115th Session **Judgment No. 3199**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs J.d.V. against the International Labour Organization (ILO) on 14 March 2011 and corrected on 18 March, and the Organization's reply of 17 June 2011;

Considering Article II, paragraph 1, 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 Dutch national born in 1967, is an Administrative Assistant working under an appointment without limit of time at grade G.5 in the Industrial and Employment Relations Department of the International Labour Office, the ILO's secretariat.

In March 2009 she submitted a travel request in respect of mission travel to be undertaken by herself and three colleagues from 21 to 30 August 2009 to Sydney, Australia. The complainant opted to receive a 100 per cent advance payment of the estimated mission travel expenses, including the daily subsistence allowance (DSA), as foreseen in paragraph 16 of Office Procedure No. 38 (Version 1) of 26 August 2008 regarding mission travel expenses. In March 2009

the DSA rate for Sydney, which is established monthly by the International Civil Service Commission (ICSC), was 222 United States dollars per day. The complainant's advance payment of DSA was calculated at the rate in effect at the time when her travel request had been authorised, namely March 2009. By August the DSA rate for Sydney had increased to 281 dollars per day.

After having undertaken the mission, the complainant completed her travel claim on 14 September 2009. The next day the complainant's Director, who had undertaken the same mission, requested the Payment Authorization Section (PAIE) to provide an adjustment to the DSA amounts that he, the complainant and another colleague had received as advance payments for their travel expenses. Specifically, he requested that the DSA be recalculated at the rate for August 2009. On 15 October the Director forwarded a copy of that request to the Chief of the Budget and Finance Branch (BUDFIN). After several exchanges, the Chief of BUDFIN addressed a minute dated 12 January 2010 to the complainant's Director, explaining why the adjustment could not be granted. He noted that under the new procedures introduced by Office Procedure No. 38, when a 100 per cent advance payment was requested, the DSA rate was fixed on the date of authorisation and was not subject to recalculation. He drew attention to paragraph 13(e) of Office Procedure No. 38, which provides that, in exceptional cases, an official may apply through ILO Form 959 for the reimbursement of costs incurred in excess of the DSA rate paid, and he invited the Director and his colleagues to resort to that mechanism for reimbursement, if applicable. No such reimbursement application was received.

Meanwhile, on 11 January 2010 the complainant filed a grievance with the Human Resources Development Department (HRD), claiming the difference between the DSA amount received and the amount she would have received had the August 2009 rate been applied. As this claim was rejected, on 10 May 2010 she submitted a grievance to the Joint Advisory Appeals Board. In its report issued on 15 October, the Board found that Office Procedure No. 38 clearly explained to staff the implications of opting for an advance payment

of travel expenses. However, it noted that the provisions of the Office Procedure could be seen as inconsistent with paragraph 18 of Annex III to the Staff Regulations of the International Labour Office, on which the complainant relied, which stipulates that "[i]n the case of travel on official business, the [DSA] shall be payable at the rate applicable to the place of official business as from the day of departure". In view of this possible ambiguity, the Board unanimously recommended that the Director-General take appropriate measures to ensure consistency between the modified travel claim procedures introduced by Office Procedure No. 38 and the relevant provisions of the Staff Regulations. However, only one member of the Board – its Chairperson – recommended that the complainant's request for an adjustment of her DSA rate should be allowed. The other two members considered that her request was unjustified, as she had not availed herself of the possibility of claiming a higher amount of DSA using Form 959, and it could therefore be assumed that the amount received had been sufficient to cover her actual expenses.

By a letter of 15 December 2010 the Executive Director of the Management and Administration Sector informed the complainant of the Director-General's decision to dismiss her grievance as devoid of merit. The Director-General took the view that, when a staff member decided to benefit from an advance payment of 100 per cent of the DSA, she or he had to accept that the amount paid would be considered as final, in accordance with Office Procedure No. 38, unless it proved insufficient to cover her or his expenses. However, the Director-General agreed that the terms of Office Procedure No. 38 could be made more explicit in this respect, and he had therefore decided that the relevant Office Procedures and Staff Regulations would be amended appropriately to avoid further misunderstandings. That is the impugned decision.

B. The complainant contends that granting different amounts of DSA to officials participating in the same mission, depending on the date when they filed their travel request and on whether they opted for an advance payment, breaches the principle of equal treatment and amounts to discrimination. She also contends that the ILO committed

an error of law, because paragraph 18 of Annex III to the Staff Regulations clearly provides that DSA shall be calculated based on the rate applicable to the place of official business at the time of the mission, and not before or afterwards. She points out that travel expenses must have increased in Australia between March and August 2009, given that the DSA rate promulgated by the ICSC rose during that period.

She asks the Tribunal to set aside the impugned decision and to order the ILO to reimburse the difference between the estimated DSA rate paid in March 2009 and the rate in effect in August 2009. She claims material and moral damages in the amount of 5,000 Swiss francs and costs in the same amount. She states that any sum awarded will be given to the ILO Staff Union in order to create a special fund "to assist any precarious employee of the [ILO]".

C. In its reply the ILO submits that the complaint is entirely unfounded, as the calculation and payment of the DSA were made in full conformity with all the applicable rules and procedures. It rejects the complainant's interpretation of paragraph 18 of Annex III to the Staff Regulations and argues that the terms of that provision clearly show that it does not determine which rates are applicable, but rather the date from which the DSA entitlement accrues. Consequently, the complainant's argument that the Staff Regulations require the Office always to apply the rate in force at the time of official travel is without merit.

The Organization emphasises that the purpose of the DSA is to cover the reasonable and necessary expenses incurred by an official undertaking mission travel, and that the complainant has failed to use any of the mechanisms available to her to claim additional travel expenses actually incurred beyond the amount advanced. The complainant's assertion that she would not use the amount claimed for personal gain but to institute a special fund to assist precarious employees tends to confirm that her claim does not aim to obtain reimbursement for expenses incurred, i.e. for purposes the DSA is intended to cover.

Lastly, referring to the Tribunal's case law, the defendant denies that there has been a breach of the principle of equal treatment, because the complainant cannot claim to be in an identical or comparable position in fact and in law to the other staff members to whom she refers. The sum she received was the result of her decision to request an advance payment five months before the date of departure, and not to claim additional expenses upon return. She and her colleagues were offered all the same options and adjustment means provided for in the applicable regulations. The differences in treatment she refers to as discrimination result from those options and from the choices of the staff members concerned. Her claim of unequal treatment amounting to discrimination must therefore be dismissed as devoid of merit.

CONSIDERATIONS

1. This matter revolves primarily around the complainant's second contention, which raises the question whether paragraph 18 of Annex III to the Staff Regulations is clear, and, if it is, whether DSA is to be calculated on the basis of the rate applicable to the place of official business as at the time when the travel is authorised or as at the actual time of the mission, in the event that an official chooses to receive an advance payment of travel expenses.

2. A majority of the members of the Joint Advisory Appeals Board construed the relevant Office Procedure and practices to mean that the rate of DSA applicable to the complainant's mission travel was the rate that was in place in March 2009 when her travel request was authorised, rather than the higher rate which was applicable in August 2009 at the actual time of the mission. The Chairperson would have allowed the complainant's claim for the higher rate applicable in August 2009 because, in her view, the clear meaning of paragraph 18 of Annex III to the Staff Regulations is that DSA is to be paid according to the rate applicable to the place of official business at the material time of the mission, and not at any time before or after.

3. In its submission to the Tribunal, the Organization seems to be in accord with the finding by the majority of the Joint Advisory Appeals Board that paragraph 18 of Annex III to the Staff Regulations has to be read in the light of Office Procedure No. 38. It points out that paragraph 16 of Annex III requires DSA to be calculated based on the schedule and rates determined by the Director-General. In addition, paragraph 13 of Office Procedure No. 38 states that DSA is intended to cover reasonable and necessary travel expenses and that, as a general rule, the ILO applies the DSA rates published monthly by the ICSC. The defendant submits that Office Procedure No. 38 provides a simplified procedure that enables officials to request an advance of their estimated mission travel expenses. Under the said procedure, when an official opts for a 100 per cent advance of travel expenses, the calculation of DSA is made using the rate in force at the time of the travel request.

4. The Organization contends that neither Office Procedure No. 38 nor the Staff Regulations provide for the possibility of post mission adjustments to the amount of the advance payment of DSA on the sole basis of a fluctuation, upward or downward, of the ICSC rates. In this regard it notes that paragraph 20(a) of Office Procedure No. 38 states that "[s]hould there be no change in itinerary nor additional travel expenses, the advance paid prior to the mission will be considered as the final entitlement". It therefore submits that the calculation and payment of the DSA to the complainant was made in full conformity with all applicable rules and procedures.

5. The defendant does not accept the complainant's contention that paragraph 18 of Annex III to the Staff Regulations adds a stringent requirement that constrains the Office always to apply the rate in force at the time of official travel. Accordingly, it further challenges her contention that the simplified advance payment procedure under Office Procedure No. 38, and, in particular, paragraph 20(a), contravenes the Staff Regulations.

6. The English language version of paragraph 18 of Annex III to the Staff Regulations states as follows:

> "In the case of travel on official business, the allowance shall be payable at the rate applicable to the place of official business as from the day of departure."

7. The Organization argues that a plain reading of the above provision, without even the need to resort to its development or consistent application in practice under Office Procedure No. 38, leads to a clear and unambiguous interpretation. In its view, the reference to "as from the day of departure" alludes to the word "payable" and determines the date as from which the DSA entitlement begins to accrue, and the same conclusion is reached under the French and Spanish language versions of the Staff Regulations. It further argues that paragraph 18 does not refer to a date in order to determine what rates are to be taken into consideration, but to the date from which the DSA entitlement accrues.

8. As far as interpretation is concerned, according to the defendant, the expressions used – "as from", "*à compter du*" and "*a partir del*" – in the English, French and Spanish versions of the Staff Regulations, respectively, can only be construed to refer to the date from which the DSA is payable. It asserts that paragraph 18 is to that end clear and unambiguous in the three working languages of the ILO.

9. This seems to be an artificial and strained interpretation of paragraph 18, which specifically provides for the rate of DSA that is to be paid for official missions. The Organization suggests that the meaning of the word "payable" is critical to a determination of the time at which a rate is applicable. In its submissions, it seems to equate "payable" with "accrue" when it urges the Tribunal to find that the DSA accrues on the date when it is actually paid. The word "payable" standing alone means "must be paid" or "due to be paid".

10. Either of these meanings could be synonymous with "accrue", but this would depend upon the context that is derived from

reading paragraph 18 as a whole. When read as a whole, it is a clear provision which means: (a) that the DSA must be paid or is due to be paid at the rate that is applicable to the place of official business; and (b) that it is applicable "as from the day of departure". To this extent it seems clear that paragraph 18 provides that the DSA rate for a mission is the rate applicable to the place of the mission at the day of departure. It does not state that the DSA rate to be paid is that which is applicable on the date when the DSA is authorised or paid.

11. Since paragraph 18 of Annex III to the Staff Regulations is clear and unambiguous, the rule of *contra proferentem* does not apply.

12. In light of the foregoing reasoning, the complainant is correct when she submits that paragraph 18 of Annex III to the Staff Regulations provides a stringent requirement that constrains the Office to apply the rate of DSA in force at the place of a mission at the time of official travel. The Chairperson of the Joint Advisory Appeals Board was accordingly correct in her reasoning and conclusion on this issue. It is commendable that Office Procedures seek to provide an efficient and simple administrative process for claims and payments. However, those procedures cannot modify or circumscribe the entitlement which paragraph 18 clearly confers upon officials of the ILO to be paid DSA at the rate existing at the place of the mission at the date of departure on the mission.

13. The foregoing provides a sufficient ground on which to set aside the decision of the Director-General approving the recommendation of the majority of the Board. However, the issue of equality of treatment will be visited for completeness.

14. The ILO asserts that the complainant was afforded equal treatment. It points out that the principle of equality requires an organisation to treat staff members equally and without discrimination in similar cases and situations and it refers to Judgment 524 and to Judgment 2066, under 8, in which the Tribunal held that the principle

is breached only where staff members in an identical or comparable position in fact and in law receive different treatment.

15. The Organization submits that the variations noted in the complaint with respect to the DSA rates do not concern the same case or situation, but concern different travel expense claims resulting from the choices made by each staff member. In its view, by applying for an advance payment, the complainant chose to use the advance travel expense mechanism under Office Procedure No. 38. Accordingly, she cannot now claim to be in an identical or comparable position in fact and in law to that of the other staff members who may have received the higher DSA that was in place at the time of the mission in August 2009. It also submits that, inasmuch as the variations in the rates, as between the complainant and other officials, were the result of her own choice, they do not involve unequal treatment. The defendant concludes that there was no discriminatory action by the Office, particularly as the complainant was quite aware of the implications of opting to receive the advance payment.

16. The Tribunal finds that all staff members are entitled under paragraph 18 of Annex III to the Staff Regulations to be paid DSA at the rate applicable to the place of the mission at the time of official travel. It follows that it would be a breach of the principle of equal treatment, and consequently discriminatory, for any staff member to be paid DSA at a different rate. There is no room for variations resulting from the options for payment which the Office Procedures provide. Anyone who, like the complainant, is not compensated at the rate applicable to the place of the mission at the time of departure will have suffered unequal treatment. Her complaint is therefore also meritorious on the ground of unequal treatment amounting to discrimination, which entitles her to moral damages.

17. It follows that the impugned decision must be set aside. The complainant is entitled to the difference between the DSA rate that she was paid in March 2009 for the Sydney mission and the DSA rate that

was in effect in Sydney at the time of her actual departure for the mission in August 2009.

18. The complainant is entitled to moral damages in the amount of 2,000 Swiss francs. She is also entitled to costs, which the Tribunal sets at 1,000 francs.

DECISION

For the above reasons,

1. The Director-General's decision of 15 December 2010 is set aside.
2. The ILO shall pay the complainant the difference between the DSA rate that she was paid in March 2009 for the Sydney mission and the DSA rate that was in effect in Sydney at the time of her actual departure for the mission in August 2009.
3. It shall pay the complainant moral damages in the amount of 2,000 Swiss francs.
4. It shall also pay her 1,000 francs in costs.

n witness of this judgment, adopted on 2 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Hugh A. Rawlins
Catherine Comtet