

ORGANISATION
FOR ECONOMIC
CO-OPERATION
AND DEVELOPMENT



ORGANISATION DE
COOPÉRATION ET
DE DÉVELOPPEMENT
ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 20 April 2020

JUDGEMENT IN CASE No. 92

Messrs AA and BB

v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 92 OF THE ADMINISTRATIVE TRIBUNAL

The Administrative Tribunal consisted of :

Mrs. Louise OTIS, Chair

Mr. Pierre-François RACINE

Mr. Chris DE COOKER

with Mr. Nicolas FERRE providing Registry services.

INTRODUCTION

1. On 25 July 2019, the applicants, Messrs AA and BB, filed an application for annulment and compensation by which they sought the annulment of the Secretary-General's decision of 29 January 2019 and an order that the Secretary-General pay €531,326.83 to the applicants as executors of Ms CC's will.
2. On 15 November 2019, the Secretary-General issued his Observations requesting the Tribunal to find that the application was inadmissible or, failing that, to reject the request for compensation.
3. On 16 December 2019, the applicants lodged their reply entitled "Further Comments" in which they reiterated their initial submissions while converting the amount claimed into Australian currency.
4. On 19 December 2019, the Secretary-General's request for an extension of time pursuant to rule 3(d) of the Rules of Procedure was granted by the Tribunal. Consequently, the Secretary-General submitted his observations in rejoinder on 31 January 2020.
5. On 8 March 2020, the legal representatives of the parties stated that no witnesses would be called before the Tribunal.
6. On 12 March 2020, in the exceptional circumstances of the COVID-19 lockdown, the President of the Tribunal suggested to the parties that they opt for the case to be considered without a prior oral argument. The legal representatives agreed and chose not to produce written arguments, relying on the complete case file as constituted.
7. The Staff Association did not intervene in this dispute.
8. On 14 March 2020, the case was adjourned for further consideration.

THE FACTS

9. Ms CC joined the OECD ("the Organisation") in October 1972 and remained there until her retirement on 31 January 1997. As Australian citizen, she returned to live in Australia until her death on 19 March 2015.
10. Her state of health deteriorated from 2002 onwards because she was suffering from multiple sclerosis, which necessitated significant medical care and costs. In an initial period up to 2008, she continued to benefit from the services of the Organisation's medical and social system, known as Omesys, which was managed by the company Henner.
11. In particular, on 25 September 2008, Henner agreed in advance to rehabilitation care and nursing care for six months and agreed to the recognition of long-term illness for 36 months, such that the medical costs were fully covered.
12. From the end of 2008 and until her death, Ms CC ceased to submit claims for the reimbursement of her expenses.
13. Ms CC, who was unmarried and had no children, had appointed in her will in 2002 two relatives, Messrs AA and BB, as executors. They then tried unsuccessfully to recover expenses from Henner, including, very substantially, personal assistance costs.
14. Following Henner's refusal, in February 2018 Messrs AA and BB, initially represented by Mr Navarro, brought an action against that company before the Nanterre Regional Court to order Henner to pay them the sum of €531 326.83 for all the expenditure incurred by Ms CC between 2006 and 2015.
15. Informed of this procedure, the Organisation contacted Mr Haji, the new counsel for Messrs AA and BB, and organised a meeting on 3 April 2018 to clarify the rules applicable to medical protection and the rules of procedure relating to decisions taken either by Henner, the Omesys manager, or by the Organisation itself. On 25 April 2018, Henner's board of directors sent Mr Haji a letter describing the procedures for appealing against the Organisation's decisions.
16. On 6 August 2018, Mr Haji forwarded to the Organisation all the invoices requested on 3 April and Henner was asked to examine them with a view to their possible reimbursement.
17. By order of 8 November 2018, the Nanterre Regional Court acknowledged the withdrawal of the application of Messrs AA and BB.
18. In a decision of 29 January 2019 by the head of human resources management (HRM), the Organisation accepted a reimbursement limited to the sum of AUD 32180.72 (€20827.40), refusing to pay the invoices prior to April 2013, i.e. two years before the death of Ms CC, in accordance with the rules governing the limitation of claims against the Organisation, and the personal assistance costs not covered by the Omesys system. Delivered on 29 January

2019, and notified on 1 February 2019 to the counsel of Messrs AA and BB, this is the decision contested by an application of 25 July 2019, registered at the Court Registry on 26 July 2019.

MATTERS IN DISPUTE

Formal points

19. Does the absence of a prior request for withdrawal under article 3(a) of Annex III of the Staff Regulations result in the inadmissibility of the application?
20. If not, under article 4 of Annex III of the Staff Regulations, was the application for annulment and compensation filed late?

The substance of the case

21. Was the limitation rule for claims against the Organisation provided for in article 17/8 of the Rules properly applied to invoices more than two years old at the time of Ms CC's death?
22. Does the refusal to pay for personal assistance services comply with the Staff Regulations and the Rules?

ANALYSIS

Admissibility of the appeal

23. The rules relating to the admissibility of the appeal are set out in articles 3 and 4 of Annex III entitled " Resolution of the Council on the Statute and Operation of the Administrative Tribunal" and read as follows:

Article 3

Request prior to the filing of applications

- a) Subject to the provisions of article 4 b) below, applications to the Administrative Tribunal shall not be admissible unless the applicant has given the Secretary-General a prior written request for withdrawal or modification of the contested decision, and the Secretary-General has rejected such request or has not replied within a period of one month. Such prior request shall be given to the Secretary-General within two months from the date of notification of the contested decision in the case of members of staff, the Staff Association or trade unions or professional organisations, or within four months from the date of such notification in the case of former members of staff or duly qualified claimants to the rights of members of staff or former members of staff.

b) In the case of applications referred to in article 1 c) above, the time limit for submitting a prior written request to the Secretary-General shall be two months from the date of the notification to the job applicant of the rejection of his application. Such notification of rejection shall set out the terms of articles 1c) and 3 a), b) and c) of the present Resolution.

c) An additional period of two months for submitting such a prior written request shall be accorded to persons resident outside metropolitan France

d) In exceptional cases, the Secretary-General may accept a request submitted after expiry of these time limits

Article 4

Filing of applications

a) Applications shall be filed with the Registry of the Tribunal within three months from the date of notification of the rejection by the Secretary-General of the prior request or from the date of the implied refusal of such request. However, in exceptional cases, the Administrative Tribunal may admit applications filed after such time limit has expired.

24. In 2018, the applicants chose as their address for service the premises of their legal representative, Me Haji, who has been the Organisation's contact person at all times for this application. Accordingly, the decision of 29 January 2019 was notified to Me Haji on 1 February 2019 for the benefit of the applicants. Starting on that date, the applicants had four (4) months, and in the best case six (6) months, to apply for the withdrawal or modification of the decision. This request prior to the filing of the application was never made.

25. As for the application initiating proceedings, even if it could be considered despite the absence of a prior request, it was filed almost 5 months after the 29 January 2019 decision.

26. Annex III, article 3(d), grants the Secretary-General the option of accepting a request made after the time limit. However, the applicants never asked the Secretary-General to allow them to submit the prior request after the time limit.

27. As for the application for annulment and compensation, assuming hypothetically that it could be considered despite the absence of a prior request, it was made almost 5 months after the 29 January 2019 decision. As a result, it is also past the time limit.

28. The applicants claim that they were never made aware of the internal appeal procedures available to them to pursue their request before the Organisation's Tribunal. Moreover, they add that the exceptional context of the dispute weighed in favour of a relaxation of the procedural rules as regards both making a request prior to the filing of the application (article 3 a) and the time-limits for the filing of the application (article 4 a).

29. This argument is based on the rule of procedural fairness that the claimants to Ms CC's rights should have been provided with the appropriate information in a timely manner in order to understand the prerequisites of their request.
30. However, this argument cannot be upheld since the applicants were duly informed of the appeals procedure well before the Secretary-General's 29 January 2019 decision.
31. After the proceedings were instituted before the Nanterre Regional Court, the Organisation contacted Me Haji, the applicants' legal representative, in order to hold a meeting with all the parties involved in the dispute. Thus, on 3 April 2018, Me Haji, on behalf of the applicants, and representatives of Henner and the Organisation met at the OECD headquarters in order to legally clarify Ms CC's case.
32. This conciliation meeting was followed by a letter from Henner's lawyers, Mr Stéphane Bonin and Ms Julie Manissier, addressed to Me Haji. This letter, dated 25 April 2018, reiterates that only the Organisation's Administrative Tribunal is competent to hear requests relating to the autonomous social protection scheme such as those submitted by the applicants.
33. This letter clearly states:
"Finally, I would like to point out that the procedures for appealing to the OECD Administrative Tribunal are set out in detail in the Resolution of the Council on the Statute and Operation of the Administrative Tribunal, which appears in Annex 3 of the Staff Regulations, which are available at the following (e-mail) address ..." ¹.
34. Finally, the letter of 25 April 2018 specifically lists the procedural arrangements for instituting proceedings before the Tribunal, i.e. the prior written request and the application initiating the proceedings.
35. The exhaustion of internal means of redress is designed to enable the Organisation to take a final position before proceedings are instituted². For this reason, the request prior to the filing of the application is mandatory.
36. If the applicants, the duly qualified claimants to the rights of a former Australian official, had not been represented by legal counsel and had never been informed of the procedural arrangements for the investigation before the Organisation's Administrative Tribunal, the "exceptional case" could perhaps be pleaded on the basis of the rule of procedural fairness, with the argument being made that the 29 January 2019 decision should have informed the

¹ Exhibit 7, accompanying the submissions.

² Plantey et Lorient, *Fonction Publique Internationale*, CNRS EDITIONS, 2005, Paris, para 1382.

claimants to the rights of Ms CC of the procedural requirements related to any request they might make.

37. However, in this case, counsel for the applicants was fully aware of the law governing appeals before the Organisation's Tribunal almost a year before the Secretary-General's 29 January 2019 decision. Consequently, no "exceptional case" can explain the failure to follow the mandatory procedural rules set out in Annex III.

38. Accordingly, the application should be declared inadmissible.

The merits of the case

39. The parties accepted the Tribunal's proposal to proceed with the examination of the case without any oral argument. In doing so, they submitted a complete case in terms of both form and content. Accordingly, the Tribunal has considered the case in its entirety. Consequently, the Tribunal concludes that if it had dismissed the application on the grounds of inadmissibility and had had to rule on the merits of the case, it would have dismissed it as having no basis in law.

1) The limitation period for expenses predating Ms CC's death by more than two (2) years

40. Article 17 a) of the Staff Regulations specifies that "Officials shall be entitled, in accordance with Rules of the Secretary-General, subject to approval by the Council: a) to benefits in case of sickness, maternity, work accident, invalidity or death".

41. Instruction 117/1.5.9 states that "Claims by the person affiliated and the Organisation under the medical and social system of the Organisation shall be prescribed in accordance with Rules 17/8 to 17/8.5".

42. Finally, article 17/8 of the Rules provides that "claims against the Organisation for payment of salary, indemnities, allowances, benefits or of other sums resulting from the application of the Staff Regulations, Rules and Instructions shall lapse two years after the date on which the payment would have been due".

43. According to article 17/8.1 of the Rules, a request submitted after the time limit may, however, be considered by the Organisation "... *if the delay is due to exceptional circumstances*".

44. The evidence shows that the Organisation reimbursed all the medical expenses incurred by Ms CC, i.e. approximately €20,000, within the two (2) years before her death.
45. The applicants are claiming all expenses incurred from 2008 to 2013, for which no claim was made, amounting to approximately AUD 800,000.00. According to them, Ms CC's illness prevented her from sending her periodic claim, which would in itself constitute an exceptional circumstance.
46. No medical evidence was submitted to the Tribunal to show that Ms CC was not only incapable of making these claims but also unable to delegate this task to agents or to the claimants to her rights, the applicants. The certificate issued on 11 August 2008 by the Royal Adelaide Hospital (exhibit 17 of the application) does not contain any such finding.
47. Instead, the evidence shows that the invoices incurred by Ms CC were paid on time, during the course of her illness, and that no trustee was appointed to oversee financial management. The applicants, Ms CC's cousin and nephew, did not allege that Ms CC's mental state would have prevented her from delegating this task. According to a document dated 15 January 2009 drawn up by Domiciliary Care SA (exhibit 17 of the application), she was "alert, oriented, able to communicate effectively, motivated towards rehabilitation, has private neuro physio strongly involved in her rehab".
48. Consequently, this first argument must be dismissed.

2) Coverage of personal assistance costs

49. The applicants maintain that the costs of home assistance, which represent the bulk of the costs incurred by Ms CC as a result of the serious illness from which she suffered, must be borne on the basis either of IV of the table in article 11 of Annex XIV to the Staff Regulations relating to health care reimbursements (nursing care) or, in any event, of XIV of that same table (care related to disability), as was accepted in principle by Henner in 2008.
50. The Tribunal finds, first of all, that the prior agreement provided for by Henner in September 2008 for a period expressly limited to six months did not entail any obligation on the part of the Organisation to bear the subsequent personal assistance costs. As for the e-mail a Henner official sent on 24 July 2015 to Mr AA informing him that his claim for reimbursement submitted on 27 June 2015 for the sum of AUD 212,216.86 had been accepted, this was the result of an error, which was very regrettable, but which was corrected a few days later and could not result in any acknowledgement of cover. In any case, the recognition of disability only affects the rate of reimbursement.

51. Secondly, the refusal made to the applicants to pay for personal assistance services is in accordance with the Staff Regulations and Rules.
52. Article 17 of the Staff Regulations and article 17/1.6 of the Rules of Procedure entrusts the Secretary-General with the task of establishing by means of instructions the nature of the medical expenses covered by the Organisation's medical and social system, the rates of reimbursement and the limits applicable according to the nature or cause of the benefits and the procedure for payment of the costs. For this purpose, instructions 117/1.6.1 and 117/1.6.2 refer to Annex XIV of the Staff Regulations, in particular article 11 thereof.
53. As decided by the Tribunal in its Judgment No. 90 of 3 October 2018, to which reference is made, such costs are not normally covered by the Omesys system. They are only covered by prior agreement and for a limited period, in accordance with section IV of the table in article 11 of Annex XIV of the Staff Regulations. However, costs of this nature for which a prior agreement was given in September 2008 are time-barred and the subsequent costs were incurred without a prior agreement.
54. The refusal to cover personal assistance services is therefore in keeping with the Staff Regulations and Rules. Consequently, this second argument must also be dismissed.

CONCLUSION

As a result of the foregoing, the Tribunal:

GRANTS the application for inadmissibility.

DISMISSES the application for annulment and compensation.

Without legal costs