation 12.01. He explained that it was his position that the Joint Appeals Board and the Tribunal had no jurisdiction in the matter, but that the complainant could proceed directly to the Tribunal if he so wished.

B. The complainant submits that the complaint is receivable because, according to the Tribunal's case law, he is entitled to challenge his payslip, which constitutes an individual decision affecting him personally. He pleads breach of procedures which resulted in errors of law and fact in that the Parking Rules and the terms of reference of the Joint Advisory Group and the Consultative Committee, which relate to parking fee increases, were not followed. The Joint Advisory Group was completely ignored by both the Garage Administration and the Consultative Committee and there was no consultation. According to the complainant, the Director General had an obligation to ensure that the applicable rules and procedures were followed before implementing the decision to deduct an additional five euros from his pay.

The complainant contends that, whilst the matter was discussed by the Agency's Joint Advisory Committee, the Staff Council representatives on that Committee were not provided with any information that would have enabled them to examine the issue properly and were not invited to provide comments or analysis. The Committee process is not a substitute for the procedures stipulated by the Parking Rules and the terms of reference of the Joint Advisory Group and the Consultative Committee.

The complainant also pleads breach of the duty to act in good faith. This includes the duty to derive reasonable conclusions from the facts. He questions the reasons provided by the Garage Administration and the Consultative Committee for raising the parking fee, which in his view, do not fall under maintenance and operation of the garage. The breach of the duty to act in good faith was compounded by the fact

that the Joint Advisory Group was not consulted in the decision-making process.

The complainant asks the Tribunal to set aside the impugned decision and to direct the Agency to refund him the five euro per month deduction effected during the period from January 2007 to the date of the Tribunal's decision, with interest of 8 per cent per annum. He claims costs.

C. In its reply the Agency objects to the receivability of the complaint insofar as it concerns the fee increase. It argues that if the announcement made in staff notice STA/NOT/68 was an administrative decision in connection to the complainant's terms of appointment, which it denies, then his request for review was time-barred under the Staff Rules and thus the complaint is irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal.

It also argues that the complaint is irreceivable under Article II, paragraph 5, of the Tribunal's Statute. It is not a term of the complainant's appointment that he is entitled to use the VIC garage or that he must consent to the parking fees. The garage is a service made available by UNOV for a fee and he may use the service if he agrees to pay that fee.

The IAEA asserts that its monthly deduction of ten euros from the complainant's pay was an administrative decision taken at the complainant's express request in accordance with the Staff Rules. Consequently, there was no violation of the terms or conditions of his appointment. The complainant was informed of the increase before he completed the electronic Application Form for Parking Permit authorising a deduction of the parking fee from his salary. Thus, he expressly and knowingly consented to the fee increase. If he wished to dispute the decision concerning the deduction of the fee, he should have pursued the dispute-resolution avenue provided for in paragraph 25 of the Parking Rules.

The Agency denies that there was an error of law or fact. It kept its Staff Council informed during the period when the Consultative Committee was considering proposals by UNOV to increase the

parking fee and no further information was requested. As a member of the Staff Council, the complainant was aware of the proposals. Despite the fact that the Staff Council is not represented on the Consultative Committee, it was not denied any material concerning the deliberations on the fee increase, nor was it denied the opportunity to make written submissions to the Consultative Committee either directly or through the Agency. Furthermore, the complainant, as the Staff Council's representative on the Joint Advisory Group, could have convened a meeting of that body and demanded the production of all relevant financial material. He did not do so.

The IAEA submits that the Joint Advisory Group, through the complainant and possibly other staff members, knew of the proposals to increase the parking fee but did nothing to be involved in the process. There was sufficient time for further consultations after the Consultative Committee made its decision, but the Joint Advisory Group "showed a marked reluctance" to advise UNOV on the issue. When it did so in its memorandum of 18 January 2007, UNOV carefully considered its views and disagreed with them.

In the alternative, the Agency argues that if there was an error in the consultation process, which it denies, then the defect was remedied by UNOV. Full information regarding the fee increase was provided to the Joint Advisory Group, and UNOV subsequently considered and then rejected its advice.

Lastly, the IAEA contests that the complainant has incurred legal costs. In the event that the Tribunal dismisses the complaint and finds that there was no reasonable basis upon which it should have been brought, it requests that the Tribunal make an award of token costs against him.

D. In his rejoinder the complainant presses his pleas. He argues that the complaint is receivable. He denies that he consented to the increase in the parking fee or that he had any knowledge, by virtue of his status as a member of the Staff Council, of the UNOV proposals before January 2007 when UNOV disclosed the financial data it used to justify the fee increase. He asserts that in its submissions the Agency

has attacked his professional reputation and that, in view of his 25 years of service, its allegations are misplaced. He contends that procedural errors are not remedied by subsequent compliance. The Joint Advisory Group should have been consulted either before the UNOV proposal was submitted to the Consultative Committee or by the Committee itself. Furthermore, once the Joint Advisory Group had given its advice on 18 January, the matter should have been referred to the Committee for further deliberation.

He urges the Tribunal to reject the Agency's request for token costs.

E. In its surrejoinder the IAEA maintains its position regarding irreceivability. It reiterates that the complainant, as a member of the Staff Council, knew of the impending increase in the parking fee but did not alert the Joint Advisory Group of this fact. It emphasises that even though the complainant is a staff member of the Agency he has not demonstrated how the increase in the cost of the service constituted non-observance of his terms of appointment; the decision to increase the fee was a decision that affected him in his capacity as a garage user.

CONSIDERATIONS

1. The complainant joined the IAEA in 1982 and he began parking his car in the Vienna International Centre (VIC) garage in 1983. Since then he has held annual and, subsequently, biennial parking permits from the VIC Garage Administration, including a permit for the 2005-2006 biennium, which expired on 31 December 2006.

2. From the time the complainant began to use the VIC garage in 1983 up until 31 December 2006, the fee for an annual (later biennial) parking permit was five euros per month.

3. On 9 October 2006 the Consultative Committee met and decided to raise the parking fee to ten euros per month effective 1 January 2007.

4. The IAEA issued on 19 December 2006 a staff notice advising staff that the Consultative Committee had decided to increase the monthly parking fee to ten euros as of 1 January 2007.

5. On 3 January 2007 it issued a staff notice, which provided an electronic link to a Garage Registration Form which was to be completed by all staff members who wished to park in the VIC garage for the period 2007-2008.

6. The complainant completed an Application Form for Parking Permit for the period 2007-2008 on 28 January 2007. On this form he selected the following item:

“Please deduct the garage fee from my salary (mandatory for staff members with contract for one year or longer)”

On 29 January 2007 the complainant reviewed his electronic payslip. The increased fee of ten euros had been deducted from his salary.

7. He wrote to the Director General on 27 March 2007 asking him to reverse the decision to deduct an additional five euros per month from his salary and not to make any further deductions. The complainant claimed that these actions violated his terms of employment in that they were taken without regard for the procedural rules relating to the garage operations and in disregard of the principle of good faith.

8. In his response of 18 April 2007 the Director General noted that while the complainant asserted that the decision violated the terms of his employment, he had failed to give any basis for that assertion. He also noted that the deduction from the complainant’s salary was made in accordance with the complainant’s instructions. Furthermore, the complainant’s consent to the increase was not required and he was

free not to use the service if he so desired. The Director General approved the complainant's request to proceed to the Tribunal directly notwithstanding that he was of the view that neither the Joint Appeals Board nor the Tribunal had any jurisdiction in the matter. That decision is impugned by the complainant before the Tribunal.

9. A number of applications to intervene were made during the proceedings.

10. The Tribunal will not, however, rule on either the receivability or the merits of the complaint, since it can only find that it has no jurisdiction to hear this dispute.

11. According to Article II, paragraph 5, of its Statute, the Tribunal "shall [...] be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any [...] international organization" recognising its jurisdiction.

12. In the present case, the impugned decision affects the complainant not as a staff member of the Agency but in his capacity as a user of the VIC garage. Moreover, the financial conditions governing the use of this garage, which is merely a facility offered to the staff of the various international organisations occupying the VIC, do not form part of the complainant's terms of appointment or of the Agency's Staff Regulations.

13. While the payment of the fee for the use of the garage does in fact take the form of a direct deduction from the Agency's staff members' salaries, this is simply a means of payment adopted for convenience sake, which does not in any way alter the nature of the fee and does not, in particular, have the effect of incorporating it into the complainant's terms of employment. In this respect, the deduction is comparable to those which an employer may effect from an

employee's wages for the purpose of paying, for example, a tax or contribution that is levied at source; here too, the fact that the tax or contribution is so deducted does not afford grounds for considering it to be part of the employee's terms of employment.

14. This dispute does not therefore fall within the scope of the above-mentioned provisions of Article II, paragraph 5, of the Statute of the Tribunal.

15. Since the Tribunal has no jurisdiction to hear the present case, it can only dismiss the complaint and likewise the applications to intervene.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 7 November 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron
Dolores M. Hansen
Patrick Frydman
Catherine Comtet