

108th Session

Judgment No. 2862

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms J. H. R. against the International Organization for Migration (IOM) on 19 September 2008 and corrected on 20 October, IOM's reply of 1 December 2008, the complainant's rejoinder of 5 January 2009 and the Organization's surrejoinder of 12 February 2009;

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 was born in 1952 and has Canadian nationality. On 4 October 2006 IOM's Director of Human Resources Management wrote to her to confirm that the Organization intended to offer her a one-year fixed-term contract as Director of the Migration Health Department at Headquarters in Geneva. Attached to this letter was a document entitled "Summary of Emoluments, Allowances and Fringe Benefits", which stated inter alia that "any taxes levied on IOM-derived earnings is [sic] reimbursed by the Organization". The author

of the letter pointed out, however, that this summary was merely indicative and had no contractual value.

At the beginning of December 2006, prior to signing her contract, the complainant met with the Organization's Legal Adviser in Geneva to discuss the terms of her appointment. The parties differ as to precisely what was said at this meeting, but it is common ground that the issue of reimbursement of income taxes was discussed. Indeed, the complainant had been informed by the Canadian tax authorities that they would continue to treat her as resident in Canada for tax purposes during her period of employment with IOM, which meant that she would be liable to pay income tax in Canada on her IOM salary and allowances. On 8 December 2006 she signed a letter of appointment which expressly stated that it was subject to "the conditions specified in the Staff Regulations and Staff Rules for Officials". She took up her functions on 8 January 2007.

By a letter of 21 December 2007 the complainant sought review of "the decision of the Administration not to reimburse [her] taxes". She stated that she had accepted the Organization's offer of employment on the assumption that her income taxes would be reimbursed, as indicated in the above-mentioned Summary of Emoluments, Allowances and Fringe Benefits, but that during her first week at IOM the Organization's Legal Adviser had informed her verbally that this was not the case and that IOM was "in the process of reviewing the regulations". However, she had discovered "approximately a month ago" that there had in fact been no change in the Staff Regulations in this respect and that she was therefore eligible for tax reimbursement.

Having received no reply to her letter, the complainant lodged an appeal with the Joint Administrative Review Board on 15 February 2008. In its submissions to the Board, the Organization asserted that the complainant had been well aware, on signing her contract, that the reimbursement of income taxes applied only to those levied at the duty station, and that this was clearly indicated in Annex A to the Staff Regulations and Rules. However, it argued that her appeal was in any

case time-barred, since she had not lodged it within 60 days of the date on which she had signed her contract.

In its report dated 15 May 2008 the Board found that the complainant had failed to identify which specific action, decision or omission she was challenging. It considered that, to the extent that the letter of appointment she had received might be regarded as an administrative decision to deny her a tax reimbursement, she had not challenged that decision within the applicable time limit. As for the Administration's failure to reply to her request for review, the Board held that this could not be regarded as constituting a decision not to reimburse the income tax that she had paid in Canada, because she had never been entitled to such reimbursement and had joined the Organization on that understanding. The Board therefore recommended that the appeal be dismissed as irreceivable. The Director General endorsed that recommendation and the complainant was so informed by a letter of 1 July 2008, which constitutes the impugned decision.

B. The complainant contests the Joint Administrative Review Board's finding that her appeal was irreceivable. She explains that her appeal was directed against the misrepresentation made to her "on or about December 7, 2006" by the Organization's Legal Adviser and that, since she lodged her appeal immediately after having discovered, in November 2007, that the information given to her by the Legal Adviser constituted a misrepresentation, she complied with the time frame set out in Annex D to the Staff Regulations and Rules.

According to the complainant, she is entitled to reimbursement of income tax pursuant to Staff Regulation 3.4. She criticises the Board for failing to take into account the fact that there was no material amendment of that regulation during her employment with IOM and the fact that, according to the letter of appointment that she signed, her terms of employment, benefits and obligations were those stipulated in that letter and in the Staff Regulations and Rules. Furthermore, she asserts that the version of Annex A which the Organization produced during the proceedings before the Board was not provided to her either at the time when she accepted the offer of employment or during her

period of employment, and she points out that there is no evidence that this version was generally available to employees at any relevant time.

She asks the Tribunal to quash the Joint Administrative Review Board's "decision" of 15 May 2008 and declare that she is entitled to reimbursement of income taxes paid by her on her IOM salary and allowances. She requests that IOM be ordered to reimburse her in respect of those taxes, failing which she requests that the matter be referred back to the Board.

C. In its reply the Organization submits that the complaint is irreceivable. It argues that, if the complainant wished to challenge the fact that she was not entitled to reimbursement of income taxes levied in Canada, she ought to have lodged an appeal within 60 days of the date on which she signed her letter of appointment, since nothing changed between that date and the date on which she lodged her appeal. Indeed, she failed to identify any administrative decision, action or omission in November 2007 against which she was appealing. Her unfounded assertion that she had "discovered a misrepresentation" did not satisfy the requirements set out in Annex D to the Staff Regulations and Rules for bringing an appeal; nor does it satisfy the requirements of the Tribunal's Statute.

On the merits the Organization denies that there was any misrepresentation in this case. It asserts that the complainant was fully informed on signing her letter of appointment that she would have to pay taxes in Canada on her IOM salary and that these taxes would not be reimbursed by the Organization. It was on that basis that she accepted the offer of employment. At the time when she signed the letter of appointment, and throughout her period of employment, Annex A to the Staff Regulations and Rules contained an explicit reference to payment and reimbursement of taxes in the duty station. IOM points out that, although the complainant acknowledges that she accepted the offer of employment on the conditions specified under the Staff Regulations and Rules, she completely disregards the provisions of Staff Rule 3.41 and Annex A concerning the conditions and procedure for reimbursement. It adds that the version of Annex A that it produced in the course of the internal appeal proceedings has been in

force since September 2006; it was amended once during the complainant's tenure, but the amendment in question had no bearing on the present case. The Organization emphasises that all staff are informed upon being recruited that the Staff Regulations and Rules are available via its intranet site.

D. In her rejoinder the complainant maintains that her appeal was lodged in a timely fashion, but submits that the real issue is that of whether Annex A was revised in any material way and, if so, whether such revision was duly communicated to the staff. According to her, the only version of Annex A that was available to staff via IOM's intranet site was the 1990 version, which did not confine the reimbursement of income taxes to those levied at the duty station. She states that although IOM posted an updated version of the Staff Regulations and Rules on its intranet site in September 2006, it removed that version only a few days later, following objections by the Staff Association, and replaced it with the 1990 version. The complainant further contends that it was the 1990 version of the Staff Regulations and Rules that was given to her during her first week at IOM by the Legal Adviser, hence the latter's statement that these texts were "in need of updating", and that in April 2008 the new version had still not been posted on the intranet.

E. In its surrejoinder IOM maintains its objection to receivability and reiterates its position on the merits. It states that the revisions to the Staff Regulations and Rules announced in September 2006 were not withdrawn but remained in force. It asks the Tribunal to award it damages for the legal costs it has incurred in responding to the complaint, which it considers to be frivolous and opportunistic.

CONSIDERATIONS

1. The critical issue raised by this complaint is whether the complainant was entitled to reimbursement of income tax levied in Canada on the salary and allowances received by her from IOM. She claims that she was and that, because of a misrepresentation by the

IOM Administration in December 2006, she only became aware of that entitlement in November 2007. She argues that the failure of the Administration to reply to her request for review, dated 21 December 2007, was an implied decision to reject her claim for reimbursement, that that implied decision was the subject of a timely internal appeal and that the complaint with respect to the decision to dismiss her appeal is therefore receivable.

2. IOM argues, on the other hand, that the complainant was not entitled to reimbursement of income tax paid in Canada, that she was correctly informed of this before accepting an offer of appointment on 8 December 2006, and that the only administrative decision that the complainant could challenge was the decision to appoint her on terms excluding such reimbursement. On that basis, it contends that her request for review of 21 December 2007 was made well after the 60 days in which that decision could be challenged by way of internal appeal and that, in consequence, her complaint is not receivable.

3. It is not in dispute that the complainant was informed before she accepted the offer of appointment that she was not entitled to reimbursement of income tax paid in Canada. She claims that the information given to her at that time was false and that at all relevant times the Staff Regulations and Rules provided for reimbursement, but that she did not become aware of that until November 2007. In support of her claim she provides a version of Annex A to the Staff Regulations and Rules which, in paragraph 2, relevantly provides that reimbursement will be made “only upon production of a receipt from the national authorities concerned showing that such taxes have been paid”. IOM produces another version providing that reimbursement will be made “only upon production of a receipt from the national authorities of the duty station showing that such taxes have been paid” (emphasis added). Canada was not the complainant’s duty station.

4. The Organization states that Annex A was amended to include the words “of the duty station” in September 2006. The complainant disputes this, asserting that, at the relevant time, neither

the hard copy of Annex A nor the electronic version available on the IOM intranet site made reference to “the duty station”. In regard to the electronic version, she accepts that a new version may have appeared for a short period but asserts that it was quickly replaced by the old version, which did not mention “the duty station”. She also argues that, if Annex A was amended in September 2006, she is not bound by the amendment because it was not brought to her attention. The latter argument is without merit. If Annex A was amended, she was correctly informed of the effect of the amendment before she signed the letter of appointment.

5. The Tribunal accepts that Annex A was amended by insertion of the words “of the duty station” in September 2006. In this regard, IOM has produced an e-mail dated 29 September 2006 informing staff that “an updated version of Staff Regulations and Rules [...] ha[d] been posted on [the] Intranet”, and expressly referring to clarifications in Annex A. The fact that this amendment was made is also corroborated by the statement made to the complainant before accepting the offer of appointment that she would not be reimbursed income tax paid in Canada. Whether or not the new version was readily available to staff is of no consequence in the present case where the complainant was correctly informed of the effect of the amendment.

6. As there was no misrepresentation with respect to reimbursement of income tax levied in Canada, the complainant’s claims made in that regard must be dismissed. And to the extent, if any, that the complaint is directed against the decision to appoint the complainant on terms which excluded reimbursement of income tax paid in Canada, her internal appeal was not brought within time and, hence, the complaint is irreceivable.

7. IOM seeks an order for costs against the complainant. Given that initial correspondence with the complainant suggested that income tax would be reimbursed, and given also the confusion relating to the precise terms of Annex A, including that the complainant was provided

with a hard copy of the annex in its unamended form, this is not an appropriate case in which to award costs against the complainant.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Agustín Gordillo
Dolores M. Hansen
Catherine Comtet