

A. and others

v.

PAHO

131st Session

Judgment No. 4348

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr J. R. A. F., Ms J. A., Mr D. L., Ms M. F. L. d. M., Mr L. R. H. and Mr D. V. against the Pan American Health Organization (PAHO) (World Health Organization) on 26 July 2019 and corrected on 23 August, PAHO's reply of 9 December 2019, the complainants' single rejoinder of 15 January 2020 and PAHO's surrejoinder of 30 April 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 none of the parties has applied;

Considering that the facts of the cases may be summed up as follows:

The complainants challenge the refusal to grant them costs incurred during the internal appeal proceedings.

At different times in March 2017, the complainants filed an individual notice of intent to appeal against the changes to the education grant benefits provided to staff members announced by a General Information Bulletin issued on 23 November 2016 and implemented with effect from 1 January 2017. In July 2017 they filed their formal statements of appeal claiming *inter alia* payment of reasonable legal fees incurred in the presentation of their appeals. On 17 September 2018 the Board of Appeal issued its report in which it considered that the appeals were receivable and, on the merits, it found partially in favour of the complainants. It did not address the request for payment of legal costs.

By letter dated 19 November 2018 the Director of PAHO issued her decision concurring with some of the Board's findings and conclusions; regarding the request for payment of legal fees, she explained that "it ha[d] not been the practice of the Organization to reimburse for legal costs that may have been incurred for appeals [before] the Board of Appeal". She invited the complainants to accept her decision as final, otherwise they had the possibility to file a complaint before the Tribunal within 90 days from the date of receipt of her decision.

On 13 December 2018 the complainants asked the Chair of the Board of Appeal for a clear recommendation regarding the issue of payment of legal costs. Following an exchange of correspondence between the complainants, PAHO's Legal Counsel and the Board of Appeal's Chair, the latter issued a first "decision" dated 28 February 2019 in which he found that the 19 November 2018 decision was not final with regard to the legal costs request, that he had no authority to issue a ruling on that issue and that only a full Board of Appeal panel could make a recommendation on the matter. He requested the parties to submit further briefs, following which a full Board panel would be reconvened.

On 30 April 2019 the Chair, who had considered the parties' additional submissions, issued a second "decision" in which he found that Rule 9 of the Board of Appeal's Rules of Procedure required the appellants to bear the costs, personally, of their internal appeals. Given the binding nature of that provision, he concluded that the Board had no jurisdiction "to consider [the complainants'] motion for reimbursement of counsel fees" and that the matter could not be addressed by a full panel. However, he suggested that PAHO re-think this policy choice as it was inconsistent with the Organization's goal of maintaining an effective dispute resolution system. He specified that the complainants' only recourse was before the Tribunal. This is the impugned decision in the present complaints.

On 29 May 2019 the complainants' legal representative requested the Director to adopt a revised policy providing for the reimbursement of legal costs at the Board of Appeal level in the event that staff members are successful or partially so and, in any event, when a case of complexity or of general interest is brought to the Board's attention and, in general terms, through the Organization's internal dispute resolution system. By a letter of 6 June 2019 the Director confirmed her decision not to reimburse their legal fees.

The complainants ask the Tribunal to “[e]stablish that [the] Board of Appeal has jurisdiction [to recommend] the reimbursement of reasonable legal costs at the internal appeal level”, to “[u]rge PAHO to update its policy regarding the reimbursement of [those costs]” and to award them costs for the internal appeal proceedings and the proceedings before the Tribunal.

PAHO invites the Tribunal to dismiss the complaints as irreceivable *ratione temporis* and *materiae* and, alternatively, to dismiss all the claims for relief.

CONSIDERATIONS

1. This judgment concerns six complaints filed on 26 July 2019 by six members of the staff of PAHO. The complainants’ arguments are embodied in one brief and arise from the same factual circumstances. The complaints are joined and the Tribunal will rule on them in a single judgment.

2. The complainants each filed, internally, a notice of intent to appeal during March 2017 concerning changes that had been made to the education grant benefits provided to staff members. The internal appeals culminated in a report of the Board of Appeal dated 17 September 2018. The Board recommended that mostly the complainants’ arguments should be rejected, though it did make two recommendations favourable to them concerning the timing of the implementation of the changes. It is not disputed that in either the notices of intent to appeal or the formal statements of appeal, the complainants sought payment of their legal costs. This issue was not addressed in the Board’s report. However, it was in the final decision of the Director embodied in a letter dated 19 November 2018. The letter commenced with two introductory paragraphs. The second of these paragraphs concluded with a sentence saying: “Below is a summary of the Board’s findings and recommendations, as well as my decisions regarding this matter.”

3. Following these introductory paragraphs, the letter is divided into four numbered parts, each addressing an issue or topic raised in the internal appeals. In relation to the first three numbered parts, the Director set out the analysis and conclusions of the Board. At the end of each of these three numbered parts, there is a section entitled “Director’s Decision” which contains the decision made by the Director on the issue in question.

4. The fourth numbered part was in the following terms:

“Request for Payment of Attorney Fees

Director’s Decision: In your appeal, you request that the Board recommend the payment of your legal costs. Although the Board did not address this matter, note that it has not been the practice of the Organization to reimburse for legal costs that may have been incurred for appeals at the Board of Appeal level.”

The Tribunal should observe, at this point, that there is no difference of substance in a case such as the present, between a claim for reimbursement of legal fees and a decision whether or not that should occur and a claim for the payment of legal fees and a decision whether or not that should occur.

5. The Director’s letter of 19 November 2018 concluded with an invitation to the complainants to accept her decision as final, while pointing out that they could appeal to this Tribunal. Thereafter, the complainants pursued the question of legal costs with the Chair of the Board of Appeal, who initially said in a “decision” of 28 February 2019 that the issue of costs had not been resolved but needed to be addressed by a full panel of the Board. In a subsequent “decision” of 30 April 2019 the Chair concluded that the Board did not have jurisdiction “to consider [the complainants’] motion for reimbursement of counsel fees [as] Rule 9 [of the Board’s Rules of Procedure] is categorical in stating that [a]ppellants must bear the cost[s] of their own representation”. This “decision” of the Chair is the decision impugned in these proceedings. Why this is so is not entirely clear, though comments in the “decision” of the Chair of 30 April 2019 may have encouraged the complainants to believe they could challenge his decision in the Tribunal and this was a course open to them. In response to a letter from a legal representative of the complainants dated 29 May 2019, the Director declined, by letter dated 6 June 2019, to reconsider “[her] 19 November 2018 decision not to reimburse legal fees”.

6. The relief sought by the complainants in these proceedings in the Tribunal contains four elements. Firstly, that the Tribunal “[e]stablish that [the] Board of Appeal has jurisdiction [to recommend] the reimbursement of reasonable legal costs at the internal appeal level”. Secondly, that the Tribunal award costs incurred in the internal appeal proceedings. The third is to “[u]rge PAHO to update its policy regarding the reimbursement of reasonably incurred legal fees” and, fourthly, to award costs for the preparation and submission of their complaints.

7. PAHO raises, as a threshold issue, whether the complaints are receivable. It argues that the decision not to reimburse the complainants their legal fees or otherwise ensure their payment by the Organization was made by the Director in her decision of 19 November 2018. Having regard to Article VII of the Tribunal’s Statute, so it is argued, the complainants had 90 days in which to challenge the decision before the Tribunal and failed to do so in the specified time. However, it is unnecessary to decide this issue, as the complaints are unfounded on the merits.

8. Rule 9 of the Board of Appeal’s Rules of Procedure provides that “[t]he [a]ppellant may [...] be represented by outside legal counsel, which shall be at the [a]ppellant’s own expense”. This provision is clear and allows no room for reimbursement of legal fees.

9. In light of the above, the complaints must be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 19 October 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ