

R. (Nos. 3 and 4)

v.

IAEA

127th Session

Judgment No. 4090

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr G. R. against the International Atomic Energy Agency (IAEA) on 30 March 2016 and corrected on 22 June, the IAEA's reply of 3 October, the complainant's rejoinder of 12 December 2016 and the IAEA's surrejoinder of 20 March 2017;

Considering the fourth complaint filed by Mr G. R. against the IAEA on 12 December 2016 and corrected on 24 February 2017, the IAEA's reply of 6 June, corrected on 16 June, and the complainant's e-mail of 6 October 2017 informing the Registrar of the Tribunal that he did not wish to file a rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges the processing of his application for a disability benefit and the calculation of his sick leave entitlements.

Much of the background to these complaints is found in Judgments 3733 and 3910. Suffice it to recall that in 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 in 1999 and 2010, respectively. In May 2012 he requested that the Joint Advisory Board on Compensation Claims (JABCC) recognise his mental disorder – which he linked to the rejection of his claim for compensation – as a service-incurred illness. A Medical Board was convened and met in June 2013. A majority of its members recommended that the Director General reject the complainant’s request on the basis that his mental condition was “pre-existent before 2010”. This recommendation was submitted to the JABCC, which approved the view of the majority and recommended that the Director General reject the complainant’s claim. By a decision of April 2014 the complainant was informed that the Director General had approved the recommendation of the JABCC.

Meanwhile, on 12 July 2013, the complainant had been placed on sick leave. By a letter of 7 November 2013 he was informed that he had exhausted his entitlement to sick leave with full pay and would therefore be on sick leave with half pay with retroactive effect from September 2013. In accordance with the Agency’s Staff Rules, he would also receive a benefit equal to 25 per cent of his net base salary under the Agency’s Temporary Disability Insurance Plan (TDIP), and he was entitled to commute 2.5 days of annual leave per month to supplement his salary, if he so wished.

Having exhausted his entitlement to sick leave with half pay, the complainant was on sick leave without pay as from 24 December 2014. However, he continued to receive benefits under the TDIP in an amount equal to 50 per cent of his net emoluments.

On 9 January 2014 the complainant applied for a United Nations Joint Staff Pension Fund (UNJSPF) disability benefit. He was directed by the Vienna International Centre Medical Service to see Dr G. On 19 June, having considered Dr G.’s report, the Staff Pension Committee (SPC) denied his application. On 23 June the complainant filed a request for review of this decision and nominated Professor S.K. to represent him on the medical board which would have to be convened in accordance with Administrative Rule K.7 of the UNJSPF.

On 6 October 2014, after the complainant's counsel had requested that the review process be expedited, the complainant was informed that the IAEA had designated Dr G. as its representative on the Medical Board. However, Dr G. resigned in November, indicating that he felt pressured, and was replaced by Dr L., the IAEA's Medical Director. Beginning in November 2014, a series of exchanges ensued between Professor S.K., Dr L. and the complainant's counsel aimed at selecting the Chair of the Medical Board. No agreement was reached.

On 20 February 2015 the complainant requested the Director General to review the decision not to pay him any salary and/or to make unlawful salary deductions in December 2014 and January 2015 and to restore him to full pay status. He also claimed moral damages, interest on the sums unlawfully withheld and costs. On 4 March he filed a similar request concerning his February 2015 payslip. On 12 March and 1 April 2015, respectively, his requests were rejected, the main reason being that his payslips reflected adjustments made due to the change in his sick leave records. The complainant appealed against both decisions before the Joint Appeals Board (JAB) on 10 April, requesting, inter alia, that he be retroactively restored to full pay status, that he be provided with a full accounting of his pay since September 2013 and that he be granted material and moral damages, as well as costs. Having raised specific questions concerning the calculation of his pay during his periods of sick leave, the complainant received, on 23 April 2015, an explanation of his payslips together with tables detailing his remuneration from February 2014 to April 2015 and his TDIP benefits.

Meanwhile, on 10 March 2015 the complainant requested the Director General to remove Dr L. from the Medical Board on the ground that he was obstructing the process of selecting a chairperson, and to immediately nominate another medical practitioner. He claimed material and moral damages in the amount of one year's net salary. On 18 March he was informed that Dr L. had decided not to participate in the Board and had been replaced by Professor S., who agreed with the suggestion of Professor S.K. concerning the Chair of the Medical Board. On 22 April 2015 the complainant was informed that his request for damages could

not be granted. He filed a request for review of this decision, which was rejected on 16 June. He appealed to the JAB on 14 July 2015.

The JAB considered the appeals of 10 April and 14 July together and issued a single report on 27 November 2015, recommending that the Director General maintain the original decisions and dismiss both appeals. By a letter dated 22 December 2015, which constitutes the impugned decision in the complainant's third complaint, the latter was informed that the Director General had accepted the JAB's recommendations.

Prior to that decision, the complainant was informed that, on 2 December 2015, the SPC had decided to grant his application for a UNJSPF disability benefit and that this benefit would be paid as from 8 March 2016, the date on which he would separate from service for health reasons after having exhausted his remaining entitlements to annual leave.

In his third complaint, the complainant asks the Tribunal to set aside the Director General's decision of 22 December 2015 and to award him material and moral damages in the amount of 150,000 euros and 25,000 euros in costs for the proceedings before the JAB and the Tribunal. Lastly, he claims any other relief that the Tribunal deems just and proper under the circumstances of the case.

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

Concurrently with the procedure leading to the third complaint, on 20 July 2015, the complainant requested the Director General to review the decisions, as reflected in his May and June 2015 payslips, not to pay him his full salary and entitlements under the Agency's Staff Regulations and Staff Rules. Having received no reply to his request, he lodged an appeal with the JAB on 15 September requesting, *inter alia*, that he be retroactively restored to full pay status, that he be provided with a full accounting of his pay since September 2013 and that he be granted material damages with interest, moral damages, as well as costs.

In September, November and December 2015 the complainant filed three new requests for review against his payslips from July to December. Following the rejection of these requests, he filed appeals

with the JAB on 11 November 2015, 23 December 2015 and 19 February 2016, respectively, making the same requests as in his appeal of 15 September.

The JAB considered the four appeals together and issued a single report on 22 April 2016, which was revised on 17 August. It recommended that the Director General dismiss the appeals. By a letter dated 12 September 2016, which constitutes the impugned decision in the complainant's fourth complaint, the latter was informed that the Director General had accepted the JAB's recommendation.

In his fourth complaint, the complainant asks the Tribunal to set aside the decision of 12 September 2016 and to award him material damages corresponding to the salary and other emoluments wrongfully withheld from May to December 2015, with interest, moral damages in the amount of one year's net base salary, and costs. Lastly, he claims any other relief that the Tribunal deems just and proper under the circumstances of the case.

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

CONSIDERATIONS

1. The complainant is a former staff member of the IAEA. From the middle of 2013 he was placed on sick leave. Initially the leave was on full pay and subsequently on half pay. The complainant exhausted his entitlement to paid sick leave in December 2014. This and related events gave rise to a multiplicity of internal appeals culminating in three reports of the JAB (the second report was superseded by the third) and, ultimately, two decisions of the Director General. The first decision of the Director General was in a letter of 22 December 2015 (the December 2015 decision) which is impugned in a complaint to the Tribunal, the complainant's third. The second decision of the Director General was in a letter of 12 September 2016 (the September 2016 decision) which is impugned in a complaint to the Tribunal, the complainant's fourth. There is sufficient commonality of factual and legal issues between the

third and fourth complaints to warrant their joinder for the purposes of rendering one judgment, as sought by the IAEA.

2. The complainant exhausted his entitlement to sick leave with full pay in September 2013. In January 2014 he applied for a UNJSPF disability benefit. This request was denied by the SPC by a letter dated 19 June 2014. The complainant sought a review of this decision a few days later. There was a considerable delay in dealing with the request for review occasioned mainly by issues concerning the composition of the medical board which would have to be convened to advise the SPC. The application for the disability benefit was ultimately granted by the SPC in a decision of 2 December 2015. The complainant was awarded a disability benefit with effect from 8 March 2016, the date of his separation from service on account of his incapacity for further service.

3. The December 2015 decision involved, in substance, the rejection of the complainant's claim for material and moral damages having regard to his December 2014, January and February 2015 payslips. The other aspect of that decision was a rejection of a claim for material and moral damages based on the conduct of the IAEA's Medical Director, the delay in processing (during the review phase) the complainant's application for a disability benefit and the alleged breach of the IAEA's duties and obligations towards the complainant.

4. The September 2016 decision involved, in substance, the rejection of the complainant's claim for material and moral damages having regard to his May, June, July, August, September, October, November and December 2015 payslips. All these claims concerning payslips received between December 2014 and December 2015 were founded on the same legal arguments that were, in several respects, repetitive of the arguments rejected in the December 2015 decision.

5. In his pleas in his fourth complaint, the complainant advances five arguments. The first is that, in substance, there was undue delay in the consideration of his request for review, and that involved obstruction by the IAEA's Medical Director and indeed his conduct amounted to

retaliation, bias and prejudice. The second and related argument is that the IAEA breached its obligation to ensure that its officials executed their responsibilities expeditiously and this involved a breach of the Headquarters Agreement with Austria and the Flemming Principle. The third argument is that the complainant's payslips after he commenced on sick leave with half pay in September 2013 until February 2015 were "calculated improperly" and this issue was not addressed in the internal appeal, though raised, or in the impugned decision. The fourth argument is that the complainant should have then (from the date he succeeded in his "pension appeal") been retroactively reinstated to full pay to the date he first applied for the disability benefit. The fifth argument is that the IAEA breached its obligation to act towards the complainant in good faith, to exercise a duty of care and to act in accordance with the principle of mutual trust.

6. The complainant's pleas in his third complaint appear to overlap significantly with the pleas in his fourth complaint though they are expressed in a shorter form. One particular matter raised in the third complaint concerned the fact that the complainant was paid no salary in December 2014, January and February 2015 because he had exhausted his entitlement to sick leave with half pay. The fact that this happened was said by the complainant to have been the result of the lengthy delay in resolving his application for a disability benefit.

7. The Tribunal considers each of these arguments in turn. The first is that, in substance, there was undue delay in the consideration of his request for review of the refusal to pay him a disability benefit, and this involved obstruction by the IAEA's Medical Director and indeed his conduct, so it is alleged, amounted to retaliation, bias and prejudice. In the pleas of both the complainant and the IAEA there is a detailed analysis of the sequence of events concerning the composition of the Medical Board and, in particular, the selection of its Chair. It is sufficient to note that the decision to constitute a medical board was taken in early July 2014 and the complainant had then nominated a person to be a member of the Board. It was Professor S.K. Almost three months later, the IAEA nominated in early October 2014 a member, Dr G. The two

nominated members were then obliged to agree on a third member to act as the Chair. On 14 November 2014 the complainant's counsel advised Dr G. that Professor S.K. proposed Professor H.-P.K. to serve as the Chair. Three days later, Dr G. indicated that he would not serve on the Medical Board. Following Dr G.'s withdrawal, Dr L. became the IAEA's nominee.

8. Dr L. was the IAEA's Medical Director. Importantly, the Director General said, in a letter dated 16 June 2015 to the complainant concerning one of the steps leading to the third complaint, that "Dr [L.] stepped in and decided to represent the Agency until such time as he could find a doctor to represent the Agency on his behalf". Thus, at that time, Dr L.'s role was to find and nominate another doctor to sit on the Board and his membership of the Board was only temporary. Notwithstanding Dr L.'s temporary status, the IAEA did not nominate another member until March 2015 when Dr L. withdrew. The newly nominated member was Professor S. Very shortly thereafter, and this is a matter of decisive importance in the Tribunal's view, Professor S. accepted Professor S.K.'s proposal that Professor H.-P.K. be the Chair of the Medical Board. The Tribunal can infer that the proposal that Professor H.-P.K. be the Chair was, in the circumstances, a reasonable one. However, in the period from November 2014 to mid-March 2015, Dr L. rejected the proposal of Professor H.-P.K. as Chair and two others nominated by Professor S.K. and proposed a number of alternatives though none were acceptable to Professor S.K. The correspondence does reveal rational grounds advanced by Dr L. for resisting the appointment of Professor H.-P.K. but obviously Professor S. did not view them as compelling.

9. By remaining as a transitional member of the Medical Board for almost four months and, in that capacity, resisting the appointment of the Chair proposed by Professor S.K., Dr L.'s conduct delayed the final constitution of the Board for almost four months. This was an unreasonably long period and delayed the resolution of the complainant's application, which was ultimately successful, for a disability benefit. While the complainant has not discharged the burden of proving

retaliation, bias and prejudice, the IAEA is liable for the consequences of this delay involving, as it does, a breach of its duty of care towards the complainant, a ground relied on by the complainant in his fifth argument (see Judgment 2936, consideration 19). The IAEA, through its officers, was obliged to take all reasonable steps to ensure that the complainant's request for review of the decision to refuse him a disability benefit was dealt with as expeditiously as possible. If, as happened, an impasse about who should be the Chair arose between a member of the Board nominated by the staff member and a temporary member (Dr L.) of the Board nominated by the Administration who also had the responsibility to nominate another member as his own replacement, then steps should have been taken with great expedition to nominate the member to replace him. The IAEA argues that the position taken by Dr L. in relation to Professor H.-P.K. was reasonable and rational and the fact that Professor S. took a different view simply illustrates that views on who might be an appropriate Chair can reasonably differ. However the fact that views might differ and that they might be anticipated to differ provided a substantial reason for Dr L. not to engage in what was in effect a prolonged and ongoing debate with Professor S.K. about who should be the Chair and a substantial reason to nominate promptly someone as his own replacement on the Board whose views about the Chair might be different and would be decisive. He did not do so.

10. The second and related argument of the complainant is that the IAEA breached its obligation to ensure that its officials executed their responsibilities expeditiously and this involved, as a consequence, a breach of the Headquarters Agreement with Austria and the Flemming Principle. The IAEA argues, correctly, that the organisation's compliance with the Headquarters Agreement is not a justiciable legal issue in proceedings in the Tribunal initiated through the complaint of a staff member. The argument concerning the Flemming principle was, in substance, that the IAEA failed to pay the complainant full salary and emoluments when he was on sick leave as, so it is said, would have occurred under Austrian law in employment regulated by that law. Even accepting, for present purposes, that the field of operation of the

Flemming principle would comprehend, as an aspect of establishing appropriate levels of pay, payment of sick leave entitlements, it is not appropriate to isolate one element of salary only and compare that element with prevailing local conditions. As the Tribunal observed in Judgment 1334, consideration 24, “[the Flemming principle] offers [...] a guide for setting general levels of pay for local staff: it offers no basis for claims about any particular component of such pay”. This argument is unfounded and is rejected.

11. The third argument of the complainant is that his payslips after he commenced on sick leave with half pay in September 2013 until February 2015 were “calculated improperly”. A related argument is that neither the JAB nor the Director General dealt with this contention concerning calculation. As to this latter point, the complainant in his pleas does nothing more than assert that an argument was not dealt with. He does not seek to demonstrate with any measure of particularity or indeed at all, what precisely was the argument put in the internal appeals that was not addressed. In his pleas in both complaints before the Tribunal, the complainant simply asserts miscalculation and consequential underpayment by reference to tables ostensibly setting out what he was paid and what he should have been paid. This does not constitute adequate proof, both in an argumentative sense as well as in an evidentiary sense, of the alleged failure of the IAEA to pay the complainant monies due. This argument is rejected as unfounded.

12. The fourth argument of the complainant is that he should have, from the time he succeeded in securing the disability benefit in December 2015, been retroactively reinstated to full pay to the date he first applied for the disability benefit. As the IAEA points out in its reply to the fourth complaint, the complainant does not refer to any provision of any normative legal document governing the staff of the IAEA in support of this argument. The complainant simply asserts that “[u]nder the law [he] was entitled to restoration of his pay status retroactively to the date of his [application] for a [disability benefit], having succeeded in his pension appeal”. The only “law” identified is Judgment 3591 of this Tribunal. However, again as the IAEA points out

in its reply, that case concerned an entirely different legal and factual situation. The complainant's argument is rejected as unfounded.

13. The fifth argument of the complainant that the IAEA breached its obligation to act towards him in good faith, to exercise a duty of care and to act in accordance with the principle of mutual trust has already, in substance, been dealt with in an earlier consideration.

14. The complainant requests an oral hearing and an order for the production of a particular document. An oral hearing is unnecessary as the issues can fairly and reasonably be resolved on the written material provided by the parties. The request for an order for the production of a document is moot as it was produced in the IAEA's reply.

15. The complainant is entitled to moral damages for the delay in the consideration of his application for a disability benefit arising from the IAEA's breach of its duty of care. The Tribunal takes into account the fact that, but for the delay, he may have been in receipt of the disability benefit earlier. The Tribunal assesses those damages in the sum of 20,000 euros. The complainant is entitled to an order for costs which the Tribunal assesses in the sum of 7,000 euros.

DECISION

For the above reasons,

1. The IAEA shall pay the complainant 20,000 euros in damages.
2. The IAEA shall pay the complainant 7,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 24 October 2018, Mr Giuseppe Barbagallo, 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 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ