

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

118th Session

Judgment No. 3351

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A.L.G. against the International Criminal Court (ICC) on 28 February 2012 and corrected on 16 April, the ICC's reply of 24 July, the complainant's rejoinder dated 3 November and corrected on 30 November 2012, and the ICC's surrejoinder of 11 March 2013;

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 was recruited by the ICC in April 2007 under a general temporary assistance contract, and was employed in The Hague at grade P2. From 15 November 2007 she was assigned to the Trust Fund for Victims in Bunia (Democratic Republic of the Congo). She received a one-year fixed-term appointment on 1 March 2009, and on 1 July 2009 was promoted to grade P3. Her appointment was subsequently extended for two years, and then for a further

three years. In January 2011 her post was transferred to Kampala (Uganda).

In the meantime, on 21 September 2010, the ICC had promulgated new provisions on conditions of service for internationally-recruited staff in field duty stations, distinguishing on security grounds between family duty stations, including Kampala, and non-family duty stations, including Bunia. The transitional measures for implementing the new conditions of service were set out in Administrative Instruction ICC/AI/2011/001, published on 31 January 2011. This instruction provided for the payment of a personal transition allowance to staff members serving in family duty stations on 1 September 2010.

On 8 April 2011 the complainant, having been informed that she was not entitled to this allowance, sent the Registrar of the ICC a request for review of that decision, which was refused on 11 May. On 22 June she filed an appeal with the Appeals Board, which recommended that the appeal be rejected as unfounded. On 26 October 2011 the Registrar endorsed that recommendation. That is the impugned decision.

B. The complainant asks the Tribunal to set aside the impugned decision and to “establish a transfer procedure”. She complains that the ICC did not inform her in advance of her transfer or seek her consent to it, and asserts that she is still officially assigned to Bunia. In these circumstances, and since the new conditions of service for staff members assigned to non-family duty stations resulted in an increase in salary for those staff members, she claims payment of the difference in salary which she considers due to her. She contends that the eligibility criteria for the payment of the personal transition allowance have resulted in discrimination, since one of her colleagues at the Trust Fund assigned to Kampala, whose situation she considers to be the same as her own, is receiving the allowance, and she requests the Tribunal to order the ICC to take the necessary steps to place her on the same footing. Lastly, she requests a symbolic award of one euro in moral damages.

C. In its reply, the ICC argues that the complaint is irreceivable. The decision refusing the complainant's request for review was notified to her in an e-mail of 11 May 2011, at 9.56 a.m., and the ICC's electronic monitoring system shows that the e-mail was read at 10.26 a.m. that day. Since the Staff Rules require an appeal to the Appeals Board to be filed within thirty days of notification of the decision, her appeal of 22 June 2011 was time-barred.

On the merits, the ICC recalls that a decision on staff reassignment is by nature a discretionary one, and that if such a decision is irregular in any way, which is not the case here, it is therefore subject to only limited review by the Tribunal. It states that the complainant was in fact consulted before being transferred.

Lastly, the ICC explains that staff members who were not employed at a family duty station on 1 September 2010 cannot receive the personal transition allowance. It also denies that there was any unequal treatment because on that date, unlike the complainant, her colleague was already employed at a family duty station.

D. In her rejoinder, the complainant seeks to show that on 11 May 2011 it was the "programme assistant" who consulted her e-mail account, and that she herself did not have access to it until 24 May. On the merits, she enlarges on her pleas.

E. In its surrejoinder, the ICC reiterates its position.

CONSIDERATIONS

1. The complainant was recruited by the ICC on 10 April 2007 under a general temporary assistance contract, as a legal officer, first class, in the Registry of the Court. This contract was renewed on several occasions.

2. From 15 November 2007 she was assigned to the Trust Fund for Victims as a Field Programme Officer, based at Bunia in the Democratic Republic of the Congo (DRC).

3. When her last general temporary assistance contract expired on 28 February 2009, following a competition she was offered a fixed-term contract for the period 1 March 2009 to 28 February 2010, to serve in the same post at Bunia.

4. In July 2009 she received a letter of appointment for the period 1 July 2009 to 28 February 2010, amending and replacing her previous contract, her duty station remaining the same. Her appointment was extended for two years from 1 March 2010 until 29 February 2012, on the same terms as those set out in the previous letter of appointment.

5. On 18 November 2010 the complainant's supervisor sent an e-mail to the field offices in Uganda and the DRC, and to the Human Resources Section, with a copy to the complainant, stating that her post would be transferred to Kampala in Uganda in January 2011, subject to the approval of the budget by the Assembly of States Parties.

On 16 December 2010 the recipients of this e-mail, and the complainant herself, were informed that the Assembly of States Parties had approved the budget for the 2011 financial year, and that the complainant's reassignment to Kampala could therefore take place.

6. It is evident from an exchange of e-mails between the Human Resources Section and the complainant in early January 2011 that she had received confirmation that her duty station would now be Kampala, and that she would be covered, in her new assignment, by the terms of employment applicable to internationally-recruited staff members serving in field duty stations.

7. On 31 January 2011 the ICC published Administrative Instruction ICC/AI/2011/001 concerning "Transitional measures for implementing new conditions of service for internationally-recruited staff in field duty stations". This instruction had retroactive

effect from 1 January 2010. Paragraph 2.2 stated that staff members appointed or assigned to a family duty station in the field on or after 1 September 2010 would not be eligible for the personal transition allowance provided for in the instruction.

8. The complainant, finding that she was not entitled to payment of the personal transition allowance, wrote to her supervisor on 22 February 2011 seeking information on her position. The latter referred her to the Human Resources Section.

In an e-mail of 8 March 2011, the Chief of that Section explained the reasons why the complainant could not claim the personal transition allowance.

9. On 8 April 2011 the complainant requested the Registrar of the ICC to review the decision of 8 March 2011 refusing to grant her the allowance. She also asked the Registrar to request the Human Resources Section to “propose to her an amendment to [her] original contract, specifying [her] new duty station, so that [she] c[ould] decide whether to accept the reassignment” and to “consent, by way of exception, to [her] eligibility for the transition allowance, or at least [to grant her] compensation so as to avoid placing [her] in a discriminatory situation by comparison with other staff members of the Court”.

10. By a memorandum of 11 May 2011 the Registrar confirmed the contested decision, stating that in the event of reassignment no new letter of appointment was necessary.

11. On 22 June 2011 the complainant filed an appeal with the Appeals Board, which concluded, in its report of 24 October 2011, that the appeal was without merit and should be dismissed.

12. In a memorandum of 26 October 2011, which constitutes the impugned decision, the Registrar of the ICC informed the complainant of her decision to adopt the conclusion and recommendation of the Appeals Board.

The complainant acknowledged receipt of the e-mail in question on 30 November 2011.

13. The ICC argues that the complaint is irreceivable because the complainant's internal appeal was itself irreceivable, being time-barred. The decision of 11 May 2011 which was challenged before the Appeals Board had been notified to her in an e-mail sent at 9.56 a.m. the same day, but the complainant had filed her internal appeal only on 22 June 2011, that is, outside the thirty-day time limit from notification of the contested decision which is required by the Staff Rules.

14. To counter the ICC's objection to receivability, the complainant contends that she herself had no access to her e-mail account until 24 May 2011. She asserts that "the ICC's 'webmail' had not been operational for several days at the Kampala field office, including the date of 11 May 2011" and the ICC Registry was aware of the breakdown, being responsible for its communications service.

Regarding the document produced by the ICC to show that the message of 11 May 2011, sent to the complainant at 9.56 a.m., was read at 10.26 a.m. on the same day, she states that her e-mail account was consulted not by herself, "but by the programme assistant [...] in The Hague, in order to deal as a matter of urgency with the contractual situation of a partner organisation of the Trust Fund for Victims", as attested by a document annexed to her rejoinder. She adds that she herself then went on leave, and afterwards on mission to the DRC, where she did not have access to her official e-mails.

15. Since the complainant had entrusted responsibility for checking her e-mails to a third party, she ought to have taken the necessary steps to be informed in a timely manner of important incoming messages addressed to her.

Even supposing that the complainant was not aware on 11 May 2011 of the message in question because of a breakdown in the e-mail

system at the ICC's Kampala office, the circumstances she mentions cannot justify the fact that, as she admits, she did not check her e-mails until 24 May.

16. It follows from the foregoing that the contested decision must be regarded as having been notified to her no later than 12 May 2011. Accordingly, the thirty-day time limit specified in the Staff Rules must be calculated from 13 May 2011.

Since the complainant filed her internal appeal on 22 June 2011, i.e. more than thirty days after 13 May 2011, the appeal was time-barred and therefore irreceivable.

17. According to the case law of the Tribunal, if an appeal was time-barred and the internal appeals body was wrong to hear it, the Tribunal will not entertain a complaint challenging the decision taken on a recommendation of that body (see, for example, Judgment 2966, under 12, and the case law cited therein).

It follows that the complaint filed on 28 February 2012 must be declared irreceivable.

18. The fact on which the complainant relies, that the Registrar of the ICC, in her decision of 26 October 2011, accepted the conclusion and recommendation of the Appeals Board, which had however declared the internal appeal to be receivable, cannot prevent the Tribunal from ruling upon the receivability of the internal appeal.

19. The complaint must therefore be dismissed, without there being any need to rule on its merits.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN
DRAŽEN PETROVIĆ