

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R.

v.

IAEA

123rd Session

Judgment No. 3733

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. R. against the International Atomic Energy Agency (IAEA) on 6 March 2014 and corrected on 13 June, the IAEA's reply of 29 September, the complainant's rejoinder of 5 December 2014 and the IAEA's surrejoinder of 12 March 2015;

Considering Article II, paragraph 5, 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 decision dismissing his two internal appeals on health-related claims.

On 10 November 2011 the complainant lodged a claim for compensation under Appendix D to the Staff Regulations and Staff Rules, which establishes the "Rules Governing Compensation in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties", in connection with two leg injuries sustained on 10 September 1999 and on 23 July 2010, respectively. The first injury occurred during a football game with other staff members which took place during office hours but for which the complainant had been officially released from work (hereinafter "the 1999 injury"). The second injury occurred when he slipped and fell in a bathroom on the IAEA's premises (hereinafter "the

2010 injury”). According to the complainant, the bathroom floor was wet at the time.

On 16 April 2012, based on the recommendation of the Joint Advisory Board on Compensation Claims (JABCC), the Director General dismissed both claims as time-barred. The complainant requested a review of this decision on 15 May 2012. By letter of 15 June 2012 the Director General decided to maintain his decision with respect to the 1999 injury but to review his decision concerning the 2010 injury, as he accepted that it was plausible that, having visited the Agency’s medical services at the time, the complainant had considered that the matter would be handled under Appendix D procedures by representatives of the Administration. The claim for the 2010 injury would therefore be treated as having been submitted in a timely manner and returned to the JABCC for consideration.

On 19 December 2012 the complainant requested the Director General to review his decision of 15 June with respect to the 1999 injury on the basis of “new information [that had come to his attention and which was] sufficient to overcome any time-bar issue”, namely the failure on the part of Agency officials to report his injury to the relevant local authorities within five days of its occurrence. On 14 January 2013, referring to the 2010 injury, the complainant requested compensation under Appendix D for loss of function of his legs, which his physician had assessed at 26 per cent, and an award of damages for pain and suffering. By letter of 12 February 2013 the Director General replied to the request for review dated 19 December, stating that he maintained his decision that the claim was time-barred. Regarding the “new information” submitted by the complainant, he pointed out that the latter was a participant in the United Nations Joint Staff Pension Fund (UNJSPF) and, as such, was covered by Appendix D and not by the local social security system.

On 14 March 2013 the complainant filed a first appeal before the Joint Appeal Board (JAB), challenging the decision of 12 February. He requested that the JAB recommend to the Director General to allow his claim for compensation and/or submit the matter to the JABCC with the direction to consider the claim as timely submitted.

On 22 May 2013 the complainant was informed that the Director General had approved the recommendation of the JABCC to pay compensation under Appendix D for loss of function – assessed at 4 per cent of the whole body – as well as the reinstatement of certain sick leave days. No mention was made of the claim for damages for pain and suffering. On 11 June 2013 the complainant requested that a medical board be convened under Appendix D to review the question of the degree of loss of function suffered as a result of his 2010 injury and asked the Director General to review the decision to deny his claim for pain and suffering damages. By letter of 11 July 2013 the Director General informed the complainant that a medical board would be convened; however, he rejected his claim for compensation for pain and suffering on the basis that such damages were not provided for under Appendix D.

On 8 August 2013 the complainant filed a second appeal before the JAB, challenging the decision of 11 July. He argued that the IAEA could be held liable for pain and suffering damages if the injury was caused by negligence. He requested the payment of damages and costs and asked the JAB to obtain the maintenance records regarding the cleaning of the bathroom in which the 2010 injury occurred.

The JAB invited the complainant to attend a number of meetings, but the latter informed the Secretary of the JAB that he remained on sick leave and could not attend any meetings, except in the presence of his lawyer.

On 13 November 2013 the JAB issued a single report with respect to the two appeals and recommended that the Director General maintain the original decisions in both cases and dismiss the appeals. In a letter of 6 December 2013, which constitutes the impugned decision, the Director General accepted the recommendations of the JAB and asserted that the claim for negligence was a new claim for which the complainant had not received a final decision. He noted that the JAB had made no finding regarding that claim.

The complainant asks the Tribunal to set aside the impugned decision, to find that the claim for compensation for the 1999 injury is not time-barred and refer the matter back to the IAEA pursuant to Appendix D, and to award him damages and costs. Additionally, he requests that the IAEA be ordered to produce the maintenance records

regarding the 2010 injury and that the objections to the receivability of his negligence claim be rejected.

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

CONSIDERATIONS

1. At the time the complainant filed his complaint with the Tribunal on 6 March 2014, he was employed by the IAEA. However the Tribunal has since been notified by the IAEA that the complainant's employment was terminated effective 8 March 2016 on the basis that, for reasons of health, he was incapacitated for further employment. Subject to processing, the complainant will receive a disability pension from the UNJSPF. Neither the complainant nor the IAEA suggest these events have relevance to the issues raised in the complaint.

2. On 10 November 2011, the complainant lodged a claim for compensation under Appendix D to the Staff Regulations and Staff Rules in relation to leg injuries he had suffered in 1999 (the 1999 injury) and in 2010 (the 2010 injury). Initially both claims were dismissed in April 2012 by the Director General on the recommendation of the JABCC. On 15 May 2012 the complainant sought a review of this decision by the Director General. By letter dated 15 June 2012, the Director General accepted the request for review in relation to the 2010 injury and reversed the decision (by accepting the injury was service-incurred) but maintained his earlier decision in relation to the 1999 injury. On 19 December 2012 a further review was sought by the complainant of the decision of 15 June 2012. It was rejected on 12 February 2013. The complainant maintained an internal appeal that resulted in a report of the JAB dated 13 November 2013. The JAB's report also addressed another internal appeal arising from a request made by the complainant on 14 January 2013 for, inter alia, compensation in the sum of 125,000 euros for pain and suffering flowing from the 2010 injury. The JAB recommended to the Director General that both appeals be dismissed. By letter dated 6 December 2013 the Director General dismissed both appeals. This is the impugned decision.

3. The issues raised in these proceedings are narrow in compass. In relation to the 1999 injury, the issue is whether a claim made in November 2011 under Appendix D in relation to this injury is time-barred. Both the JAB and the Director General concluded it was.

In relation to the 2010 injury the issues are firstly whether a memorandum dated 14 January 2013 from the complainant to the Director General in which he requested that “[the Director General] make an award for pain and suffering damages in the amount of 125,000 [euros]” could or should have been viewed and treated as a claim for damages based on the negligence of the IAEA. A related issue is whether, in the internal appeal, the complainant was afforded due process. That issue has two elements. The first is whether the JAB erred in not pursuing a request of the complainant to secure certain documents that were said to be relevant to the issue of liability of the IAEA in the negligence claim. The second element concerns the refusal or failure of the JAB to allow the complainant to be represented by a lawyer in the internal appeal.

4. It is convenient to deal first with the issue concerning the 1999 injury. Appendix D sets out rules governing compensation in the event of death, injury or illness attributable to the performance of official duties. Part VI identifies entitlements payable under the Appendix that include medical expenses, salary during absence from work, travel expenses and compensation during periods of partial or total loss of earning capacity.

Article 34 provides:

“Claims for compensation under these rules shall be submitted within four months of the death of the official or the injury or onset of the illness; provided, however, that in exceptional circumstances the Director General may accept for consideration a claim made at a later date.”

In addition, there is an overarching provision in Staff Rule 8.04.1 that provides that compensation in the event of death, injury or illness attributable to the performance of official duties shall be payable in accordance with the provisions of Appendix D. Staff Rule 5.01.8(A), a rule of general application, says that no staff member shall be entitled to receive any payments unless payment was claimed within two years from the date on which such payment would have become due.

5. The original “claim” made by the complainant (and on which his request for review and internal appeal was based) in relation to the 1999 injury in the memorandum of 10 November 2011 was not expressed with great clarity. It certainly did not include a claim for the payment of any specified benefit payable under Appendix D. The subject matter of the memorandum was “Retroactive Recognition of two Work-Related Injuries for Compensation under Appendix D to the Staff Rules”. It appears that both the complainant and the IAEA proceeded on the basis that a claim could be made for the recognition of an injury without that being coupled with a claim for the payment of a specified benefit. The Tribunal will likewise do so without deciding whether this approach is correct.

6. It is difficult to discern from the pleas precisely what the complainant’s arguments are as to why the “claim” in relation to the 1999 injury was not time-barred. One point is that there is substantial similarity between the injury sustained in 1999 and the injury sustained in 2010. However it is not at all clear what the legal relevance of this is. If the disabling effect of the 2010 injury is compensable under Appendix D then it is of no moment that there may also be a continuing disabling effect of the 1999 injury. If there was a disabling effect of the 1999 injury that did not arise from the 2010 injury and a claim was made based on that different effect of the 1999 injury, then *prima facie* the time bar in Appendix D would be engaged in relation to that claim.

7. Another point made by the complainant was, in effect, that he in fact had reported the 1999 injury and the IAEA was aware, or should have been aware, that the injury was attributable to the performance of official duties. Again, it is not clear what is said to be the legal effect of this. Appendix D concerns claims. The time limit in the Appendix addresses the making of claims. Irrespective of what the Administration knew or ought to have known in 1999, no attempt was made by the complainant to invoke the provisions of Appendix D until November 2011. It was in that circumstance that the operation of the time limit came into play.

8. The last point raised by the complainant concerns the Flemming principle seemingly on the basis that under Austrian law (the complainant was an Austrian resident and the IAEA Headquarters are in Austria), so it is said, there is no time limit. Even if the Flemming principle did apply in a case such as the present, and the Tribunal is not satisfied it does, there is a clear provision in Article 34 of Appendix D for claims out of time to be entertained which, potentially, would accommodate the factual situation adverted to by the complainant that an injury might not manifest itself for many years. The Director General was entitled to proceed on the basis that the “claim” in the letter of 10 November 2011, insofar as it related to the 1999 injury, was time-barred. Thus the complaint should be dismissed insofar as it challenges that decision.

9. The resolution of the issues raised in relation to the 2010 injury depends, in part, on the terms of the 14 January 2013 memorandum from the complainant to the Director General. The memorandum said:

“Subject: Service-Incurred Injury (23-07-2010)

Claim for Loss of Function, and Pain and Suffering Damages

I refer to your letter dated 15 June 2012 recognizing my service-incurred injury sustained on 23 July 2010, and enclose for the JABCC a copy of the medical report of [...] Dr. [H.].

Please note that [...] Dr. [H.] has concluded that I suffer a loss of use of function of 26 percent of my legs. I therefore request compensation in accordance with Articles 25 and 26 of Appendix D. [...] Dr. [H.] also concluded that I suffered severe and on-going pain from the injury, and I request you to make an award for pain and suffering damages in the amount of 125,000 [e]uros.”

The response of the Director General to this memorandum was dated 22 May 2013. No mention was made in that response to the claim for 125,000 euros. In a memorandum from the complainant to the Director General dated 11 June 2013, the complainant noted that “[the Director General] ha[d] decided not to compensate [him] for pain and suffering in the amount of 125,000 [e]uros” and the complainant requested a review of this decision. This led to a response from the Director General dated 11 July 2013 noting that Appendix D made no provision for compensation for pain and suffering and that Article 11 of the Appendix stipulated that “the compensation payable under these rules shall be the sole compensation” payable to an official arising from death, illness or injury

attributable to the performance of official duties. The complainant lodged an internal appeal against this decision on 8 August 2013. He referred, for the first time, to the alleged negligence of the IAEA and linked that negligence to its liability to pay him damages for pain and suffering.

10. In its report the JAB noted the complainant's reference to negligence and also his request that the JAB obtain the maintenance records regarding the cleaning of the bathroom in which the 2010 injury occurred. The relevance of this was that the complainant had said he had slipped and fallen in the men's bathroom while washing his hands and had hurt his leg seriously. The JAB said:

“The Board notes that the [complainant] has himself submitted no evidence of any negligence on the [IAEA]'s part, but rather has invited the Board to search for any such evidence itself. In the circumstances the Board considers that as no evidence of negligence on the part of the [IAEA] has been submitted by the [complainant], the Board cannot entertain such a claim.”

11. The Director General took the approach in the impugned decision of 6 December 2013 that no claim based on negligence had been made and, in particular, that the request for review of 11 June 2013 did not seek a review of a rejected claim based on negligence and, accordingly, there was no final administrative decision against which the complainant could appeal to the JAB. The Director General also noted that the complainant had not submitted any evidence in support of such a claim to the JAB and that he bore the burden of establishing the factual foundation on which his claim was based.

12. A cause of action by an official based on the negligence of the organisation that employs her or him contains several elements (see, for example, Judgment 2804, consideration 25). The first is that the organisation has failed to take reasonable steps to prevent a foreseeable risk of injury. The second is that liability in negligence is occasioned when the failure to take such steps causes an injury that was foreseeable. In the original request for compensation in the sum of 125,000 euros in the memorandum of 14 January 2013, nothing was said to suggest that liability for the claimed amount arose from a failure of the IAEA to take reasonable steps to prevent the fall which, on the complainant's account,

had caused his injury. Nor was anything said to the same effect in the request for review of 11 June 2013. Yet in the internal appeal, the complainant knew sufficient of the legal principles (or had received advice to that effect) to identify the negligence of IAEA as the foundation for the claimed compensation in the sum of 125,000 euros.

13. Ultimately this case turns on the question of whether the Director General understood the claim for 125,000 euros as having been made under Appendix D and not having been based on negligence, whether this was reasonable and, in the result, the rejection of the claim did not involve an administrative decision rejecting a claim based on negligence. On receipt of the memoranda of 22 May 2013 and 11 June 2013, the Administration was reasonably entitled to take the approach that the amount claimed was being sought under Appendix D and did not reflect a claim based on negligence. Accordingly it is correct to say that there has been no administrative decision upon which an internal appeal could be maintained rejecting a claim for damages based on negligence. Thus it was open to the Director General in the impugned decision to reject the appeal on this footing. This conclusion is not intended to suggest that an official needs to articulate a claim with the precision that might be expected of a competent lawyer. But something needs to be said by the official which, viewed reasonably, would result in the Administration understanding the true character of the claim and giving it the opportunity to respond appropriately.

Given the conclusion reached above, it is unnecessary to deal with any other issues.

14. The complaint must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 27 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ