

K. (No. 2)

v.

IAEA

139th Session

Judgment No. 4955

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr N. K. against the International Atomic Energy Agency (IAEA) on 22 February 2021 and corrected on 1 April 2021, the IAEA's reply of 7 March 2022, the complainant's rejoinder of 6 June 2022 and the IAEA's surrejoinder of 9 September 2022;

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

Having examined the written submissions;

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

The complainant challenges the decision to reject, on grounds of irreceivability, his compensation claims for what he considers to be a service-incurred illness.

The complainant joined the IAEA in 2000. On 26 March 2018, while being on extended sick leave, the complainant sent an email to the Medical Officer, Vienna International Centre (VIC) Medical Services, "seeking [her] help to find out a [specialist physician] to consult [...] and getting help with [his health] problem". He further wrote in his email that he was "sure" that his health condition "ha[d] a direct link to the tasks [he] had to perform" at the IAEA.

On 17 April 2019, the complainant was notified of the decisions to award him a disability benefit in accordance with Article 33 of the Regulations of the United Nations Joint Staff Pension Fund (UNJSPF) and to terminate his contract, effective September 2019, for health reasons.

By letter of 26 June 2019 addressed to the Chair of the Joint Advisory Board on Compensation Claims (JABCC), the complainant, referring to Appendix D of the IAEA's Staff Regulations and Staff Rules, "Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties", submitted two claims for compensation and reimbursement. First, the complainant made "a claim under Article 20 of Appendix D for total loss of earning capacity since [he] believe[d] [his] disability was service-incurred". Second, the complainant made "a claim under Articles 16, 25-26 of Appendix D for injury to [his body member]". The complainant specified in his letter that he had been on "continuous sick leave since 26 January 2018".

On 16 July 2019, the Director of the Division of Human Resources (MTHR) advised the complainant that his 26 June 2019 compensation claims were time-barred, since pursuant to Article 34 of Appendix D, claims for compensation should be submitted "within four months of [...] the injury or onset of the illness" and his "injury/illness dated back to 26 January 2018".

On 31 July 2019, the complainant requested the acting Director General, pursuant to Article 40 of Appendix D, to "reverse the [16 July 2019] decision and authorize [the] matter to be submitted to the JABCC for its advice".

By letter of 23 August 2019, the acting Director General wrote to the complainant that, after consideration of his "appeal dated 31 July 2019", he had decided to refer the complainant's 26 June 2019 claims to the JABCC for it to consider "whether, for purposes of Article 34 of Appendix D, [his] request was timely, and if so, to review [his] claim under Appendix D". The acting Director General concluded his letter stating that he would revert upon receipt of the JABCC's recommendation.

On 17 September 2019, the complainant separated from the IAEA.

On 2 December 2020, the Secretary of the JABCC wrote to the complainant that, after a thorough review of his claims, the Director General, following a recommendation of the JABCC, had decided that “the time limit of four months of the date of the injury or onset of the illness set under Article 34 of Appendix D should not be waived”.

By letter of 21 December 2020, the complainant’s counsel requested the Director General to “set aside [the Director of MTHR]’s decision of 16 July 2019, thereby allowing the late filing of [the complainant]’s compensation claim[s] of 26 June 2019, by way of an exceptional waiver, granted by [his] Office, of the statutory time limits set forth under Article 34 of Appendix D to the Staff Regulations” and to grant the complainant 15,000 euros as a one-time compensatory payment (moral damages and material costs) “in connection with the breaking into his [office] cabinet”, as well as legal costs. The complainant’s counsel also stated that “should [the complainant] receive no response [...] within two (2) months of receipt hereof, with respect to the above two (2) requests, [they] w[ould] interpret [such] silence as a sign of refusal, thereby proceeding filing suit to the [...] Tribunal”.

By letter dated 2 February 2021, sent to the complainant by email on 2 February 2021 and by registered mail on 3 February 2021, the Director General responded to the 21 December 2020 letter. Regarding the request that the 16 July 2019 decision be set aside, the Director General recalled that subsequent decisions had been taken on 23 August 2019 and 2 December 2020. The Director General also indicated that, as a former staff member, the complainant could appeal the 2 December 2020 decision directly before the Tribunal. The Director General further stated that the complainant’s request for moral damages and material costs was related to the outcome of an investigation conducted by the United Nations Security and Safety Services (UNSSS) into allegations that documents were missing from his cabinet and that such request was not “within the time limits established under Staff Rule 12.01.1”.

On 22 February 2021, the complainant filed the present complaint before the Tribunal, being directed against what he considers to be an implied decision of rejection of his counsel’s letter of 21 December

2020. In his rejoinder, the complainant submits that the letter of 2 February 2021 was not available at the time when he filed his complaint and “requests the Tribunal [to] strike out this correspondence for being inadmissible”.

On 25 February 2021, the IAEA sent another email to the complainant, stating that it had received a notification from the post office that the letter, “which was emailed to [him] on 2 February 2021 and sent by registered mail to [his] home address on 3 February 2021, was unclaimed”. In its email, the IAEA asked the complainant to “confirm the receipt of an electronic copy”. It re-sent the letter of 2 February 2021 by registered mail on 12 March 2021. The registered mail was delivered on 16 March 2021.

The complainant asks the Tribunal to set aside the “impugned decision”, and to grant him moral damages in the amount of 25,000 euros, including for what he considers to be a delay in the internal appeal process, as well as the reimbursement in full of his legal costs. Finally, he seeks the payment of interest and “any other consequential or punitive relief that the Tribunal may determine to be necessary, just, appropriate and equitable”.

The IAEA asks the Tribunal to dismiss the complaint in its entirety and submits that some of the complainant’s claims are irreceivable, *ratione materiae*.

CONSIDERATIONS

1. In filing his complaint with the Tribunal on 22 February 2021, the complainant relies on Article VII, paragraph 3, of the Statute of the Tribunal. He argues that, as he did not receive a final decision within sixty days from the notification to the IAEA of his counsel’s letter of 21 December 2020, he is entitled to bring his case directly to the Tribunal. He also asserts that he has exhausted all available internal remedies.

2. Pursuant to Article 40 of Appendix D of the IAEA's Staff Regulations and Staff Rules applicable at the relevant time, "[r]econsideration of the determination by the Director General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability, may be requested within thirty days of notice of the decision; provided, however, that in exceptional circumstances the Director General may accept for consideration a request made at a later date". Article 41 of Appendix D states that "[a] medical board shall be convened to consider and to report to the Joint Advisory Board on Compensation Claims [JABCC] on the medical aspects of the appeal. [...]" Article 42 of Appendix D states that "[the JABCC] shall transmit its recommendations together with the report of the medical board to the Director General, who shall make the final determination". According to the IAEA's Staff Rule 12.01.1(D)(1), a staff member who wishes to appeal against an administrative decision, shall, as a first step, address a letter to the Director General, requesting that the administrative decision be reviewed or reconsidered. However, Staff Rule 12.02.1(D) specifies that former staff members shall have the right to appeal directly to the Tribunal against administrative decisions taken after their separation from service.

3. It is necessary to recall that on 26 June 2019, the complainant filed compensation claims under Appendix D, which were rejected on 16 July 2019 by the Director of the Division of Human Resources (MTHR), on the ground that they had not been submitted within four months of the injury or onset of the illness. By letter of 31 July 2019, the complainant, referring to Article 40 of Appendix D, requested the acting Director General to "reverse the [16 July 2019] decision and authorize this matter to be submitted to the JABCC for its advice". On 23 August 2019, the acting Director General responded to the complainant that he had referred his 26 June 2019 claims to the JABCC for its advice and that he would revert to him upon receipt of the JABCC's recommendation. The complainant separated from the organization on 17 September 2019. On 2 December 2020, the complainant was notified of the Director General's decision, taken

following a recommendation of the JABCC, not to waive the relevant time limit, thus confirming the 16 July 2019 decision. By letter of 21 December 2020, the complainant's counsel again requested the Director General to "set aside [the Director of MTHR]'s decision of 16 July 2019". He also requested that the complainant be granted a compensatory payment "in connection with the breaking into his [office] cabinet". On 2 February 2021, the Director General responded to the 21 December 2020 letter from the complainant's counsel. Regarding the complainant's renewed request to set aside the 16 July 2019 decision, the Director General referred to his previous decision of 2 December 2020 and indicated that such decision could be appealed before the Tribunal. Regarding the complainant's additional request for a compensatory payment, the Director General indicated that this was related to the outcome of an investigation conducted by the United Nations Security and Safety Services (UNSSS) and that such request was time-barred. On 21 February 2021, the complainant filed the present complaint before the Tribunal, impugning what he considers to be the Director General's implied decision to reject the requests contained in his counsel's letter of 21 December 2020. The complainant asserts that he had not received the 2 February 2021 response from the Director General at the time when he filed his complaint before the Tribunal.

4. It is clear from the contents of the 31 July 2019 letter from the complainant and of the 21 December 2020 letter from his counsel that both communications constituted requests that the same 16 July 2019 decision be reviewed. Even if the complainant's 31 July 2019 request to "reverse the [16 July 2019] decision" were to be regarded as having been made and dealt with under Articles 40 and 41 of Appendix D, the evidence shows that, at the time of the 21 December 2020 letter, and when he filed his complaint before the Tribunal, the complainant had already been issued on 2 December 2020 with a decision on his request for reconsideration of the 16 July 2019 decision, thus providing him with a final decision on his compensation claims pursuant to Article 42 of Appendix D. It is unnecessary to establish whether or not, when he filed his complaint before the Tribunal, the complainant had received the 2 February 2021 response from the Director General to the

21 December 2020 letter from his counsel, since, regarding the complainant's reiterated request that the 16 July 2019 decision be set aside, the 2 February 2021 response merely confirmed the Director General's decision taken on 2 December 2020, specifying that such decision could be appealed before the Tribunal. Therefore, pursuant to Staff Rule 12.02.1(D), the 2 December 2020 decision is the decision that the complainant, being a former staff member at the time when it was taken, should have impugned before the Tribunal within the ninety-day time limit prescribed by its Statute. He did not do so. It follows that the aspects of the complaint involving the complainant's 26 June 2019 compensation claims made under Appendix D are irreceivable.

5. Regarding the complainant's request for a compensatory payment "in connection with the breaking into his [office] cabinet" contained in the 21 December 2020 letter from his counsel, it appears from the file that this request for compensation relates to the outcome of an investigation by UNSSS that the complainant did not challenge on time. As the Tribunal recalled in Judgments 4830, consideration 6, 4742, consideration 9, and 4655, consideration 15, in a dispute involving a challenge to individual decisions, compensation for injury arising from the alleged unlawfulness of such decisions could only be granted as a consequence of their setting aside, which presupposes by definition that they have been challenged within the applicable time limit. The aspects of the complaint involving the complainant's request for a compensatory payment "in connection with the breaking into his [office] cabinet" contained in the 21 December 2020 letter from his counsel are thus also irreceivable.

6. It follows from the foregoing that the complaint must be dismissed in its entirety. The complainant's request for oral proceedings is accordingly rejected.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 21 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER