

S. (No. 7)

v.

IAEA

123rd Session

Judgment No. 3734

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Ms H. S. against the International Atomic Energy Agency (IAEA) on 18 November 2013 and corrected on 27 February 2014, the IAEA's reply of 10 June, the complainant's rejoinder of 3 September and the IAEA's surrejoinder of 10 December 2014;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant challenges the IAEA's decision not to pay her compensation for the loss of earning capacity beyond the age of 60.

The complainant, a former staff member of the IAEA, separated from the Agency for health reasons on 1 August 2013 and has since been receiving a disability benefit under the United Nations Joint Staff Pension Fund Regulations, Rules and Pension Adjustment System.

By a memorandum of 24 May 2013, the Director of the Division of Human Resources (MTHR) informed her, inter alia, that further to a recommendation by the Joint Advisory Board on Compensation Claims (JABCC), the Director General had decided to award her compensation for the loss of earning capacity under Article 20 of Appendix D to the Staff Regulations and Staff Rules. He added that this compensation

would be paid to her on a monthly basis as from the date of her separation from the Agency until the age of 60, i.e. her normal retirement age.

On 7 June 2013 the complainant sought a reconsideration of the Director General's decision to discontinue paying her the relevant compensation at the age of 60 and requested that it be paid to her for life, but on 8 July 2013 she was informed that the Director General had decided to maintain his decision.

On 6 August 2013 she lodged an appeal with the Joint Appeals Board (JAB) against this decision, requesting that it be reversed and that the Director General ensure that she continue to receive compensation for loss of earning capacity after the age of 60. She also claimed costs. By a letter of 2 October 2013, the Director General notified her of his decision to waive the JAB's jurisdiction, thus allowing her to file a complaint directly with the Tribunal. On 18 November 2013 the complainant filed the present complaint (her seventh) with the Tribunal, impugning the Director General's decision of 2 October 2013.

The complainant asks the Tribunal to set aside the impugned decision, to find that monthly benefits for the loss of earning capacity under Appendix D to the IAEA Staff Regulations and Staff Rules are payable for life and to award her costs.

The IAEA invites the Tribunal to dismiss the complaint and all claims made therein and to order the complainant to pay the costs of the proceedings.

CONSIDERATIONS

1. This complaint concerns the interpretation of Article 20(a) of Appendix D to the Staff Regulations and Staff Rules. It reads:

“In a case where the loss of earning capacity is determined to be total:

- (a) An official shall be entitled, as from the date on which payment ceases under Article 17(a), whether or not he/she is thereafter separated from service, and for so long as the disability continues, to annual compensation equal to two-thirds of his/her final average remuneration. This annual compensation shall not amount to less than the midpoint of the regular General Service net salary scale then applicable at the duty station of the official. It shall, however, not exceed the maximum established in Article 8(b).”

2. At issue is the Director General's decision that the compensation payable to the complainant pursuant to Article 20(a) of Appendix D would terminate once she reached the age of 60, the normal retirement age in her case.

3. The IAEA submits that where, as in this case, there is no ambiguity in the provision at issue, the "term" should be given its obvious and ordinary meaning. As well, the construction of the term requires that the objectives sought to be achieved by the instrument having regard to the language used must be ascertained. The IAEA takes the position that the words "loss of earning capacity" in Article 20(a) "imply that, as a matter of principle (and consistent with established practice) no compensation can be paid under Appendix D after an individual reaches retirement age and the compensation for loss of earning capacity is no longer relevant". The IAEA submits that this is consistent with a plain reading of Appendix D, in view of the objectives and goals of Appendix D.

4. The IAEA's interpretation of Article 20(a) is fundamentally flawed as it is based solely on the meaning of the words "loss of earning capacity" in Article 20(a). The principles of statutory interpretation are well settled in the case law. The primary rule is that words are to be given their obvious and ordinary meaning and any ambiguity in a provision should be construed in favour of the staff member and not the organization (see, for example, Judgments 2276, under 4, and 3310, under 7). It is the obvious and ordinary meaning of the words in the provision that must be discerned and not just a phrase taken in isolation. Article 20(a) establishes the duration of the entitlement to compensation in cases where the loss of earning capacity is determined to be total. It provides that an official is entitled to this compensation from the date on which payment ceases under Article 17(a) and "for so long as the disability continues". The provision is clear and unambiguous. The entitlement to compensation is contingent on the presence of the disability only. Moreover, if the drafter of the provisions had intended that the entitlement to the payment of the compensation terminate upon reaching the age of retirement, it would have been explicitly stated.

5. As noted above, the IAEA also claims that its interpretation of Article 20(a) is consistent with its established practice. As stated in Judgment 2702, under 11, “[i]t is well established that the party seeking to rely on an unwritten rule bears the onus of proving the substance of the rule. This applies equally to a party seeking to rely on an established practice.” Beyond stating that its established practice is consistent with its interpretation, the IAEA has not adduced any proof of the existence or nature of the practice. It may also be added that a practice cannot become legally binding if it is at odds with a statutory provision already in force, as is the case here (see, for example, Judgment 3546, under 8, and the judgments cited therein).

6. It is also noted that the characterization of the present complaint as being frivolous and vexatious and “costly and time-wasting” is obviously without any foundation.

7. As the Director General’s 2 October 2013 decision is grounded on an erroneous interpretation of Article 20(a), it will be set aside. The complainant is entitled to moral damages in the amount of 7,000 euros and costs in the amount of 4,000 euros. As the complainant will not have reached the age of 60 at the time of the public delivery of this judgment, there will be no award of material damages.

DECISION

For the above reasons,

1. The Director General’s 2 October 2013 decision is set aside as are his earlier decisions of 8 July 2013 and 24 May 2013.
2. The IAEA shall pay the complainant moral damages in the amount of 7,000 euros.
3. The IAEA shall pay the complainant costs in the amount of 4,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 4 November 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ