

ORGANISATION
FOR ECONOMIC
CO-OPERATION
AND DEVELOPMENT



ORGANISATION DE
COOPÉRATION ET
DE DÉVELOPPEMENT
ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 11 October 2022

JUDGEMENT IN CASE No. 103

AA

v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 103 OF THE ADMINISTRATIVE TRIBUNAL

Hearing on 10 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 David DRYSDALE, Deputy Registrar, providing Registry services.

The Tribunal heard

Clara GUERTIN, Counsel of the Applicant and the Applicant ;

Diana BENOIT, Head of General Legal Affairs Division, Auguste NGANGA-MALONGA, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs and Jeremy LAGELEE, Legal Advisor, on behalf of the Secretary-General ;

INTRODUCTION

1. In his application for annulment and compensation lodged with the Registry on 29 July 2021, AA (hereinafter the Applicant) requests the annulment of the decision of the Secretary-General of the OECD (hereinafter 'the Organisation') of 18 May 2021, rejecting his prior request for the withdrawal of a decision of 11 March 2021 by the Head of the Human Resources Management Service concluding that, in the absence of a contractual connection with the Applicant, the Organisation cannot be held responsible for decisions made by a subcontracting company.
2. The Organisation submitted its comments in response on 28 March 2022.
3. On 14 April 2022 the Tribunal accepted the Organisation's request that the Applicant produce the contracts concluded with the subcontracting companies in his name or through third-party companies, with the submission of his rejoinder.
4. The Applicant submitted a reply on 28 April 2022.
5. The Organisation submitted its comments in rejoinder on 30 May 2022.
6. In a management decision of 29 August 2022, the Chair of the Tribunal informed the parties that in accordance with the principle of efficient case management and fair and proportionate application of the procedure, the Tribunal would first hear the parties on the legal question of the Tribunal's jurisdiction.
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**.

The facts

8. After reviewing the documentary evidence, the Tribunal singles out the following facts as relevant:
9. The Applicant, of French and Lebanese nationality, is a computer engineer. He provided on-site IT services on the Organisation's premises between September 2005 and September 2020. The Applicant, through private companies, invoiced for his services to the Organisation's subcontractors, the last of which was BB, a private company.¹
10. On 21 September 2020, the Applicant informed the Organisation that the laptop computer made available to him by it had been seized by the French police during a search of his home that took place in a private context on 16 September 2020.
11. On 22 September 2020, the Organisation asked the subcontractor BB to replace the Applicant immediately, in accordance with Article 5.4 b) of the framework contract. This article states that:

'The Organisation reserves the right to ask for immediate replacement of all Technical Consultants working in the premises of the Organisation, without any obligation to justify such decision. In this event, the Contractor commits to proposing a replacement of Technical Consultant to the Organisation at the Contractor's expense and within the working days provided in Annex II '[of the framework contract], following the request of Organisation, on the understanding that Contractor will do its best to reduce this time in the case of an urgent request.'
12. In her letter of 18 November 2020, counsel for the Applicant asked the Secretary-General for the Applicant's 'reinstatement' within the OECD 'under an open-ended contract, grade B5, with resumption of seniority and related rights'. In the alternative, counsel for the Applicant requested the 'reclassification of the contractual relationship as an open-ended employment

¹ Document R-2, Documents O-1, O-2 and O-3 attached to the response.

contract of indefinite duration', the payment of compensation for loss of employment, pension rights, compensation in lieu of notice and related paid leave as well as the payment of moral damages.

13. In her letter of 11 March 2021, the Head of the Human Resources Management Service (HRM) pointed out to the Applicant's counsel that the Organisation had not had any contractual relationship with the Applicant in any capacity whatsoever, as he provided IT services on behalf of the Organisation's subcontractors. The Head of HRM concluded that, in the absence of a contractual connection with the Applicant, the Organisation could not be held responsible either for the decisions taken by the company BB with regard to the Applicant, or for the consequences under French employment law of the existence or non-existence of a written employment contract between the Applicant and the company BB.
14. In his letter of 15 April 2021, the Applicant requested the withdrawal of the decision of the Head of HRM.
15. In its letter of 18 May 2021, the Organisation confirmed the position of HRM.
16. On 29 July 2021, the Applicant filed an application with the Tribunal.

The dispute

17. With regard to the jurisdiction of the Tribunal, the Applicant observes that applications may be filed with the Tribunal in particular by the Organisation's officials or former officials or the duly qualified claimants to their rights. He asserts that, having worked for the Organisation for fifteen years, he should have been granted official status. He also points out that the jurisdiction of the Tribunal and the merits of his application are related, since the very purpose of the application is for the Applicant to be recognised as an official. The

Organisation may not refuse the Applicant access to the Tribunal, as the Applicant would otherwise be the victim of a denial of justice.

18. The Organisation denies that only officials or former officials or the duly qualified claimants to their rights may file applications with the Tribunal. Persons who have applied for positions in the Organisation and have not been selected may also do so. The Applicant does not fall into any of these categories. The Tribunal, which has limited jurisdiction, may only hear the merits of a dispute if it falls within its jurisdiction, as defined by the statutory texts.

Analysis

19. Further to the management decision of 29 August 2022, the Tribunal must rule on its jurisdiction to judge the Applicant's application. In considering this question, the Tribunal must assume that it has a vested jurisdiction² and, like other international administrative tribunals, has no powers other than those derived from the Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation (hereinafter 'Staff Regulations'). Its jurisdiction is defined in the *Resolution of the Council on the Statute and Operation of the Administrative Tribunal* in the following terms³:

Article 1

Jurisdiction of the Tribunal

a) The Administrative Tribunal of the OECD shall have jurisdiction over applications filed in the cases provided for under the Staff Regulations, and the Regulations for Council experts and consultants, auxiliaries or employees.

b) The Tribunal shall also have jurisdiction over applications filed by the

² Judgment No. 93, Administrative Tribunal of the Organisation.

³ Annex III of the Staff Regulations.

Staff Association or a trade

union or professional organisation in respect of any act affecting them or directly prejudicing any rights accorded to them under the Regulations, Rules and Instructions applying to the officials of the OECD, Council experts and consultants, auxiliary staff or employees.

c) The Tribunal shall have jurisdiction over applications filed by persons who are not members of staff of the Organisation, challenging the refusal of their application for appointment to functions governed by the above-mentioned Regulations, where it is alleged that such refusal was the result of discrimination based on the grounds of racial or ethnic origin, nationality, opinions or beliefs, gender, sexual orientation, health or disabilities.

20. The Organisation's Staff Regulations state:

Regulation 1

a) These Regulations shall apply to all persons employed by the Organisation whose letter of appointment states that they are officials of the Organisation (hereinafter "officials").

...

c) These Regulations shall not apply to other categories of staff employed by the Organisation except to the extent determined by the Council.

21. The concept of an official is clearly defined in the Staff Regulations. It is clear from the case documentation that the Applicant is not an official of the Organisation. He does not hold any letter of appointment stating that he is an official of the Organisation. He also does not fall within the category of 'Council experts and consultants, auxiliaries or employees' provided for in Article 1 (a) of Annex III to the Staff Regulations. Nor is he a non-staff member of the Organisation whose application for a position in the Organisation has been rejected.

22. Nor is he subject to the obligations incumbent on officials under the terms of the Staff Regulations.

23. Moreover, the framework contract between the OECD and the subcontractor BB has a similar provision:

Neither the Contractor nor any of the Contractor's Technical Consultants, employees, agents, or representatives ... shall in any capacity be considered as members of the staff, employees or representatives of the Organisation.

24. The Applicant claims to be subject to the jurisdiction of the Tribunal, asserting that an examination of his appeal on the merits will confirm that he is indeed entitled to be recognised as an official of the Organisation and that, therefore, he must be now authorised to file an application with the Tribunal. This argument is certainly ingenious but cannot be upheld by the Tribunal.

25. The case law of the various international administrative tribunals is not uniform on the question of jurisdiction. However, the Tribunal abides by the principles consistently expressed by the Administrative Tribunal of the International Labour Organization (ILOAT), as well as those that emerge from the Administrative Tribunal of the International Monetary Fund (IMFAT) and the Administrative Tribunal of the North Atlantic Treaty Organisation (NATOAT).⁴ In a recent judgment dated 6 July 2022, the International Tribunal of the International Labour Organization reiterated its position:

8. The Tribunal recently concluded in Judgment 3551, consistent with more recent case law, that a person in a situation broadly analogous to that of the complainant could not avail himself of the Tribunal's jurisdiction as he was not an official of the defendant organisation. Not only was the existence of an arbitration clause viewed as relevant in Judgment 3551 in determining the status of the complainant, the existence of such a clause has, in a number of cases concerning individuals on contract, been treated as evidencing an agreement to exclude the jurisdiction of the Tribunal (see, for example, Judgments 1938, consideration 4, 2017, consideration 2(a), 2688, consideration 5, 2888, consideration 5, and 3705, consideration 4).

⁴ See ILOAT, Nos. 4045, 3551, 3049 and 2649; IMFAT, No. 1999-1; NATOAT, No. 2015/1056-1064.

...

10. Accordingly, the complainant is not an official of WHO who can invoke the jurisdiction of the Tribunal under Article II, paragraph 5, of its Statute. His complaint must be dismissed because it is irreceivable. In these circumstances, there is no reason to hold oral proceedings and the complainant's application to that end is rejected.⁵

26. The Applicant also claims that the Organisation may not deny him access to a court, as he would otherwise be the victim of a denial of justice.

27. The Tribunal does not accept this argument. The Applicant has a subcontracting agreement with a private company. The successive contracts all stipulate that any dispute relating to the interpretation or execution of these contracts will be submitted to the Commercial Court of Paris, which has sole jurisdiction. Neither BB and, consequently, its employees and subcontractors, may seek redress before the Tribunal.

28. After all, the framework contract between the OECD and the company BB provides as follows:

Clause 14: Applicable Law and Dispute resolution

a) Given the status of the Organisation as an international organisation, the Parties specifically agree that their rights and obligations shall be governed exclusively by the terms and conditions of the present Contract.

b) Any dispute, controversy or claim arising out of or relating to the interpretation, application or performance of this Contract, including its existence, validity or termination, shall be settled by final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties as in effect on the date of this Contract.

29. Company BB could have initiated the arbitration procedure because of the Organisation's decision to request the immediate replacement of AA, but it refrained from doing so.

⁵ ILOAT, No. 4526.

30. The argument that the Applicant is the victim of a denial of justice cannot be accepted, since at the time of the facts in the contentious situation the only forum with jurisdiction was the one empowered to resolve disputes between BB and the Applicant or the company through which he was associated with BB, namely the Commercial Court of Paris. If the Applicant has any recourse, it will be against BB and not against the Organisation. In this context there can be no denial of justice.
31. However, the Organisation proposed during the hearing that, in the event of the Tribunal declaring that it does not have jurisdiction, the dispute should be brought before an Arbitration Tribunal, constituted on the basis of consensus between the parties, which could obey the rules of procedure of this Tribunal *mutatis mutandis*.
32. The Tribunal finds that the Applicant does not meet the clear requirements of the Staff Regulations regarding the filing of applications with the Tribunal. Accordingly, the Court considers that it does not have jurisdiction to hear his application for annulment and compensation.

FOR THESE REASONS,

The Tribunal dismisses the application on the ground of lack of jurisdiction.