R. (No. 2)

v.

IAEA

125th Session **Judgment No. 3910**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr G. R. against the International Atomic Energy Agency (IAEA) on 22 July 2014 and corrected on 28 August 2014, the IAEA's reply of 5 January 2015, the complainant's rejoinder of 27 March and the IAEA's surrejoinder of 10 July, corrected on 22 July 2015;

Considering Articles II, paragraph 5, and VII 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 IAEA's refusal to recognise his illness as service-incurred.

On 16 May 2012 the complainant requested that the Joint Advisory Board on Compensation Claims (JABCC) recognise his mental disorder as a service-incurred illness 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 order to have the costs of treatment reimbursed and certified sick leave reinstated. He linked the cause of his health condition to an earlier decision of the Director General concerning injuries he had sustained in September 1999 and July 2010, respectively.

On 24 October he was informed that, further to the JABCC's recommendation, the Director General had decided to reject his request on the basis that "the [mental] condition was pre-existent".

On 28 November 2012 the complainant asked the Director General to reconsider his decision pursuant to Article 40 of Appendix D and, with reference to Article 41, he requested that a medical board be convened. He selected Dr S., the IAEA selected Dr B., and these two doctors agreed to select Dr V. as the third member and Chair of the Medical Board.

The Medical Board met on 3 June 2013. In October 2013 Dr S. submitted a report to Dr V. in which she made her own evaluation of the complainant's mental condition. In December 2013 she received the minutes of the meeting which were signed by Dr B. and Dr V. She was asked to sign the minutes and to submit her invoice. She refused to sign them. On 22 February 2014 Dr B. submitted the Medical Board report to the JABCC with the minutes of the 3 June meeting attached. Dr S.'s report was not sent to the JABCC. The latter accepted the conclusion of Dr B. and Dr V. according to which the complainant's mental disorder was "pre-existent before 2010" and recommended that the Director General reject the complainant's claim on that basis.

By a memorandum dated 22 April 2014, the complainant was informed that the Director General had followed the recommendation of the JABCC and, in light of the report of the Medical Board, confirmed that the complainant's mental condition was pre-existent. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to award him material damages in accordance with Appendix D retroactively and with interest of 8 per cent or, alternatively, to refer the matter back to the JABCC for reconsideration, to award him moral damages in the amount of 30,000 euros and costs in the amount of 10,000 euros. Additionally, he requests that the IAEA be ordered to produce a certain number of documents in the possession of the JABCC.

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

CONSIDERATIONS

1. This complaint concerns the complainant's 16 May 2012 request that the JABCC recognise his condition as a service-incurred illness under Appendix D to the Staff Regulations and Staff Rules. On 24 October 2012 the complainant was informed of the Director General's decision to accept the recommendation of the JABCC and to reject the request on the basis that his condition was "pre-existent". On 28 November 2012, pursuant to Article 40 of Appendix D, the complainant asked the Director General to reconsider his decision and requested the convening of a medical board as provided in Article 41. In the impugned decision of 22 April 2014, received by the complainant on 10 July 2014, the complainant was informed that, on the recommendation of the JABCC, the Director General approved the Medical Board's report confirming that the complainant's condition was "pre-existent". The complainant filed a complaint with the Tribunal against this decision on 22 July 2014.

2. The complainant submits that, as the Director General's 22 April 2014 decision was a final decision, he has exhausted the internal means of redress as required in Article VII, paragraph 1, of the Tribunal's Statute, and, therefore, the complaint is receivable. In support of his position, the complainant relies on the Tribunal's observations in Judgment 2753, considerations 5 and 6, which state:

> "5. The question of receivability depends on the interpretation of Article 17 of Appendix D and Chapter XII of the Staff Rules. Article 17 of Appendix D provides for the establishment of a medical board to consider and report to the Advisory Board on the medical aspects of appeals in case of injury or illness. The Advisory Board shall then 'transmit its recommendations together with the report of the medical board to the Director-General who shall make the final determination'.
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> Staff Rule 112.03(a) stipulates that '[s]taff members shall have the right of further appeal against administrative decisions by applying to the Administrative Tribunal of the International Labour Organization in accordance with the provisions of the Statute of the Tribunal'. Pursuant to Staff Rule 112.03(b) '[a]n application to the Tribunal shall not be receivable unless the applicant has previously submitted the dispute to the Joint

> Appeals Board under rule 112.01 and the Board has communicated its opinion to the Director-General [...]'.
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> 6. In the Tribunal's view, it is illogical that appeals in case of injury or illness must, before being allowed to go to the Tribunal, go through two distinct appeals processes, first the medical board and the Advisory Board and then the Joint Appeals Board. Likewise, it is unreasonable to expect that the Director-General must decide on an appeal three times before that appeal is brought before the Tribunal. The Tribunal considers that appeals lodged before a medical board and the Advisory Board run parallel to appeals brought before the Joint Appeals Board. Therefore, upon receipt of the Director-General's final decision the staff member was entitled to lodge a complaint with the Tribunal, in accordance with Article VII of its Statute requiring the exhaustion of internal remedies. It should be noted that the use of the term 'final determination' in Article 17 of Appendix D shows that appeals in case of injury or illness are governed by a 'special rule' which takes precedence over 'ordinary rules' unless the particular circumstances of a case require otherwise. [...]"

3. In advancing his position, the complainant points out that according to the 22 April 2014 memorandum the Director General had made a "final determination". The complainant also notes that the provisions of Article 17(a)(b) and (c) in Appendix D of UNIDO's rules, which the Tribunal considered in Judgment 2753, are identical to Articles 40, 41 and 42 in Appendix D of the IAEA's rules. The IAEA disputes the complainant's assertion that he has exhausted the internal means of redress. The IAEA submits that Staff Rule 12.01.1(D) governing the appeal process provides a compulsory appeal procedure for staff members wishing to contest an administrative decision. Moreover, there is nothing in the Staff Regulations and Rules indicating that the procedure for reconsideration under Appendix D was intended to replace the appeal process under Staff Rule 12.01.1(D). The IAEA contends that the complainant's reliance on Judgment 2753 to argue that Appendix D has a separate appeal procedure that runs parallel to the internal appeal procedure before the JAB is "without merit". Judgment 2753 was limited to an analysis of the UNIDO internal appeal process and, as such, the Tribunal's holdings in that case are of limited relevance in interpreting the IAEA's legal framework. Contrary to the IAEA's assertion that the Tribunal's analysis in Judgment 2753 was limited to UNIDO's internal appeal process, as noted in consideration 5

of that judgment, the Tribunal's analysis focused on the interpretation of Article 17 of Appendix D. As the IAEA has not made any submissions directed at the correctness of the Tribunal's interpretation of the relevant UNIDO Appendix D provisions, identical to those of the IAEA, warranting a departure from the reasoning cited above in consideration 2, the IAEA's position is rejected and the complaint is receivable.

4. The complainant submits that the impugned decision is tainted by violations of his due process rights and errors of law and fact. The complainant advances a number of arguments in support of his position. First, he was never given notice of the composition of the Medical Board; second, Dr V. was not qualified to sit on the Medical Board as he did not have expertise in psychiatry; third, Dr S. was not given the relevant reports referred to by Dr B. during the Medical Board meeting despite her requests; fourth, Dr S. was denied the opportunity to express her opinion to the Medical Board; fifth, Dr V. transmitted the medical report to Dr S. for signature without prior consultation on its substance; sixth, the medical report was not validly submitted to the JABCC as it was signed by only two members of the Medical Board; and, lastly, Dr S. was not permitted to file a minority report and the report she had submitted to Dr V., the Chair of the Medical Board, was not sent to the JABCC with the medical report. This latter argument raises the issue that is determinative of the outcome of the present complaint.

5. The following is a chronology of the relevant facts. The Medical Board met on 3 June 2013. According to the complainant, at the meeting, Dr B. referred to medical reports from 2006 regarding a diagnosis of the complainant's condition at that time. Dr S. noted that she had not seen the referenced reports and requested copies of them. According to the complainant, Dr B. did not have the reports "with her", therefore, Dr S. advised that she would finish her report upon receipt of the additional medical reports. The complainant points out that Dr V. was also not provided with the reports to which Dr B. allegedly referred. As Dr B. did not provide the requested medical reports, Dr S. obtained the medical reports herself and sent her report to Dr V. on 11 October

2013. The complainant also notes that the Medical Board did not reach any final conclusion at the meeting.

6. It is convenient to deal with the third and fourth arguments advanced by the complainant at this juncture. The IAEA stresses that all three members of the Medical Board were sent the medical reports held by the Vienna Medical Services, including from the period 2006-2007. There is nothing in the medical report itself indicating that Dr B. had referred to two additional medical reports that had not been provided to Dr S. or Dr V. The only evidence in the record is that Dr S. obtained two medical reports herself. Additionally, the complainant did not adduce any evidence in support of his assertion that Dr S. was not given the opportunity to express her opinion to the Medical Board. As well as participating in the 3 June meeting of the Medical Board, Dr S. submitted her own report to Dr V. in October 2013. Accordingly, the complainant's third and fourth arguments are unfounded.

7. According to the complainant, on 5 December 2013 Dr S. received an undated document from Dr V.'s office entitled "Medical Board on 3 June 2013" signed by Dr V. and Dr B. Dr S. was asked to sign the document purported to be the Medical Board's report and to submit her invoice. The complainant notes that as Dr S. was not told who had drafted the document; was not consulted in advance regarding its content; disagreed with its factual content and the medical conclusions contained therein; and her October report was ignored and not mentioned, she did not sign the document. At this point, it may be observed that, contrary to the assertion in the complainant's fifth argument, this "undated document" was the original of the minutes of the 3 June 2013 meeting of the Medical Board being circulated to the Board members for signature and not the Medical Board report as asserted, and, as such, this argument is unfounded.

8. Dr S. lodged her disagreements with Dr B. and the Vienna International Centre (VIC) Medical Director and requested another meeting of the Board. On 10 January 2014 the VIC Medical Director wrote to Dr S. The Director informed Dr S. that her letter should have

been sent to the Chair of the Medical Board. However, in the interests of the complainant, who had been waiting for the Medical Board's report to be submitted back to the JABCC for a lengthy period of time, he was willing to advise the JABCC at its next meeting, when the Medical Board report would be considered, about her non-signature on the report and the information contained in her letter with her explanations for not signing, her objections and suggestions. The Director asked Dr S. to let him know whether she would like him to do this. Dr S. did not reply to the Director's email.

9. On 22 February 2014 Dr B. submitted the Medical Board report to the JABCC with the minutes of the 3 June 2013 meeting attached. The report relevantly notes that the Medical Board met on 3 June 2013 to discuss whether the complainant was suffering from a pre-existing mental health condition prior to his work-related accident. The report states that "[a]n agreement was reached that there had been a pre-existent medical condition amongst all three participants." Additionally, that "Dr [S.] volunteered to follow-up with a report on her own expertise which she had written on behalf of [the complainant]" which would be sent "to the Chair of the Medical Board in the following days". Although the date is not specified in the report, it does note that Dr S. sent her report to Dr V. Subsequently, efforts were made to arrange for Dr S.'s signature on the original minutes from 9 December 2013 onwards. The Medical Board report goes on to state that "[s]everal email exchanges followed, where Dr [S.] stated that she was unwilling to sign the minutes based on her own expertise and demanded that another Medical Board should be arranged with experts of her own choice". The report also notes that this same suggestion was also addressed to the Medical Director. As noted above, the complainant received on 10 July 2014 the Director General's 22 April 2014 decision rejecting his claim for compensation.

10. The determinative issue is whether the failure to provide Dr S.'s report to the JABCC constitutes a reviewable error. The IAEA submits that there is no provision in Appendix D that, in case of disagreement, the minority member is entitled to submit a minority report. The IAEA adds that, in any event, the fact that Dr S. did so, does

not prejudice the validity of the official Medical Board report submitted to the JABCC. At the outset, it is observed that it is not a matter of the "minority member [being] entitled to submit a minority report" or whether Appendix D contemplates a minority report. It is implicit in the composition of the three-member Medical Board provided in Article 41 that there may be a dissenting view. In the performance of its role to make recommendations to the Director General, it is essential that the JABCC have both the majority and dissenting opinions. In the end, it is for the Director General to make the final determination in light of all available information. The Agency's failure to provide the JABCC with Dr S.'s opinion, compromises the benefits of having a three-member Board and impairs the JABCC's ability to properly perform its function.

11. As to the complainant's first and second arguments, it is observed that there is no obligation to notify a claimant of the composition of a medical board. As well, it is also noted that the complainant's designated representative on the Medical Board accepted and, more importantly, could have but did not object to Dr V.'s selection as the third member of the Board. Accordingly, these two arguments are also unfounded.

12. In the circumstances, the Director General's decision of 22 April 2014 and his earlier decision of 24 October 2012 will be set aside. The matter will be remitted to the IAEA for the JABCC's reconsideration after having obtained a copy of Dr S.'s report. The complainant is entitled to an award of moral damages in the amount of 7,500 euros and costs in the amount of 5,000 euros. In the circumstances, the complainant's request for the production of documents is rejected.

DECISION

For the above reasons,

1. The Director General's decision of 22 April 2014 and his earlier decision of 24 October 2012 are set aside.

2. The matter is remitted to the IAEA for the JABCC's reconsideration after having obtained a copy of Dr S.'s report.

3. The IAEA shall pay the complainant moral damages in the amount of 7,500 euros.

4. The IAEA shall pay the complainant costs in the amount of 5,000 euros.

5. All other claims are dismissed.

In witness of this judgment, adopted on 31 October 2017, 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 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ