

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

D.
v.
ICC

136th Session

Judgment No. 4681

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms I. D. against the International Criminal Court (ICC) on 13 January 2020, corrected on 13 February and 9 March, the ICC's reply of 15 July 2020, the complainant's rejoinder of 8 September 2020 and the ICC's surrejoinder of 21 December 2020;

Considering the applications to intervene filed by Ms N. D. S. and Mr S. D. S. on 19 June and 24 August 2021, respectively, and the ICC's comments thereon dated 10 August and 20 October 2021, respectively;

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 contests the ICC's decision to reject her request to pay her the education grant in respect of her son for the school year 2018-2019.

On 5 February 2019, the complainant submitted a request for payment of the education grant in respect of her son for the school year 2018-2019. The next day, on 6 February 2019, an official from the Human Resources Section (HRS) informed her that she was not eligible to receive the education grant for the current school year because her son,

who was born on 27 December 2013, had not reached the age of five within three months of the beginning of the academic year on 4 September 2018, as required by Staff Rule 103.18(d)(i).

Having received, on 20 February 2019, confirmation from HRS that the decision to reject her 5 February request would not be reversed, the complainant filed a request for review on 8 March 2019. On 10 April 2019, the ICC Prosecutor decided to reject this request for review and, on 9 May 2019, the complainant filed an appeal with the Appeals Board against the ICC Prosecutor's decision.

In its report of 16 September 2019, the Appeals Board made two recommendations. First, considering that the ICC education grant scheme was in line with United Nations (UN) Administrative Instruction ST/AI/2018/1/Rev.1, entitled "Education grant and related benefits", and that there was no discrimination in the way the ICC had formulated its Staff Rules, it recommended that the ICC Prosecutor maintain the contested decision and reject the complainant's appeal. Second, questioning whether the ICC education grant scheme was "fit for purpose" in view of local conditions, the Appeals Board recommended that when considering amendments to the relevant Staff Rules, the ICC Prosecutor give proper effect to the purpose of the education grant and the practical situation in the Netherlands (namely that enrolment in primary school in the Netherlands was mandatory once a child turned five; that mid-term enrolment was not an option in practice because waiting lists in international schools were long; that certain international schools had announced that those enrolled mid-term would be placed on waiting lists; and that even where late enrolment was possible, it was subject to the availability of places).

By a letter of 16 October 2019, the ICC Prosecutor informed the complainant that she had decided to accept the Appeals Board's first recommendation to maintain the contested decision and to reject her appeal. As regards the Appeals Board's second recommendation, the ICC Prosecutor noted that, although she did not agree with the Appeals Board's conclusion that the education grant scheme was not fit for purpose as it currently stood, she had decided to accept it by taking into

consideration the elements referred to by the Appeals Board during the revision process. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to find that she is entitled to receive the education grant for the school year 2018-2019, and to order the ICC to reimburse her on that basis the amount of 10,575 euros, corresponding to 75 per cent of 14,000 euros, which is the full-year tuition fee she paid for her son's school attendance in 2018-2019. Alternatively, she asks the Tribunal to order the ICC to reimburse her the education grant on a pro-rata basis from 27 December 2018, the date of her son's fifth birthday, until the end of the 2018-2019 school year, and to pay her on that basis the amount of 7,500 euros, corresponding to 75 per cent of 9,400 euros, that is the tuition fee she paid for the second and third terms of her son's school attendance in 2018-2019. She claims moral damages for the unfair treatment and the prejudice she suffered, and she also claims the legal costs incurred. Lastly, she asks that the ICC be ordered to review its current education grant system.

The ICC asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant impugns the ICC's decision of 16 October 2019 to endorse the Appeals Board's recommendations of 16 September 2019 and to dismiss her 9 May 2019 appeal. The present complaint raises the question whether the complainant, whose child turned five years old during the academic year in which he commenced primary education, but not within the first three months of that year, should be entitled to an education grant for that child, pursuant to Staff Rule 103.18(d)(i).

2. There are two applications to intervene, from Ms N. D. S. and Mr S. D. S. The ICC does not object to these applications insofar as the applicants have the same claims as the complainant and seek the same redress on the strength of the same pleas. As both applicants seek payment of the education grant in respect of children that turned five

after the first three months of the school year in which they commenced primary education, the Tribunal accepts that the applicants are “in a situation in fact and in law similar to that of the complainant”, as required by Article 13, paragraph 1, of the Rules of the Tribunal. The applications to intervene are therefore receivable.

3. Turning to the question raised in this complaint, the Tribunal notes that the ICC’s Staff Rule 103.18, entitled “Education grant”, provides, in relevant part, as follows:

“Rule 103.18: Education grant

[...]

Eligibility

- (b) A staff member shall be entitled to be paid an education grant in respect of each child provided that:
 - (i) The staff member is an internationally recruited staff member and resides and serves at a duty station outside his or her home country;
 - (ii) The child is in full-time attendance at an educational institution; and
 - (iii) The appointment of the staff member is for a minimum period of six months or the staff member has been continuously employed for at least six months.

[...]

Duration

- (d) The education grant shall be paid:
 - (i) **From the commencement of primary education, provided that the child is at least five years of age or reaches the age of five within three months of the beginning of the academic year;**

[...]” (Emphasis added.)

4. The complainant challenges the impugned decision on two main grounds. First, the ICC’s current interpretation of the rules governing the education grant, including Staff Rule 103.18(d)(i) and section 2.3 of UN Administrative Instruction ST/AI/2018/1/Rev.1, is erroneous and frustrates the purpose and the nature of the education grant. She argues that the impugned decision misconstrues section 2.3 of UN Administrative Instruction ST/AI/2018/1/Rev.1, which provides that

“[i]n exceptional circumstances, a lower minimum age of eligibility to receive the education grant may be accepted if the child is required by law to commence formal primary education at an earlier age” and which is applicable in the present case, because she was *de facto* required to enroll her son in primary education at an earlier age than the eligibility age of five for two reasons: (a) the law in the Netherlands requires a child to attend compulsory primary education on the first day of the new month after the child turns five; and (b) mid-year enrollment in an international school is in practice an unrealistic option. Second, the impugned decision violates the principle of equal treatment because it results in an arbitrary and discriminatory outcome, whereby staff members whose children’s fifth birthday falls in the first three months of the academic year are entitled to the education grant for that year, while staff members whose children’s fifth birthday falls in the remaining months of the year are not entitled to the education grant for that year, even though these children could be in the same school year and even in the same classroom. She argues that the inequality arises from the fact that, unlike in the Netherlands, staff members of United Nations agencies or the ICC, who are based in other duty stations, are not required by law to send their children to school if their children’s fifth birthday occurs after the first three months of the academic year and can choose to enroll them the following year.

5. The basic principles of statutory interpretation are well settled in the Tribunal’s case law, as the Tribunal confirmed, for example, in Judgments 4145, consideration 4, and 4477, consideration 4:

“The principles of statutory interpretation are well settled in the case law. The primary rule is that words are to be given their obvious and ordinary meaning (see, for example, Judgments 3310, consideration 7, and 2276, consideration 4). Additionally, as the Tribunal stated in Judgment 3734, consideration 4, ‘[i]t is the obvious and ordinary meaning of the words in the provision that must be discerned and not just a phrase taken in isolation’.”

Moreover, as the Tribunal stated in Judgment 3701, consideration 4:

“Where the language of the text is clear and unambiguous, the words must be given effect without looking outside of the text to determine the meaning.”

6. The language contained in Staff Rule 103.18(d)(i) is clear and unambiguous. According to the obvious and ordinary meaning of the plain language of the provision, eligibility for the education grant is dependent on whether either one of the following conditions apply: (i) that the child is at least five years old at the beginning of the school year in which the child commences primary education; or (ii) that the child reaches the age of five within three months of the beginning of that school year. The language of the provision leaves no room for a different interpretation.

7. The complainant also relies on section 2.3 of UN Administrative Instruction ST/AI/2018/1/Rev.1, which provides that:

“Education is deemed ‘primary’ for the purposes of the present instruction when the child is 5 years of age or older at the beginning of the academic year, or when the child reaches the age of 5 within three months of the beginning of the school year. **In exceptional circumstances, a lower minimum age of eligibility to receive the education grant may be accepted if the child is required by law to commence formal primary education at an earlier age.**” (Emphasis added.)

However, this provision is not relevant in this case because, under Dutch law, the mandatory age for attending primary school is five years, and not an earlier age to which the exception referred to in section 2.3 of UN Administrative Instruction ST/AI/2018/1/Rev.1 may apply.

8. Since the complainant’s child was not five years old at the beginning of the school year in which he commenced primary school, nor did he reach the age of five years within three months of the beginning of that school year, the complainant is not entitled to the education grant for that school year.

9. With regard to the principle of equal treatment, the Tribunal reiterates what it said in Judgment 4157, consideration 13:

“Reference must be made to the Tribunal’s consistent precedent that ‘the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgments 1990,

under 7, 2194, under 6(a), 2313, under 5, or 3029, under 14)’ (see Judgments 3787, under 3, and 3902, under 5).”

The principle of equal treatment does not guarantee that all persons receive the same benefit but, rather, requires that persons in like situations be treated alike and persons in relevantly different situations be treated differently. In the present case, the criteria for the payment of the education grant set forth in Staff Rule 103.18(d)(i) apply equally to all staff members of the ICC. Although, as pointed out by the complainant, this may result in a situation where children at approximately the same age, or even in the same classroom, may be treated differently with respect to the education grant, this is not due to any inconsistency or discrimination in the application of the criteria set forth in Staff Rule 103.18(d)(i), but to a clear and objective cut-off date established by that rule. The cut-off date distinguishes between children who turn five prior to or within the three-month window, and children who turn five outside the three-month window. Because these two categories of children are not in the same legal position, the principle of equal treatment is not violated when these two categories are treated differently. The Tribunal also finds that the Appeals Board correctly found that it was justified, and not unusual, for the ICC to set a cut-off date for the grant of a benefit.

10. Lastly, it should be noted that the complainant’s claim that the ICC be ordered to review its current education grant system is irreceivable, because the Tribunal has no jurisdiction to order an organisation to amend its rules (see, for example, Judgment 4551, consideration 15).

11. In light of the above considerations, the complaint should be dismissed. It follows that the applications to intervene should also be dismissed.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The applications to intervene are dismissed.

In witness of this judgment, adopted on 24 May 2023, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ