Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

H. (No. 3)

v.

CTBTO PrepCom

135th Session **Judgment No. 4604**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr M. H. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter "the Commission") on 10 June 2019, the Commission's reply of 2 August 2019, the complainant's rejoinder of 4 September 2019, the Commission's surrejoinder of 12 December 2019, the complainant's additional submission of 25 February 2020 and the Commission's final comments of 30 July 2020;

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 challenges the decision not to pay him a repatriation grant upon his separation from service.

The complainant joined the Commission at its headquarters in Vienna (Austria) in June 2011 as a Personnel Officer, grade P-4. At the time of his recruitment, he was living in Kinshasa (Democratic Republic of the Congo), where he had been working for the United Nations (UN). The offer of appointment included several annexes, one of which stated: "[a] repatriation grant will be payable on separation

from the Organization, but only upon completion of at least twelve months' service and subject to submission of documentary evidence of relocation away from the country of duty station".

The complainant's initial three-year fixed-term contract with the Commission was extended once, for a period of one year, but in February 2015 he was informed that no further extension would be granted in view of his unsatisfactory performance, and that his employment would therefore end on 26 June 2015, the contractual expiry date. The email notifying him of the non-extension of his contract also indicated that a repatriation grant would be paid when he relocated outside Austria.

In anticipation of his separation from service, the complainant informed the Commission in May 2015 that he would prefer to be repatriated to Prague (Czech Republic) rather than to his place of recruitment (Kinshasa), and he requested that arrangements be made for his repatriation travel. The Commission replied that, as an Austrian national serving in his home country at the time of separation, he was not entitled to repatriation travel. The complainant sought clarification, emphasising that his letter of appointment and the email of 25 February 2015 concerning his separation both indicated that he would receive a repatriation grant. Citing the same reason, the Commission informed him that he was not entitled to a repatriation grant.

Following an unsuccessful request for review of that decision, the complainant lodged an appeal with the Joint Appeals Panel (JAP). In its report dated 4 March 2019, the JAP concluded that he was not entitled to the repatriation grant, but it disagreed with the Administration's interpretation of Staff Rule 7.1.01(b) and found that he was entitled to payment of his travel expenses to Prague, as these did not exceed the cost of travel to his place of recruitment. It expressed concern regarding the confusing information that had sometimes been given to the complainant concerning his entitlements and recommended that he be paid 4,000 euros in moral damages on that account. In addition, the JAP recommended an award of material damages equivalent to his travel expenses to Prague, with interest at the rate of 5 per cent per annum calculated from the date of separation. Lastly, it recommended an award of 3,000 euros for the delay in dealing with his appeal.

By a letter of 4 April 2019, the Executive Secretary informed the complainant that he had decided to accept all of the recommendations of the JAP. That is the impugned decision.

The complainant asks the Tribunal to order the Commission to pay him a repatriation grant based on the period of service from 3 April 2000 to 26 June 2015, with interest at the rate of 7 per cent per annum calculated from the date of his separation from service. He claims moral damages in an amount equal to 20 per cent of the repatriation grant thus calculated, and exemplary damages in an amount equal to the additional amount of repatriation grant he would have received had he remained in service until the mandatory retirement age, that is, until 30 October 2025. He also seeks compensation equivalent to the travel expenses to Prague for himself and his dependent child, with interest at the rate of 7 per cent per annum calculated from the date of separation, and a lump-sum payment for shipment of household effects in accordance with UN Information Circular 2017-35, amounting to 18,000 United States dollars, with compound interest at the rate of 7 per cent per annum from the date of separation. Lastly, the complainant seeks an order requiring the Commission to issue him a "UN Retiree-Groundspass", to enable him to have access to the Vienna International Centre, where the Commission is located.

The Commission asks the Tribunal to dismiss the complaint as partly irreceivable and wholly unfounded.

CONSIDERATIONS

1. The central question for determination is whether the complainant, an Austrian national, whom the Commission recruited in June 2011 from Kinshasa in the Democratic Republic of the Congo where he had lived and worked for some years, was entitled to a repatriation grant upon his separation from the Commission on 26 June 2015. For the purpose of legal context, it bears recalling the Tribunal's statement, in consideration 6 of Judgment 3018, that a repatriation grant is intended to assist internationally recruited staff members in the efforts required of them if they decide, at the end of their employment, to return

to their country of origin with the intention of establishing themselves there.

2. In his internal appeal, dated 14 July 2015, the complainant identified the administrative decision he contested as the decision contained in the email which the acting Chief of the Human Resources Section sent to him on 29 May 2015. He was informed that, pursuant to Staff Rule 9.4.01, he was not entitled to a repatriation grant upon his separation from the Commission, first because as an Austrian national, the Commission had no obligation to repatriate him, since he was in Austria, his home country. The second reason was that at the time of his separation he was not residing, by virtue of his service with the Commission, outside of Austria, the country of his nationality. In contesting that decision, the complainant sought two substantive remedies. He requested the payment of a repatriation grant calculated on the basis of his service from 27 June 2011 to 26 June 2015, as determined on 25 February 2015, and moral damages, by way of a lump-sum, equivalent to 20 per cent of the amount calculated as the repatriation grant.

3. In the impugned decision of 4 April 2019, the Executive Secretary accepted the JAP's recommendation to pay the complainant 4,000 euros in moral damages, material damages equivalent to his travel expenses to Prague, plus 5 per cent compound interest per annum on the material damages since the time of his separation from service, as well as to pay him 3,000 euros for the JAP's delay in considering his appeal. The JAP made the recommendation pursuant to Staff Rule 7.1.01(b) and on its conclusion that letters which the Administration issued to the complainant on 25 February 2015 and 7 April 2015 misled him regarding his entitlement to repatriation grant and the payment of his travel expenses, which was only clarified on 28 May 2015.

4. In the impugned decision, the Executive Secretary also accepted the JAP's recommendation to dismiss the complainant's claim for repatriation grant, thereby upholding the 29 May 2015 decision on his request for review. The complainant contests this decision requesting,

among other things, that the Commission be ordered to pay him a repatriation grant calculated by reference to a period of service from 3 April 2000 to 26 June 2015, on the basis that he joined the Commission in June 2011 on secondment from the UN. However, it is clear from the file that, although the possibility of a secondment was discussed at the time of his recruitment, no agreement was reached and ultimately it was not on the basis of a secondment that the complainant joined the Commission. His claim for repatriation grant is therefore limited to the period of service with the Commission from 27 June 2011 to 26 June 2015.

5. The Commission objects to the receivability of aspects of the complaint on the basis of non-compliance with the requirement in Article VII, paragraph 1, of the Statute of the Tribunal, according to which a complaint shall not be receivable unless the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations. Staff Rule 11.1.02(a) states that, "[a] staff member wishing to appeal an administrative decision [...] shall, as a first step, address a letter to the Executive Secretary, requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing". The complainant did not file a request for review relating to the following claims which he proffers in his complaint: his claim for a lump-sum payment for shipment of his personal effects (which is beyond the Tribunal's competence, because the UN Circular on which it is based does not form part of his terms of appointment); his claim for a "UN Retiree-Groundspass" to enable him to have access to the Vienna International Centre, and his claim for return travel for his dependent son. These claims are therefore irreceivable. Insofar as the complainant seeks an order to be paid his own travel expenses, the claim is moot as he was paid those expenses pursuant to the impugned decision as reflected in consideration 3 of this judgment.

6. It is noteworthy that whilst in his internal appeal the complainant claimed repatriation grant based on a period of service from 26 June 2011 to 27 June 2015, in his complaint he claims the

repatriation grant for the period 3 April 2000 to 26 June 2015. This is essentially a new claim which he seeks to justify on the basis that he worked for the United Nations from 3 April 2000 and joined the Commission on secondment therefrom on 26 June 2011. The claim is unfounded because, as noted above, it has been established that the complainant was not seconded to the Commission. However, on the assumption that the original claim for a repatriation grant based on a period of service from 26 June 2011 to 27 June 2015 is inherent in the claim, the Tribunal will consider whether the Executive Secretary erred by accepting the JAP's recommendation to reject his claim for repatriation grant.

7. The complainant relies upon Staff Rules 4.1.05 and 7.1.01. He submits that the Executive Secretary erred by accepting the JAP's recommendation to reject his claim for repatriation grant as, having regard to these provisions, the Commission was obliged to repatriate him away from the duty station in Vienna either to the place of recruitment or to any other place within the established limits. His reliance on these provisions is misplaced. It is clear, as the JAP, whose reasoning the Executive Secretary accepted in the impugned decision, concluded, that read together, Staff Rules 4.1.05 and 7.1.01 provide for entitlement to travel expenses upon separation from service and not for entitlement to a repatriation grant. Staff Rule 4.1.05, which is under the heading "International Recruitment", relevantly states as follows:

> "Staff members other than those regarded under Rule 4.1.04 as having been locally recruited shall be considered as having been internationally recruited. The allowances and benefits in general available to internationally recruited staff members include: payment of travel expenses upon initial appointment and on separation for themselves and their spouses and dependent children, removal of household effects, assignment grant, home leave where applicable, education grant and repatriation grant."

Staff Rule 7.1.01, which is under the heading "Official Travel of Staff Members", relevantly states as follows:

> "(a) Subject to the conditions laid down in these Rules, the Commission shall pay the travel expenses of a staff member under the following circumstances:
>
> [...]

(iv) On separation from service, in accordance with the provisions of Article 9 of the Staff Regulations and these Rules.

(b) Under paragraph (a)(iv) above, the Commission shall pay the travel expenses of a staff member to the place of recruitment or, if the staff member had an appointment for a period of two years or longer or had completed not less than two years of continuous service, to the place recognized as his or her home for the purposes of home leave under Rule 5.2.01. Should a staff member, on separation, wish to go to any other place, the travel expenses borne by the Commission shall not exceed the maximum amount that would have been payable on the basis of return transportation to the place of recruitment or home leave."

8. The JAP had correctly concluded that entitlement to the repatriation grant was governed by Staff Rule 9.4.01, then in force, which relevantly stated as follows:

"The repatriation grant shall be payable to staff members whom the Commission is obliged to repatriate and who at the time of separation are residing, by virtue of their service with the Commission, outside their country of nationality. Staff members shall be entitled to a repatriation grant only upon relocation outside Austria. The amount of the grant shall be proportional to the length of service with the Commission in a post in the Professional category or in a post in the General Service category subject to international recruitment [...]"

9. The complainant, who at the time of separation resided by virtue of his service with the Commission in, and not outside of, the country of his nationality, was clearly not entitled to a repatriation grant under this provision. It is noteworthy that Staff Rule 9.4.02(a) provided that the expression "obliged to repatriate" in Staff Rule 9.4.01 shall mean the obligation of the Commission to return a staff member and his or her spouse and dependent children to a place outside Austria upon separation. Staff Rule 9.4.02(d) provided that the payment of the repatriation grant was subject to the former staff member providing documentary evidence of relocation away from Vienna. The complainant has not provided such evidence. Staff Rule 9.4.01(g) provided, among other things, that no repatriation grant was payable "to any staff member who is residing at the time of separation in his or her home country while performing official duties".

10. Moreover, the complainant's contention that there is contradiction between Staff Rules 4.1.05 and 7.1.01, on the one hand, and Staff Rule 9.4.01, on the other, which could somehow inure to his benefit is misplaced. As the JAP (whose reasoning was accepted in the impugned decision) in effect found and the Commission submits, Staff Rule 7.1.01 is irrelevant in the context of the present case; Staff Rule 4.1.05 merely contains a listing of allowances benefits that are "in general" available to internationally recruited staff and does not deal with the specific conditions of entitlement for each allowance; and for the repatriation grant, the conditions are set out in Staff Rule 9.4.01, where the requirement of relocation is made clear. It is based on the complainant's misapprehension of the ambit of these provisions that he contends, in error, that the Executive Secretary accepted the JAP's recommendation concerning his travel expenses to Prague and that he is therefore entitled to the repatriation grant because travel to the place of recruitment or to any other place away from the duty station represents nothing else than repatriation away from the duty station.

11. The complainant relies, as confirmation of his entitlement to the repatriation grant away from his duty station in Vienna, upon paragraph 7 of a document entitled "Conditions of Employment, Indicative Salary and Allowances (net per annum) at Dependency Rate", which was attached to the offer of appointment dated 21 April 2011 and a provision in the Office's communication to him, dated 25 February 2015, which notified him of the modalities of his separation from service. Paragraph 7 of the above-mentioned document attached to the offer of appointment states as follows:

> "A repatriation grant is payable on separation from the Organization but only upon completion of at least twelve months' service and subject to submission of documentary evidence of relocation away from the country of duty station."

The provision in the communication of 25 February 2015 relevantly stated as follows:

> "A Repatriation Grant calculated on the basis of the period of service from 27 June 2011 to 26 June 2015 will be transferred to a bank account of your choice when you relocate outside Austria. Evidence of relocation shall be constituted by documentary evidence such as a declaration by the immigration,

> police, tax or other authorities of the country or by your new employer, or notarised contracts of lease or for the purchase, construction or reparation of property. [...]"

12. In the impugned decision, the Executive Secretary correctly accepted the JAP's conclusion that, as the complainant was not entitled to a repatriation grant under the Staff Regulations and Rules, he was not entitled to a repatriation grant under the foregoing provisions because the documents which contained them stipulated that the Staff Regulations and Rules applied. In the impugned decision, the Executive Secretary correctly stated that it was "not legally possible for the Administration to agree to the entitlement to a repatriation grant where none would be due under the Staff Regulations and Rules, which govern the employment relationship between [the complainant] and the organisation [and that the complainant] did not qualify for the repatriation grant even if the erroneous clause, on its terms, had been valid is equally significant". This statement is in keeping with the Tribunal's case law stated, for example, in consideration 7 of Judgment 4018.

13. The complainant contends that the award of 3,000 euros in moral damages for delay in the appeal procedure was insufficient, but as he does not explain why it is, his claim for an increased amount will be dismissed.

14. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ