S. (No. 12)

v.

IAEA

123rd Session **Judgment No. 3735**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Ms H. S. against the International Atomic Energy Agency (IAEA) on 2 May 2014 and corrected on 20 June, the IAEA's reply of 2 October, the complainant's rejoinder of 12 December 2014 and the IAEA's surrejoinder of 23 March 2015;

Considering Articles II, paragraph 5, and VII 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 Director General's decision to recognise her illness of 27 January 2012 as "possibly related" to the service-incurred injuries which she sustained on previous occasions.

The complainant is a former staff member of the IAEA who separated from the Agency for health reasons in August 2013. On 27 January 2012 she became ill while attending a hearing of the Joint Appeals Board (JAB) on IAEA premises. On 28 March 2012 she submitted a claim for the recognition of that illness as service-incurred and the reimbursement of all related medical expenses under Appendix D to the Staff Regulations and Staff Rules. By a memorandum of 28 June 2012, the Secretary of

the Joint Advisory Board on Compensation Claims (JABCC) informed her that the Director General had decided to recognise the illness which she had suffered on 27 January 2012 as "possibly related" to the service-incurred injuries which she had sustained on previous occasions and that arrangements had been made to reimburse the related medical costs and to reinstate her sick leave days. On 19 July 2012 the complainant wrote to the Director General. Referring to his decision of 28 June 2012, she argued that the balance of her claims had apparently been rejected and she requested a review of that decision, reimbursement in full of the medical expenses claimed together with interest at the rate of 8 per cent and the convening of a medical board. The Director General replied by a letter of 15 August 2012, clarifying that her claims under Appendix D had not been rejected and that the Division of Human Resources would now proceed with the reimbursement of the relevant medical expenses. He added that there was therefore no need to convene a medical board.

On 8 November 2012 the complainant asked that her case be resubmitted to the JABCC in order for it to recognise the work-related nature of her illness of 27 January 2012. On 15 May 2013 she was notified of the Director General's decision, taken further to the JABCC's recommendation, not to re-open her case on the grounds that there was "no new evidence and therefore no basis to revisit the previous decision". In a letter of 7 June 2013 to the Director General, she asserted that his decision conveyed to her on 28 June 2012 was ambiguous and, since it appeared to be a decision not to recognise her illness as service-incurred, she reiterated her request for the convening of a medical board to examine the medical aspects of her case. The Director General replied on 11 July 2013 stating that, as the complainant had not requested a review of the 15 August 2012 decision within the applicable two-month time limit but had instead attempted to resubmit her request for the recognition of her illness as service-incurred, that latter request could not "restart the clock".

On 6 August 2013 the complainant filed an appeal with the Joint Appeals Board (JAB) requesting it to recommend that the Director General reconfirm unequivocally that the illness she had suffered on 27 January 2012 was service-incurred and that he reimburse her legal costs.

In its report of 31 December 2013, the JAB concluded that it did not have competence to deal with the matter because the complainant's request was not an appeal against an administrative decision alleging the non-observance of her terms of appointment, as required by Staff Rule 12.01.1(C)(1). By a letter of 31 January 2014, the complainant was informed of the Director General's decision to dismiss her appeal as time-barred. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to find that the injury sustained by the complainant on 27 January 2012 on the IAEA premises was service-incurred and that she is therefore entitled to all benefits provided under Appendix D in respect of that injury, to send the matter back to the IAEA for further processing of her claim, and to award her moral damages and costs.

The IAEA asks the Tribunal to dismiss the complaint in its entirety and, as it is vexatious, to order the complainant to pay the costs of the proceedings.

CONSIDERATIONS

1. The central issue in this complaint is receivability. In the complainant's 6 August 2013 appeal, she asked the JAB "to recommend to the Director General to reconfirm unequivocally that the illness [she] suffered on 27 January 2012 was service-incurred, and to also recommend reimbursement of [her] legal costs". The JAB concluded that it was not competent to deal with the matter as the complainant's request was not an appeal against an administrative decision alleging the non-observance of the terms of appointment as provided in Staff Rule 12.01.1(C)(1).

2. On 31 January 2014, the Director General dimissed the appeal. He advised the complainant that as she had not brought an appeal against his decision of 15 August 2012 within the two months required by Staff Rule 12.01.1(D)(1) her appeal was time-barred.

3. The complainant submits that her appeal challenged the 11 July 2013 decision implicitly rejecting her claim for the recognition

of her illness of 27 January 2012 as service-incurred. The complainant argues that because the IAEA did not act in good faith and misled her, it cannot now rely on the matter being time-barred. She maintains that the Director General's decision of 15 August 2012 was ambiguous and she was not given any advice that she could file an appeal or that her illness had not been recognized as service-incurred.

4. In Judgment 2011, under 18, the Tribunal explained the conditions that must be met for a decision to be considered a new decision. It reads:

> "[...] According to the case law of the Tribunal, for a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) the following conditions are to be met. The new decision must alter the previous decision and not be identical in substance, or at least must provide further justification, and must relate to different issues from the previous one or be based on new grounds (see Judgments 660 and 759). It must not be a mere confirmation of the original decision (see Judgment 1304). The fact that discussions take place after a final decision is reached does not mean that the Organization has taken a new and final decision. A decision made in different terms, but with the same meaning and purport as a previous one, does not constitute a new decision giving rise to new time limits (see Judgment 586), nor does a reply to requests for reconsideration made after a final decision has been taken (see Judgment 1528)."

5. In her 7 June 2013 letter to the Director General, the complainant took note of the Director General's letter of 15 August 2012 in which he advised her that her claims were not rejected and repeated that the new injury possibly related to the service-incurred injuries which were previously sustained. The complainant stated that based on a memorandum of 15 May 2013 it appeared that the Director General had taken a decision not to recognize her injury as service-incurred. The complainant reiterated her request for the convening of a medical board to consider the medical aspect of her case.

6. The Director-MTHR's Interoffice Memorandum of 15 May 2013 simply advised the complainant that the Director General had decided on the recommendation of the JABCC that there was no new evidence and no basis on which to revisit the previous decision. In his letter of 11 July 2013, the Director General reviewed the history of the

file, noted that the complainant had not contested the decision conveyed in the memorandum of 15 May 2013 and that a final decision under Appendix D had been communicated to her on 15 August 2012 and that no appeal of that decision had been commenced within the prescribed two months in the rules.

7. As it cannot be said that the letter of 11 July 2013 in any way altered the earlier decision of 15 August 2012, provided further justification for the decision or was related to different issues, the 11 July letter was not a new administrative decision subject to challenge pursuant to the Staff Rules. The JAB did not err in finding that it was not competent to deal with the appeal. Additionally, as the complainant did not challenge the decision of 15 August 2012, her request of 7 June 2013 in relation to the same matters dealt with in the earlier decision was clearly time-barred. It follows that the present complaint is irreceivable and will be dismissed.

DECISION

For the above reasons,

The complaint is 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