



ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 20 October 2022

JUDGEMENT IN CASE No. 105

AA

v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 105 OF THE ADMINISTRATIVE TRIBUNAL

Hearing on 12 October 2022

In Château de la Muette,

2 rue André-Pascal à Paris

The Administrative Tribunal consisted of :

Louise OTIS, Chair

Pierre-François RACINE

And Chris DE COOKER

with Nicolas FERRE, Registrar, and David DRYSDALE, Deputy Registrar, providing Registry services.

The Tribunal heard

Eric WITT, Counsel of the Applicant ;

Auguste NGANGA-MALONGA, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General ;

INTRODUCTION

1. In her application lodged with the Registry on 21 February 2022, AA (hereinafter 'the Applicant') requests that the decision arising from the absence of any reply from the Secretary-General (hereinafter 'the Organisation') for more than a month to her prior request of 17 December 2021 for the withdrawal of a decision of 17 August 2021 of the Organisation be annulled.
2. This prior request was for the withdrawal of a declaration of claim made on 15 December 2020 by the Organisation to the notary in charge of the estate of the Applicant's mother, BB, who died on 29 July 2020. The latter was employed by the Organisation from 1979 to 1 December 2005, the date of her retirement, and from that date until her death received benefits from the co-ordinated pension scheme (hereinafter 'CPS'), including the household allowance.
3. The Organisation considered that BB had, from the death of her husband on 4 June 1996 until her own death, lost any right to receive the household allowance which she had nevertheless received throughout this period of 24 years.
4. The Organisation requested an extension of the time limit to submit its comments in response. By decision of the Chair of the Tribunal of 14 April 2022, the time limit was extended until 6 May 2022, on which date the Secretary-General submitted his comments.
5. The Applicant submitted a reply on 10 June 2022.
6. The Secretary-General submitted his comments in rejoinder on 11 July 2022.
7. All the documents cited and produced by the Applicant (annexes) bear the reference letter R, whereas those cited and produced in defence by the Organisation (documents) bear the reference letter O.

8. The application hearing was held on 12 October 2022. The counsels of the parties were heard by video link.

EVIDENCE

9. In support of her application, the Applicant produced documentary evidence but did not call any witnesses.
10. The Organisation also submitted documentary evidence.

THE FACTS

11. BB, the Applicant's mother, was a former official of the Organisation who entered its service on 1 January 1979 and retired on 1 December 2005. Since 1993, she had received the household allowance solely for her husband, since he was not engaged in gainful employment. She continued to receive it as a pensioner as provided for in the CPSR until her death on 29 July 2020.
12. CC, the Applicant's father, died on 4 June 1996 without his wife, BB, ever informing the Organisation. It was not until July 2020 that the Organisation, having been informed of BB's death, learned that her husband had been deceased for more than 20 years (Document 0-2).
13. The Organisation considered that between June 1996 and July 2020, BB had unduly received the sum of €55,491.50, less an amount of €10,364 representing the additional tax adjustment to which she would have been entitled as a widow if she had declared the death of her husband. On 15 December 2020, the Organisation therefore sent the notary in charge of the estate a declaration of claim in the amount of €45,245.50.

14. Numerous exchanges then took place between counsel for the Applicant and the Organisation during which counsel, acknowledging the merits of the Organisation's claim, argued that it was time-barred, other than a sum of €2,467.55 representing the household allowances received by BB during the years 2019 and 2020, as the Organisation had failed to provide evidence of BB's lack of good faith.
15. In a letter dated 17 December 2021, counsel for the Applicant asked the Secretary-General to annul the decision of 17 August 2021 of the Executive Director of the Organisation to maintain the declaration of claim in the amount of €45,245.50 and to replace it with a declaration limited to the sum of €2,467.65.
16. As the Organisation did not respond to this request, an implied decision of rejection arose on the expiry of the prescribed period of one month and counsel for the Applicant validly filed an application with the Tribunal on 21 February 2022.

THE PARTIES' ARGUMENTS

Arguments of the Applicant

17. The Applicant does not contest either the existence or the amount of the Organisation's claim, but argues that, under Rule 17/8.3 of the applicable Staff Regulations, Rules and Instructions (hereinafter 'the Staff Regulations'), this claim is time-barred at the end of a period of two years following each payment of the allowance, unless the Organisation establishes that her mother demonstrated a lack of good faith or gross negligence.
18. According to the Applicant, it was incumbent on the Organisation to establish, by clear evidence, gross negligence or bad faith on the part of her mother. However, the Organisation has produced no evidence in this regard.

19. The Applicant maintains that, since the Organisation failed to produce a copy of the declaration of status for 1996, the year of her father's death, it is unable to establish that BB lacked good faith or was guilty of gross negligence. The Applicant deduces from this that the claim is time-barred, other than the allowances which were paid to her mother during the two years preceding the Organisation's first written request, in other words the declaration of claim made on 15 December 2020.
20. In addition, it appears from the documents produced by the Organisation that BB did not tell any lies in the answers to the questions about the situation of her husband, in view of the way in which these questions were formulated: no question related to whether her husband was still alive, and as no changes occurred between 2006 and 2019, she had nothing to report regarding her family situation.
21. Finally, the Applicant also alleges breaches by the Organisation of its duty of care. According to her, the Organisation should have reminded BB every year of her rights and obligations and the forms she was supposed to complete.
22. Consequently, the Applicant asks the Tribunal: to rule that the Organisation's claim is time-barred in the amount of €41,665.85, i.e. the initial claim of €45,245.50 less the household allowances wrongly paid in 2019 and 2020, i.e. €3,579.65; to order the Organisation to withdraw its declaration of claim and replace it with a declaration limited to €3,579.65; in the alternative, to order it to pay the Applicant the sum of €41,665.85 and in any event to order it to pay her the sum of €2,500 for representation fees.

Arguments of the Organisation

23. For its part, the Organisation points out that it is not disputed that BB wrongly received the household allowance from 4 June 1996, the date of her husband's death, to 29 July 2020, the date of her death, and that it is entitled to recover amounts unduly paid under Rules 17/8.3 and 17/8.4 of the Staff Regulations.

24. These rules were already in force in 1996, when the undue payments began, and remained in force after BB's retirement in 2005, as Instruction 35.1/2 of the Co-ordinated Pension Scheme Rules (CPSR) refers to the rules of each coordinated organisation with regard to the refunding of amounts unduly paid.
25. During the period from the death of her husband to her retirement, BB failed to comply with her obligation to inform the Organisation without delay of any change in the composition of her household. The Applicant cannot claim that her mother was unaware of her obligations under the Staff Regulations, since it is settled case law that 'a staff member is deemed to know the regulations and rules governing her or his appointment'¹. Moreover, the allowance and its rate and amount were expressly shown on a separate line on the payslips, so that the Applicant could not have been unaware that she was continuing to receive it.
26. Nor did BB inform the Organisation of her husband's death when she retired in 2005, as is apparent in particular from her pension application in which she certified that she was still married and that her spouse -deceased since 1996- was not gainfully employed, was neither retired nor a pensioner and did not receive other income linked to his situation as head of the family².
27. The Organisation is therefore entitled to claim a refund from the Applicant of the overpaid household allowance, less the amount of the tax adjustment that her mother would have received if she had declared the death of her husband. Accordingly, the Organisation concludes that all of the Applicant's claims should be dismissed.

¹ Administrative Tribunal of the International Labour Organization (hereinafter 'ILOAT'), Judgment 3878, consideration 12.

² Document R-7.

THE TRIBUNAL'S ANALYSIS

Applicable rules

28. Under Rule 16/1 of the Staff Regulations and Article 28 of the CPSR, the household allowance is paid to officials and pensioners who either are married, subject to the conditions relating to the spouse's income, or have one or more dependants. Since Mr and Ms CC had not had a dependent child since 1993, it was solely on the basis of her spouse, having regard to his income, that BB was entitled to this allowance.
29. Instruction 116/0 of the Staff Regulations (Document O 1-1) stated in 1996 that: *'Entitlement to allowances shall be determined at the time of appointment. Thereafter, the entitlement of officials shall be reviewed periodically. A questionnaire shall be circulated for this purpose. Officials shall inform the Head of Human Resource Management without delay of any changes in personal or professional status that may affect their entitlement to allowances.'*
30. Instruction 116/0.2, also in force in 1996, provided in particular that: *'Where an official misinforms or omits to inform the Head of Human Resource Management of any relevant fact and receives, as a result, an undue allowance, he/she shall be required to refund any sums of money so received and shall be liable to disciplinary action.'*
31. Article 35 of the CPSR (Document O 1-5) stated in 2005 - the year of BB's retirement - that: *'Persons who are eligible for benefits under these Rules shall inform the Organisation or the Joint Pensions Administrative Section of any facts which may affect their entitlement to benefits and to furnish such supporting evidence as may be required of them. Should they fail to comply with these obligations, they may be deprived of the right to benefits under this Scheme; save in exceptional circumstances, they shall refund any sums received to which they were not entitled.'*

32. Rule 17/8.3 of the Staff Regulations states: *'The right of the Organisation to recover any payment made unduly shall lapse two years following that payment,'* and Rule 17/8.4 that: *'There shall be no limitation if the information provided was inaccurate as a result of a lack of good faith or gross negligence'*. It is up to the party who invokes this exception to the rule of limitation to establish the debtor's lack of good faith, since bad faith cannot be presumed.

33. Lack of good faith or gross negligence are established by clear evidence.

The Tribunal's appraisal

34. It is not disputed that BB did not inform the Organisation in 1996 of the death of her husband, although the rules applicable at the time as cited above required her to do so, especially in connection with an allowance which implies the current existence of a 'household'.

35. The Tribunal recalls that all international officials are deemed to know the regulations and rules governing their appointment. This is particularly true of BB, who had been with the Organisation for 16 years at the time of her husband's death.

36. This rule is aptly illustrated by the robust and consistent case law of the international tribunals.³

37. Moreover, the duty of care of international organisations invoked by the Applicant does not extend to reminding every official, every year, of their rights and obligations. This principle is even clearer with regard to family allowances, if the officials have provided the Organisation which employs them with the information necessary to establish the principle and the amount of their entitlement to the allowances. The Applicant's

³ For example, see: ILOAT, Judgments No. 1700, consideration 28; 2960, consideration 7; 3135, consideration 14; 3726, consideration 12; 3878, consideration 7.

challenge to the Organisation to produce a questionnaire relating to BB's family situation in 1997 is irrelevant, because the Organisation had by that time ceased to send an annual questionnaire to its officials.

38. In a dispute also concerning household allowance unduly received by an official of the European Patent Office, ILOAT⁴ ruled that the absence of an annual request to update personal information *'did not in any way mitigate or cancel out the obligation to give notice of any changes as soon as they occur'*.

39. It is also not disputed that BB persisted in her failure to inform the Organisation of the death of her husband from 1997 to 2005, the year of her retirement. As the household allowance and its rate and amount were expressly shown on a separate line of her payslip, she could not have been unaware that she was continuing to receive it.

40. What is more, just before her retirement, BB signed a pension application form on 14 November 2005 (Document R-7) in which she was asked to specify her family situation with respect to her entitlement to household allowance. Although she had been a widow since 1996, she mentioned CC as her 'spouse' and stated that he was not in gainful employment, was neither retired nor a pensioner and did not receive any income linked to his situation as head of the family.

41. The pension application form is a document that enables officials who are retiring to exercise their rights (underlined by the Tribunal) to the benefits provided for by the Staff Regulations and that enables the Organisation to verify their existence and extent. The terms that appear on the form are therefore of legal significance. In particular, this is the case with the term 'spouse', which can only designate a living spouse as a marriage is

⁴ ILOAT, Judgment No. 3167.

dissolved by the death of one of the spouses.⁵ Any other reading is legally indefensible, in the absence of any specification to the contrary on the form.

42. This is sufficient to rule out the excuse put forward by the Applicant that BB 'did not lie' by responding as she did to the questions on the form relating to her 'spouse'.

43. Moreover, even if it were admitted, against all reason, that the term 'spouse' could also designate a deceased spouse, the questions on the form concerning the 'spouse' would have required the same negative answers for all retiring officials, given that a deceased person cannot be gainfully employed or receive a pension or allowance. Such a reading of the term 'spouse' is therefore also absurd as a matter of pure logic.

44. Subsequently, on 17 June 2006, BB confirmed the accuracy of the information contained in the general information file establishing the right to a pension (Document R 4) sent to her on 19 December 2005. Under the heading 'Spouse', this document showed that CC was still 'married', yet in point 14 of this document, after having confirmed that this information was accurate, she undertook immediately to report to the Joint Pensions Administrative Section any subsequent change to the declared situation and in point 15, the heading 'Correction' gave her an opportunity to report changes in order to ensure the accuracy of the information provided, if necessary on a blank sheet of paper. It is clear that BB did not take the opportunity offered to her to declare her real family situation.

45. As a pensioner, BB received a form every year (Document R 5) whose purpose was to enable the Organisation to modify her benefits, in terms of either the fact of her entitlement or the amount. The notice accompanying this form (Document O-8) expressly informed her that a change of marital status could modify her rights to benefits and should be reported without delay. At no point between 2006 and 2020, the year of her

⁵ According to the rules concerning spouses of French nationality, as in the present case, set out in Article 227 of the Civil Code.

death, did she inform the Organisation that her husband had died in 1996. It was only by means of a telephone call on 31 July 2020 from her daughter, the Applicant, that this information reached the Organisation.⁶ While it is true, as the Applicant maintains, that BB's family situation did not change between 2006 and 2020, that circumstance in no way exempted her from the obligation at all times to reveal the truth to the Organisation and thus put an end to a situation that reflected a total lack of good faith.

46. It follows from the foregoing that the Organisation has demonstrated BB's lack of good faith by clear evidence as required by Rule 17/8.4 of the Staff Regulations. Consequently, the disputed claim is not time-barred.

47. To establish its claim fairly and equitably, the Organisation of its own accord reduced the amount of the undue payments received by BB by the additional tax adjustment from which she would have benefited if she had revealed the death of her husband at the right time. It thus limited to €45,245.50 the debt declared to the notary in charge of BB's estate.

48. Finally, the Applicant does not mention any fact or argument relating to her own situation which would be such as to reduce the amount of the Organisation's claim on her mother's estate.

⁶ Document O-2.

FOR THESE REASONS, THE TRIBUNAL

1. DECLARES that the application is admissible
2. REJECTS the application.