NINETY-SIXTH SESSION

Judgment No. 2296

The Administrative Tribunal,

Considering the second complaint filed by Mr W. R. against the International Labour Organization (ILO) on 18 March 2003, the ILO's reply of 30 May, the complainant's rejoinder of 29 August and the Organization's surrejoinder of 16 October 2003;

Considering Articles II, paragraph 1, 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 is a United States citizen and was born in 1951. Since 1980 he has been employed in Geneva by the International Labour Office, the ILO's secretariat, and is subject to the payment of US income tax. In 1984 a Tax Reimbursement Agreement was signed between the United States of America and the International Labour Office, replacing an earlier one of 1975. By the terms of that Agreement the ILO reimburses officials subject to US taxation on their ILO income (hereinafter "institutional income"). The system also allowed for advance payment to the official concerned of the estimated taxes, in the form of a cheque to be forwarded to the appropriate US tax body.

Article 14.8 of the ILO Staff Regulations, headed: "Time limit for submission of claims", reads as follows:

"Except where these Regulations otherwise provide, no claim under them shall be entertained if it is submitted after the expiry of 12 months from the date on which the right to bring it forward accrued to the person concerned."

Between 1995 and 2001 the complainant did not file any US tax returns or seek reimbursement from the ILO for tax due on his institutional income. In July 2001 he received a reminder, and in December 2001 he completed tax forms for the years 1995 to 2000. By a minute of 19 December 2001 to the Payment Authorisation Section the complainant sought either reimbursement by the ILO or a cheque for the Internal Revenue Service covering the amount of tax due, adding that the late submission of his tax returns was due to an "unintentional oversight". The Office authorised a cheque covering the tax owed for the years 1999 and 2000 only.

By a minute of 22 January 2002 the complainant sought reimbursement for the years 1995 to 1998. In an e-mail of 4 March 2002 the Director of the Financial Services Department informed the complainant that his claim had been submitted to the US government and that as soon as the funds had been received from the US, the ILO would reimburse him.

On 24 May 2002 the complainant lodged a grievance, under chapter XIII of the Staff Regulations, against the refusal to reimburse him. He filed it with the relevant line manager, the Deputy Director of the Sectoral Activities Department. No solution having been found, he submitted it to the Joint Panel on 12 August. In a report of 4 November 2002 the Panel recommended that the amount claimed by the complainant should be "unconditionally reimbursed to him by the Office within 30 working days of the Director-General's decision to that effect". The Director-General's decision was notified to the complainant by a letter of 16 December, which the complainant received on 19 December 2002. It confirmed the decision to reimburse the complainant for 1995-98 only upon receipt of the appropriate amount from the US government. It informed him that the Director-General had taken note of the recommendations made by the Joint Panel, but considered that certain of its conclusions and recommendations went beyond its mandate. The complainant impugns that decision.

On 19 February 2003 a memorandum entitled "US Tax Reimbursement Rules and Procedures" was drawn up by the

Director of the Financial Services Department, and circulated to officials subject to US income tax legislation.

B. The complainant contends that the ILO's action in withholding reimbursement is unjustifiable and inconsistent with the Staff Regulations and the provisions of the Agreement between the ILO and the US. He puts forward three main pleas. First, citing the ruling of the Tribunal in Judgment 2032 he submits that exemption from national taxation on institutional income is an essential condition of employment in the international civil service, and is "an important guarantee of independence and objectivity". Thus, by refusing to reimburse him for the tax he paid for 1995-98 the Office has stopped short in its responsibility of respecting that condition of employment. He contends that the ILO should reimburse his claim in line with the Organization's stated procedures, under which it pays the official first and then claims back the corresponding amount from the US government. To do otherwise is tantamount to denying him the condition of employment which exempts him from national taxation. Because the ILO has withheld reimbursement for 1995-98 he has had to absorb the full cost of the taxes he owed to the US for those years; the ILO has thus failed to apply what was a key consideration of the Tribunal in Judgment 2032.

Second, the Office has failed to respect the principle of equality of treatment in two respects. At the relevant time, no clear instructions existed for officials liable for US taxation, whereas over the same period the Office was producing instructions annually to help officials subject to taxation by the French tax authorities. Although the ILO took the view that he had prior knowledge of his obligations from instructions contained in an ILO notice entitled "Reimbursement of Taxation", it was only after he filed his grievance that he became aware of the notice in question. It was unsigned and undated, and the Joint Panel itself considered that there was uncertainty as to its origin. Furthermore, the ILO has applied the procedures for reimbursement on an unequal basis. For other officials it has reimbursed them first, and then sought reimbursement from the US government.

Third, he objects to the ILO's narrow interpretation of Article 14.8 of the Staff Regulations concerning the time limit for submitting claims, maintaining that his claim for reimbursement was filed within the time period specified in that article. He takes the view that the time limit of Article 14.8 became operable once the tax forms had been filled out, and not before. Besides which, Article 14.8 has to be read in conjunction with the Tax Reimbursement Agreement between the USA and the ILO, and that Agreement does not explicitly exclude reimbursement of previous years' taxes.

The complainant seeks reimbursement of the tax he paid on his ILO income for the years 1995 to 1998, wanting it to be paid "within 30 working days", in line with the recommendation of the Joint Panel. He specifies that he is not claiming interest or costs.

C. In its reply the Organization submits that the complaint is irreceivable. Time and again, by his own negligence, the complainant let pass the maximum deadline for claiming reimbursement of taxes due on his ILO income. His appeal to the internal appeals body was thus time-barred and his complaint to the Tribunal is irreceivable under Article VII(1) of its Statute. While acknowledging that tax exemption is an important element of the status of international organisations and of officials employed by them, it says that if he wishes to enforce a right the official himself has certain obligations, one of them being to respect time limits. It is clear from the "instructions" referred to by the complainant and given to him upon his first contract with the ILO that: "Claims for reimbursement must be made within the twelve-month period following that in respect of which the taxed income was received." The complainant was aware of the system because records dating from 1990 onwards show that he submitted yearly tax claims up to 1995. Records also show that he was sent a further reminder by e-mail on 11 June 2000.

The Organization notes that the complainant is disputing the way in which it construes the *dies a quo* of the 12-month time limit provided for in Article 14.8 of the Staff Regulations. It denies that there is any ambiguity in the article, but states that the ILO's practice regarding US taxation has evolved over time, and could lead officials to believe that the 12-month time limit provided for in the relevant texts is not absolute. It adds that the complainant's argument regarding the time limit would "deprive the statutory limitation of any possible meaning". The tolerance exercised by the Office could not lead him to believe that a six-year time delay would be acceptable. Moreover, the complainant has not put forward any evidence of compelling circumstances that would have deterred him from acting within the prescribed time. While deeming his reimbursement claims to be time-barred it has nonetheless taken action to obtain recovery of the amount from the US government.

Subsidiarily it considers that the complaint is devoid of merit and rebuts the complainant's pleas. It contends that when an entitlement has been forfeited by an official's wilful neglect or omission it does not mean that the Organization has deprived him of an essential condition of employment, but rather that he has let his entitlement

lapse. The complainant would have received the necessary forms and rules every year from the Internal Revenue Service but did not take the necessary action.

The Organization takes the view that the case law cited by the complainant is not relevant to the circumstances of his case, since the complainants he refers to had filed timely tax returns. It justifies why before reimbursing the complainant it has first to recover the relevant amount from the US government. It has to ensure that tax paid to one member State will not be borne by the Organization's budget, to which all member States contribute. It sees no reason why it should reimburse the complainant in advance of recovering the amount from the US government. Such action would be equivalent to granting him an interest-free loan despite the fact that the delay that has occurred is due solely to his own negligence.

The ILO refutes the complainant's claims of breach of equal treatment. With regard to the first ground raised by the complainant, it asserts that he is subject to US tax because of his nationality and the Organization is not obliged to inform officials of their private obligations. As for the second ground he gives, the complainant has failed to show in what respect any particular staff member in a comparable situation has received different treatment.

D. In his rejoinder the complainant contests the Organization's pleas of irreceivability, inasmuch as he could only lodge a grievance when he was in disagreement with a decision and he did that on 24 May 2002, within the applicable time limit.

He stresses that at the material time he was unaware of the tax reimbursement instructions that he was supposedly given on recruitment in 1980. The checklist produced by the Organization purporting to show that he would have received such a document shows no addressee and is not signed or dated. There is therefore no evidence that the document accompanied the employment offer. Despite having made claims prior to 1995, what he did not know in 2001 and could not know was that his backdated claims would not be allowed. He denies all knowledge of the reminder of 11 June 2000, and has no proof of having received any tax forms from 1995 addressed to him personally. The Organization, he notes, has not produced any evidence to show that a six-year time delay would not be accepted.

E. In its surrejoinder the Organization presses its pleas of irreceivability. It states that the complainant has benefited from a favourable application of relevant time limits and that the question of whether he received the tax reimbursement instructions upon recruitment, or the e-mail of 11 June 2000, is immaterial here since the complaint concerns the years 1995-98. It nonetheless certifies that a copy of the reimbursement instructions given to him upon recruitment was found in his personnel file with a checklist of other accompanying documents stapled to it. It affirms that the complainant was aware of his own obligations even though the Office did not issue yearly reminders, but through his inexplicable lack of diligence he took no action.

On the merits, it states that the only question of substance is whether the decision to consider the claims for 1995 to 1998 to be time-barred was made in a manner that was discriminatory towards the complainant.

CONSIDERATIONS

1. The complainant has been an official with the ILO since 1980. As an American citizen, he is subject to the payment of US income taxes, even though as an international civil servant, he should normally be exempt from national income taxes. To address such a situation, the ILO signed an Agreement with the USA in 1984 to provide reimbursement to officials of the ILO who are subject to US tax law. The Agreement does not exempt officials to whom it applies from filing tax forms according to US tax law, but allows them to seek reimbursement from the ILO of the estimated taxes.

2. Between 1995 and 2001, the complainant did not file US tax returns or pay the taxes due, nor did he seek reimbursement from the ILO of tax on his institutional (ILO) income, owing - he asserts - to an oversight on his part. In December 2001, after having consulted an official in the Financial Services Department about the procedure to follow, the complainant completed tax forms for the years 1995-2000, and requested the ILO either to reimburse him or to issue a cheque for the estimated amounts to be paid concerning ILO income for these years. In January 2002, the ILO sent a cheque to the complainant for a sum corresponding to taxes for the years 1999 and 2000 only. The complainant thereupon requested reimbursement of the amounts for the years 1995-98 and when

this was refused, he submitted a grievance which was heard by the Joint Panel which recommended that the amount of 16,718 United States dollars - representing the taxes for the years in question but without interest or penalties - should be reimbursed to him.

3. With regard to the ILO's plea that the claim for reimbursement for 1995-98 was time-barred, the Joint Panel stated that the ILO instruction notice entitled "Reimbursement of Taxation", upon which the plea was based, could not be considered to regulate the conditions of employment in this case because of the uncertainty of its origin and since it is doubtful what circulation it was actually given. It said:

"Both parties have confirmed the uncertainty of origin of the document - it resembles in substance paragraph 9 of the 1961 document - and it is unclear what circulation it is given. The fact that it seems to have been withdrawn in 1994 and then reinstated in 1995 (in both cases without explanation) adds to the confusion. In the Joint Panel's view, that document may not be considered to regulate the conditions of employment in this case."

4. While the Joint Panel recognised that the complainant could have avoided any financial loss by complying with the applicable national tax laws and filing timely claims each year, it nevertheless considered that the complainant's delay in doing so should not be fatal to his claim for reimbursement.

5. By a letter to the complainant, dated 16 December 2002, the Director-General rejected the recommendation of the Joint Panel since in his opinion, this situation has arisen as a direct result of the complainant's failure to comply with obligations under US tax legislation of which the complainant was aware or should have been aware. Further, the Director-General considered that the complainant's late claim for reimbursement may have prejudiced the Office's ability to obtain reimbursement of the amount in question. In any event, he believed that Article 14.8 of the Staff Regulations established an unambiguous limitation period of 12 months which excluded the complainant's claim. Thus, the Director-General refused to confirm the decision to reimburse the complainant unless and until the ILO received the claimed amount from the United States government. That is the impugned decision.

6. There is no issue between the parties that the complainant, as an international civil servant, since he is taxed on his ILO income by the US government, is entitled to have such taxes reimbursed to him. The only serious question is whether his claim is time-barred.

7. Two separate texts are invoked by the ILO in support of its plea. Firstly, it argues that upon the complainant's recruitment in 1980, he was provided, as any other official, with documents governing his conditions of employment, duties and obligations, and that these must have included a copy of the instructions headed "Reimbursement of Taxation". The relevant text of the latter reads:

"6. Claims for reimbursement must be made within the twelve-month period following that in respect of which the taxed income was received. Claims made after the expiration of this period will be rejected. Claimants must submit a copy of the tax return and evidence of payment of the tax in respect of which reimbursement is requested."

The complainant formally denies ever having seen this document prior to the filing of his grievance. The ILO has neither asserted nor proved that it was ever made widely available to members of staff and the only indication of its having been given to the complainant is an administrative checklist in the complainant's personnel file listing the documents he was given on recruitment. The Joint Panel, as indicated, had considerable doubt as to the applicability of the "instructions". The Tribunal shares those doubts.

8. The second text relied on by the ILO is Article 14.8 of the Staff Regulations. It reads:

"Except where these Regulations otherwise provide, no claim under them shall be entertained if it is submitted after the expiry of 12 months from the date on which the right to bring it forward accrued to the person concerned."

9. While there can be no doubt that this text validly enacts a limitation period, it is impossible to see how - in the absence of some other applicable limitation, such as that contained in paragraph 6 of the tax reimbursement instructions quoted above - it can be invoked against the complainant in this case. By the very terms of the Staff Regulation, the limitation period only starts to run from the day when the claim could have been "brought forward" i.e. properly asserted. Since the present claim is one for reimbursement of taxes paid, it is manifest that it could not have been made until such time as the complainant had actually paid his US taxes for the years in question. Nowhere, either in the Staff Regulations or in the Agreement between the USA and the ILO is timely payment of taxes made a condition of the right to reimbursement.

10. Indeed, the ILO frankly admits that its practice in the past (as in this very case) has always been to admit claims for reimbursement of back taxes for periods of at least two years. Obviously, then, it does not act as though it believes that the 12-month period mentioned in Article 14.8 of the Staff Regulations starts to run from the date that the taxes fell due.

11. What remains is the purported limitation contained in paragraph 6 of the ILO tax reimbursement instructions. Since it is not a published rule or regulation and is not even contained in a generally available information circular issued to the staff, the burden is on the ILO to show that it was properly brought to the attention of those whose rights it seeks to circumscribe. The Organization has failed to meet that burden. The findings of the Joint Panel quoted above are consistent with this conclusion.

12. There can be no doubt of the right of an international organisation to set obligatory rules for the conduct of its staff governing various aspects of their relations with their employer, and that this right includes the right to set reasonable limitation periods during which claims against the employer must be asserted. However, such rules must be published or otherwise made known to all the members of staff concerned in a way which can leave absolutely no doubt as to the nature and reach of the rule, and no doubt that it has been brought to the attention of all those to whom it applies. Even if the ILO had succeeded in showing that the tax reimbursement instructions had been given to the staff individually, which it has signally failed to do, it would also have to have shown that all others in like case had been similarly advised. Rules limiting the right to exercise a fundamental condition of employment applicable to all international civil servants are only permissible if they, too, are applicable to all.

13. There can be no doubt that the complainant has been, at the very least, negligent in the fulfilment of his duties to his national government, and for this he has been duly penalised by that government and has paid the fines imposed by it. Since he does not seek to recover those penalties, nor the interest charges associated with late payment, those facts cannot affect his right to recover the actual taxes paid in the absence of a specific text depriving him of that right. Further, it has not been shown that the Agreement between the ILO and the US government has such effect or that, in law, the US can properly refuse payment to the ILO of any amounts which the latter pays to the complainant in reimbursement of taxes paid by him beyond their due date. In any event, the right of an international civil servant to recover from his employer the taxes which he has been forced to pay on his tax-exempt income cannot be made contingent upon the employer's right to recover those amounts from the national government concerned. The impugned decision was accordingly wrong.

14. The complainant, whose loss in this matter has been largely of his own making, has very properly sought neither damages nor costs and none will be awarded.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The ILO shall reimburse the complainant the sum of 16,718 United States dollars.

In witness of this judgment, adopted on 7 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.