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

TWENTIETH ORDINARY SESSION

In re MARTIN

Judgment No. 123

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Atomic Energy Agency (IAEA) drawn up by Mr. Paul Martin on 25 September 1967, the reply of the IAEA dated 3 November 1967, the supplementary memorandum submitted in rejoinder by complainant on 12 January 1968, and the reply of the IAEA to that memorandum dated 19 February 1968;

Considering Article II, paragraph 5 and Article VII, paragraph 2 of the Statute of the Tribunal, Article 6.01.1 of the Staff Regulations of the respondent organisation and Article 1.04 of the Travel Rules of the organisation;

Having examined the documents in the dossier, oral proceedings having neither been requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. Mr. Martin entered the service of the Agency on 1 June 1964 under a daily appointment. This was renewed up to 11 September 1964, at which date he entered into a special service agreement with the Agency which came into force on 12 September 1964 and expired, after several successive renewals, on 31 March 1965. Before the expiry of the last renewal period the agreement was superseded by a fixed-term contract which came into force on 1 March 1965. The latter contract was twice renewed and terminated on 31 August 1966.

B. Six days before the expiry of his final contract complainant applied for payment of a repatriation grant to Harrisburg (Pennsylvania, United States), for payment of a lump sum on account of repatriation travel expenses, and for extension of the six-month period stipulated under the Regulations and Rules of the Agency, within which repatriation travel must begin. The Director of the Personnel Division informed him, by his reply of 31 August 1966, that he would be paid a lump sum on account of his travel expenses, with the proviso that payment would not take place until definite arrangements for the journey had been made. In addition, a repatriation grant of US$1,269.24 was paid to complainant.

C. At the end of 1966, the internal auditor having questioned complainant's entitlement to this payment, the Agency's Legal Division was consulted and it was established that Mr. Martin was entitled neither to repatriation grant nor to repatriation travel expenses, and complainant was informed on 31 January 1967 that the decision to pay him a lump sum on account of repatriation travel was withdrawn, that he was not entitled to the payment of US$1,269.24 already made on account of repatriation grant, but that the Director-General was prepared to treat that amount as an ex gratia payment on the understanding that such payment was made in full and final settlement of any claim that complainant might have against the Agency.

D. The Director-General cancelled the Personnel Division's decision of 31 August 1966 by two communications addressed to complainant on 10 March and 7 April 1967 respectively. On 14 May 1967 Mr. Martin submitted an appeal to the Joint Appeals Committee of the Agency, which unanimously recommended that his appeal should be dismissed but that the ex gratia payment should be confirmed on the terms specified by the Agency. The Director-General accepted this recommendation and informed complainant of his decision on 26 June 1967. After leaving the Agency's service complainant remained in Europe as consultant to Industria G.m.b.H.

E. In his complaint to the Tribunal Mr. Martin prays that the Tribunal should quash the decision of 26 June 1967 and confirm the decision of 31 August 1966. He also claims damages in the amount of US$1,720 for loss of contracts and clients resulting from his dispute with the Agency and from the radical change in his family and professional plans resulting from the decision of 26 June 1967. He contends that his home is in Harrisburg (United States); that he was employed by the Agency continuously for two years and three months, and has thus acquired

entitlement to repatriation grant and travel expenses as laid down in the Agency's Regulations and Rules; that the Director of the Personnel Division's decision of 31 August 1966 approving such payments was binding on the Agency, and that even if a mistake had been made it did not invalidate the decision, which was tantamount to an agreement that could not be broken unilaterally.

F. The Agency submits that the complaint is irreceivable, and subsidiarily that it should be dismissed on its merits. It points out that the complaint was not filed within the time limit of ninety days stipulated in Article VII, paragraph 2, of the Statute of the Tribunal. The decision impugned, dated 26 June 1967 and despatched to complainant in a registered envelope, was delivered to his address at Perchtoldsdorf (Austria) on 27 June 1967. The complaint was posted on 26 September 1967, more than ninety days after receipt of the notification. The fact that as a precautionary measure the Agency had sent a duplicate to a secondary address supplied by complainant, to which it was delivered on 28 June 1967, could not be held against it. The earliest date at which the notification was received by a member of complainant's family authorised by him to receive his mail should be regarded as the only valid date. Subsidiarily, on the merits of the case, the Agency contends that the Staff Regulations were applicable to complainant only during the period of his employment under a fixed-term contract; this had been only for one-and-a-half years, whereas at least two years of continuous service were required to confer entitlement to repatriation grant and travel expenses. The fact that approval of payment of the repatriation grant and travel expenses had been notified to him by mistake could not give rise to an entitlement which did not exist under the Regulations and Rules. The Agency does not deny that complainant may have suffered a certain amount of inconvenience as a result of this mistake, and that was why it had offered him an ex gratia payment, although there was no proof that complainant, whose professional activities in Europe had not been interrupted, had actually suffered losses amounting to that sum.

CONSIDERATIONS:

1. Under the terms of Article VII, paragraph 2, of the Statute of the Tribunal, a complaint must have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published.

In the present case the Agency sent complainant two copies of the decision of 26 June 1967: the first, addressed to his usual home address, was delivered on 27 June, and the second, sent to a business address, was received on 28 June. If the time limit of ninety days began to run on 27 June, it expired on 25 September, and therefore the complaint, which was posted on the following day, is out of time. On the other hand, if the time limit runs from 28 June, it ended only on 26 September, i.e. on the day on which the complaint was posted, so that the complaint is receivable. The question at issue is thus whether the first or the second notification is decisive.

By sending two copies of its decision the Agency sought to ensure that at least one of them would reach its destination. It therefore admitted that if one copy were to go astray the time limit of ninety days would run from the date of receipt of the second.

Moreover, on receipt of the two copies sent to him complainant might reasonably have felt some doubt as to the date from which the time limit ran. In addition, as the two copies were identical, he might without prejudice to his duty to exercise proper care have kept only one of them, namely the one that had reached him on 28 June, and have reckoned the time limit as running from that date.

In these circumstances it is consonant with the rules of good faith to hold that the time limit began to ran from 28 June, and accordingly that the complaint is receivable. This is all the more justifiable in that it was open to the Agency to remove any possible misunderstanding by specifying that the date of receipt of a particular copy was to be regarded as the date of notification.

2. Under the terms of Staff Regulation 6.01.1 the Agency is required to repatriate a staff member on separation, that is to say to return him at its expense to a place outside the country of the duty station. It follows from this provision and from Travel Rule 1.04 that a staff member is entitled to reimbursement of travel costs only if he is returning to the place from which he was recruited. The second part of the same Travel Rule 1.04 specified that if the staff member has completed two years of continuous service, and if entitlement exists under the Staff Regulations and Rules, he may claim repayment of travel expenses to the place recognised as his home for the purpose of home leave under Staff Rule 7.021. The same provisions apply to the repatriation grant.

In the case under review the first contract, signed on 1 June 1964, contains the following notation "Permanent residence, 2100 Forster Street, Harrisburg, Penna. USA". The same indication is found on the second contract, dated 4 August 1964. It might mean either that complainant was recruited in Harrisburg, or that he was supposed to spend his home leave there. Being open to interpretation in either of these two ways, this incitation is thus not decisive. What is decisive, however, is the fact that complainant does not deny that at the time of his recruitment he was at Perchtoldsdorf in Austria, which was the country of his duty station; he admits, in fact, that it was for that reason that he refrained from claiming travel expenses from the United States to Europe. It follows that he was locally recruited and that he is not entitled to claim payment of his travel expenses or to a repatriation grant either under Staff Regulation 6.01.1 or under the first part of Travel Rule 1.04.

Neither had complainant completed two years of continuous service as required by the second part of Travel Rule 1.04. The Tribunal considers that within the meaning of this Rule two years of continuous service must be interpreted as a period of service as a staff member covered by the Staff Regulations and Rules; but complainant was so covered only under his contracts running from 1 March 1965 to 31 August 1966, or for 18 months. He does not therefore fulfil the condition laid down by Travel Rule 1.04. There is all the less reason to take into account the duration of complainant's previous contract inasmuch as the short-term agreements specifically stated "No travel cost involved", and that the special service agreements stated that the provision for payment of travel expenses was not applicable.

3. It thus appears that the Director of the Personnel Division misinterpreted the relevant regulations in approving, on 31 August 1966, complainant's application for repatriation grant and in accepting, subject to a reservation, the application for a lump sum in settlement of travel expenses. Complainant contends nevertheless that the Agency is bound by this approval, whether given in error or not, and that it was not entitled to rectify the error as it did on 31 January 1967.

As regards the repatriation grant, the question raised does not need to be disposed of. The Agency paid a sum of US$1,269.24 on this account, which the Director-General has approved as an ex gratia payment. It is true that this was subject to the proviso that complainant should renounce any other claim against the Agency. However, while it is not necessary for the Tribunal to rule on the validity of this proviso, it may be noted that the Agency has implicitly waived it by refraining from claiming repayment of this amount in the course of the present procedure. Complainant's right to keep the money he has received is thus not in question.

On the other hand, it is necessary to consider whether the Agency was justified in withdrawing the Director of Personnel Division's approval concerning the lump sum for travel expenses. It is clear that in particular circumstances the mere approval given by one of its organs may commit the Agency under the rules of fair dealing. These circumstances do not however exist in the present case. In the first place, as is evident from the considerations set forth above, the Director of the Personnel Division mistook the applicable rules. Secondly, contrary to the position in regard to the repatriation grant, the lump sum for travel expenses was never actually paid. Furthermore, the approval relating to the lump sum for travel expenses, unlike that given in respect of the repatriation grant, was merely provisional. In order to receive payment, complainant had to produce proof that he had made definite travel arrangements for his own and his family's travel. It is not established that he took any steps to this end. Nor has it been proved that he incurred any expenditure whatsoever in consequence of the correction of 31 January 1967. In these circumstances, the Agency did not violate any law by withdrawing its approval, given in error, before any action had been taken upon it and before the stipulated proviso had been fulfilled, and without any costs having been incurred by complainant. In other words, complainant's claim for compensation in the amount of some US$1,300 on account of travel expenses is unfounded.

4. Neither is there any justification for the claim for additional compensation amounting to US$,1,720. On the one hand, complainant has simply alleged, without adducing any proof, that he suffered a loss of US$320 through being obliged to change his plans as a result of the withdrawal of approval of his travel expenses on 31 January 1967. On the other hand, if he devoted several days to defending his alleged interest before various organs of the Agency and the Tribunal, he did so with the object of securing payment of sums to which he was not entitled, and he cannot therefore interpret these activities as entitling him to compensation. Furthermore, his complaint concerning the inconvenience of the date of the sittings of the Appeals Committee is groundless; in any case, the circumstances he alleges clearly had no influence on the disposal of his complaint and therefore did not cause him any prejudice.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment, delivered in public sitting in Geneva on 15 October 1968 by M. Maxime Letourneur, President, M. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Assistant Registrar of the Tribunal.

(Signed)

M. Letourneur
André Grisel
Devlin
Bernard Spy

Updated by PFR. Approved by CC. Last update: 7 July 2000.