

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

E. E.

v.

ACP Group

132nd Session

Judgment No. 4404

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. E. E. against the African, Caribbean and Pacific Group of States (ACP Group) on 26 April 2019 and corrected on 4 June, the ACP Group's reply of 19 July, corrected on 12 August, the complainant's rejoinder of 21 October and the ACP Group's surrejoinder of 26 November 2019;

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 seeks reimbursement of an amount wrongly deducted from her pay owing to double national taxation of her income, and compensation for the moral injury allegedly suffered as a result.

The complainant, a Swiss national, joined the ACP Group – whose Secretariat is located in Brussels (Belgium) – on the basis of a fixed-term contract that ran from 1 November 2016 to 30 April 2017 and specified that income tax – in this case, Belgian – would be deducted from her salary. As her post was in Geneva, she was issued a Swiss legitimization card for the duration of her employment. On 4 January 2017, the Permanent Mission of Switzerland to the United Nations Office and other international organizations in Geneva sent her an information sheet concerning her situation in respect of mandatory Swiss social insurance, health insurance and Swiss income taxes, to which she was

fully subject. The complainant was concerned about paying taxes in Belgium while she was subject to tax in Switzerland and requested her employer for an explanation. She did not receive a response.

In July 2017, having received a second fixed-term contract from 1 May to 31 October 2017, she was informed that, under this second contract, she was considered to be subject to Swiss income tax. At the same time, she lodged an objection against the decision of the *Office cantonal des assurances sociales de Genève* (the Geneva Cantonal Social Insurance Office) ordering her to pay her contributions. She asked for the amount payable to be decreased in view of her difficult financial situation, but this request was refused. She then referred the matter to the *Bureau de l'Amiable Compositeur*, a body created by the Government of the Republic and Canton of Geneva in 1995, with the support of the Swiss federal authorities, whose remit is to identify amicable solutions to disputes between institutions or persons with diplomatic status and their employees. On 27 November 2017, the Chair of the Bureau wrote to the ACP Group informing it that, as a Swiss national holding a legitimisation card, the complainant had to pay her taxes in Switzerland and could not be taxed twice. She requested that the complainant be reimbursed for the sums deducted in respect of Belgian income tax between November 2016 and April 2017, the term of her first contract. On 18 December 2017, the Chair of the Bureau was informed that the ACP Group did not consider that there was a dispute with the complainant and that the first contract had been performed in accordance with its terms.

In October 2018, when she was no longer employed by the ACP Group, the complainant, who had received her Swiss tax statement, asked the Geneva tax authorities to exempt her, stating that she had paid taxes in Belgium. Her request was refused and she received a letter of confirmation dated 6 November 2018 certifying that her income was fully taxable in Switzerland. At the same time, she lodged a new objection against the decision of the Geneva Cantonal Social Insurance Office refusing to reduce the amount payable and, as she wished to leave Switzerland permanently to return to live in Africa with her family, she sent several requests to the administration of the ACP Group to repay the sums unduly deducted from her pay during her first contract so that she could regularise her situation with regard to Swiss taxes. On

19 December 2018 she was notified that the reimbursement procedure had been initiated. Since the reimbursement was not actually effected before her final departure on 24 December 2018, the complainant repeatedly contacted the administration in January 2019 and even travelled to Geneva in the hope of resolving her situation.

By an email of 6 February 2019, which constitutes the impugned decision, she was informed that the financial controller required proof of payment or documents from the tax authorities in order to proceed with the reimbursement. The complainant again submitted the letter of confirmation of 6 November 2018 and the tax statement without showing the sums concerned since, in her view, that was a private matter. She informed the Administration that if she was not reimbursed by 4 March 2019, she would file a complaint with the Tribunal as the Swiss Mission recommended.

In her complaint of 26 April 2019, the complainant requests the Tribunal to set aside the impugned decision and to order the reimbursement of the total amount unduly deducted from her pay, together with interest, from November 2016 until the present day. In addition, she seeks compensation for the moral injury that she and her family consider they have suffered, the assessment of which is left to the ACP Group and the Tribunal, taking into account various factors.

The Secretariat of the ACP Group, which made an initial reimbursement on 18 April 2019 – which the complainant states she received on the day she filed her complaint – maintains its commitment to settling the case definitively by paying, as a sign of goodwill, the remainder of the sums claimed by the complainant in the initial complaint.

CONSIDERATIONS

1. The complainant was recruited by the ACP Group, whose Secretariat is located in Brussels, to act as private secretary to the Head of the Permanent Delegation of that organisation to the United Nations Office and other international organizations in Geneva. During her initial employment contract, from 1 November 2016 to 30 April 2017, her pay was subject, in accordance with the rule normally applied to officials of the ACP Group, to monthly deductions of income tax

payable in Belgium, although the complainant, who was a Swiss national and employed as a member of the administrative staff located in Geneva, was in fact subject to income tax in Switzerland, not Belgium. Although these undue deductions were stopped under the complainant's new contract that commenced on 1 May 2017, the ACP Group at first refused to reimburse her for the deductions made during her initial contract.

2. After much time-consuming effort, the complainant was informed by the Assistant Secretary General of the Department of Administration, Finance and Human Resources on 19 December 2018 that the ACP Group had "initiated the procedure for reimbursement" of the deductions in question. However, in an email of 6 February 2019, the same official told the complainant that the Group's financial controller required her to submit documentary evidence that she was liable to Swiss taxation before the reimbursement could be authorised. That email is the decision impugned by the complainant.

3. As the Tribunal has repeatedly stated in its case law, "[o]rdinarily, the process of decision-making involves a series of steps or findings which lead to a final decision. Those steps or findings do not constitute a decision, much less a final decision. They may be attacked as a part of a challenge to the final decision but they, themselves, cannot be the subject of a complaint to the Tribunal" (see Judgment 2366, consideration 16, confirmed by Judgments 3433, consideration 9, 3512, consideration 3, 3700, consideration 14, 3876, consideration 5, and 3961, consideration 4).

In this case, the email of 6 February 2019, the sole purpose of which was to invite the complainant to submit documents deemed necessary by the organisation's services so that the deductions could be reimbursed, was merely a step in preparation for the decision that would ultimately be taken as to the payment of the sums in question. That email cannot therefore be construed as constituting a final decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal and could not, therefore, be impugned before the Tribunal (for a similar case involving a request for the production of supporting documents required

for the examination of an application for financial benefits, see Judgment 3876, considerations 4 and 5).

It follows that the complaint must be dismissed as irreceivable.

4. Nevertheless, the Tribunal is aware that, although the dismissal of the complaint is necessary from a legal point of view, it will not put an end to the dispute between the complainant and the ACP Group. While the Tribunal notes that the ACP Group, in its written submissions, states it is prepared to resolve this dispute by means of an amicable settlement between the parties, the Tribunal observes that it does not, however, appear able by itself to offer the complainant an adequate response to her claims. On an entirely exceptional basis, the Tribunal will therefore set out below, purely for guidance, what would appear to be the most appropriate terms for such a settlement, having regard to the circumstances of the case.

5. It is clear from the evidence, and in particular from an information sheet drawn up on 4 January 2017 for the complainant by the Permanent Mission of Switzerland to the United Nations Office and other international organizations in Geneva, and from a letter of confirmation issued on 6 November 2018 by the tax authorities of the Republic and Canton of Geneva, that the complainant was fully subject to income tax – and, likewise, mandatory social contributions – in Switzerland.

Consequently, the ACP Group was wrong to make monthly deductions from her pay during her initial employment contract in respect of the income tax applicable in Belgium, which had the effect of subjecting her pay to double taxation. The Tribunal notes, moreover, that the ACP Group itself evidently became aware of that anomaly at the time since, as already stated above, those deductions were stopped under the complainant's new contract starting on 1 May 2017.

6. It follows from the foregoing that the settlement of the dispute must logically be based, as the complainant rightly maintains and as, moreover, the Chair of the *Bureau de l'Amiable Compositeur* stated to the ACP Group in a letter of 27 November 2017, on the repayment to

the complainant of the sums wrongly deducted from her pay from November 2016 to April 2017 in respect of Belgian income tax.

The Tribunal observes that the Group is thus mistaken in taking the view, as its written submissions and various other documents in the file show, that it should, on the contrary, reimburse the complainant for the taxes which she had to pay in Switzerland. In that regard, the ACP Group's services were, in particular, wrong to think it necessary to ask the complainant, in the impugned email of 6 February 2019, to provide them with new supporting documents proving that she was subject to tax in Switzerland, and specifically to request, moreover, in a further email sent to her the following day, that she produce, inter alia, her latest Swiss tax statement in a version showing the amount of tax at issue. Indeed, as the complainant rightly argues, and even though this circumstance has no bearing on the irreceivability – demonstrated above – of the complaint against that email of 6 February 2019, the request for the submission of those documents was in fact completely unwarranted, since the amount of tax to which the complainant was subject in Switzerland did not, in this case, have any bearing on the determination of the ACP Group's liability to reimburse her. In fact, in order to establish that reimbursement of the complainant for the sums deducted from her pay in respect of Belgian income tax was justified, all that was required was proof that she was subject to tax in Switzerland, which the documents already in the ACP Group's possession at the time, and in particular those referred to in consideration 5 above, were sufficient to establish on their own.

7. The Tribunal considers that, in order to resolve the dispute fairly, the ACP Group should therefore repay to the complainant the amount of the monthly deductions unduly made from her pay during the period in question in respect of Belgian income tax, which, according to the file, amount to an undisputed total sum of 9,750 Swiss francs.

The amount of the partial reimbursement of 4,288.10 Swiss francs already made by the ACP Group to the complainant on 18 April 2019 should of course be deducted from this sum. Indeed, although that reimbursement was intended to compensate for the payment of part of the taxes to which the complainant was subject in Switzerland – namely, cantonal and communal taxes – and thus, as stated above, was based on

incorrect reasoning, it nevertheless reduced the ACP Group's debt to the complainant by the same amount.

According to the Tribunal's case law, the sums corresponding to the reimbursement of the wrongful monthly deductions should bear interest at the rate of 5 per cent per annum from the date of each deduction until the date of reimbursement.

8. Moreover, the Tribunal considers that, quite apart from the reimbursement of the deductions themselves and payment of interest thereon, the complainant may legitimately seek compensation for the various other injuries resulting from her unacceptable situation of double taxation and the ACP Group's wrongful conduct in her regard.

In this respect, it is clear from the evidence that the complainant experienced serious difficulty in meeting her tax obligations and paying her social security contributions in Switzerland owing to the considerable total amount of tax she had to pay in relation to her salary. This situation forced her to undertake a large number of administrative steps and unquestionably subjected her to emotional strain, particularly owing to the risk that the authorities concerned would take legal action against her and the difficulty in making arrangement for a lawful departure from Switzerland, and also led her to incur various expenses.

Furthermore, it is also clear from the evidence that the ACP Group, which did not acknowledge that the complainant's claim was well-founded until December 2018, after having, in particular, wrongly denied the existence of a dispute with the complainant to the *Bureau de l'Amiable Compositeur* and failed to answer many of the complainant's emails, even though she had raised the matter with the ACP Group as far back as December 2016, was negligent in dealing with the complainant's internal complaint and showed a lack of consideration in her respect.

In the light of all these factors, the Tribunal considers that the ACP Group would make fair redress for the injuries thus caused to the complainant by awarding her, in addition to the reimbursement with interest of the aforementioned deductions, compensation of 12,000 Swiss francs under all heads.

9. However, as made clear above, this guidance is provided by the Tribunal solely with a view to assisting the parties to resolve the dispute amicably, given that, for the reasons set out in consideration 3 above, this complaint must be dismissed as irreceivable.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 3 June 2021, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

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

(Signed)

PATRICK FRYDMAN DOLORES M. HANSEN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ