Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. (Nos. 4 and 5)

v.

IAEA

120th Session **Judgment No. 3491**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth and fifth complaints filed by Ms H. S. against the International Atomic Energy Agency (IAEA) on 31 July 2012 and corrected on 7 November 2012, the IAEA's single reply of 28 February 2013, the complainant's rejoinder of 31 May and the IAEA's surrejoinder of 5 September 2013;

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:

Part of the background to the present case is to be found in Judgment 3215, delivered on 4 July 2013. Suffice it to recall that the complainant suffered four service-incurred injuries which, according to the Medical Board convened under Appendix D to the Staff Regulations and Staff Rules, led to a 19 per cent loss of her bodily function with 50 per cent of that loss being attributable to the aforesaid injuries.

At the beginning of 2010, her treating physician, Dr H., recommended that she engage in regular swimming therapy. Further to this recommendation, in April 2010 the complainant joined a gym for an initial period of five months. The cost of her membership for

this five-month period was fully reimbursed by the IAEA, upon the recommendation of the Joint Advisory Board on Compensation Claims (JABCC). However, the complainant was subsequently notified, through memoranda of 21 May, 13 July and 15 September 2010 from the Chairperson of the JABCC, that in the future reimbursement of medical expenses by the IAEA would be made by reference to the latest edition of the Occupational Medicine Practice Guidelines of the American College of Occupational and Environmental Medicine (hereinafter "the Occupational Medicine Practice Guidelines"). She was also advised to contact Dr L., the Director of the Vienna International Centre (VIC) Medical Service, and to coordinate with him on any future treatment so as to ensure appropriate management of her health situation.

In October 2010 the complainant renewed her membership of the gym for one year and on 17 January 2011 she submitted a claim for reimbursement of the relevant cost. In February 2011 Dr L. and Dr H. consulted with regard to the complainant's treatment plan. Although they agreed on a plan which included swimming therapy three times per week for eight weeks, during their consultation Dr L. informed Dr H. that the IAEA would reimburse the cost of the complainant's swimming therapy during these eight weeks but only as an exceptional measure and that the cost of swimming therapy would no longer be reimbursed after that. On 13 April 2011 the complainant met with Dr L. to discuss the treatment plan agreed upon with Dr H. At the meeting, Dr L. told the complainant that swimming therapy costs would no longer be reimbursed and that leave taken for such therapy would no longer fall under certified sick leave. The complainant expressed her disagreement with the position advanced by Dr L., arguing that Dr H. recommended that she continue to engage in swimming therapy.

By a memorandum of 17 June 2011, the complainant was notified of the Director General's decision, taken further to the JABCC's recommendation, to only partially reimburse the cost of her one-year membership of the gym. On 21 July 2011 she sought a review of this decision pursuant to Article 40 of Appendix D. By a letter of 15 August 2011, the Director General informed her that he had decided not to

grant her request on the ground that there was no error in the JABCC's determination of the matter – the Director General reviewed her request under Staff Rule 12.01.1(D) because he considered that it did not fall within the purview of Article 40 of Appendix D. On 5 October 2011 the complainant appealed with the Joint Appeal Board (JAB) the Director General's decision not to grant her request. She claimed full reimbursement of her gym membership and costs (appeal underlying the complainant's fourth complaint).

Soon after, the complainant received the Director General's decision of 18 October 2011, taken further to a recommendation by the JABCC, to deny her the reinstatement of sick leave days taken for swimming therapy after February 2011. On 11 November 2011 she sought a review of this decision pursuant to Appendix D, although this time she requested guidance as to whether her request should instead be submitted under Staff Rule 12.01.1(D). By a letter of 6 December 2011, the Director General rejected the complainant's request under Staff Rule 12.01.1(D) on the ground that swimming therapy was not endorsed as a treatment under the Occupational Medicine Practice Guidelines and that, following consultations with Dr H., Dr L. had determined that it would not be continued after February 2011. On 3 January 2012 the complainant filed a further appeal with the JAB requesting the reinstatement of her sick leave days taken for swimming therapy and moral damages (appeal underlying the complainant's fifth complaint).

The JAB issued its report on 29 March 2012. It recommended the rejection of the two appeals on the ground that the IAEA had properly reimbursed the complainant for the cost of her gym membership and had also properly reinstated the sick leave days she had taken for swimming therapy in accordance with the treatment plan agreed upon by Dr L. and Dr H. Through a letter of 27 April 2012, the Director General notified the complainant of his decision to accept the JAB's recommendations. That is the decision impugned by the complainant in her fourth and fifth complaints to the Tribunal.

In her fourth complaint, the complainant asks the Tribunal to set aside the impugned decision and to order the IAEA to pay her material

damages in the amount of 414 euros, together with interest at 8 per cent from January 2011. She claims moral damages and costs.

In her fifth complaint, she asks the Tribunal to set aside the impugned decision and to order the reinstatement of all sick leave or annual leave days she has taken for the purpose of engaging in swimming therapy. She seeks moral damages and costs.

The IAEA invites the Tribunal to dismiss both complaints in their entirety.

CONSIDERATIONS

1. The complainant requests the joinder of her two complaints to which the IAEA has no objection. As the two complaints arise from the same facts, raise similar issues of law and contain the same arguments, they are joined and will be the subject of a single judgment.

2. As noted above, the complainant launched two internal appeals from the IAEA's refusal to fully reimburse the cost of her extended gym membership and to reinstate the sick leave she took for swimming therapy at the gym. The Joint Appeals Board (JAB) took note of the two memoranda of July 2010 and September 2010 from the Chair of the Joint Advisory Board on Compensation Claims (JABCC) to the complainant and the e-mail exchange between Dr L. and Dr H. in February 2011. The JAB found that the "terms of the agreed treatment plan had been clearly communicated to the Appellant but she appears to have ignored them". The JAB concluded that the IAEA had compensated the complainant for the gym membership in accordance with the treatment plan agreed to by Dr L. and Dr H. Based on the same reasoning, the JAB concluded that the IAEA had reinstated the sick leave in keeping with the same treatment plan.

3. On 27 April 2012 the Director General accepted the JAB's conclusions and recommendations and dismissed the complainant's two internal appeals. He observed that on two occasions prior to the complainant's renewal of her gym membership, she was told by Dr L.

and the Chair of the JABCC to coordinate any future treatment plan with Dr L. As the complainant had not done so, she had been "properly reimbursed for only that portion of the yearly membership fee that corresponded to the period for which swimming therapy was an approved part of [her] treatment plan". Regarding the claim for the reinstatement of the sick leave, the Director General accepted the JAB's reasoning that the claim was "intrinsically linked" to the claim for the reimbursement of the gym membership and that the sick leave was reinstated in accordance with the treatment plan.

4. The complainant submits that the Director General erred in fact and in law in refusing her two claims. In summary, the complainant takes the position that in denying her two claims, the IAEA imposed an ad hoc rule, namely, that the IAEA would only reimburse the cost for treatment included in an agreed upon treatment plan and listed in the Occupational Medicine Practice Guidelines. As this rule has no foundation in Appendix D to the Staff Regulations and Staff Rules, it is *ultra vires*.

5. The IAEA submits that it acted in conformity with its procedures for determining claims entitlement and that the complainant has failed to demonstrate that its implementation of the JABCC's recommendations involved an error of law. The IAEA grounds its position on two practices. First, it is the IAEA's "standing practice" in cases where treatment is expected to be required over a long period of time to require that a treatment plan be established on the basis of consultation between the VIC Medical Service and the staff member's treating physician. Second, it is also a practice of the VIC Medical Service to establish treatment plans based on the treatments listed in the Occupational Medicine Practice Guidelines. Moreover, these two practices reflect the "direct implementation" of Articles 16 and 39 of Appendix D.

6. The IAEA points out that the JABCC advised the complainant that she should coordinate future treatment with Dr L., the Director of the VIC Medical Service. The IAEA states that this was for the purpose

of accommodating the complainant's requests and to ensure that she would be reimbursed for any treatment she received. Despite the JABCC's advice, the complainant did not seek written approval from the VIC Medical Service before she renewed her gym membership.

7. At this point, a more detailed review of the undisputed facts is useful. It is not disputed that in May 2010, the complainant was informed that "in future" the assessment of her treatment would be made by reference to the Occupational Medicine Practice Guidelines. This was reiterated by the Chair of the JABCC in his July memorandum to the complainant at which time he also informed her that she should immediately get in touch with Dr L. to coordinate any future treatment. In his September 2010 memorandum to the complainant, the Chair advised that the JABCC had taken note that swimming was included in the treatment plan submitted earlier in the year and therefore agreed that the cost should be reimbursed this time. He also advised that any future treatment should be closely coordinated with Dr L. to ensure the appropriate management of the complainant's health situation. The complainant was also asked to contact Dr L. before she submitted any further claims.

8. It is also not disputed that starting in 2009, yearly and quarterly treatment plans were prepared by Dr H. in consultation with Dr L. Up until February 2011, these treatment plans included swimming therapy. On 9 February 2011 Dr H. sent an e-mail to Dr L. to which he stated he had "attached [the complainant's] new treatment plan" and asked Dr L. for his response. The attached plan included the swimming therapy.

9. In his e-mail of 9 February in response to Dr H., Dr L. informed him that the cost of "limited evidence therapy" under the Occupational Medicine Practice Guidelines would no longer be reimbursed by the "UN". In the same e-mail, Dr L. states that in 2011 the "UN" will only once and exceptionally reimburse the cost of, among other things, "aqua training" for a period of eight weeks. As an

aside, in the context of the e-mail exchange the "UN" appears to be the IAEA.

10. Returning to the JAB's report, the Board's conclusions and recommendations were based on the complainant having had clear notice of the "agreed treatment plan" at the time she renewed her gym membership in October 2010, a plan that she chose to ignore. It is clear from the text of the report that the referenced treatment plan was the plan agreed to by Dr L. and Dr H. in February 2011. As the "agreed treatment plan" was made some four months after the complainant renewed her gym membership in October 2010, she could not have known about the "agreed treatment plan" and, in particular, that the cost of swimming therapy would no longer be reimbursed. The erroneous finding that the complainant knew and ignored the "agreed treatment plan" was central to the JAB's conclusions and recommendations. It follows that the JAB's conclusions and recommendations are fundamentally flawed by this erroneous finding of fact.

11. As the Director General accepted the JAB's conclusion and recommendation regarding the full reimbursement of the gym membership, his decision is also tainted by the erroneous finding of fact. However, it must also be observed that in his decision for refusing the claim, he added an additional consideration. Leaving aside that it was the Chair of the JABCC and not Dr H. who had advised the complainant to coordinate her treatment with Dr L., his decision appears to also be grounded on the fact that the complainant had failed to coordinate any future treatment plan with Dr L. Based on the evidence that treatment plans were in place from 2009 to February 2011, that swimming therapy was included in those treatment plans and that Dr H. initiated the discussion regarding a new treatment plan in February 2011, it is clear that at the time the complainant renewed her gym membership in October 2010, a treatment plan that included swimming therapy was in place. It is also clear that the complainant was unaware and would not have known that swimming therapy was not a listed treatment in the Occupational Medicine Practice Guidelines and thus not reimbursable at the time she renewed her gym membership.

At the time the Chair of the JABCC informed the complainant that in future, her treatment plan would be based on the Occupational Medicine Practice Guidelines, the complainant should also have been informed that swimming therapy was not endorsed in these Guidelines and that in future it would not be reimbursed so that she could govern herself accordingly. In these circumstances, the impugned decision and the Director General's earlier decisions will be set aside and the IAEA will be ordered to pay the complainant 414 euros for the remaining portion of the gym membership together with interest at 5 per cent per annum from the day she submitted the claim to the date of payment. The IAEA will also be ordered to reinstate the complainant's sick leave for the swimming therapy taken during the currency of the gym membership. She is also entitled to an award of costs in the amount of 2,000 euros.

DECISION

For the above reasons,

1. The Director General's decision of 27 April 2012 and his earlier decisions of 6 December 2011 and 15 August 2011 are set aside.
2. The IAEA shall pay the complainant material damages in the amount of 414 euros, together with interest at 5 per cent per annum from the date the reimbursement of the gym membership was claimed to the date of payment.
3. It shall pay the complainant the amount of 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2015, 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 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ