Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

107th Session **Judgment No. 2828**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr F. L. against the International Olive Oil Council (IOOC) on 17 July 2008, the Council's reply of 7 November 2008, the complainant's rejoinder of 21 January 2009 and the IOOC's surrejoinder of 17 April 2009;

Considering Article II, paragraph 5, 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 provisions of the IOOC Staff Rules that have a bearing on this case stipulate, inter alia, the following:

"**Rule 4.7: International recruitment**

(a) […] The allowances and benefits in general available to internationally recruited staff members shall be:

(i) payment of travel expenses upon initial appointment and on separation for themselves, their spouse and their dependent children;

(ii) payment of removal expenses;

[…]

(v) repatriation grant.

(b) A staff member who has changed his residential status in such a way that he may, in the opinion of the Executive Director, be deemed to be a permanent resident of the country where the Council headquarters is located, shall lose entitlement to the following allowances and benefits:

[…]

(iii) repatriation grant;

(iv) payment of travel expenses upon separation for the staff member, his spouse and dependent children;

(v) payment of removal expenses.

Rule 7.2: Approved travel of family members

(a) Subject to the conditions laid down in these Rules, the Council shall pay the travel expenses of the eligible family members of an internationally recruited staff member under the following circumstances:

[…]

(ii) on separation from service, provided he has completed not less than one year of continuous service, or earlier if his services are terminated by the Council;

[…].

Rule 7.18: Removal expenses

(a) The Council shall pay expenses in connection with the removal of an internationally recruited staff member's personal effects and household goods, under the following circumstances:

[…]

(ii) upon separation from service, provided he has completed not less than two years of continuous service, or earlier if his services are terminated by the Council.

[…]

Rule 9.12: Repatriation grant

(a) An internationally recruited staff member whom the Council is obliged to repatriate who has completed one year of continuous service shall be entitled to a repatriation grant […].

(b) A staff member who abandons his post or is summarily dismissed shall not be entitled to the repatriation grant.

[…]

Rule 9.13: Service grant

(a) Upon separation from service on their own initiative or through termination, staff members who are not entitled to claim the repatriation grant shall receive a service grant, the amount of which shall be:

(i) one week's pay, according to the category of the staff member and to the pensionable scale in force at the United Nations […], for each year of service, if the staff member does not have dependents;

(ii) two weeks' pay, according to the category of the staff member and to the pensionable scale in force at the United Nations […], if the staff member has dependents, taking into account the different periods of service with or without dependents.

The starting amount of the grant shall be four and six weeks' pay respectively.

(b) A staff member who abandons his post or is summarily dismissed shall not be entitled to the service grant.

[…]"

Facts relevant to the present dispute are set out in Judgments 2582 and 2692 concerning the two earlier complaints that the complainant submitted to the Tribunal. It should be recalled that the complainant, an Italian national, was an official of the European Commission when it was decided to appoint him, with effect from 1 October 1987, to the office of Executive Director of the IOOC, which has its headquarters in Madrid. On 20 December 2002, following an audit report on the IOOC's administrative budget which, according to the Council, revealed serious financial irregularities, the complainant tendered his resignation. On 14 May 2003 the Council lifted the immunities previously enjoyed by the complainant. Charges were brought against him before the criminal courts of Madrid in September 2004.

In a letter of 27 January 2003 the complainant requested payment of all the "end-of-service benefits" to which he considered he was entitled under the Staff Regulations and Rules. He repeated this request on several occasions, including on 30 April and 25 November 2003. In Judgment 2582 the Tribunal set aside the implicit decision resulting from the IOOC's failure to respond to the complainant's request and sent the case back to the Council for the latter, after considering the merits of the request "in accordance with the applicable rules and

whatever information he has supplied", to take an explicit, reasoned decision regarding the benefits he was claiming. It furthermore awarded the complainant 1,000 euros in compensation for moral injury. After the complainant had filed an application for execution, the Tribunal, in Judgment 2692 delivered on 6 February 2008, ordered the execution of Judgment 2582 in full within ninety days, with a penalty for default of 500 euros per day.

By a decision of 29 April 2008, which constitutes the impugned decision, the complainant was informed that his request for payment of the repatriation grant and his travel and removal expenses had been rejected on the grounds that he did not meet all the conditions of entitlement laid down in the Staff Rules. First, while the IOOC did not contest the fact that the complainant had been recruited internationally, it contended, with reference to various items of evidence, that he had become a permanent resident of Spain and that, pursuant to Rule 4.7(b), he had therefore forfeited his entitlement to the allowances and benefits he was claiming. On this point, the Council stated that it was "obvious and logical" that the complainant had not undertaken any removal since he himself had admitted before the Tribunal that he continued to reside intermittently in Spain. Furthermore, the Council maintained that the documents produced by the complainant to establish that he resided in Italy – including, for instance, his voting card – had no probative value. Secondly, the IOOC explained that, while the complainant's separation from service had taken the form of a resignation, it had in fact been a summary dismissal, within the meaning of Rule 9.12(b), which precluded the payment of a repatriation grant. Pursuant to Rule 9.2, the term "resignation" means "a separation from service initiated by the staff member". In the case in point, it was first the European Commission and then the IOOC that requested the complainant's separation on account of the financial irregularities detected. These represented a "serious breach of the standards of conduct required of international civil servants", warranting a summary dismissal under Rule 10.6. The IOOC added that any amount paid to a staff member upon separation from service is intended to "reward" the staff member for his or

her dedication and professionalism, and that if a staff member is dismissed as a disciplinary penalty for breach of obligations, payment of the allowances and benefits foreseen under the Staff Rules is excluded. Given that the irregularities ascribed to the complainant led to proceedings before the criminal courts of Madrid, the refusal to pay the sums claimed was the only possible decision. Moreover, citing Rule 9.13(b), the IOOC indicated that a staff member who is summarily dismissed on disciplinary grounds is not entitled to the service grant.

B. The complainant submits that he was entitled to payment of his travel and removal costs and of the repatriation grant (or the service grant) pursuant to Rules 7.2, 7.18, 9.12 and 9.13. The impugned decision is, in his opinion, unlawful inasmuch as it is based on three errors of law.

First, the complainant argues that Rule 4.7(b) was not applicable to him because he could not be deemed to be a permanent resident of Spain at the time of his separation from service. According to the provision in question, it is for the Executive Director himself to assess whether such status has been acquired. During his term of office, however, not only had he never considered himself to be a permanent resident of Spain, but he had actually enjoyed diplomatic status, which is incompatible with the status of a permanent resident. He adds that since his separation from service he has divided his time between Italy, where he owns a house, and Spain, where he stays at his wife's home. Nevertheless, he considers that such information does not concern the IOOC because his place of residence has no bearing on the determination of his entitlements. He further contends that the Council's reasoning in its decision of 29 April 2008 was "fundamentally flawed" inasmuch as the organisation relied on evidence post-dating his separation from service to prove that he had acquired the status of a permanent resident of Spain. Moreover, the evidence was unconvincing because it was factually erroneous. The complainant asserts that, pursuant to Rule 7.18(d), removal expenses were payable only after the Executive Director had determined "the

most convenient" conditions, subject to the submission of three estimates. As he had submitted three estimates to the organisation by a letter dated 20 April 2003, he affirms that the IOOC cannot rely on his alleged failure to undertake any removal to justify its refusal to pay the said expenses. Lastly, he emphasises that he never sought to establish that he resides in Italy throughout the year.

Secondly, the complainant submits that Rule 9.12(b) was not applicable to his case. Pointing out that the Council accepted his resignation on 20 December 2002, he contends that the IOOC's attempt to reclassify it as a summary or disciplinary dismissal is based on arguments which are unfounded both in fact and in law. He adds that such a reclassification would amount to retroactive denial of the safeguards that a disciplinary procedure affords and would constitute a breach of the "principle of non-retroactivity of adverse administrative decisions". In his view, the Council cannot, without violating the principle of the presumption of innocence, withhold payment of the repatriation grant on the grounds that criminal proceedings are pending. The complainant asserts that the issue of his management methods is irrelevant: all the allegedly illegal measures identified by the audit were subject to the applicable approval and oversight procedures at the relevant time, and by failing to mention the existence of these internal and external oversight mechanisms the IOOC is seeking to "diabolise" him.

Thirdly, the complainant submits that, since he was neither dismissed on disciplinary grounds nor summarily dismissed, Rule 9.13(b) is not applicable to him.

The complainant considers that his repatriation grant (or service grant) amounts to 232,159.23 United States dollars. Furthermore, referring to the lowest estimate, he assesses his removal expenses at 17,734 dollars. His travel expenses would amount to 2,482.80 dollars on the basis of the rates applicable in 2003. He asks the Tribunal to set aside the impugned decision and to draw all the relevant legal consequences, namely to order the IOOC to pay him 233,034 euros – corresponding to the sum of the above-mentioned amounts converted into euros as at 27 January 2003 – together with interest at a rate of

8 per cent per annum with effect from that date, as well as compensation for the moral injury caused by the damage to his reputation. Lastly, he requests that he be awarded costs.

C. In its reply the IOOC reiterates the arguments set forth in the decision of 29 April 2008. It maintains that the complainant did not settle in Italy after his separation from service because he acquired the status of a permanent resident of Spain. The Council disputes the contention that the complainant, in his capacity as Executive Director, had the authority to determine whether or not he had permanent resident status and to decide on his entitlement to the removal grant. Stressing that the Tribunal, in Judgment 2582, stated that the complainant had an obligation to provide evidence showing in particular "that his repatriation to his home country did in fact occur and, as the case may be, that he incurred expenses on that occasion", the IOOC argues that his request cannot be allowed as the "the main and essential condition, that of having returned to his country of origin", has not been met. According to the Council, the proper time for determining whether or not the complainant was entitled to a repatriation grant was after his separation from service. As he still lives in Spain, in the residence he occupied when he was employed at the IOOC, the complainant has by definition no right to receive the grants he is claiming. Furthermore, the Council notes with surprise that the letter dated 20 April 2003 was produced only in the context of the present proceedings and it denies having received it at that time.

The IOOC also maintains that the complainant is not entitled to the repatriation grant or, alternatively, to the service grant, since he was in fact summarily dismissed for having committed serious irregularities in the performance of his duties. The Council considers that the complainant's statements in defence of his management methods when he headed the IOOC are scarcely credible in the light of the content of the audit reports. It adds that "the most elementary notion of justice would be flouted" if an official were to receive a sizable grant for services rendered although he had committed "a series of irregularities […] that led to the institution of criminal proceedings".

The Council submits that the complainant's request to be awarded interest for delay should be rejected on the grounds that such interest can only accrue on claims that are liquidated and payable, and the complainant's claims do not satisfy that essential requirement. It considers that the 1,000 euros awarded by the Tribunal in Judgment 2582 are sufficient to compensate for the alleged moral injury caused to the complainant, since he has suffered no additional moral injury since that judgment.

D. In his rejoinder the complainant reiterates his arguments. With regard to the letter of 20 April 2003, he states that he had no reason to send it by registered mail. He explains that his letter of 25 November 2003 referred to that of 30 April, which was in turn simply a "reminder" of the request contained in the above-mentioned letter of 20 April.

Furthermore, the complainant submits that the Council committed an error of law with respect to "the consequences of the location in which retired international civil servants spend their lives". He asserts that two former staff members of the organisation – one a Tunisian national and the other a Moroccan national – received the sums to which they were entitled on separation from service, yet they are in a similar situation to him, since they have retained an apartment in Spain. In the complainant's opinion, the IOOC also ignored the practice whereby, when an official is approaching retirement age, international organisations calculate all the amounts to which he or she will be entitled upon separation.

E. In its surrejoinder the IOOC reiterates its position. While maintaining that the letter of 20 April 2003 is not an essential item of evidence, since the fact that the complainant has not undertaken a removal is indisputable, it nevertheless observes that neither of the letters mentioned by him contains a reference to the letter of 20 April.

The IOOC asserts that, apart from the fact that the complainant has produced no evidence of the existence of the practice he mentions, any such practice would breach the applicable written rules,

which require the fulfilment of a number of conditions and the implementation of a specific procedure before any sum can be paid. It notes that the examples that he mentions involving two former staff members of the organisation are not supported by any evidence.

Lastly, the Council considers that the complainant's due process rights have never been flouted and that the safeguards to which he was entitled have not been breached.

CONSIDERATIONS

1. The facts of the case are set out in Judgment 2582, delivered on 7 February 2007, concerning the complainant's first complaint, in which he sought the quashing of the implicit decision to reject his request for payment of the repatriation grant, the travel expenses incurred in returning to his country of origin and his removal expenses, i.e. the end-of-service benefits to which he believed he was entitled. In that judgment the Tribunal sent the case back to the IOOC for the latter, "after considering the merits of the complainant's request in accordance with the applicable rules and whatever information he has supplied, to take an explicit, reasoned decision regarding the benefits he is claiming". Seised of an application for execution, the Tribunal ordered the execution of the judgment in full within ninety days of 6 February 2008 (see Judgment 2692).

2. The complainant impugns the decision of 29 April 2008 informing him that his request for payment of the repatriation grant and his travel and removal costs had been rejected, and that he was not entitled to the service grant. He asserts that this decision is illegal since it is based on errors of law, the IOOC having, in his view, wrongly relied on paragraph (b) of Rules 4.7, 9.12 and 9.13, respectively, in rejecting his request.

3. The relevant texts are quoted under A above.

4. It follows from Rules 4.7 and 9.12 that, to be entitled to the repatriation grant, a staff member must have been recruited internationally, must not be deemed to be a permanent resident of the country where the headquarters is located, and must not have abandoned his or her post or have been summarily dismissed. The first two of these conditions are also applicable to the reimbursement of travel and removal expenses.

The fact that the complainant was recruited internationally is not disputed in the present case. However, in order to justify its refusal to pay him the repatriation grant, the defendant organisation claims that he did not return to his country of origin because he acquired the status of a permanent resident of Spain, and that, "regardless of the fact that the termination of his relationship with the IOOC should have been termed a resignation, [the complainant] was summarily dismissed on account of serious irregularities detected during the performance of his duties as the head of the IOOC".

5. The repatriation grant provided for in the IOOC Staff Rules is logically intended to enable internationally recruited staff members, who leave their country of origin to carry out their duties, to return to that country upon separation under the best possible circumstances and without being inconvenienced in any way by their repatriation. Payment of that grant, and likewise the reimbursement of travel and removal expenses, thus presupposes that the staff member must return to his or her country of origin to live there or has already done so. It was for this reason that the Tribunal, in view of the circumstances of the case, ruled in Judgment 2582 that the complainant had an obligation to supply the IOOC with evidence showing in particular that his repatriation to his home country had in fact occurred and indicating any expenses that he had incurred on that occasion.

6. With regard to the travel and removal expenses, the complainant himself acknowledges in his submissions that such expenses can be reimbursed only if their existence is proved. The Tribunal finds that no such proof has been furnished, since the

complainant's presentation of mere estimates is not sufficient in this regard.

7. The Tribunal does not agree with the complainant's contention that his place of residence after his separation from service has no bearing on the determination of his entitlements. Given the purpose of the repatriation grant and the foregoing observations regarding the factual basis of repatriation, the complainant was under an obligation to produce evidence of his repatriation. Neither the certificate of residence in Italy nor the 2006 tax return nor the complainant's voting card can be deemed to be sufficient, in the light of the other evidence on file, to prove that the complainant left Spain to settle in his country of origin on separation from service.

It follows that the complainant, who has not proved that his repatriation to his home country has in fact occurred, is not entitled either to the repatriation grant or to reimbursement of travel and removal expenses.

8. A question remains, however, as to whether the complainant is entitled to the service grant.

The IOOC argues that, given the irregularities that tainted the complainant's management methods, his departure should be assimilated to a summary dismissal or reclassified as such. It argues that the complainant therefore fails to meet one of the preconditions for receipt of the grant in question. The Tribunal notes, however, from the evidence on file that the complainant tendered his resignation, which was accepted by the organisation with immediate effect. It may therefore be concluded, without dwelling on the parties' lengthy arguments concerning this issue, that the resignation should not be assimilated to a summary dismissal or reclassified as such, the parties having expressed their intentions clearly. It follows that, pursuant to Rule 9.13, the complainant, who did not abandon his post and was not summarily dismissed, is entitled to the service grant calculated on the basis set out in that rule.

In view of the circumstances of the case, interest at a rate of 8 per cent per annum will be payable on the resulting amount with effect from the date of the request, i.e. 27 January 2003.

9. The complainant is seeking compensation for moral injury. The Tribunal finds that it has already awarded sufficient redress for this moral injury in Judgment 2582.

10. As he partially succeeds, the complainant is entitled to costs, which are set at 1,000 euros.

DECISION

For the above reasons,

1. The decision of 29 April 2008 is set aside.
2. The IOOC shall pay the complainant the service grant, calculated as indicated under 8, above.
3. It shall also pay him 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 30 April 2009, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet