Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

L. G. (No. 2)

v.

ICC

124th Session **Judgment No. 3861**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms A. L. G. against the International Criminal Court (ICC) on 30 December 2014 and corrected on 16 April 2015, the ICC's reply of 27 August, the complainant's rejoinder of 12 November 2015 and the ICC's surrejoinder of 22 February 2016;

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 may be summed up as follows:

The complainant challenges the refusal to grant her flexible working arrangements during the breastfeeding period.

Administrative Instruction ICC/AI/2010/001 of 21 September 2010, on conditions of service for internationally-recruited staff in field duty stations, distinguishes between family duty stations and non-family duty stations depending on their level of security. Non-family status precludes and prohibits the travel and/or installation of any eligible family member either by the organisation or by the staff member.

At the material time, the complainant was assigned to the Trust Fund for Victims in Kampala (Uganda), a family duty station. However, as part of her duties, she was required to undertake regular official

journeys to non-family duty stations. She ceased to undertake this kind of travel as from February 2013 as she had become pregnant. In view of the lack of adequate medical facilities in Kampala, she was exceptionally authorised to work from Europe from 28 June 2013 until the start of her maternity leave on 8 August 2013. The complainant gave birth to a daughter on 11 August.

On 21 October 2013 the complainant was asked what her "plans" were for returning to Kampala. She replied that she would like to discuss various possible flexible working arrangements, such as telecommuting, as she was breastfeeding and was therefore unable to travel to non-family duty stations. However, she made it clear that she was prepared to travel to countries where her daughter could accompany her as soon as her maternity leave ended. On 4 November her supervisor informed her that the Court had no legal framework governing flexible working arrangements. She added that the Trust Fund for Victims needed regional field-based support, that Kampala was a family duty station and that, in principle, the complainant could take her daughter there. However, since that nature of her duties required her to travel to non-family duty stations, the supervisor inferred from what the complainant had said that she would be unable to perform her duties for at least one year and she suggested that the complainant should consider taking special leave without pay in order that she could breastfeed her child. On 12 November 2013 the complainant replied that requesting such leave would not be in her interests and she again stated that she would like to telecommute.

On 26 November 2013 the Administration advised the complainant that staff members did not have a right to telecommute and reminded her of the guidelines on breastfeeding. The complainant replied the next day, complaining that she was the victim of discrimination and harassment. She drew attention to the fact that she was due to return to work on 29 November 2013 and asked for further clarification, in particular with regard to the Court's telecommuting practice and its implementation of a breastfeeding policy. Pending a reply to her request, she asked to take annual leave until 10 January 2014, which was accepted. She received the explanations she had requested in an email of 12 December 2013. She was advised that the only option which could be considered in her

case was for her to request special leave without pay during the breastfeeding period. She was also told that if the responses which had been provided were not to her satisfaction, she could request an administrative review. At her request, she was placed on special leave without pay from 13 January 2014 until 11 August 2014.

On 12 January 2014 the complainant submitted a request for a review of the decision of 12 December 2013 in which she asked the Registrar of the ICC to reconsider that decision, to take note of the legal vacuum regarding breastfeeding in the case of women serving in non-family duty stations, to clarify the rules which applied to them and to convert the annual leave she had been obliged to take and the special leave without pay into special leave. On 5 February 2014 the Registrar informed her that he considered her request for review to be time-barred, as she should have challenged the decision of 4 November 2013, and unfounded.

The complainant filed an appeal with the Appeals Board on 10 March 2014 in which she reiterated some of the claims entered in her request for review. On 12 August she resumed her duties in Kampala. The Board issued its report on 3 September. It considered the appeal to be receivable. On the merits, the majority of its members recommended the dismissal of the appeal, but invited the Court to clarify the conditions for applying the breastfeeding guidelines to women who were required to undertake official travel to non-family duty stations. In a dissenting opinion, one member of the Board found that the Court had breached its duty of care. By a memorandum of 6 October 2014, which constitutes the impugned decision, the Registrar of the ICC informed the complainant that he considered the appeal to be irreceivable *ratione temporis*, that he confirmed his decision of 5 February 2014 and that he undertook to clarify the conditions for applying the aforementioned guidelines.

The complainant asks the Tribunal to set aside the decision of 12 December 2013, as confirmed by those of 5 February and 6 October 2014, to order the ICC to convert the annual leave and special leave without pay which she had been obliged to request into special leave with pay, to pay her the sum of 38,132 euros to compensate for the financial injury which she claims to have suffered and one symbolic

euro for moral and professional injury, and to grant her costs in the amount of 6,000 euros.

The ICC asks the Tribunal to dismiss the complaint as irreceivable *ratione temporis* and, subsidiarily, as unfounded.

CONSIDERATIONS

1. The ICC challenges the receivability *ratione temporis* of the complaint on the grounds that the complainant was notified of the administrative decision denying her request for permission to telecommute on 4 November 2013. It submits that the email of 12 December 2013 merely confirmed that initial decision and that the complaint is out of time, since the complainant offers no evidence of the existence of exceptional circumstances warranting a departure from the applicable time limit.

2. In the complainant's opinion, neither the email of 4 November nor that of 26 November 2013 may be termed an administrative decision. Only that of 12 December 2013 was "complete" and responded to the points she had raised. It advised her that she could request a review.

3. In order to determine whether the complaint is receivable, it is therefore necessary to consider the nature of the various exchanges between the parties so as to ascertain which communication was the challengeable administrative decision and whether the time limits were observed.

4. In the email of 4 November 2013, the complainant's supervisor suggested that she should consider the option of taking special leave without pay in order to be able to breastfeed her child, since that would have been a "viable" option both for her and for the Court. In the email of 26 November, the Administration informed the complainant of the breastfeeding guidelines and of the fact that there was no right to telecommute. It also advised her that those guidelines applied to all staff members and that, notwithstanding any facilities that might be available

for breastfeeding and expressing milk, staff members were not automatically entitled to bring their infants to the workplace or to take them on missions, even to family duty stations.

5. The Tribunal points out that the term "decision" means an act by an officer of an organisation which has a legal effect (see, for example, Judgments 532, under 3, and 3141, under 21). Having examined the two aforementioned emails, one containing a suggestion to the complainant and the other informing her of guidelines applicable within the ICC, it is obvious that they do not constitute administrative decisions. Moreover, in Judgment 2644, under 8, the Tribunal explained that "[t]here are occasions when a staff member may treat a communication or other action [...] as embodying a decision with respect to his or her entitlements (see Judgment 2629 [...]).However, where, [...] there is no indication that the communication in question constitutes a final decision, there are and may be circumstances that lead a staff member to reasonably conclude that it does not. Particularly is that so if, [...] it concerns a matter that has not been the subject of an express claim or there is nothing to suggest that the matter in question has been considered by a person with authority to make a final decision thereon." It is plain from the submissions in the file that the complainant did not regard the emails of 4 and 26 November 2013 as administrative decisions because, after receiving that of 26 November, she asked for detailed clarifications, particularly regarding the Court's practice in respect of telecommuting. The Tribunal therefore considers that the email of 12 December 2013, providing the complainant with the explanations she had requested, constitutes an administrative decision which was not merely confirmatory.

6. With regard to the objection that the complaint is irreceivable *ratione temporis*, the Tribunal recalls that it has ruled, with respect to an internal appeal filed by an official, that a time limit expiring on a Saturday is automatically extended to the following Monday if Saturday is a non-working day in the organisation concerned (see Judgments 2831, under 3, and 3566, under 4). In this case, under the Staff Rules, which set a thirty-day time limit for submitting a request for review, the complainant ought to have submitted her request at the latest by

11 January 2014, which was a Saturday. As it would appear from the submissions that Saturday is not a working day at the ICC, the time limit was extended to Monday 13 January 2014. Thus, the request submitted by the complainant on 12 January was not time-barred. The complaint must therefore be declared receivable.

7. The complainant raises the following pleas in support of the merits of her complaint: the ICC stated no reasons for rejecting the Appeals Board's finding that her appeal was receivable; the impugned decision ignored an essential fact, namely that the complainant had proposed an alternative solution to the option of telecommuting from her family home in Rome; the Registrar of the ICC committed an error of law in holding that the provisions of the breastfeeding guidelines did not apply to the complainant when she had to undertake official travel to non-family duty stations and that the only option open to staff members in such a situation was to apply for special leave without pay; the complainant had been the victim of discriminatory treatment on account of her sex and, lastly, the Court breached its duty of care.

8. With regard to the latter plea, the complainant submits that it is unclear how the policy on the breastfeeding guidelines applies to women whose duties entail regular travel to non-family duty stations. In her opinion, the Registrar of the ICC had a duty to introduce a policy on the application of those guidelines to staff in field duty stations, which, in the absence of specific rules, should be based on the rules and practices of United Nations agencies. The ICC maintains that it fulfilled its duty of care by promptly granting the complainant special leave without pay, although that considerably hampered its operations. It adds that it displayed great flexibility.

9. In Judgment 3024, under 12, the Tribunal recalled that the principle of good faith and the concomitant duty of care demand that international organisations treat their staff with due consideration in order to avoid causing them undue injury; an employer must consequently inform officials in advance of any action that may imperil their rights or harm their rightful interests (see Judgment 2768, under 4). In this case,

the Court refused to adjust the complainant's working conditions, disregarding her status as a breastfeeding woman, and instead suggested that she took special leave without pay, although it could have allowed her to continue work, for example by exempting her from travel to non-family duty stations throughout the breastfeeding period. Indeed, the submissions in the file show that this option was not outright impossible, as is evidenced by the fact that, when the complainant again became pregnant in 2014, the Court adjusted her responsibilities to avoid her having to travel to non-family duty stations. By failing to do so in 2013 the Court breached its duty of care.

10. In light of the foregoing, the impugned decision and the decision of 12 December 2013 must be set aside, without there being any need to examine the complainant's other pleas.

11. The complainant asks the Tribunal to order the ICC to convert the annual leave and special leave without pay which she was obliged to request into special leave with pay. The Tribunal considers that the setting aside of the impugned decision entails the conversion of this annual leave and leave without pay into special leave with pay. In compensation for the financial injury which she suffered, the ICC will be ordered to pay the complainant the full remuneration which she would have received during her special leave, in the undisputed sum of 38,132 euros.

12. The ICC will also be ordered to pay the complainant one symbolic euro for moral and professional injury and costs in the amount of 6,000 euros.

DECISION

For the above reasons,

1. The impugned decision and that contained in the email of 12 December 2013 are set aside.
2. The ICC shall pay the complainant 38,132 euros in compensation for financial injury.
3. It shall also pay her one symbolic euro for moral and professional injury.
4. It shall pay her costs in the amount of 6,000 euros.

In witness of this judgment, adopted on 28 April 2017, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ