115th Session **Judgment No. 3211**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr L. G., Ms L. I., Ms R. J., Ms Z.A.O. and Mr Z. P. against the International Organization for Migration (IOM) on 18 March 2011 and corrected on 3 May, the Organization's reply of 15 July, the complainants' rejoinder of 12 October and IOM's surrejoinder of 20 December 2011;

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 none of the parties has applied;

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

A. According to Rule 3.23 of the IOM Staff Regulations and Staff Rules for Officials, an official who is obliged to change his/her place of residence as a result of his/her appointment, or who is transferred to a new duty station, is entitled to an assignment grant if the assignment is expected to be of at least one year's duration. This grant comprises a portion payable as a Travel Allowance and, where applicable, a

portion payable as a lump sum. With respect to the lump-sum portion, Rule 3.233 provides as follows:

> "The assignment grant shall be increased by a lump sum for officials who are not entitled to removal of household goods. This lump sum payment shall consist of:
>
> i. At duty stations in category 'H' (see Annex G to these Rules): one month's base salary plus post adjustment at the duty station to which assigned, at the official's grade, step and rate.
>
> ii. At all other duty stations:
>
> (a) if the assignment is expected to be of a duration of 3 years or more, two months' base salary plus post adjustment at the duty station to which assigned, at the official's grade, step and rate.
>
> (b) if the assignment is expected to be of two years or less, only one month is payable: the second month is payable at the start of the third year at the duty station if the assignment is extended to a total of at least three years."

At various dates between 2002 and 2005 the complainants' respective assignments were extended in circumstances such that they each became entitled to a second lump-sum payment pursuant to Rule 3.233(ii)(b). Several years later, in the course of 2009, they wrote to the Administration asserting that they had never received that second lump sum and requesting that it be paid to them retroactively. The Administration replied that their requests could not be granted because they were time-barred. On 17 September 2009 one of the complainants, Ms J., sent an e-mail to the Chief of Human Resources Operations and Administrative Services, Mr H., which was copied to the other complainants, stating that she was writing on behalf of those in copy and requesting "a more flexible approach" by the Administration, given the number of officials concerned. Following another exchange of e-mails, Mr H. wrote to Ms J. on 3 November 2009, copying the other complainants, explaining that "[t]he rule and practice of the Organization is that staff allowances, grants or benefits under the [Staff Regulations and Rules] shall not be paid retroactively beyond one year from the date they were due from the Organization" and referring to Staff Rule 12.60. He also offered to call Ms J. to explain the Administration's decision over the phone.

Staff Rule 12.60 reads as follows:

> "Except when it is otherwise provided in these Staff Rules, in the Annexes thereto, or in any relevant official instructions, an official who has not been receiving an allowance, grant or other benefit to which he is entitled shall not receive retroactively such allowance, grant or benefit beyond one year from the date on which he makes a written claim thereto."

On 11 November 2009 Ms J. replied to Mr H.'s message, disputing the Administration's interpretation of Staff Rule 12.60 and proposing a further discussion by conference call the following week. Efforts to arrange a conference call proved unsuccessful and, on 6 December 2009, Mr H. again e-mailed Ms J., with the other complainants in copy, reiterating the position expressed in his e-mail of 3 November.

On 2 February 2010 the complainants submitted a request for review of the decision not to grant them retroactively the second lump-sum payment, indicating that they had been notified of this decision on 6 December 2009. Having received no response from the Administration within the time limit stipulated in Annex D to the Staff Rules they lodged an appeal with the Joint Administrative Review Board (JARB) on 7 April. The Organization challenged the receivability of the appeal on the grounds that the decision at issue had in fact been communicated to the complainants on 3 November and they had not filed a request for review within the following 60-day period, as required by Annex D. However, noting that in his e-mail of 3 November Mr H. had offered to explain the Organization's rules and practice over the phone, the JARB held that it was not sufficiently clear that that e-mail contained the Administration's final decision on the complainants' requests. Consequently, it accepted that the final decision had been conveyed to them on 6 December and that their appeal was therefore receivable. On the merits, the JARB took the view that Rule 12.60 was ambiguous with respect to lump-sum entitlements and that, as the Administration was responsible for ensuring that the provisions of the Staff Regulations and Rules were clear, the interpretation most favourable to the staff members concerned should prevail. It therefore recommended that the

Administration pay them the second lump sum. It also recommended that damages in an amount equal to the "market rate" interest on the sums in question, calculated from due dates, be paid to four of the complainants, but not to Ms J. because, unlike the other complainants, she had received a Personnel Action notifying her that the second lump-sum payment was due but had taken no action at the time to ensure that it was paid.

By an e-mail of 6 December 2010 the Administration sent the complainants "an advance copy of a letter from the [Director of Human Resources Management] concerning [their] appeal, together with the JARB Report". The e-mail specified that the original copy of the letter and a copy of the report were being sent through one of the complainants, Ms O. The letter from the Director of Human Resources Management informed the complainants of the Director General's decision not to endorse the recommendations of the JARB and to reject their appeal on the basis that it was not receivable. The complainants filed their complaints with the Tribunal on 18 March 2011, indicating that they were impugning the Director General's decision of 6 December 2010 and that they had received that decision on 21 December 2010.

B. The complainants interpret Staff Rule 12.60 to mean "that they had one year to receive the benefit they [were] entitled to from the date of their group's written claim". They argue that, as was recognised by the JARB, Staff Rule 12.60 is ambiguous with respect to the retroactive payment of lump-sum entitlements and as such should be interpreted, in accordance with the case law of the Tribunal, to the detriment of the party which drafted it.

The complainants also contend that the Administration failed in its duty of care to the extent that it did not inform them in a timely manner, by means of a Personnel Action, that they were entitled to the second lump sum.

Lastly, they argue that the impugned decision is tainted with an error of law in that, contrary to the requirements of the case law, the Director General failed to give sufficient reasons for rejecting

their appeals. They request that the impugned decision and the Administration's decision of 6 December 2009 be set aside and that they be granted the second lump sum retroactively together with interest. In addition, they claim moral damages and costs.

C. In its reply IOM contests the receivability of the complaints on three grounds. Firstly, it submits that the complainants did not file their complaints with the Tribunal within ninety days of the notification of the impugned decision, as required by Article VII(2) of the Statute of the Tribunal. It maintains that the impugned decision was notified to them via the e-mail of 6 December 2010, and it recalls that in Judgment 2966 the Tribunal held that notification of a decision by e-mail is valid.

Secondly, IOM argues that the complaints are irreceivable under Article VII(1) of the Statute of the Tribunal, since the complainants failed to exhaust the internal remedies available to them. In its view, the JARB erred in concluding that the appeal was receivable, since the request for review was not filed within the time limit stipulated in Annex D to the Staff Rules. In the present case the 60-day period began on 3 November 2009, when Mr H. confirmed the Administration's position on retroactive payments, and ended on 4 January 2010. As the request for review was not sent until 2 February 2010, it was out of time. The Organization adds that Mr H.'s subsequent e-mail of 6 December 2009 clearly did not set off a new time limit, since it merely confirmed the decision of 3 November.

Thirdly, IOM argues that the complaints are irreceivable due to the failure of the complainants' counsel to correct the complaints within the thirty-day period that she was granted by the Registrar of the Tribunal for that purpose. Should the Tribunal determine that the complaints are nevertheless receivable, the Organization argues that, in keeping with Judgment 2715, the Tribunal should disregard the submissions which were produced out of time.

On the merits, IOM does not dispute the entitlement of each of the complainants to the second lump-sum payment at the time it

became due. It submits that this was in no way concealed from them, as it was clear from Staff Rule 3.233(ii)(b) that they were entitled to the second payment, and the Staff Regulations and Rules are explicitly incorporated by reference into their contracts, as well as being available on the Organization's intranet. However, it argues that it cannot now retroactively grant them the second lump sum without violating Staff Rule 12.60, the complainants' interpretation of which is inconsistent with the plain language of that provision. The Organization states that it cannot know with certainty whether or not the second lump sum was paid to any of the complainants when it became due, because of the difficulty involved in locating records of such payments following the delocalisation of the relevant human resources services from Geneva to Manila in 2005 and the replacement of the payroll system by a new computerised system in 2006. In any case, it submits that any failure to make such payments would have been solely due to clerical oversight, and not to any intentional omission or act of bad faith.

Concerning the alleged breach of its duty of care, IOM notes that the Staff Regulations and Rules do not require the Administration to inform staff members that the second lump sum has become due, and that the criteria for entitlement are clearly set forth in Staff Rule 3.233. Moreover, Personnel Action forms were in fact issued to two of the complainants in 2002 and 2003, respectively, notifying them of their entitlement to a second payment.

The Organization rejects the complainants' arguments concerning the lack of reasons for the Director General's final decision and asserts that they were well aware that the basis for the impugned decision was that their request for review had been lodged out of time. Nevertheless, should the Tribunal quash the impugned decision on the basis that it was not sufficiently substantiated, the Director General would be prepared to issue a new decision stating his reasons.

Lastly, IOM submits, with respect to the complainants' claim for moral damages, that any damage suffered by them was strictly financial in nature and that, in any case, they have produced no evidence of any moral injury.

D. In their rejoinder the complainants point out that Annex D to the Staff Rules provides that submissions by e-mail are accepted by the JARB in exceptional cases only, and that in such cases hard copies must be posted within 48 hours of the dispatch of the e-mail. They assert that the Administration has in the past denied an appeal which was lodged by e-mail only. On this basis they argue that the hard copy of the final decision of the Director General should prevail over the e-mail notification. In addition, they contend that, in the case of a joint appeal, the time limit for filing a complaint with the Tribunal should begin "only when all the complainants are fully aware of the final decision". In the present case, not all the complainants read the e-mail of 6 December 2010 on the date when it was sent. They maintain their interpretation of Staff Rule 12.60.

E. In its surrejoinder IOM reiterates its position. It submits that complainants in a joint appeal who have received notification of the final decision should not be able to use the delay in notification to another complainant as a means of extending their own appeal deadlines, as this would contravene the principle of legal certainty on which organisations are entitled to rely.

CONSIDERATIONS

1. The complainants contest the Director General's decision, dated 6 December 2010, not to follow the recommendations of the Joint Administrative Review Board (JARB) regarding their joint internal appeal, filed on 2 February 2010 against the 6 December 2009 decision not to consider them eligible for the retroactive payment of the second instalment of the lump-sum portion of their assignment grants. In their complaints, filed on 18 March 2011, the complainants request the Tribunal to set aside the decision of 6 December 2010 (allegedly received by them on 21 December 2010) as well as the decision of 6 December 2009, to order the retroactive payment of the second lump sum with interest, and to award them moral damages and costs.

2. The JARB found that the complainants' joint appeal was receivable and that each of them was entitled to retroactive payment of the second lump sum. It also recommended that damages, in the form of interest on the amounts due, should be awarded to those complainants who had not received a Personnel Action notifying them that the second payment was due.

3. The complainants were notified of the Director General's decision to reject their appeal in a letter dated 6 December 2010 from the Director of Human Resources Management. It stated in relevant part: "The Director General has determined that your appeal is not receivable and accordingly has not endorsed the JARB's recommendations".

4. As the five complaints raise the same issues of fact and law and seek the same redress, it is convenient that they be joined to form the subject of a single judgment.

5. As indicated above under C, the Organization raises several objections to the receivability of the complaints. In particular, it submits that the complaints are irreceivable for failure to exhaust the internal means of redress.

6. The Organization considers that Mr H.'s e-mail of 3 November 2009 contained the explicit decision that the complainants were no longer eligible for the retroactive payment of the second lump sum, as their requests, having been received more than one year past the date on which the payment was due, were time-barred. According to the Organization, Mr H.'s e-mail of 6 December 2009 was merely confirmatory, reiterating the information provided in the e-mail of 3 November, and cannot be considered a new decision. It cites Judgment 2011, consideration 18, which states:

> "[…] According to the case law of the Tribunal, for a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) the following conditions are to be met. The new decision must alter the previous decision and not be identical in substance, or at least must provide

> further justification, and must relate to different issues from the previous one or be based on new grounds […]. It must not be a mere confirmation of the original decision […]."

Considering that the 6 December 2009 e-mail did not alter or provide further justification for the 3 November 2009 decision, that it did not relate to different issues from the previous one and was not based on new grounds, the Organization submits that the 60-day time limit for filing a request for review was 4 January 2010 (2 January being a Saturday), counting from the e-mail of 3 November. As the complainants filed their request for review on 2 February, the Organization considers that it was irreceivable as time-barred and that, as a result, their complaints should also be considered irreceivable for failure to exhaust internal remedies.

7. The e-mail of 3 November 2009 from Mr H. reads as follows:

> "[t]he rule and the practice of the Organization is that staff allowances, grants or benefits under the [Staff Regulations and Rules] shall not be paid retroactively beyond one year from the date they were due from the Organization. Conversely the Administration applies the same rule to itself […]
>
> You cite below the [Staff Rule] 12.60: 'an official who *has not been receiving* an allowance, grant or other benefit to which he is entitled shall not receive retroactively such allowance, grant or benefit beyond one year from the date on which he makes a written claim thereto'.
>
> As highlighted in italics, the wording of the above Rule is framed in terms of ongoing entitlements. As an example, in cases of on-going allowances - e.g. Child allowance - if the staff member was entitled to the allowance from January 2004 and makes the claim in January 2009, the staff member would be able to claim retroactively the child allowance, which was payable for 2008 only, and would start receiving the regular payment as of 2009.
>
> In yours and similar cases, the entitlement was due 7 years ago - when you should have made a claim if you did not receive it. As the omission was more than one year ago, the Administration is not in a position to retroactively make the payment. The staff member is, each month, responsible for checking his/her pay check to verify whether eligible salary and entitlements are paid by the Administration.
>
> Once more, I would be very happy to call you and explain over the phone."

The e-mail from Mr H. dated 6 December 2009 stated:

> "I am afraid I can only repeat what I said in my previous message. IOM's law and practice is to not pay retroactively beyond one year from the date the entitlement is due. It is very important that staff members know the [Staff Regulations and Rules], which is why letters of appointment stipulate that benefits and obligations are stated in the [Staff Regulations and Rules]. By signing such letters, the staff member accepts the terms and conditions of employment, including [the Staff Regulations and Rules].
>
> The Administration will not pay now an entitlement that might not have been paid 7 years ago."

8. Contrary to what the JARB determined, the final sentence of the e-mail of 3 November, stating "[o]nce more, I would be very happy to call you and explain over the phone", does not indicate that the Organization was willing to continue to debate the merits of the request. It was merely a courtesy phrase stating in conclusion that, if the complainants did not understand what was written in the e-mail of 3 November, Mr H. would call them to explain it over the phone. The Tribunal finds the e-mail of 6 December 2009 to be a mere confirmation of the previously expressed decision, which is reinforced by the statement "I can only repeat what I said in my previous message". It is to be noted that none of the conditions set out in Judgment 2011 (cited above) was fulfilled by the e-mail of 6 December in order to sustain the conclusion that it contained a new decision "setting off new time limits for the submission of an internal appeal". Considering this, by submitting their request for review on 2 February 2010, the complainants were outside the time limit stipulated in Article 4(iv) of Annex D to the Staff Rules and their appeal was irreceivable as time-barred. It follows that the present complaints are irreceivable for failure to exhaust all internal remedies.

9. The Tribunal finds it useful to note that the complaints are also unfounded on the merits. The complainants' interpretation of Staff Rule 12.60 is incorrect. By their reasoning, employees could request at any time limitless retroactive payment of unpaid amounts,

which is untenable. The Rule clearly states that retroactive payments are limited to one year in the past from the date on which the payment is requested. Therefore, in order to receive a payment retroactively, be it an ongoing entitlement or a lump sum, the request must be made within one year from the date the payment was originally due. The complainants' requests for review, made several years past the date the payments were due, were therefore time-barred.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 10 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet