

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B.
v.
IAEA

140th Session

Judgment No. 5046

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. W. I. B. against the International Atomic Energy Agency (IAEA) on 22 May 2023, the IAEA's reply of 3 October 2023, the IAEA's additional submissions of 9 October 2024, the complainant's comments thereon of 22 November 2024 and the IAEA's final comments of 20 December 2024;

Considering the application to intervene filed by Mr D. E. L. on 26 January 2024 and the IAEA's comments thereon dated 2 May 2024;

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 neither party has applied;

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

The complainant challenges the communication, addressed by the IAEA to all of its staff members of British nationality, informing them that officials holding a residence permit under Article 50 of the Treaty on European Union (TEU) would be considered as having obtained permanent residence status in the country of their duty station (Austria), which would affect their home leave and repatriation grant entitlements as well as the privileges and immunities granted to them.

At the material time, the complainant was a P-5 staff member of British nationality working for the IAEA in Vienna, Austria.

Following a decision by the Government of the United Kingdom (UK) to leave the European Union (EU), the UK and the EU entered into a Withdrawal Agreement effective 31 January 2020. British nationals in Austria were given the possibility to apply for a residence permit under Article 50 of the TEU, issued for a renewable period of five or ten years. Applications for an Article 50 card had to be submitted by 31 December 2021. During that period, the IAEA received a number of queries from British officials about their ability to remain in Austria.

On 13 January 2020, in response to such queries, the Visa and Customs Unit (VCU), Division of General Services, Department of Management, sent an email to all staff of British nationality. In this email, the VCU stated that British staff members holding a “legitimation card” – a temporary residence permit available to all IAEA staff members – did not require any other residence permit to remain in Austria while being employed by the IAEA.

One year after, on 14 January 2021, the VCU sent another email to all staff of British nationality, informing them that holders of a legitimation card “can [...] apply for [an Article 50 card]” and advising them to consult with the national authorities.

On 30 June 2021, the VCU sent a third email to all staff of British nationality, stating that the IAEA understood that the decision by British staff members to apply for an Article 50 card was a “personal, voluntary decision based on his/her long term interests in residing in Austria” and that “[t]he status of the card holder will generally be similar to that of an Austrian citizen. Therefore, some limitations will occur.”

Following an email sent by the Unit Head, Human Resources Service Centre, Division of Human Resources (MTHR) to the Ministry of the Interior of Austria enquiring about whether an Article 50 card should be regarded as a “permanent residence status”, on 9 July 2021, the Ministry of the Interior of Austria responded to the IAEA that Article 50 cards were issued “as a regular permit (for five years) and as a permanent residence status (for ten years)”.

The complainant applied for an Article 50 card and later had an appointment with the Austrian authorities on 11 November 2021.

On 3 December 2021, the Austrian Federal Ministry for European and International Affairs sent a *Note Verbale* to the IAEA, stating that the holder of an Article 50 card was considered by the Ministry to be “permanently resident” for the purposes of Article 38 of the Vienna Convention on Diplomatic Relations and that, as a result, the privileges and immunities granted to British officials would be limited to the scope defined in Article 38 of the Convention should they obtain an Article 50 card and, specifically, VAT refunds previously granted to staff members at grades P-5 and above would no longer be applicable.

The IAEA shared this information with its British staff members by an email of 8 December 2021, in which it announced that the Austrian Federal Ministry for European and International Affairs had formally confirmed that the Article 50 card was equivalent to permanent residence in Austria. In light of this, the IAEA explained that “all Agency staff members who opt for the Article 50 card will have only those privileges and immunities accorded to IAEA officials under Section 38 of the Headquarters Agreement” and that “[s]taff who are at grades P5 and higher who opt for the Article 50 card will not enjoy the additional privileges and immunities provided for under Section 39 of the Headquarters Agreement”. The IAEA also explained that obtaining permanent residence status in the country of the duty station would affect the benefits and entitlements of staff in the Professional and higher categories as established in the IAEA Staff Rules. The IAEA indicated that “[a]ccording to Staff Rule 6.01.1 (B), staff are not eligible for payment of the repatriation grant if they have permanent residence status in the country of the duty station. Further to Staff Rule 7.02.01 (B)(2), and confirmation from the Austrian authorities that the Article 50 card is equivalent to permanent residence in Austria, staff members will also lose their entitlement to home leave.” The IAEA further stated that “staff members considering the Article 50 card could opt instead to continue their current status and continuing with their current [legitimation card]”.

On 19 January 2022, the complainant submitted a request for review directed against the 8 December 2021 communication, which was rejected by the Director General on 18 February 2022. The Director General dismissed the complainant's request for review on the merits and noted that the request for review was also irreceivable for not being directed against an administrative decision taken in respect of the terms of the complainant's employment. In this regard, the Director General observed that there was no record of any rejection of home leave or repatriation grant request for the complainant and that the complainant had challenged the "potential impact of something that ha[d] not been specifically applied in a manner prejudicial to [him]". The Director General further stated that any change in the complainant's privileges and immunities would be due to the complainant's voluntary decision to obtain an Article 50 card and the stated position of the Austrian Government.

On 17 March 2022, the complainant lodged an appeal with the Joint Appeals Board (JAB). The JAB received a number of similar appeals from other staff members of British nationality.

On 9 November 2022, the JAB issued its report. The JAB found that the complainant's appeal met the receivability requirements set forth in Staff Rule 12.01.1. The JAB concluded that the 3 December 2021 *Note Verbale* "[could not] be considered as a solid basis for the administration to regard the affected staff members as having 'permanent residence' for the purposes of entitlements under the Staff Rules regarding home leave and repatriation grant". The JAB also found that "it was not in accordance with the Agency's duty of care to present a decision at the last minute and apply it to staff retroactively". The JAB recommended the "restoration of repatriation grant and home leave to those affected" and that the IAEA "consider reinterpretation of 'permanently resident for the purposes of Article 38 of the Vienna Convention on Diplomatic Relations' in the [*Note Verbale*] of 3 December 2021". It further recommended that the IAEA "explor[e] further with the Austrian authorities regarding the withdrawal of the additional privileges and immunities announced in the [*Note Verbale*] of 3 December 2021".

On 23 February 2023, the Director General notified the complainant of his decision not to follow the JAB's recommendations and to dismiss his appeal as irreceivable. The Director General noted that the complainant had declared in his application for a legitimization card submitted in December 2021 that he did not possess an Article 50 card. As a result, the Director General found that the complainant had not provided evidence that he was a recipient of the card. The Director General concluded that the complainant "[did] not possess an Article 50 card" and that "the Board failed to consider the issue of receivability in this connection". This is the impugned decision.

On 30 April 2024, the complainant separated from the IAEA. He was not paid repatriation grant upon separation.

On 16 July 2024, the Austrian Federal Ministry for European and International Affairs sent another *Note Verbale* to the IAEA, explaining that the Republic of Austria uses different legal bases to define permanent residence, and that it is possible to be considered "permanently resident" for the purposes of headquarters agreements and Article 38 of the Vienna Convention on Diplomatic Relations, without having a right to long-term residence under the Withdrawal Agreement or national residency law.

The complainant asks the Tribunal to set aside the impugned decision, the 8 December 2021 communication, and all related issuances about Article 50 cards. He requests that a Secretariat Directive be published within 90 days of the judgment, confirming that these have been set aside. He seeks the reinstatement of "all benefits and entitlements (including accrued service towards same) and Privileges and Immunities which have been withheld, delayed or otherwise diminished, in connection with the holding of an Article 50 card, to all staff (whether or not they have appealed)", with interest. He further requests that the IAEA "[c]ontact all affected current and former staff members, and provide full recompense to each of them, whether or not they have appealed". He also asks that the IAEA "[o]btain the written agreement of [the Austrian Government], that anyone who cancelled their appointment, withdrew their application, did not proceed with their appointment / application or who handed back their Article 50

card, may reapply and/or recover their card”. Additionally, he requests that the IAEA “[engage] constructively with all affected staff to assist in securing proper continuity of their rights of residence in Austria”. He claims 5,000 euros in material damages for lost VAT allowances, 2,000 euros for lost home leave and requests that his repatriation grant be paid to him. He asks for moral damages in the amount of 10,000 euros. Lastly, he claims costs and shipping fees. In a letter dated 8 October 2024, the IAEA informed the complainant that, in light of the information provided in the 16 July 2024 *Note Verbale*, and since the complainant was holding an Article 50 card with a five-year duration, the IAEA had decided to make a payment of 36,282 United States dollars corresponding to the complainant’s repatriation grant, contingent upon evidence of relocation, as well as a payment of 1,015 euros corresponding to the complainant’s home leave.

The IAEA asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. Eleven similar complaints are before the Tribunal this session with each complainant pursuing a grievance against the IAEA (collectively, the aggrieved complainants). One additional aggrieved complainant has settled her grievance and withdrawn her complaint. The central legal issue is broadly the same though the factual circumstances together with, in some instances, ancillary legal issues concerning each complainant are sufficiently different to preclude joinder of the complaints which, in any event, is not sought by any complainant nor the IAEA. Some of the following discussion is repetitive of what is said in other judgments.

2. Much of the relevant history concerning this particular complainant is set out earlier in this judgment. Following the publication of an email of 8 December 2021 (8 December email) the complainant sought a review of the email on the footing it was a challengeable administrative decision. This application for review was unsuccessful. The complainant appealed to the JAB.

3. Two related threshold issues are raised by the IAEA about the receivability of this complaint. It argues it is not. Several matters can, in this respect, be noted. The first is that the complainant has not provided persuasive evidence he received an Article 50 card before he commenced these proceedings. It appears he applied for an Article 50 card in 2021 and had an appointment with the Austrian authorities about his application in early November 2021.

4. In the impugned decision, the Director General said the following about whether the complainant had in fact received an Article 50 card:

“I recall that despite your obligations under Staff Rule 1.05.3 (A) to provide the Director General with all information relevant to your appointment, and Staff Rule 1.05.3 (C)(1) to notify the Director General, *inter alia*, regarding changes to nationality, permanent residence or personal status, although being given various opportunities to do so, you have neither informed the Agency about holding the Article 50 card, nor supported your claims with any evidence of being a recipient of the Article 50 Card.

While having declared, in your e-mail to MTHR, on 15 February 2022, that you had applied for the Article 50 card and even had an appointment with the Austrian authorities [...] on 11 November 2021, you have in the meantime declared that you are not in possession of any Austrian residence permit; Namely, in your Legitimations card application submitted in December 2021.”

Plainly there was an important factual issue between the complainant and IAEA, namely whether he had ever held an Article 50 card and when. Of some significance is that in his brief (and he filed no rejoinder) he does not expressly challenge the conclusion of the Director General and his reasoning in the above passage, nor does he furnish any evidence that he ever held an Article 50 card. Whether he did or did not obtain an Article 50 card was peculiarly within his knowledge (see, for example, Judgment 4308, consideration 17). He could have been expected to provide evidence that he did. An inference can be readily drawn, in the circumstances, that he had not obtained one by the time he commenced these proceedings which is when a cause of action must exist (see Judgment 4846, consideration 10).

5. In the 8 December email which is the alleged administrative decision from which a review was sought by the complainant and an internal appeal maintained, and is foundational to this complaint, the following is said:

“According to Staff Rule 6.01.1 (B), staff are not eligible for payment of the repatriation grant if they have permanent residence status in the country of the duty station. Further to Staff Rule 7.02.01 (B)(2), and confirmation from the Austrian authorities that the Article 50 card is equivalent to permanent residence in Austria, staff members will also lose their entitlement to home leave.”

The “confirmation” was in a *Note Verbale* dated 3 December 2021 from the Austrian Federal Ministry for European and International Affairs (the initial *Note Verbale*) (the Austrian Ministry). From this extract from the email, it is clear that the IAEA was stating a person with an Article 50 card would not be paid the repatriation grant and would not be entitled to claim home leave.

6. The first question is whether this email, and these statements set out above in particular, constitute an administrative decision for the purposes of partly determining whether this complaint is receivable. As explained in, for example, Judgment 3168, consideration 9, for there to be a cause of action rendering the complaint receivable, the complainant must demonstrate that the contested administrative decision caused injury to the complainant’s health, finances or otherwise or that it is liable to cause injury. The injury need not be immediate and liability to cause injury is sufficient (see, for example, Judgment 3740, consideration 11). This aspect of the principle applies in this case. Moreover, a communication clarifying the basis of an entitlement can embody a decision as to entitlements (see Judgment 3861, consideration 5). In the present case the position taken by the IAEA was quite specific: a staff member, as viewed by the IAEA as a permanent resident (based on what the Austrian authorities considered constituted permanent residence status), would receive no repatriation allowance nor home leave. This, in the Tribunal’s opinion, would have given rise to a cause of action had the complainant then held an Article 50 card and the complaint would have been receivable. The second question is whether, having

regard to the fact that he did not then have, on 8 December 2021, an Article 50 card, the complainant was affected by this decision so as to sustain a conclusion that it fell within Article II of the Tribunal's Statute. The administrative decision discussed in the preceding consideration was intended to operate in situations an Article 50 card was held. The holding of the card was a precondition to the substantive operation of the decision, namely the repatriation grant would not be available and home leave was not available.

7. It may be accepted, as just discussed, a cause of action can arise not only when an administrative decision causes a complainant injury. In the present case the contested decision certainly did not cause the complainant injury either actual or future, because he then did not hold an Article 50 card.

8. It might be thought that the administrative decision in the present case was liable to cause the complainant injury. But this concept of "liable to cause injury" involves a measure of likelihood about the occurrence of the injury and certainly not just a remote possibility. In the circumstances of this case that would require proof enabling an inference to be drawn that within a reasonable period after the 8 December 2021 decision, and certainly by the time he filed his complaint on 22 May 2023, the complainant was issued with an Article 50 card. On the facts of this case no such inference can be drawn.

9. The complainant has no cause of action, and his complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed, as is the application to intervene.

In witness of this judgment, adopted on 2 May 2025, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

RENÉ M. VARGAS M.