

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K.
v.
IOM

132nd Session

Judgment No. 4403

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. W. K. against the International Organization for Migration (IOM) on 23 November 2018, IOM's reply of 8 August 2019, the complainant's rejoinder of 21 October 2019 and IOM's surrejoinder of 23 January 2020;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges the decision to reject his claim for additional compensation for the injuries suffered in connection with the performance of his contract and to deny him access to the internal appeal process.

The complainant joined IOM under a one-month "Consultant's Contract" starting on 9 November 2011 and expiring on 8 December 2011. His Terms of Reference, annexed to the contract, included a field travel assignment in northern Kenya. On 13 November 2011, while travelling on mission, an incident occurred during which armed men shot and severely injured the complainant.

On 20 November 2013 the complainant signed a discharge statement for the payment of approximately 67,000 United States dollars as a Permanent Partial Disability indemnity under the IOM Compensation Plan Instruction, IN/95 Rev.2. The statement provided that "such payment [was] in full and final settlement of all entitlements under the

[Compensation Plan] in relation to the 13 November 2011 accident, with the exception of IOM's obligation to reimburse medical expenses related to the above-mentioned accident [...] Upon receipt of the [payment] I hereby release IOM and discharge IOM from any and all liability in relation to my consultancy with IOM." By an email of the same date the complainant expressed his reservations as to the amount offered and indicated that it was not an end to the legal dispute.

On 21 November the Administration asked the complainant to confirm that if IOM proceeded with the payment, he accepted to release and discharge IOM from any liability in relation to the incident. The complainant replied requesting that the payment be made.

In 2014 the complainant's legal counsel contacted the Administration requesting additional compensation.

In June 2014 IOM offered an *ex gratia* payment of 25,000 dollars, which the complainant refused. There were subsequent exchanges in which the complainant requested IOM to appoint an arbitrator to settle the dispute pursuant to clause 17 of his contract, which provides that "[a]ny disagreement or dispute concerning the interpretation or application of the terms of this contract shall be settled by mutual agreement or, failing that, through arbitration".

In October 2015 the complainant initiated proceedings before the High Court of the Republic of Kenya for an order referring the matter to arbitration. On 19 February 2016 the High Court dismissed his appeal on the ground that IOM enjoys immunities from such legal proceedings and therefore that the Court lacked jurisdiction.

On 22 March 2018 the complainant's counsel submitted a claim for compensation for occupational injury on behalf of the complainant. The Administration maintained its position that, by signing the discharge statement on 20 November 2013, the complainant had released IOM from any liability in relation to the incident of 13 November 2011. Consequently, his demand for arbitration was without legal basis.

The complainant requested the review of that decision in May 2018, which the Administration rejected on 16 July.

On 6 August the complainant submitted an appeal to the Joint Administrative Review Board (JARB) against the decision of 16 July.

On 31 August 2018 the Director of the Human Resources Management Division informed the complainant that, as a consultant, he was not considered a staff member and, therefore, that he did not have access to the JARB. In any event, his claim for additional compensation in relation to the incident that occurred on 13 November 2011 was time-barred. That is the impugned decision.

The complainant asks the Tribunal to order IOM to produce documents relating to the *ex gratia* payment offered in 2014 and documents relating to its refusal to have an arbitrator appointed to resolve the dispute. He further asks the Tribunal to quash the impugned decision and to award him moral damages under several heads. He seeks material damages for loss of employment years due to his occupational injuries, as well as costs, with interest on all sums awarded. Lastly, he claims exemplary damages.

IOM asks the Tribunal to dismiss the complaint as irreceivable. It submits that the complaint is irreceivable *ratione personae* as the Tribunal lacks jurisdiction over complaints filed by consultants, as well as time-barred.

CONSIDERATIONS

1. The complainant entered a contract in late 2011 with IOM to perform, between 9 November 2011 and 8 December 2011, a range of tasks specified in an annex to the contract. Towards the beginning of the contractual period an incident occurred, at the very least indirectly connected to the performance of the contract, in which the complainant was shot and seriously injured. A dispute between the complainant and IOM ensued about, generally described, compensation for the injury he had suffered. Relevantly, the dispute culminated in a decision of 31 August 2018 of IOM that an appeal to the JARB filed by the complainant on 6 August 2018 would not be considered by the JARB. This is the decision impugned in these proceedings by way of a complaint filed on 23 November 2018.

2. The Tribunal finds the written submissions to be sufficient to reach a fair and reasoned decision and therefore there is no need for oral hearings.

3. The rationale for the decision impugned was, in part, that the complainant was not a staff member of IOM and, accordingly, did not have access to the JARB having regard to the Staff Regulations and Staff Rules for Officials and Employees of IOM and the applicable IOM Instruction (IN/217 Rev.1). IOM's position that the complainant was not a staff member is foundational to an argument advanced in these proceedings that the complaint is irreceivable.

4. It is convenient to deal with this threshold issue at the outset. The issue has two related elements. The first is whether, as a combined matter of fact and law, the complainant was a member of the staff of IOM. The second is whether, depending on the answer to the question posed in the preceding sentence, the complainant can invoke the jurisdiction of the Tribunal.

5. The latter element is readily susceptible of an answer. The Statute of the Tribunal both defines and limits its jurisdiction. That jurisdiction is to hear and determine grievances from officials (or former officials or individuals to whom the official's rights have devolved) of both the International Labour Office and other international organizations which have recognised the Tribunal's jurisdiction (see Article II, paragraphs 1, 5 and 6, of the Statute). IOM's recognition of the Tribunal's jurisdiction in November 1996 concerned, in substance, grievances of "staff members", to use the language of the resolution of the Organization's Council recognising jurisdiction. The Tribunal has determined in Judgment 3381, consideration 6, in relation to IOM that "[a]s [...] the complainant did not become a staff member of IOM and, therefore, not an official for the purpose of Article II of the Tribunal's Statute, the complaint is clearly irreceivable" (see also Judgment 3049, consideration 4). Accordingly, unless the complainant had become a member of the staff of IOM at the time of the events founding his grievance, the Tribunal has no jurisdiction to hear and determine that grievance raised by way of complaint.

6. In the contract dated 11 November 2011 (for the performance of tasks by the complainant between 9 November 2011 and 8 December 2011) the complainant is described as a "Consultant". This characterisation accords with both the substance and form of the contract. IOM, in support of its argument that the complainant was not a member of staff,

points to Instruction IN/84, effective 6 June 2007, which declares that “[consultants] are neither ‘staff members’ under the Staff Regulations and Staff Rules for Officials and Employees of IOM nor for the purposes of the Agreements on the Privileges and Immunities of IOM with respective countries”. Instruction IN/84 constitutes guidelines for the selection and employment of consultants.

7. In his rejoinder, the complainant does not directly challenge what is said in Instruction IN/84 nor its legal status and, subject to what follows, its legal effect. Rather, the complainant argues that other normative legal documents which take a more expansive approach to what is a staff member should be preferred and should govern the complainant’s status. One is the Compensation Plan Instruction, IN/95 Rev.2 and the other is the Malicious Acts Insurance, contained in the Information Bulletin IB/17, Rev.1. The latter document draws a clear distinction between staff members and consultants and does not provide support for the complainant’s argument. The former document states that “[t]he term ‘Staff Member’ is used to define all staff in the service of the Organization [...] including temporary personnel, who do not hold contract subject to [...] Staff Regulations and Rules for Officials [...] [and] [f]or purposes of the Compensation Plan (CP) insurance only, the term also applies to consultants”. The fact that consultants are defined by this provision as staff members for purposes of the Compensation Plan insurance only does not sustain a conclusion that a consultant covered by this insurance policy is an official for the purposes of Article II, paragraph 5, of the Statute of the Tribunal. Consultants like the complainant were not.

8. Accordingly, the Tribunal is satisfied the complainant cannot invoke the Tribunal’s jurisdiction. His complaint is irreceivable and should be dismissed. There is no need to rule on the request for disclosure of documents.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 26 May 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ