

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

L.
v.
FAO

124th Session

Judgment No. 3878

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. L. against the Food and Agriculture Organization of the United Nations (FAO) on 26 May 2014, the FAO's reply of 6 October, the complainant's rejoinder of 15 December 2014 and the FAO's surrejoinder of 13 May 2015;

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 contests the decision not to reimburse him for his FAO-derived income taxes, interest charges and penalties paid to the United States tax authorities.

The complainant is a dual German and United States national who began working with the FAO in May 2005. Although he was born in the United States of America, he lived there for only a few months after birth. Prior to joining the FAO he lived in Germany and had had no contact with the United States tax authorities. The FAO records only one nationality for its staff and the complainant's nationality was registered as German.

Upon recruitment to the FAO the complainant was posted to Chile. In March 2006, through the issuance of an annual FAO Administrative Circular on United States Income Tax, he became aware of the obligation of United States nationals employed by the FAO to pay income tax to the United States authorities which would be reimbursed by the FAO. He began to make enquiries within the FAO Liaison Office for North America (FAO LOW) on whether he was required to pay income taxes to the United States authorities. FAO LOW referred him to an external tax consultant, whom the complainant consulted over the telephone and was left with “the impression that there was no need for action”. He subsequently took no steps to pay such taxes. He made further enquiries in April 2009 without however resolving the issue. In 2011 he was assigned to a position at the FAO Headquarters in Rome, where a different external tax consultant advised that he file annual tax returns from 2005 onwards. In April 2012 the complainant filed tax returns with the United States authorities for the years 2005 to 2011.

On 11 December 2012 he wrote to the Director of FAO LOW requesting that the FAO reimburse him for: (i) the taxes that he had had to pay to the United States authorities for the years 2005 to 2008, amounting to 16,081 United States dollars; (ii) the interest charged by the United States authorities for his late payment of taxes for the years 2005 to 2011, amounting to 4,638 dollars; (iii) the “failure-to-file” and “failure-to-pay” penalties he had incurred for the years 2005 to 2011, amounting to 16,980 dollars. The Director of FAO LOW replied on 20 December 2012 indicating that the FAO would reimburse the complainant for the years 2009 to 2011, but not for the years 2005 to 2008 since the two-year time limit for seeking reimbursement for the latter period had expired. The complainant appealed this decision to the Director-General on 7 January 2013. This appeal was rejected and on 18 March 2013 the complainant filed an appeal with the Appeals Committee requesting compensation for the financial damage he had incurred allegedly as a result of the FAO’s negligence and inactiveness.

The Appeals Committee issued its report on 13 November 2013. It found that the FAO had failed in part in its duty of care towards the complainant and that the Administration shared responsibility for the

situation that he was facing. It recommended that he be compensated in the amount of 16,081 United States dollars, i.e. the amount paid by him in taxes for the years 2005 to 2008, but that he assume responsibility himself for the amounts paid in penalties and interest. By a letter dated 1 April 2014, the Director-General rejected the Appeals Committee's findings, including the one concerning the duty of care, and the recommendation that the complainant be compensated. That is the impugned decision.

The complainant asks the Tribunal to award him the outstanding reimbursements of his United States income taxes in the amount of 16,081 United States dollars, along with 14,499.42 dollars paid in penalties and 5,999.89 dollars paid as interest charges to the United States Internal Revenue Service. He requests reimbursement of bridge financing calculated in June 2014 to the amount of 3,903.75 dollars and on which he has incurred interest charges of 222.33 dollars per month (not including compound interest) as from June 2014. He also requests the reimbursement of tax consultant fees in the amount of 3,120 dollars.

The FAO asks the Tribunal to dismiss as irreceivable the complainant's claim for the reimbursement of tax consultant fees. It otherwise asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. In December 2012 the complainant submitted a claim for reimbursement of the United States income taxes he paid for the years 2005 to 2008, together with the interest and late payment penalties he paid for the years 2005 to 2011. The FAO rejected the claim for reimbursement for the 2005 to 2008 taxation years on the basis that it was submitted beyond the two-year time limit in the FAO's rules. The FAO also rejected the interest and late penalty claims. However, the FAO agreed to reimburse the complainant for the income taxes paid for 2009 and the following years.

2. The complainant lodged an internal appeal against this decision. Based on a review of the Staff Rules and other relevant rules and procedures, the Appeals Committee found that, as the complainant's circumstances did not fall within FAO Manual paragraph 309.5.2, and as he had missed the two-year time limit provided in Manual paragraph 309.6.1, he was not entitled to claim reimbursement for the 2005 to 2008 taxes, penalties, and interest. However, the Appeals Committee found that the situation in which the complainant found himself was, in great part, caused by the FAO's failure to properly exercise its duty of care toward the complainant and the tax consultant's negligence for which the FAO should assume some responsibility. The Appeals Committee recommended that the complainant should be paid damages in the amount of 16,081 United States dollars, corresponding to the amount he paid in taxes on his FAO-derived income for the 2005 to 2008 years.

3. In his 1 April 2014 decision, the Director-General endorsed the Appeals Committee's reasoning and conclusion that under the rules the complainant was not entitled to reimbursement of the taxes, penalties, and interest for the years 2005 to 2008. However, the Director-General rejected the Appeals Committee's conclusion that the situation in which the complainant found himself was the result of a shared responsibility between the Organization and the complainant, as well as its recommendation regarding the payment of compensation. In detailed reasons, the Director-General concluded that there was no breach of the FAO's duty of care and that the FAO could not be held responsible for advice provided by an external consultant. Accordingly, the Director-General dismissed the appeal.

4. In summary, the complainant submits that the decision refusing the reimbursement of taxes, penalties and interest is in direct contradiction with the intent of the United Nations tax reimbursement system which, as stated in Staff Rule 302.3.151, is "to equalize the salaries of staff members by reimbursing the minimum legally-due income tax on a staff member's FAO-derived income". The complainant also claims that the decision directly contradicts his terms of employment; Staff

Rule 302.3.15; FAO Administrative Circulars 2013/09, 2012/06 and the United Nations Information Circular ST/IC/2013/8 and respective prior versions. Additionally, the complainant submits that the late filing of the tax returns on FAO-derived income and the resulting alleged ineligibility to claim reimbursement for the taxes, accrual of interest charges and penalties was caused by the negligence on the part of the Administration and the “official FAO LOW tax consultant”.

5. There are two main issues in this case. The first concerns the applicability of the two-year time limit for claiming reimbursement in Manual paragraph 309.6.1. The complainant contends that it is not applicable in his case. In advancing this position, he relies on the United Nations Information Circular ST/IC/2013/8, section II, paragraph 20, which relevantly states under the heading “Limitation on retroactivity of claims for reimbursement of taxes” that if there are “extenuating circumstances [...] a staff member may request that the time limit [...] be waived”. The complainant argues that the FAO’s negligence is such an extenuating circumstance. The complainant also points to paragraph 21 of the same United Nations circular that provides for the reimbursement of “late-payment and/or underpayment interest and penalty charges” arising from delays for which the United Nations acknowledges responsibility. The complainant notes that this rule is “confirmed” in the FAO’s Administrative Circulars on United States tax, for example, in Administrative Circular 2013/09, Annex 1 “Most Frequently Asked Questions on Income Taxes in the United Nations”, paragraph 10, and in prior versions of the circular.

6. The complainant’s reliance on the United Nations Information Circular ST/IC/2013/8 is misplaced. The circular is only directed to the staff members of the United Nations and not to the staff members of other organisations. This is clearly illustrated, for example, at the top of page 2 where reference is made to “reimbursement of income taxes by the United Nations”. The complainant himself does not suggest that an FAO staff member may claim reimbursement for income tax paid on FAO-derived income from the United Nations. As a staff member of the FAO, the complainant is subject to the FAO Staff Regulations and

Staff Rules. As stated in Staff Regulation 301, “[t]he Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the staff members of the Food and Agriculture Organization. They represent the broad principles and personnel policy for the staffing and administration of the Organization.”

7. Relevantly, Manual paragraph 309.6.1 specifically states that “[t]he Organization does not entertain any claim for reimbursement of income taxes more than two years after the last date on which the staff member is required to file his or her return, including any extension of filing date authorized under the relevant tax laws and regulations”. Unlike the United Nations circular governing claims by staff members for the reimbursement of income tax, the FAO rule does not provide for a waiver of the time limit in extenuating circumstances. As the complainant did not submit a claim for the reimbursement of the income taxes paid on FAO-derived income for the years 2005 to 2008 within the two-year time limit in Staff Rule 309.6.1, the claims for reimbursement for these years must fail.

8. To the extent that the complainant relies on FAO Administrative Circular 2013/09, Annex 1 “Most Frequently Asked Questions on Income Taxes in the United Nations”, paragraph 10, in support of his claim for the reimbursement of interest and penalties, his reliance is also misplaced. Paragraph 10 provides a response to the question “[w]ho pays the penalties and interest imposed by tax authorities?”. The answer reads: “Staff members are responsible for filling complete, correct and timely tax returns. FAO will not reimburse staff members for penalties and/or interest imposed by tax authorities on their FAO earnings unless: (a) the delays are attributable to the Organization.” In this case, the complainant does not allege delay on the part of the FAO. Paragraph 10(b) states that penalties or interest may be paid under certain conditions as provided in Manual Section 309. The exception found in Manual paragraph 309.5.2, to which the Appeals Committee referred in its report, concerns staff members who may be eligible for a tax exemption. It has no application in this case. Moreover, paragraph 10(b) also relevantly states that “FAO will not pay any late filing penalties under any circumstances”.

In a similar vein, Manual paragraph 309.5.2 specifically limits when “the Organization [will assume] the responsibility to reimburse any penalty or interest on tax payments made after due dates” to the circumstances described in the rule. It follows that the claims for the reimbursement of penalties and interest must also fail.

9. The second issue concerns the complainant’s allegations of negligence. That is, even though the complainant’s claims for reimbursement pursuant to the relevant statutory provisions fail, has the complainant established a claim in negligence? The complainant claims that during his enrolment and induction in Rome, prior to taking up his duties in Chile, the FAO failed to brief him on the special tax status of United States nationals, the related entitlements and the underlying rules and regulations. As well, his United States nationality was not recorded in the FAO system and as a result he did not receive certain statements relevant to tax advances and settlements. He states that in March 2006 due to the issuance of the annual FAO Administrative Circular on United States Income Tax, Administrative Circular 2006/11, and inquiries with colleagues, he learned that colleagues with United States nationality paid income tax to the United States tax authorities and were reimbursed by the FAO. He then contacted the FAO Regional Office for Latin America and the Caribbean (RLC), the FAO LOW Administration, and the FAO LOW’s designated official tax consultant by e-mail and telephone to ascertain whether he was required to pay taxes in the United States on his FAO-derived income. He claims that the FAO failed to respond to his attempts to clarify his tax situation beyond providing him with contact information and documentary advice. He states that the tax consultant did not respond to his e-mails and when he followed up by telephone, the tax consultant negligently left him “under the impression that there was no need for action, given [his] background and history”.

10. The complainant states that in April 2009 when he was considering taking a position with a United States-based company and was “increasingly feeling uneasy with eventual tax obligations stemming from [his] employment with FAO”, he contacted FAO LOW again. He claims that FAO LOW was negligent and inactive in addressing his

questions regarding his FAO-derived income or in pointing him in the right direction and then “bounced” him to the tax consultant who did not respond. He points out that according to FAO’s Administrative Circulars on United States Income Tax, such as Administrative Circular 2009/05, Annex “Most Frequently Asked Questions on Income Taxes in the United Nations”, paragraph 22, and others, the tax consultant was contracted by the FAO between 2004 and 2009 “to provide advice on complex [United States tax cases]”. He adds that in 2011, when he took up his new assignment in Rome, he consulted another tax consultant and he was finally able to resolve his complex tax situation without the help of the FAO.

11. The complainant maintains that the impugned decision is flawed on the grounds that it is based on incomplete facts and erroneous suppositions. He insists that the decision fails to take into account the provisions of Administrative Circular 2012/06, paragraph 12, and the United Nations Information Circular ST/IC/2013/8, paragraph 22, that clearly establish the FAO’s and the United Nations’ obligations to provide advice and assistance to staff members on tax matters and in relation to the treatment of United Nations and FAO-derived income. The impugned decision’s characterisation of Ms L. as an “external tax consultant” is at odds with her specific designation as “FAO-LOW tax consultant” and focal point for “special cases” in the FAO’s annual “guidance” on United States taxation. Despite repeated requests for advice or assistance on tax matters, the complainant has received no advice and the FAO has not put forward any evidence to demonstrate that it had done so.

12. The complainant’s position is fundamentally flawed as it fails to have regard to the relevant FAO Staff Regulations and Staff Rules and other applicable rules and procedures and, in particular, the respective responsibilities and obligations of the FAO and the complainant. It is convenient to add here that a staff member is deemed to know the regulations and rules governing her or his appointment (see, for example, Judgments 1700, consideration 28, 2960, consideration 7, 3135, consideration 14, and 3726, consideration 12). Pursuant to Staff Rule 302.4.41, staff members are responsible at the time of appointment for providing all information that may be necessary to determine their

status under the Staff Regulations and Staff Rules. Under Staff Rule 302.4.71, the FAO “shall not recognize more than one nationality for each staff member” and, if a staff member has more than one nationality, for the purposes of the Staff Regulations and Staff Rules, Staff Rule 302.4.72 provides that it is the nationality of the State with which the staff member is most closely associated that is recognized.

13. As set out above, pursuant to its policy to equalize the salaries of staff members stated in Staff Rule 302.3.151, the FAO reimburses the income tax on the staff members’ FAO-derived income. At the same time, Staff Rule 302.3.1541 places the responsibility on each staff member to meet their obligations for the filing of tax returns, to make tax payments when due, and to comply with applicable income tax laws and regulations creating exemptions from the levy or payment of income tax. Additionally, under Staff Rule 302.3.1542 each staff member is responsible for providing the Administration with all information in relation to her or his income tax liability and the responsibility to be assumed by the Organization.

14. The above provisions make it clear that the staff member bears the sole responsibility for all aspects of her or his tax obligations. It is equally clear that the FAO’s responsibility pursuant to its policy of equalizing the salaries of staff members is limited to the reimbursement of the income tax on FAO-derived income provided that the staff member has met the statutory conditions for reimbursement. As to the complainant’s assertion set out above that the FAO is obliged to provide staff members with guidance and assistance on tax matters in relation to FAO-derived income, Administrative Circular 2012/06, on which the complainant relies, does not support his assertion. Paragraph 12 under the heading “Income Tax Assistance and Inquiries” does not create an obligation on the part of the FAO, rather, it states that the FAO cannot provide assistance or advice to staff members “on tax matters other than in relation to the treatment of FAO earnings” or communicate directly with tax authorities on behalf of a staff member. To suggest that this statement creates an obligation is directly at odds with the statement in the section under the heading “Requirements for applications for

reimbursement” at page 2 of the same circular. Under the heading in bold type “Important Notice and Dates” it states: “Tax advice and tax forms: The LOW Tax Unit team is not permitted to provide advice to staff members or to assist in the preparation of tax returns. Staff members who need detailed tax advice and/or tax forms should refer to www.irs.gov.”

15. As noted above, the complainant maintains that according to the Administrative Circulars on United States Income Tax, the FAO contracted the tax consultant to provide advice on complex United States tax cases. At paragraph 17 in the “Most Frequently Asked Questions on Income Taxes in the United Nations” Annex to the Circular cited above by the complainant, the question posed is: “I am getting ready to send my tax return to the IRS; however, I would like to have it reviewed. Is there someone at FAO/WFP/IFAD who could do this for me?” The response reads: “FAO/WFP/IFAD primarily issues tax reimbursement for individuals who have already filed their taxes with the IRS. You may choose to employ a tax service centre for this purpose. FAO/WFP/IFAD is not in a position to either review or provide advice. For special cases, you may contact FAO-LOW tax consultant [Mr L.]: Email Address [...] Tel. No.: [...]” In the absence of information regarding the contractual relationship between the FAO and the tax consultant, at best this is no more than a referral to a tax consultant who may be of assistance. It certainly does not support the assertion that the FAO contracted this individual for the purpose of providing advice and assistance to its staff members. Without more, this does not give rise to liability on the part of the FAO for advice given by this consultant.

16. Having regard to the Staff Regulations and Staff Rules and the relevant Administrative Circulars, it is clear that the FAO has a duty of care towards its staff members stemming from its obligations in relation to the reimbursement of income tax. However, the duty of care does not extend to the obligations resting exclusively with the staff member for the filing of tax returns, making tax payments when due, and complying with applicable income tax laws. Further, as stated in the rules and relevant Administrative Circulars, the duty of care does

not extend to providing advice or assistance in relation to these staff member responsibilities.

17. Essentially, the complainant grounds his complaint on his assertion that having dual citizenship he did not know whether he was required to pay United States income tax on his FAO-derived income and the FAO did not provide any help in resolving his quandary. However, the complainant states that he first became aware “[i]n March 2006, due to the issuance of the annual FAO Administrative Circular on [United States] Income Tax (Administrative Circular 2006/11) and [his] inquiries with RLC colleagues, [he] found out that [United States] colleagues pay income tax and get reimbursed.” In the “Most Frequently Asked Questions on Income Taxes in the United Nations” Annex, in response to the question, “[w]ho is subject to United States income taxation on FAO earnings” the latter circular states, “United States citizens and permanent residents who have signed the Waiver of Rights, Privileges, Exemptions and Immunities (the Waiver) are subject to United States income tax on their FAO/WFP/IFAD earnings”. Although very clear, even if it could be said that this answer leaves open the question as to whether staff members having dual citizenship are subject to the United States tax laws, the circular also provides several sources, including telephone numbers and Internet sites, that can be accessed by a staff member seeking advice about United States income taxation. With this information, it was incumbent on the complainant to make the necessary inquiries to ascertain whether he was subject to United States taxation. In these circumstances, it cannot be said that the FAO was in any way negligent in its dealings with the complainant.

18. In conclusion, the Director-General’s rejection of the Appeals Committee’s finding of shared responsibility and its recommendation concerning the payment of compensation are well founded and the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 17 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ