

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session

Judgment No. 3121

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D.A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 10 May 2010, the FAO's reply of 13 August, the complainant's rejoinder of 23 September and the Organization's surrejoinder of 3 December 2010;

Considering Articles II, paragraph 5, 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, a Canadian national born in 1951, joined the Finance Division of the FAO in 1985 as an accountant at grade P-3. He was transferred and promoted several times, attaining grade P-5 in December 2002. On 26 April 2010 he tendered his resignation with effect from 27 July 2010.

For the scholastic year 1999-2000 the complainant was entitled to an education grant for his three children. He received three advance payments in 1999 and, after having submitted the exact amounts

claimed for each child, he received further payments in December 2000 and January 2001.

Seven years later, in January 2008, he received his periodic “statement of account at 31 December [2007]” on which it was indicated that 7,500 United States dollars would be recovered from his salary in respect of an overpayment of the education grant he had received for the scholastic year 1999-2000. The complainant wrote a memorandum to the Administration requesting in particular that it should not recover the overpayment made. He referred to Staff Rule 302.3.172 according to which the FAO’s right to claim reimbursement of any overpayment lapses two years after the overpayment is made. The Director of the Finance Division nevertheless asked him, by a memorandum of 16 May 2008, to pay back 7,500 dollars, noting that the overpayment was “significant”. He asked to be informed once the payment had been effected and invited the complainant to contact him as soon as possible if he wished to make alternative proposals for repayment.

By a memorandum of 23 July 2008 the Director of the Finance Division notified the complainant that, since no agreement had been reached on the method of reimbursement, the amount overpaid would be recovered from his salary in six monthly instalments starting in September. He added that the two-year time limit foreseen in Staff Rule 302.3.172 for the recovery of an undue payment did not apply to his case, as there was a patent disproportion between the amount of education grant claimed and the amount paid to him. That same day the complainant appealed to the Director-General against the decision of 16 May, but the appeal was rejected on 8 September. In the meantime, on 12 August, the Director of the Finance Division notified the complainant that the overpayment would be recovered in 12 monthly instalments starting in September.

The complainant lodged an appeal with the Appeals Committee on 6 October 2008 challenging the decision of 16 May. He contended that the Organization had acted in breach of Staff Rule 302.3.172 in recovering an overpayment made seven years earlier, and asserted that

he had not noticed the overpayment. In its report dated 6 August 2009 the Committee held that there were no valid grounds for concluding that the complainant had not received the overpayment in good faith. It noted in particular that the payments had stretched over two calendar years, i.e. 2000 and 2001, and that they were to be offset against the advances paid in 1999. It concluded that in light of the above-mentioned Staff Rule the FAO was not entitled to recover the overpayment, and it therefore recommended that the decision of 16 May should be set aside and that the FAO should not pursue the recovery of the overpayment.

By a letter of 12 February 2010, which is the impugned decision, the Director-General informed the complainant that he had decided to reject the Appeals Committee's recommendation. In his view, the amount overpaid was too large to have gone unnoticed and the complainant had not accepted the overpayment in good faith. Consequently, the Organization was not bound by the time limit set out in Staff Rule 302.3.172.

B. The complainant contends that in 2008 the FAO was no longer entitled to recover the overpayment it made with respect to the education grant for the scholastic year 1999-2000. Indeed, according to Staff Rule 302.3.172, its right to claim back an overpayment made and received in good faith by a staff member lapsed two years after the overpayment was made. He adds that the Tribunal's case law also provides that a claim for recovery of undue payment is not imprescriptible and must be brought – even in the absence of a provision in writing to this effect – within a reasonable time. He asserts that he received the overpayment in good faith and that he was unaware of the error until it was pointed out to him years later. He stresses that the education grant was paid in five instalments over a period of 18 months, which made it difficult to check.

He also contends that the decision to recover the overpayment by deductions from his salary was tainted with abuse of authority, and he criticises the Organization for failing to take into account his request

that no salary deductions be made until a decision was taken on his internal appeal.

In addition, he alleges undue delay in the internal appeal proceedings, pointing out that nearly two years elapsed between the filing of his internal appeal and the final decision, and that during that time he was deprived of part of his salary. He notes in particular that the Director-General took six months to issue his final decision following receipt of the Appeals Committee's report.

The complainant asks the Tribunal to set aside the impugned decision and to order the reimbursement of the sum of 7,500 dollars, plus interest at the rate of 8 per cent per annum from the date of recovery to the date of reimbursement of that amount. He also claims 10,000 dollars in compensation for undue delay, 10,000 dollars in moral damages and an additional 10,000 dollars in costs, including costs in relation to the internal proceedings.

C. In its reply the FAO submits that it was entitled to recover a sum it had paid mistakenly and that, since the complainant did not act in good faith, the time limit foreseen in Staff Rule 302.3.172 did not apply. It emphasises that there was an obvious discrepancy between the amount of education grant claimed by the complainant and the amount paid to him; indeed, the overpayment represented one third of the total amount he had claimed, and he could not have been unaware of it. In the Organization's view, the complainant had a duty of care to verify the amounts he received against the claims he submitted. It draws attention to the fact that the complainant has experience in accounting and financial matters.

According to the defendant, the claim for moral damages is irreceivable for failure to exhaust internal means of redress and without merit, as the complainant has not shown any unlawful act on the part of the Organization. It denies any abuse of authority, contending that a recovery decision falls within the Director-General's discretion. Moreover, discussions were held with the complainant in order to attempt to find a mutually agreed plan for recovery of the

overpayment, and it was decided that the total amount would be recovered in 12 monthly instalments starting from September 2008.

The Organization also raises an objection to the receivability of the claim for compensation for undue delay on the grounds that internal means of redress have not been exhausted. In any event, it asserts that the internal appeal proceedings were carried out promptly and that the final decision was taken within a reasonable period of time. It stresses that Staff Rule 303.1.38 does not set out a specific time limit within which the Director-General must take a final decision following receipt of the Appeals Committee's report.

D. In his rejoinder the complainant acknowledges that his claim for moral damages is not receivable, and therefore withdraws it. However, he submits that the claim for compensation for inordinate delay in the internal appeal proceedings is receivable, since he could not have raised it before receiving the final decision on his appeal.

E. In its surrejoinder the Organization maintains its position.

CONSIDERATIONS

1. The complainant joined the Finance Division of the FAO in 1985 as an accountant, grade P-3, under a three-year fixed-term appointment. When he left the Organization on 27 July 2010, he was a Senior Administrative Officer, grade P-5, in the Emergency Operations and Rehabilitation Division.

From 12 July 1999 to 24 January 2001 he received from the Organization a number of advance payments of education grant for his three daughters for the scholastic year 1999-2000. These advance payments amounted to 31,557.90 United States dollars, but the claims for the education grant which he had submitted showed that the total should not have exceeded 24,057.90 dollars.

The first occasion on which the Organization noted this overpayment was when it issued to the complainant, in January 2008,

a statement of account indicating that 7,500 dollars would be recovered from his salary. When the complainant asked for an explanation, he was told that this sum corresponded to an advance payment made on 18 August 1999 for the education grant for one of his daughters, and that it should have been deducted from the education grant payments made for the scholastic year in question.

The complainant then invoked the time limit of two years in the Staff Rules which, in his view, applied to recovery of the overpayment, but this was contested by the Organization, which argued that he could not have accepted such a large overpayment in good faith and could not therefore rely on the time limit. It proposed a plan of reimbursement through regular deductions from his salary. The sum of 7,500 dollars was thus deducted from his salary for the years 2008 and 2009.

2. The complainant lodged an appeal with the Appeals Committee, which recommended to the Director-General that he uphold the appeal and set aside the decision to recover the sum of 7,500 dollars. In its view, the undisputable right to claim reimbursement of a payment made in error was barred in this case by the two-year time limit for recovery. In the circumstances of the case, the complainant could not be accused of bad faith, particularly because the payments of the education grant had been made at different times and in various amounts.

By a decision of 12 February 2010 the Director-General refused to follow this recommendation. That is the decision impugned before the Tribunal.

3. It is common ground that the FAO paid the disputed sum in error, and that it is accordingly justified in claiming reimbursement. However, the complainant contends that recovery is time-barred. The defendant's response is that the time bar can only have come about through a lack of good faith on the complainant's part. It argues that in view of the latter's training and his accounting functions, as well as the size of the sum in dispute, it could not have escaped his notice that the payment had been made in error.

4. It should first be noted that bad faith on the part of a debtor, whatever the source of his or her obligation, does not in principle prevent a debt from being extinguished by prescription.

That will only occur if the debtor has used deception to prevent the creditor from taking action before the expiry of the prescription period. Moreover, an ordinary prescription period formally laid down will not normally apply if the debt arises from a criminal act, in which case the prescription period for criminal proceedings will apply.

The present case does not fall into either of these categories. The defendant's argument that the complainant acted in bad faith is based solely on Staff Rule 302.3.172, which states:

"The right of the Organization to claim from a staff member any overpayment made and received in good faith shall lapse two years after such overpayment was made."

5. The wording of this rule is clear. It means that the two-year time limit for the recovery of a sum paid in error does not apply if the recipient accepted it in bad faith. This cannot be presumed (see, *inter alia*, Judgment 2282, under 6). It should also be noted that the time limit specified in the staff rule in question is quite sufficient for the Organization to seek reimbursement of an overpayment. The question whether the period of time within which it did so in this case was reasonable need not be decided since, as the Appeals Committee pointed out, it has not proved that the complainant acted in bad faith.

6. The complaint must therefore be allowed and the impugned decision set aside.

7. The Organization shall repay to the complainant the sum of 7,500 dollars which was deducted from his salary for the years 2008 and 2009, plus interest at 5 per cent per annum. It shall pay him compensation of 800 euros for injury.

8. As he succeeds, the complainant is also entitled to costs, set at 500 euros.

DECISION

For the above reasons,

1. The complaint is allowed and the impugned decision is set aside.
2. The Organization shall repay to the complainant the sum of 7,500 United States dollars deducted from his salary for the years 2008 and 2009, plus interest at the rate of 5 per cent per annum.
3. The FAO shall pay the complainant compensation of 800 euros for injury.
4. It shall also pay him 500 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 1 May 2012, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba
Claude Rouiller
Giuseppe Barbagallo
Catherine Comtet