

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

116th Session

Judgment No. 3292

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. M. T. against the Centre for the Development of Enterprise (CDE) on 8 July 2011 and the CDE's reply of 26 October 2011, the complainant having chosen not to file a rejoinder;

Considering Article II, paragraph 5, 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 first paragraph of section 3 of Internal Rule No. R 18/CA/05, entitled "Installation and reinstallation allowance", reads:

"A staff member with no dependants who provides evidence of a change of residence shall be entitled, on termination of service, to a reinstallation allowance based on the monthly basic gross salary equal to 2.5 months for the Director, 2 months for the Deputy Director, 1.5 months for the Heads of Units and the Financial Controller (provided these staff members have accomplished at least 5 years of service at these positions) and 1 month for the other staff members (provided these have accomplished at least 3 years of service) and provided that the staff member concerned does not receive a similar allowance in his new employment. The number of months for calculating the allowance is doubled when the Staff member has dependants."

On 1 March 2009 the complainant, a Senegalese national, was appointed Director of the CDE, which has its Headquarters in Brussels. His term of office ended on 28 February 2010.

On 11 May 2010 the complainant sent the CDE an e-mail in which he asked, *inter alia*, for a reinstallation allowance. As he received no answer, he repeated his request on 1 June. On 21 June the Director *ad interim* explained that the processing of his file had been held up by difficulties in interpreting Internal Rule No. R 18/CA/05. He assured him, however, that he would inform him as soon as a decision was taken.

On 13 July 2010 the complainant announced that, as he had not received any reply to his e-mail of 11 May within the two-month time limit laid down in Article 66(1) of the Staff Regulations of the CDE, he was submitting an internal complaint under paragraph 2 of that article. The Chairman of the Executive Board replied to him on 14 September 2010. Regarding the complainant's request for a reinstallation allowance, he explained that the first paragraph of section 3 of the aforementioned Internal Rule specified that the Director of the CDE was entitled to such an allowance only after serving for at least five years. Since the complainant's term of office had lasted only 12 months, he could not be granted that allowance. The conciliation procedure initiated by the complainant failed on the issue of granting the above-mentioned allowance. On 8 July 2011 he filed a complaint with the Tribunal in which he impugns the decision of 14 September 2010.

B. The complainant contends that the CDE's interpretation of the first paragraph of section 3 of Internal Rule No. R 18/CA/05 is "grammatically incorrect". Since under the terms of that paragraph a staff member is "entitled [...] to a reinstallation allowance based on the monthly basic gross salary equal to 2.5 months for the Director, 2 months for the Deputy Director, 1.5 months for the Heads of Units and the Financial Controller (provided these staff members have accomplished at least 5 years of service at these positions)",

he submits that, according to the rules of French grammar, the demonstrative pronoun “‘these’ refers to the noun immediately preceding it in the sentence” and therefore applies solely to heads of units and financial controllers, but not to directors or deputy directors. In this connection, he adds that the Director in office at the time when the aforementioned internal rule was drawn up and entered into force has confirmed that its authors did not intend to stipulate a minimum length of service in the case of a director or deputy director. He infers from this that, irrespective of the length of his term of office at the CDE, he is entitled to the reinstatement allowance referred to in section 3 of Internal Rule No. R 18/CA/05.

The complainant also contends that, unlike heads of units and financial controllers, who hold a contract for an indefinite period of time, the Director and Deputy Director perform “operational management and not administrative duties” during their appointment which, in accordance with Article 7(2) of Decision No. 8/2005 of the ACP-EC Committee of Ambassadors of 20 July 2005 on the Statutes and rules of procedure of the Centre for the Development of Enterprise, is for a maximum period of five years and is not renewable. He explains that, in practice, their term of office is always shorter because the Committee, which is competent for appointing them, may by delaying their appointment “ensure” that they never serve for five years so that the CDE never has to pay them a reinstatement allowance when they leave office. He infers from this that, since the accomplishment of five years of service is an entirely potestative condition in the case of the Director and Deputy Director, it is null and void.

The complainant claims the payment of a reinstatement allowance equivalent to five months of his basic gross salary plus interest at 8 per cent per annum as from 15 July 2010. Subsidiarily, relying on the practice of other international organisations, he asks that the amount of that allowance be calculated in proportion to the length of his term of office. He also requests an award of costs in the amount of 20,000 euros.

C. In its reply the CDE submits that the complainant's interpretation of the first paragraph of section 3 of Internal Rule No. R 18/CA/05 is inconsistent with the Tribunal's case law and with the principle that "all provisions governing financial entitlements must be interpreted strictly". It states, with regard to the wording of that paragraph, that the demonstrative pronoun "these" plainly refers to the Director, Deputy Director, Heads of Units and the Financial Controller. It therefore holds that the complainant, whose term of office lasted for 12 months, did not accomplish the five years of service with the CDE required in order to obtain a reinstallation allowance equivalent to five months of his basic gross salary. Referring to the provisions of section 1 of the Rule, it points out that, in order to claim such an allowance, a staff member must also have completed a minimum of 36 months of service with the CDE, in which case, the allowance amounts to one month's basic gross salary.

The CDE adds that the allegation that the Director in office when Internal Rule No. R 18/CA/05 was drawn up and entered into force has confirmed the complainant's interpretation is not supported by any evidence and ignores the fact that that rule "improved" the conditions governing the reinstallation allowance, which were formerly defined in Internal Rule No. S7/L.IV/93, by introducing different benefits for management. Lastly, it contends that granting the complainant an allowance calculated in proportion to the length of his appointment would be contrary to the applicable law.

The CDE asks the Tribunal to order the complainant to bear the costs of the proceedings.

CONSIDERATIONS

1. On 1 March 2009 the CDE recruited the complainant on a one-year appointment as Director of that organisation, after which he left the Centre and returned to his country of origin.

2. The complainant disputed the financial terms accompanying his departure from the CDE and asked for a reinstallation allowance amounting to five months of his basic gross salary as well as the

reimbursement of incidental travel expenses incurred on his return to his home country, for which the Centre considered the supporting documents to be insufficient. On 13 July 2010 he submitted an internal complaint in that connection under Article 66(2) of the CDE Staff Regulations, which the Executive Board decided to dismiss on 14 September of the same year.

3. After having pursued the conciliation procedure provided for in Article 67(1) of the Staff Regulations, which led to a settlement only with respect to the issue of the reimbursement of his incidental travel expenses, the complainant filed a complaint with the Tribunal, impugning the above-mentioned decision of 14 September 2010 insofar as it refused the grant of the reinstallation allowance which he had requested.

4. Section 3 of Internal Rule No. R 18/CA/05, entitled “Installation and reinstallation allowance”, provides that any staff member of the CDE who has to change his or her residence on termination of service and who does not receive a similar allowance in his or her new employment is “entitled [...] to a reinstallation allowance based on the monthly basic gross salary equal to 2.5 months for the Director, 2 months for the Deputy Director, 1.5 months for the Heads of Units and the Financial Controller (provided these staff members have accomplished at least 5 years of service at these positions) and 1 month for the other staff members (provided these have accomplished at least 3 years of service)”. This section also stipulates that the number of months of basic gross salary is doubled when the staff member in question has dependants, so that a Director may be entitled to an allowance equivalent to five months’ salary, provided that, as in the present case, he or she fulfils the latter condition.

5. In support of his claim to a reinstallation allowance amounting to five months’ salary the complainant submits that the demonstrative pronoun “these”, in the first phrase in brackets of this provision, must be understood to refer only to holders of the two kinds of posts mentioned immediately before the brackets – namely Heads

of Units and the Financial Controller – and not to the Director and Deputy Director, with the result that the latter are exempted from the condition of having to serve for at least five years in their position.

6. It is, however, plain from a straightforward, objective reading of the provisions in question that this demonstrative pronoun must be understood to refer to the holders of all the posts listed in the passage preceding the phrase in brackets.

The complainant's argument that the term "these" normally refers to the nouns immediately preceding it in a sentence is misconceived, for this is true only when this pronoun is used in contrast to "those" (or to a similar pronoun with the same connotation), which is not the case in the text under consideration.

Only a contrived interpretation of these provisions would make it possible to agree with the complainant, and it is clear that they would have had to be worded differently in order to exempt the Director and Deputy Director from having to comply with the condition of serving for the minimum number of years prescribed therein.

7. Contrary to the complainant's submissions, the literal manner in which the above-mentioned provisions of Internal Rule No. R 18/CA/05 must be construed is in no way inconsistent with their spirit or with their authors' intention.

These provisions replaced previous arrangements under Internal Rule No. S7/L.IV/93 which established that the same reinstatement allowance should be paid to all staff members and indeed their purpose was to introduce a specific set of conditions applicable to senior management. Persons in such positions thus receive a higher allowance than that granted to other staff members – an allowance which increases according to their level of responsibility – provided that they meet a more stringent condition regarding length of service.

There is no reason to concur with the complainant's argument that the authors of the text intended to exempt the Director and Deputy Director from compliance with the latter condition on the grounds that they perform "operational management and not administrative duties",

or because they exercise their functions during a limited term of office instead of being given a contract for an indefinite period of time, as is the case for heads of units or financial controllers.

On the contrary, it would be paradoxical if the Director and Deputy Director, who hold the most senior positions at the Centre, were not to be covered by the scope of the specific rules set out above since, as has just been stated, they were designed precisely for senior management.

8. The complainant's plea that the Director of the Centre in office when Internal Rule No. R 18/CA/05 was issued has confirmed the accuracy of his own interpretation of the provisions in question is unconvincing, especially as it is not even supported by a written statement to that effect.

Moreover, the acceptance of such an interpretation would be tantamount to admitting that the Director and Deputy Director may claim a reinstatement allowance without having to fulfil any condition regarding length of service – in the extreme case, even if their term of office lasted for only a few days – which is plainly inconceivable.

This interpretation would also be incompatible with section 1 of Internal Rule No. R 18/CA/05, which makes it plain that this allowance may only ever be granted to staff members who have “completed a minimum of 36 months of service”.

9. In an attempt to convince the Tribunal of the cogency of his argument, the complainant points out that, according to Article 7(2) of Decision No. 8/2005 of the ACP-EC Committee of Ambassadors of 20 July 2005 on the Statutes and rules of procedure of the Centre for the Development of Enterprise, the appointments of the Director and Deputy Director “shall be for a maximum period of five years and shall not be renewable”. The complainant submits that the combined effect of this provision and section 3 of Internal Rule No. R 18/CA/05 making the grant of the reinstatement allowance conditional upon the completion of at least five years of service – if the latter applied to the Director and Deputy Director – would be to prevent both these persons from ever receiving the allowance. However, the combined

reading of these texts, which are in no way incompatible, simply means that the Director and Deputy Director may not claim an allowance of two and a half months' or two months' salary respectively (or double these amounts if they have dependants) unless they have held office for five years in total. Contrary to the complainant's submissions, this situation cannot be regarded as purely theoretical, even though the CDE does not dispute the fact that, in practice, the holders of these posts have until now occupied them for shorter periods of time.

10. The Tribunal therefore considers that the interpretation of the above-mentioned provisions of Internal Rule No. R 18/CA/05 on which the complainant relies cannot be accepted and that, contrary to his subsidiary arguments, they are not in fact ambiguous on the point in dispute. Hence there are no grounds for applying the precedent established in Judgments 1755, 2276 and 2358 that if any text issued by an international organisation is ambiguous, it must be construed in the interest of its staff.

11. The complainant submits that if the provisions of Internal Rule No. R 18/CA/05 were to be construed as making the allowance which he is claiming subject to the condition that he had served for five years – a hypothesis which has been confirmed in the light of the foregoing – they would be unlawful.

He contends that, as the Committee of Ambassadors unilaterally determines the duration of the term of office of the Director and Deputy Director when they are appointed, this body thus has the discretion to decide whether or not to grant the allowance to the persons concerned, and the requirement of this minimum length of service is therefore an entirely potestative condition and, as such, must be deemed "null and void". However, the fact that potestative clauses are prohibited by the contract law of some States obviously does not prevent an international organisation from adopting a clause in its rules and regulations whereby its decisions with regard to its staff are subject to conditions the fulfilment of which depends, as it does in this case, on legal and factual circumstances which it can itself influence.

Moreover, while it is true that, as stated above, owing to the limited duration of their term of office, it might be difficult in practice for the Director and Deputy Director to fulfil the condition of serving for the minimum period of time required by the above-mentioned provisions, contrary to the complainant's submissions, this fact does not *per se* render these provisions unlawful.

The plea of unlawfulness will therefore be dismissed.

12. The Tribunal further notes that the severity of the condition in question is greatly mitigated by the CDE's generous interpretation of section 3 of Internal Rule No. R 18/CA/05 to the effect that a Director or Deputy Director who has not served for five years is not necessarily deprived of any entitlement to a reinstatement allowance. Indeed, relying on a combined reading of sections 1 and 3 of the Internal Rule and on previously applicable provisions of Internal Rule No. S7/L.IV/93 which, it says were not meant to be affected by the new text, the Centre considers that the Director and Deputy Director, like other staff members, may claim a reinstatement allowance equal to one month's salary (or double that amount if they have dependants) if they have completed at least 36 months' service within the organisation. This interpretation, which was endorsed by the conciliator and which, while being far from obvious, is indeed acceptable, thus reduces the amount which is specifically made contingent on attaining the threshold of five years of service in the position in question to a mere supplement to this basic allowance. The complainant, however, whose term of office lasted for no more than 12 months, is not even entitled to receive this basic allowance.

13. Lastly, there is no merit in the complainant's subsidiary plea that he should receive a reinstatement allowance in proportion to his length of service within the CDE. The fact that the staff regulations of other international organisations or institutions, in particular the Conditions of employment of other servants of the European Communities, make provision for the grant of an allowance calculated in this matter is beside the point, since the situation of CDE staff

members is governed exclusively by the organisation's own rules and regulations.

14. It follows from the foregoing that the complaint must be dismissed in its entirety.

15. The CDE has submitted a counterclaim that the complainant should be ordered to pay costs. Without ruling out, as a matter of principle, the possibility of making such an order against a complainant (see, *inter alia*, Judgments 1884, 1962, 2211 and 3043), the Tribunal will avail itself of that possibility only in exceptional circumstances. Indeed, it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive or chilling effect of possible adverse awards of that kind. In the instant case, although the complaint must be dismissed, it cannot be regarded as vexatious. The CDE's counterclaim will therefore be dismissed.

DECISION

For the above reasons,

The complaint and the CDE's counterclaim are dismissed.

In witness of this judgment, adopted on 12 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Claude Rouiller
Patrick Frydman
Catherine Comtet

