

116th Session

Judgment No. 3254

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. N. against the International Atomic Energy Agency (IAEA) on 18 April 2011 and corrected on 31 August 2011, the IAEA's reply of 6 February 2012, the complainant's rejoinder of 20 April and the Agency's surrejoinder of 25 July 2012;

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 and the pleadings may be summed up as follows:

A. Under the IAEA Staff Regulations and Staff Rules, the Director General is responsible for establishing joint management and staff bodies with staff participation to advise him or her regarding, among other things, general questions of staff welfare and relevant administrative issuances. At the material time, one such body, the Joint Staff Welfare Committee (SWC), was mandated by its terms of reference to administer what was then known as the Staff Welfare Fund (hereinafter "the Fund") pursuant to the rules of the Fund, which

were approved by the Director General in consultation with the Staff Council. The Fund accumulates financial means for the welfare and social activities of IAEA staff members and retired staff members. According to the rules for the administration of the Fund in force at the material time, the Fund shall provide, as appropriate, financial support for activities which are of potential benefit to the staff of the Agency as a whole, including activities of the Staff Council, and financial assistance in the form of loans or grants to individuals. The Fund shall be administered by the SWC, which shall adopt its own procedures, and decisions on loans and grants by the SWC shall be final and the records of its meetings confidential.

Prior to the decision at issue in this complaint, the travel costs of IAEA Staff Association delegates attending the Federation of International Civil Servants' Associations (FICSA) Council had been shared, in varying proportions, between the Administration and the SWC for over two decades. The SWC portion was disbursed from the Fund. In a memorandum of 6 January 1994, the President of the Staff Council was informed that the Administration had approved the payment of 50 per cent of the travel, per diem, and terminal costs of four staff members to attend the FICSA Council, and that this would be the standard arrangement from then on.

The complainant joined the IAEA in March 1987. He was elected President of the Staff Council in 2002 and was subsequently released from his regular duties in order to exercise those functions on a full-time basis.

By a memorandum of 24 November 2009 to the Deputy Director General in charge of the Department of Management, the complainant, in his capacity as President of the Staff Council, asked the Administration, based on the funding agreement reached in January 1994, to pay 50 per cent of the travel, per diem and terminal costs for four members of the selected delegation to represent the IAEA Staff Association at the upcoming FICSA Council Session in 2010. He stated that the remaining 50 per cent of those costs was to be borne by the Fund, that the costs of a fifth member of the delegation

would be borne by the Staff Association, and that the costs of a sixth member, who was also a member of the FICSA Executive Committee, would be borne by FICSA. The Director of the Office of Legal Affairs, acting in his capacity as Chairperson of the SWC, wrote to the complainant on 8 December 2009 and explained that the SWC had decided to support only a grant covering 50 per cent of the costs of the two members of the delegation who were not part of the Staff Council.

The complainant wrote to the Chairperson of the SWC on 16 December, asking him to explain and justify the decision of 8 December and pointing out that for more than 20 years the SWC had approved funding for a portion of the travel costs of four delegates to attend FICSA Council sessions. He indicated that the Staff Council would not accept the memorandum of 8 December 2009 as official notification of the SWC's decision because the memorandum did not provide reasons for the SWC's departure from its past practice in this respect. In his response of 21 December the Chairperson stated that, in accordance with the rules of the Fund, the decisions of the SWC are final and the minutes of its meetings are confidential. As a consequence, it was the SWC's policy not to explain or justify its decisions.

On 18 February 2010 the complainant asked the Director General to reverse the SWC Chairperson's decision of 21 December 2009. Having received no reply, on 15 April 2010 he lodged an appeal with the Joint Appeals Board (JAB), requesting, among other things, a reversal of the decision by the SWC to refuse to pay 50 per cent of the costs of the delegates to attend the 2010 FICSA Council Session in accordance with the past practice.

In a letter to the complainant of 14 September 2010 the Director General explained that the SWC had been established to administer the Fund and that the administrative and financial processes of the SWC were independent from those of the Agency. Under the rules of the Fund, the SWC had sole authority to administer the Fund and to approve expenditures. Decisions concerning loans and grants were taken by a majority vote and were final. As a consequence, there was

no basis upon which he could intervene in SWC decisions and he could not accede to the complainant's request for review of 18 February. The Director General added that his reply was "not being made in the context of Staff Rule 12.01", as the challenged decision had not been taken by the Administration.

By an e-mail to the Secretary of the JAB of 7 October the complainant requested that the Board be convened to consider his appeal. In its report of 18 January 2011 the Board held that the information provided to the complainant by the Director General in his letter of 14 September 2010 was accurate: the SWC had the sole authority to administer the Fund, and its decisions were final and not subject to internal appeal. The Board concluded that the impugned decision was not an administrative decision for the purposes of Staff Rule 12.01(C)(1) and that, as a consequence, it was not competent to consider the merits of the appeal. By a memorandum of 18 January 2011, appended to which was a copy of its report, the Board notified the Director General of its "decision". The Board likewise notified the complainant by forwarding a copy of the aforementioned memorandum and report to him that same day.

The complainant wrote to the Director General on 7 March 2011, requesting that the correct internal appeal procedure be followed and that he be provided with a response regarding his appeal. By a memorandum of 21 March, the Secretary of the JAB informed the complainant that the Board had not made a recommendation to the Director General. Rather, it had taken a final decision which had been conveyed to both the Director General and the complainant, thereby completing the internal appeal process.

The complainant indicates on the complaint form that he is challenging the decision of 18 January 2011.

B. The complainant states that he has filed his complaint in his capacity as President of the Staff Council and, referring to the case law and to the Staff Regulations and Staff Rules, he asserts that he has *locus standi* in this capacity.

He submits that the JAB committed two fundamental legal errors. First, it held that it was not competent to decide on the merits of the dispute. In this respect the complainant observes that, according to the relevant statutory provisions, the SWC was established by the Director General as a joint advisory body. It is not an independent legal entity. When it was created, it was, in effect, given a delegation of authority from the Director General to take decisions on his or her behalf. Although the Fund rules provide that decisions of the SWC “shall be final”, this simply means that those decisions are automatically approved by the Director General by virtue of a delegation of authority. In addition, the right to financial support for activities of the Staff Council that are of benefit to all staff, and the right to freedom of association, are both expressly provided for in the relevant Staff Regulations and Staff Rules, which are incorporated into every staff member’s contract. Therefore, the decision by the SWC, taken by virtue of delegated authority, is an administrative decision affecting his rights. Pursuant to Staff Regulation 12.01 he had the right to lodge an appeal challenging that decision, and the JAB should have considered the merits of the case.

Second, in breach of the case law and the Staff Regulations and Staff Rules, the Board considered that it was competent to take a final decision on the matter, rather than to provide only a recommendation to the Director General. In the complainant’s view, the Director General had a duty to treat the Board’s memorandum of 18 January 2011 as a recommendation and to take a final decision on the appeal himself within 30 days. According to the relevant statutory provisions regarding internal appeals, he was entitled to interpret the Director General’s failure to take a decision as an implied final decision rejecting his appeal.

On the merits, the complainant submits that, since at least 1984, the Administration and the Staff Council had agreed that a portion of the travel costs for four delegates to attend the annual FICSA Council would be covered by the Fund. Historically, the cost-sharing arrangement fluctuated; the Administration would fund either 50 or

60 per cent of the cost and the SWC, through the Fund, would bear the cost of the remaining portion. By the memorandum of 6 January 1994, the Administration expressly agreed to fund, from that date onwards, 50 per cent of the costs, and all parties knew from past practice that the remaining 50 per cent would be funded by the Fund. The complainant points out that this cost sharing took place every year thereafter until 2010. In his view, as a matter of law, the rules governing the Fund were thus amended to include the cost-sharing agreement made in 1994. The SWC Chairperson's decision was a breach of that agreement or, alternatively, of the rules of the Fund incorporating that agreement. Referring to the Tribunal's case law, the complainant argues in the alternative that that decision constituted a breach of a binding practice and should be set aside on that basis.

The complainant alleges that the decision of the SWC is tainted by breach of procedure. Furthermore, it is a violation of the Staff Council's right to freedom of association and amounts to discrimination against Staff Council representatives. Lastly, the Agency breached the principles of good faith and mutual trust.

He asks the Tribunal to set aside the "impugned decision". He requests it to "order the IAEA to abide by the long-standing cost-sharing agreement and/or practice". He claims material damages in an amount equivalent to the payments made by the Staff Council for the travel costs of the three delegates to attend the 2010 FICSA Council Session, plus interest from 8 December 2008. He seeks moral damages in the amount of one euro for each staff member, to be paid to the account of the Staff Council, and legal fees and costs in the amount of 10,000 euros.

C. In its reply the IAEA submits that the complaint is irreceivable on several grounds. First, the complainant does not allege non-observance of either the terms of his appointment (or that of any other staff member he represents), or of the Staff Regulations, as required by Article II, paragraph 5, of the Tribunal's Statute. Instead, he asserts that the Director General took a decision which violated a long-standing agreement or binding practice, and which also

breached the rules of the Fund. The Agency contends that the decision was taken by the SWC and that decisions taken by that body, by their very nature, do not satisfy the criteria of Article II, paragraph 5, of the Statute. They cannot be attributed or imputed to the Director General, they are not final decisions of the Administration and, under the rules of the Fund, the affected party does not have recourse to the internal appeals process.

Second, the complainant cannot bring his complaint under Article VII, paragraph 1, of the Statute because the letter of 18 January 2011 from the Chairperson of the JAB is neither a final nor an implied administrative decision. Third, the complainant failed to request the Director General to review the issue of whether the JAB was competent to consider the case on the merits, and in this respect his complaint is therefore irreceivable for failure to exhaust the internal means of redress.

On the merits, the IAEA argues that the Staff Council does not have an acquired right to continued funding from the Fund in connection with the travel costs of IAEA Staff Association delegates attending the FICSA Council. It asserts that there is a deliberate “separation” between the SWC and the Administration and the former cannot be compelled by the latter to continue the financial support it historically provided in that respect. Furthermore, there was no improper change in practice. The IAEA points out that although the complainant relies on the memorandum of 6 January 1994, this memorandum outlined the position of the Administration regarding its commitment to provide partial funding. The Director of the Division of Human Resources was not authorised to commit to expenditures on behalf of the Fund and he did not do so. The Agency states that it has continually honoured its commitment. There was no bad faith on its part and it did not violate the principle of freedom of association on account of the decision taken by the SWC.

Lastly, the IAEA submits that the JAB acted in accordance with Staff Rule 12.01.1 when it concluded that it was not competent to consider the merits of the appeal. There were no procedural errors in that respect.

D. In his rejoinder the complainant develops his pleas. He asserts that his complaint is receivable and that he exhausted the internal means of redress.

E. In its surrejoinder the Agency maintains its position in full.

CONSIDERATIONS

1. The complainant seeks to challenge an alleged “final implied administrative decision contained in a letter dated 18 January 2011 from the Chair of the Joint Appeals Board (JAB) to the Director General of the [IAEA] [...] dismissing his internal appeal”. It is noted that his initial action, on behalf of the Staff Association, sought to challenge a decision taken by the SWC not to approve a request by the Staff Council for financial support from the Fund. The complainant states that the Staff Council requested financial support to cover 50 per cent of the costs for four Staff Association delegates to attend the meeting of the 2010 FICSA Council. He states that the request was based on an agreement and past practice of cost sharing whereby the SWC always covered half the costs for four delegates. The complainant insists that the practice was confirmed in the memorandum of 6 January 1994 from the Director of the Division of Human Resources which informed the President of the Staff Council that the Administration had approved the payment of 50 per cent of the travel, per diem, and terminal costs of four staff members to attend the FICSA Council and that this was approved as the standard arrangement. However, in this case, the SWC only authorised the allocation of funds for two delegates who were not members of the Staff Council. Since there was only one non-Staff Council delegate, the Staff Council had to meet the non-covered costs of three delegates from its own budget. The SWC met 50 per cent of the costs of only one delegate.

2. It is noteworthy that in the initial stages, the complainant sought the intervention of the Director General to review the decision

of the SWC. The Director General refused to intervene on the grounds that the administrative and financial processes of the SWC were independent from those of the Agency; the decision of the SWC was expressly made final under the applicable rules, and the decision was not taken by the Administration.

3. On appeal, the JAB concurred with the reasons and decision of the Director General and sent a copy of its report to the Director General and to the complainant. This was sent by the Chairperson of the JAB under cover of a memorandum dated 18 January 2011. In its report, the JAB concluded that the decision by the SWC was final and not subject to appeal. Additionally, that it was not an administrative decision within the meaning of Staff Rule 12.01.1(C)(1). The matter therefore did not fall within its (the JAB's) competence.

4. Staff Rule 12.01.1(C)(1) falls under Article XII, which provides for appeals. It provides as follows:

“The Joint Appeals Board shall be competent to hear appeals by staff members against administrative decisions alleging the non-observance of terms of appointment.”

5. The JAB stated as follows, in paragraphs 11 and 13 of its “decision”:

“11. The SWC was established by the Director General and comprises members designated by the Director General and by the Staff Council. The *‘Rules for the Administration of the IAEA Staff Welfare Fund’* state at paragraph 2 that *‘the Fund shall provide, as appropriate, financial support for activities which are of potential benefit to the staff of the Agency as a whole, including activities of the Staff Council, and financial assistance in the form of loans or grants to individuals, in accordance with these Rules.’* The Rules further provide at paragraph 9 that *‘decisions on loans and grants by the Committee shall be taken by majority vote. The decisions of the Committee shall be final ...’*.

[...]

13. The Board considered that the statement of the Director General was an accurate description of the nature of the SWC and its relationship to the Agency's administration. The Board further considered that the points raised by the Appellant in response to the letter from the Director General

do not alter the fact that SWC has sole authority to administer the Fund and that its decisions are final and not subject to appeal to the Agency's Joint Appeals Board."

6. Inasmuch as paragraph 9 of the Rules for the Administration of the IAEA Staff Welfare Fund expressly stipulates that decisions on grants by the SWC are final, the decision of the SWC communicated to the President of the Staff Council in the letter dated 8 December 2009 was the final decision. It informed him that the SWC would cover 50 per cent of the costs for only two non-Staff Council members of the delegation to attend the 2010 FICSA Council meeting. A complaint against that final decision should have been filed with the Tribunal within the time limit set out in Article VII of its Statute. This was not done. This complaint, in substance though not in form, really seeks to challenge the decision of the SWC of 8 December 2009. Accordingly, the complaint which was filed on 18 April 2011 is time-barred. It is therefore dismissed as irreceivable.

DECISION

For the above reasons,
The complaint is dismissed in its entirety.

In witness of this judgment, adopted on 1 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet