Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

112th Session **Judgment No. 3074**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D.E. H. against the World Meteorological Organization (WMO) on 8 February 2010, WMO's reply of 30 March, the complainant's rejoinder of 24 April and the Organization's surrejoinder of 6 August 2010;

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 national of the United States of America born in 1946, is a former official of WMO who retired in August 2008. On 8 January 2008, shortly after tendering his letter of resignation to the Secretary-General, he was informed that under Staff Rule 172.1 he was entitled to the removal of his household goods and personal effects at the Organization's expense up to a maximum of 8,150 kg net weight or 50.97 cubic metres. The complainant, who had decided to move back to the United States, submitted estimates from three removal companies to the Administration on 26 June 2009. He noted that the

shipment of his household goods might exceed the maximum allowed expense and that, in that event, it might be necessary for him to pay a portion of the removal expenses. He expressed his preference to engage Pelichet, the removal company which had provided the second lowest estimate, and indicated his willingness "to pay the difference between WMO's maximum expense and the total expense if the weight limit were exceeded".

On 1 July 2009 the Chief of the Human Resources Division informed the complainant that he could engage Pelichet but that the Organization's maximum liability for the removal would be 17,762 Swiss francs, which represented the prorated amount it would have paid for the removal of 50.97 cubic metres of household goods if it had chosen the removal company which had provided the lowest estimate. As a result, based on the estimate from Pelichet, the complainant would be required to pay 19,188 francs, the difference between the total cost of the removal and the Organization's maximum expense. By a letter of 20 July the complainant challenged the decision to limit its expense to the removal of 50.97 cubic metres of household goods. He pointed out that when he had joined WMO in 1989 the Staff Rules stipulated that the maximum liability was 8,150 kg or 61 cubic metres and he requested that the Organization reconsider its maximum expense using 61 cubic metres as the basis for its calculation. That same day the Chief of the Human Resources Division replied that, at the time of his recruitment, a typographical error had existed in some copies of the Staff Rules, which indicated a maximum of 61 cubic metres instead of 51, but this error had been corrected in a later version. He added that, in any case, WMO's maximum weight limit of 8,150 kg had never changed. Consequently, the Organization would not increase its maximum limit for volume to 61 cubic metres.

By a letter of 1 November 2009 to the Secretary-General, the complainant requested reimbursement of a portion of the removal costs which he had been required to pay and asserted that he was entitled to the removal of 61 cubic metres of household goods at the Organization's expense. He also objected to the fact that, although

the Organization had authorised him to engage Pelichet for the removal of his household goods, it had calculated its share of the removal expenses on the basis of the estimate provided by the lowest bidder. On 13 November the Director of the Resource Management Department informed the complainant that WMO would not pay the amount he had requested, as he had expressly agreed in his letter of 26 June to pay the difference between the cost of the lowest bidder and that of his chosen contractor Pelichet, as well as the excess cost above the limit of 8,150 kg or 50.97 cubic metres. That is the impugned decision.

B. The complainant submits that WMO breached his right to the removal of 61 cubic metres of his household goods as stipulated by the version of Staff Rule 172.1 that was in effect at the time of his recruitment.

He contends that it was unethical for the Organization to calculate his removal entitlements by reference to the lowest estimate from another company, after having agreed that Pelichet, which provided a higher estimate, could be engaged to undertake the removal. He submits that in his letter of 26 June 2009, when he agreed to pay the difference between WMO's "maximum expense" and the total expense if the maximum limits were exceeded, he was of course referring to the maximum expense based on the estimate from Pelichet. In addition, he argues that it is WMO's practice to pay for removals based on either the weight or the volume of household goods, whichever costs less, yet there is no authority for this practice in the Staff Regulations and Staff Rules. He points out that, had WMO paid a prorated share of the cost of the removal of his household goods based on weight, its share of the cost would have been considerably greater. According to his calculations, based on Pelichet's estimate, WMO actually only paid for the removal of 46.06 cubic metres, and not 50.97 cubic metres.

The complainant seeks payment of the costs for the removal of 8,150 kg or 61 cubic metres of his household goods, based on the rate charged by the contracted company (Pelichet), in accordance with the

Staff Regulations and Staff Rules that were in effect from 1 January 1986 to 30 April 1994. He also claims moral damages and costs.

C. In its reply WMO states that the complainant did not submit his dispute to the Joint Appeals Board, as required by the Staff Regulations and Staff Rules. Consequently, his complaint is irreceivable for failure to exhaust the internal means of redress.

On the merits, it contends that the complainant's letter of appointment stated that he was subject to the provisions of the Staff Regulations and Staff Rules and to changes which might be made to such Regulations and Rules from time to time. The figure of 61 cubic metres which appeared in the version of Staff Rule 172.1 in effect at the time of his appointment was incorrect and the complainant did not rely on this figure when he was recruited. The Organization is entitled to make changes to the Staff Regulations and Staff Rules, and in this case an error was corrected. It points out that the maximum weight limit for removals has never changed. Furthermore, before his separation from service, the complainant was informed on several occasions of his entitlement to the removal of 50.97 cubic metres of household goods and he did not question this entitlement until July 2009.

D. In his rejoinder the complainant emphasises that the Staff Rules which deal with appeals before the Joint Appeals Board refer to "staff members" and not "former staff members". He submits that, as a former staff member, he is no longer subject to the Staff Regulations and Staff Rules and that is why he sent his request of 1 November 2009 directly to the Secretary-General. In his view, his letter of 1 November satisfied the requirement of Article VII of the Tribunal's Statute and, consequently, his complaint is receivable. Moreover, if the Organization deemed it necessary for him to engage the internal appeal process, it could have informed him of this in its letter of 13 November.

E. In its surrejoinder WMO reiterates its position both on the receivability and the merits of the complaint. It states that under its

Financial Rules and Staff Rule 172.1 (d)(iv) it is required to use the lowest estimate as a basis for its calculation of its liability for removal expenses. Before the removal took place the complainant was fully informed of the method used for this calculation and the exact amount the Organization would pay. Furthermore, referring to the Tribunal's case law, it contends that the correction of the typographical error in Staff Rule 172.1 did not breach any acquired rights because the contested change did not impair a fundamental and essential term of the complainant's conditions of appointment.

CONSIDERATIONS

1. The complainant, a national of the United States of America, was recruited by WMO in 1989, at grade P.5, as a Senior Scientific Officer. At the end of his career he held the grade D.2 post of Director of the Observing and Information Systems Department.

2. When he retired in August 2008, he decided to move back to his country of origin. He therefore asked the Organization to defray his removal expenses from the French village of Echenevex, near Geneva, to Santa Fe, New Mexico (United States of America).

3. The conditions governing the defrayal of WMO staff members' removal costs are set forth in Staff Rule 172.1. Paragraph (d)(i) of this rule stipulates that for a staff member in the complainant's family situation "[t]he maximum weight and volume for which entitlement to removal at the Organization expense exists shall be […] 8 150 kg (18 000 lb) or 50.97 cubic metres (1 800 cubic feet)".

4. On 26 June 2009 the complainant, in accordance with the instructions he had been given, submitted estimates from three removal companies to the Organization. In the accompanying letter he drew attention to the fact that, according to these three proposals, the quantity of household goods and personal effects to be shipped "m[ight] exceed WMO's maximum allowed expense" and "thus it m[ight] be necessary for [him] to pay a portion of the removal

expense". He also emphasised that he would like the Organization to select the firm Pelichet because, although the latter had not submitted the lowest bid, it appeared to offer the best guarantees in terms of the quality of the services provided. He made it clear that, in that case, he "would be willing to pay the difference between WMO's maximum expense and the total expense if the weight limit were exceeded".

5. By a letter of 1 July 2009 the Chief of the Human Resources Division informed the complainant that, in accordance with his wishes, he was authorised to engage Pelichet. The same letter stated, however, that the Organization would pay only 17,762 Swiss francs towards the complainant's removal expenses, this being the prorated amount that it would have paid for the transportation of 50.97 cubic metres based on the estimate of the company which had submitted the lowest bid.

6. On 20 July 2009 the complainant wrote to the Organization to challenge this decision, mainly on the grounds that, according to the version of the Staff Rules in force when he was recruited in 1989, the maximum limits for the defrayal of removal costs were "8 150 kg (18 000 lb) or 61 cubic metres (1 800 cubic feet)" and that the maximum figure of 50.97 cubic metres therefore did not apply to him.

7. By an e-mail of the same date the Chief of the Human Resources Division replied that the reference to the figure of 61 cubic metres which was to be found in "some copies of the WMO Staff Rules at the time of [his] recruitment" was a "typographical error" which had since been corrected, and that, "[i]n any case, 8,150 kg ha[d] been stipulated all the time in any version of the Staff Rules as the maximum and the Organization ha[d] consistently applied this rule which ha[d] not been changed".

8. On 1 November 2009 the complainant wrote to the Secretary-General of the Organization to protest once more against the decision of 1 July 2009. Expanding on his arguments, he added the critical remark that the Organization was guilty of "unethical" behaviour by

agreeing to award the contract to Pelichet, whilst calculating its share of the costs on the basis of the estimate supplied by the lowest bidder.

9. By a letter of 13 November 2009 the Director of the Resource Management Department rejected the complainant's request for additional reimbursement. Referring to the latter's letter of 26 June, he took the view that the complainant had agreed to bear the financial consequences of choosing Pelichet and had "expressed [his] agreement to pay […] the excess cost above the limit, as communicated to [him], of 8,150 kg or 50.97 cubic metres".

10. That is the decision impugned before the Tribunal by the complainant, whose claims must also be deemed to be directed against the initial decision of 1 July 2009 which set the amount of the expense to be borne by the Organization.

11. WMO submits that, under Article VII, paragraph 1, of the Statute of the Tribunal, the complaint is irreceivable because the complainant has not exhausted the internal means of redress available to the Organization's staff. It contends that, before filing a complaint with the Tribunal, the complainant failed to submit the dispute to the Joint Appeals Board established, pursuant to Article 11.1 of the Staff Regulations, by Staff Rule 1111.1 and governed by Chapter XI of the Staff Rules.

12. However, as the complainant rightly points out, Article 11.1 of the Staff Regulations and Staff Rule 1111.1 *et seq.* provide access to the internal appeals procedure for "*fonctionnaires*", according to the French version of these texts, or "staff members", according to the English version, but nowhere do the Staff Regulations or Staff Rules specify that these terms also cover former "*fonctionnaires*" or former staff members. As the Tribunal recently found with regard to other international organisations' staff rules and regulations couched in similar language, in the absence of any indication to the contrary in the applicable texts, these terms must be interpreted as referring solely to

serving staff members (see Judgments 2840, under 17 to 21, and 2892, under 6 to 8).

13. As the complainant had left WMO by the time he was notified of the decisions at issue in this case, he therefore did not have access to the internal appeal procedure. Consequently, he was entitled to file a complaint directly with the Tribunal (see Judgments 1399, under 7 and 10, and 2582, under 7, as well as the above-mentioned Judgments 2840 and 2892).

14. In support of his claims, the complainant first submits that the Organization was obliged to pay for his removal expenses up to the limit of 61 cubic metres of household goods, since this was the figure to be found in the version of the Staff Rules which he had been given when he was recruited, not the limit of 50.97 cubic metres which applied when he retired.

15. Although the complainant manifestly attaches particular importance to this plea, it is completely irrelevant. Contrary to the complainant's submissions, international organisations' staff members do not have a right to have all the conditions of employment laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career. Indeed, as the complainant's letter of appointment of 7 April 1989 expressly indicated, most of those conditions could be altered during his employment as a result of amendments to those provisions.

16. Of course the position is different if, having regard to the nature and importance of the provision in question, the complainant has an acquired right to its continued application. However, according to the case law established in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, the amendment of a provision governing an official's situation to his or her detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an

appointment, or which subsequently induced him or her to stay on. In order for there to be a breach of an acquired right, the amendment to the applicable text must therefore relate to a fundamental and essential term of employment within the meaning of Judgment 832 (in this connection see also Judgments 2089, 2682, 2696 or 2986). The conditions for the payment of removal expenses, in particular a limit on the volume of household goods which may be shipped at the Organization's expense, plainly do not have this character and it cannot seriously be argued that changing this limit adversely affected the balance of obligations under the complainant's contract, or altered a condition which induced him to join WMO in 1989 and to pursue a career there.

17. In view of the foregoing, it is immaterial whether the figure of 61 cubic metres shown in the version of the Staff Rules given to the complainant when he was recruited was a mere typographical error, as the Organization contends. The complainant's plea would be dismissed even if this limit had in fact been altered since then. The Tribunal finds, however, that there is little doubt that the Organization's explanation in this respect is true.

18. The complainant submits, secondly, that the Organization was not entitled to defray his removal costs on the basis of the estimate of the company which had submitted the lowest bid, once it had agreed to Pelichet being entrusted with the removal. This plea is likewise unfounded.

19. As the Organization rightly points out in its submissions, as far as the defrayal of removal expenses is concerned, it must abide by Staff Rule 172.1(d)(iv), according to which the "[t]ransportation of personal effects and household goods shall be by the most economical means, as determined by the Secretary-General". The only way it could reconcile this requirement with the complainant's firm wish to have the contract awarded to Pelichet was to select the latter company, but to calculate the amount to be paid by the Organization on the basis of the lowest bidder's estimate, leaving the excess to be borne by the

complainant. The Tribunal fails to see how this manner of proceeding can be regarded as "unethical", as the complainant contends. Moreover, in this respect, WMO merely followed a practice that is fairly widespread among international organisations whereby, when officials are entitled to the defrayal of certain expenses – such as transport costs, for example – the amount thereof is usually based on the most economical rate, but the person concerned is free to use a more expensive service of his or her personal choice. The fact that, under the rules applicable in the instant case, the complainant's choice of company was subject to the Organization's prior authorisation is no obstacle to proceeding in this manner, since the sole reason for choosing a service provider other than the company putting in the lowest bid was to respect the complainant's wish.

20. Similarly, it is to no avail that the complainant argues that his letter of 26 June 2009 did not constitute agreement to that course. When he wrote that he "would be willing to pay the difference between WMO's maximum [allowed] expense and the total expense if the weight limit were exceeded", he may well have hoped that the share of the costs borne by the Organization would be calculated on the basis of Pelichet's estimate. But, since it would otherwise have been impossible to reconcile the choice of that company with the need to seek the most economical contractual conditions, the Organization was right to interpret this letter as expressing the complainant's agreement with the solution chosen.

21. However, the complainant's third argument, that the portion of the expenditure borne by the Organization ought to have been calculated by reference to the weight and not to the volume of the goods and effects to be transported, is much more cogent.

22. The above-mentioned provisions of Staff Rule 172.1(d)(i), which state that "[t]he maximum weight and volume for which entitlement to removal at the Organization expense exists shall be […] 8 150 kg […] or 50.97 cubic metres […]", must be interpreted as giving the staff member the right to choose which of these criteria

should be used to calculate the limit on the defrayal of his or her removal costs. Indeed, these references to either the weight or the volume of the goods and effects to be transported may be more or less advantageous to the person concerned, depending on the characteristics and bulkiness of the said goods and effects.

23. In the instant case, the evidence shows that the quantity of the complainant's household goods exceeded the limit in terms of volume far more than the limit in terms of weight. According to the figures in the estimate of the company which put in the lowest bid, to which the Organization's services referred, the volume of the complainant's household goods was 90 cubic metres, which exceeded by approximately 76.6 per cent the limit of 50.97 cubic metres set in the Staff Rules, whereas they weighed only 9,000 kg, which exceeded the limit of 8,150 kg by a mere 10.4 per cent. By choosing to prorate its liability by reference to a shipment of 50.97 cubic metres – which led it to set this liability at approximately 56.6 per cent of the amount of the estimate – the Organization therefore opted for a solution which was less favourable to the complainant than if it had effected a pro rata calculation by reference to the maximum weight of 8,150 kg, in which case its liability would have amounted to approximately 90.6 per cent of the estimate.

24. The Organization, which had itself drawn attention to the two alternatives in its correspondence with the complainant, had no right to decide on its own initiative to opt for the criterion which was most favourable to its own interests. As stated above, the choice in question lay with the complainant, and the above-mentioned provisions requiring transport to be effected on the most economical conditions plainly do not apply where a right has been granted to staff members, as in this case. Had the complainant been offered a choice, he would undoubtedly have requested that his expenses be calculated on the basis of the other criterion, which was more favourable to him. Indeed, the Tribunal notes that this could even be inferred from the wording of his letter of 26 June 2009, since he expressed his

willingness to bear a portion of the expenses “if the weight limit were exceeded”.

25. It may be concluded from the foregoing that the decisions of 13 November 2009 and 1 July 2009 must be set aside insofar as the portion of the complainant’s removal expenses to be defrayed by the Organization, based on the estimate submitted by the company that put in the lowest bid, was prorated by reference to the volume, and not the weight, of the household goods to be shipped. The case will therefore be referred back to the Organization in order that it re-examine the complainant’s rights in the light of this new criterion. The exchange rates to be used in determining the amount owed to the complainant shall be those in force on the date of the initial decision setting the amount to be paid by the Organization, in other words 1 July 2009.

26. In view of the nature of this dispute and of the Organization’s unlawful decision, the Tribunal considers that there are no grounds for granting the complainant’s request for compensation for moral injury. The decisions which have been set aside caused the complainant purely material injury which will be compensated as indicated above.

27. As the complainant succeeds in part, he is entitled to an award of costs, which the Tribunal sets at 1,000 United States dollars.

DECISION

For the above reasons,

1. The decision of WMO’s Director of the Resource Management Department of 13 November 2009 and the decision of the Chief of the Human Resources Division of 1 July 2009 are set aside to the extent indicated in consideration 25, above.

2. The case is referred back to the Organization in order that the complainant’s rights may be examined in accordance with the conditions mentioned in that same consideration.

3. The Organization shall pay the complainant costs in the amount of 1,000 United States dollars.

4. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2011, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Patrick Frydman
Catherine Comtet