

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R. (No. 16)

v.

IAEA

136th Session

Judgment No. 4704

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mr R. R. against the International Atomic Energy Agency (IAEA) on 26 January 2019 and corrected on 6 March, the IAEA's reply of 17 June 2019, the complainant's rejoinder of 30 September 2019 and the IAEA's surrejoinder of 20 January 2020;

Considering the complainant's letter of 21 April 2023 to the Registrar of the Tribunal seeking the recusal of several judges;

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 determination made on his Clearance Certificate, upon his separation from service, that there was no medical reason to believe that he was incapacitated due to illness constituting an impairment to health likely to be permanent or of a long duration, as well as the decision to separate him from IAEA while on sick leave.

The complainant joined the IAEA in 2013. He was placed on certified sick leave in February 2017 and remained on sick leave until his separation from service on 31 May 2018, upon the expiry of his fixed-term appointment.

The complainant challenged the decision not to renew his fixed-term appointment before the Tribunal in the context of his sixth complaint, which was dismissed as entirely unfounded in Judgment 4346, delivered in public on 7 December 2020.

Meanwhile, in April 2018, the complainant was informed of the IAEA's separation process, which included a medical examination at the IAEA's medical service, the Vienna International Centre (VIC) Medical Service.

The complainant was examined by a Medical Officer at the VIC Medical Service on 28 May 2018.

On 29 May 2018, on the basis of the Medical Officer's notes and the complainant's medical file, Dr L., Medical Director of the VIC Medical Service, certified on the complainant's Clearance Certificate that there was no medical reason to believe that he was incapacitated owing to "illness constituting an impairment to health which is likely to be permanent or of a long duration" within the meaning of Article 33(a) of the Regulations and Rules of the United Nations Joint Staff Pension Fund (UNJSPF).

By letter of 26 September 2018, the complainant requested the IAEA to review the decision of 29 May 2018 and to "order the determination of [his] incapacitation". He also alleged that his separation from service while on certified sick leave was unlawful and claimed moral damages.

By a decision of 29 October 2018, the complainant was informed that, according to Paragraph 1 of Annex I, Part II, Section 7 to the Administrative Manual (AM.II/7) "Procedures concerning Disability", consideration for determination of incapacity to work is made upon receipt of a report from the staff member, her or his supervisors, or the Medical Director, to the Director of the Division of Human Resources. The determination whether the staff member is incapacitated is made by the IAEA's Staff Pension Committee (SPC), in accordance with

Paragraph 8 of Annex I to AM.II/7. In the complainant's case, no such request was made and, therefore, no further determination was required by the IAEA. He was nevertheless informed that, if he believed that he was incapacitated owing to illness constituting an impairment likely to be permanent or of a long duration, he could follow the procedures set out under Article 33 of the Regulations and Rules of the UNJSPF, as well as the procedures set out under Paragraph 9 of Annex I to AM.II/7. Paragraph 9 provides that a staff member may also request a determination of her or his incapacitation if no action has been taken under Paragraph 8, or whenever she or he alleges that on the date of her or his separation she or he was incapacitated within the meaning of the Regulations and Rules of the UNJSPF. The complainant was also advised that, since the determination is administered directly by the SPC, the Director General was not in a position to "order the determination" of the complainant's incapacitation, but that such a request should be addressed to the Secretary of the SPC, as provided under Paragraphs 9 and 10 of Annex I to AM.II/7 and Article 33 of the Regulations and Rules of the UNJSPF. Lastly, his claim for moral damages was rejected, on the ground that there was no provision in the Staff Regulations and Rules and no established administrative practice, which required the organisation to extend the complainant's contract because he was on sick leave at the time of the expiration of his appointment. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order, pursuant to the principles set forth in Judgments 3353, 938 and 607, that a medical inquiry be conducted to determine his incapacitation within the meaning of the Regulations and Rules of the UNJSPF. He claims material, moral, and consequential damages, as well as punitive damages, with interest on all sums awarded. He also seeks costs.

The IAEA requests the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. On 26 September 2018, the complainant requested the IAEA to review the decision made by Dr L., Medical Director of the Vienna International Centre (VIC) Medical Service, who had completed Item 10 in the VIC Medical Service section of the Clearance Certificate. Dr L. had ticked the two relevant boxes to complete the following statement: “[T]his is to confirm that there is medical reason to believe that the participant is not incapacitated within the meaning of Article 33(a) of the [Regulations and] Rules of the [United Nations Joint Staff Pension Fund (UNJSPF)] and needs not to [sic] be reviewed by the [Staff Pension Committee (SPC)] for the award of a disability benefit.” The complainant alleged that, in accordance with the Tribunal’s case law, “a staff member cannot be separated while on sick leave”, as stated in Judgment 938, consideration 12, and that the VIC Medical Service should have first determined his ability to return to work. He sought the quashing of Dr L.’s decision, the determination of his incapacitation within the meaning of the Regulations and Rules of the UNJSPF, and the award of equitable pecuniary compensation as a result of the breach of the duty of care by Dr L.’s negligent conduct. He also alleged that his separation from service while on certified sick leave was unlawful, and claimed moral damages.

2. By a letter dated 29 October 2018 from the Deputy Director General, Ms H., on behalf of the Director General, the IAEA informed the complainant that the Director General was not in a position to “order the determination” of the complainant’s incapacitation, as such a determination was administered directly by the SPC in accordance with Paragraphs 9 and 10 of the “Procedures concerning Disability”, contained in Annex I to AM.II/7. She also informed the complainant that, in accordance with Paragraphs 9 and 10 of Annex I to AM.II/7 and Article 33 of the Regulations and Rules of the UNJSPF, his request for a determination of his incapacitation to work should be addressed to the Secretary of the SPC. Finally, she rejected the complainant’s claim for moral damages on the ground that there was no provision in the Staff Regulations and Rules or established administrative practice requiring the IAEA to

extend a staff member's contract to cover sick leave at the time of the expiration of her or his appointment. This is the impugned decision.

3. The complainant bases his complaint mainly on the following grounds:

- (a) the underlying decision made by Dr L. and the impugned decision are manifestly unreasonable and not sufficiently substantiated, which constitutes a gross abuse of authority, and also breaches the principle *tu patere legem quam ipse fecisti*, since the Medical Director delegated the function of carrying out the medical examination to a Medical Officer;
- (b) the facts, including Dr L.'s certification, constituted institutional harassment;
- (c) the non-extension of his appointment was unlawful because the IAEA was under a positive obligation to determine his ability to return to work, so that he could be expressly separated on that date.

4. The IAEA raises receivability as a threshold issue. It submits that the complainant's claims concerning his incapacitation are irreceivable. Neither Dr L.'s certification nor the Director General's explanation in the impugned decision on that certification constituted an administrative decision.

5. It is well established in the Tribunal's case law that "[o]rdinarily, the process of decision-making involves a series of steps or findings which lead to a final decision. Those steps or findings do not constitute a decision, much less a final decision. They may be attacked as a part of a challenge to the final decision but they, themselves, cannot be the subject of a complaint to the Tribunal" (see Judgments 4404, consideration 3, 3961, consideration 4, 3876, consideration 5, and 3700, consideration 14).

6. According to Paragraph 3 of Annex I to AM.II/18, entitled "Medical Examinations", the purpose of the medical examination on separation is solely to determine whether there is **any indication** of the

staff member's incapacitation that may lead to claims under Appendix D of the Regulations and Rules of the UNJSPF. It does not delegate to the Medical Director the authority to assess the staff member's incapacitation. Instead, in accordance with Paragraphs 10 and 11, of Annex I to AM.II/7 "Procedures concerning Disability", it is the responsibility of the Secretary of the SPC, at the request of the Director of the Division of Human Resources or a staff member, to initiate the action foreseen under the Regulations and Rules of the UNJSPF and for the IAEA's SPC to determine the staff member's incapacitation. Indeed, Section H of the Regulations and Rules of the UNJSPF provides that "[t]he determination of incapacity for the purpose of disability benefits under article 33 (a) and (b) of the Regulations [...] shall, by virtue of the powers delegated in accordance with article 4(c), be made in each case by the staff pension committee of the organization by which the participant is employed". The IAEA correctly stated in the impugned decision that it was "not in a position to accede to [the complainant's] request to 'order the determination of [the complainant's] incapacitation'" and accordingly advised him of the recourse under Paragraph 9, Annex I to AM.II/7, which reads as follows:

"9. A staff member may also request a determination of his/her incapacitation if no action has been taken under paragraph 8 above, or whenever he/she alleges that on the date of separation he/she was incapacitated within the meaning of the Regulations of the UNJSPF."

The Tribunal finds that neither Dr L.'s certification nor the IAEA's statement in the impugned decision for the purpose of explaining Dr L.'s certification constitutes a final decision within the meaning of Article VII, paragraph 1, of the Tribunal's Statute. The complainant's claims concerning his incapacitation are therefore irreceivable.

7. In his final plea, the complainant asserts that the impugned decision violates the principles of law established by the Tribunal, relying on Judgments 3353, consideration 26, 938, consideration 12, and 607, consideration 17. He assumes that the impugned decision was the decision not to extend his contract. On that assumption he argues that: the case law has established the general principle that a staff member cannot be separated while on sick leave; where there is a gap in the

internal laws of the organisation, the standards of the United Nations (UN) common system including Section 3.9 of the UN Secretariat Administrative Instruction on sick leave (ST/AI/2005/3), and the general principles of the law of the international civil service should prevail; the IAEA sought to banish him from its premises, deprived him of social protection and forced him to hastily repatriate, causing him injury; the refusal to exchange terms for an amicable settlement willfully aggravated his condition; and the IAEA's unreasonable approach was dictated by some unauthorized purpose.

8. The IAEA denies the complainant's allegations in that the Tribunal's subsequent case law, for example, Judgment 3754, consideration 14, has clarified that it is lawful not to extend a staff member's contract to cover sick leave, especially when the organisation's rules do not provide for such an extension and there is no established practice requiring it to do so; that the duty of care was respected as the rules provide social protection, and the complainant's reliance on ST/AI/2005/3 is therefore misplaced; and that he was repatriated in accordance with the IAEA's policies and received full entitlements due to him upon separation.

9. The IAEA's legal position is correct. Judgments 938 and 607, on which the complainant relies, did not establish a general principle that a staff member may not be separated while on sick leave. The question of whether an organisation is under an obligation to extend a fixed-term contract to cover a period of sick leave must be determined by having regard to the organisation's rules, including any established practice which is binding on the organisation. This position is consistently stated in the Tribunal's case law, most recently in Judgment 3754, consideration 14:

“Early judgments of the Tribunal, such as Judgment 938 relied on by the complainant, may have been thought to establish a principle of general application that an official's employment could not be terminated while the official was on sick leave. However it is clear that no such principle of general application has been established by the Tribunal's case law. This issue was discussed by the Tribunal in Judgment 3175, consideration 14.”

10. As there was neither a provision in the IAEA's Staff Regulations and Staff Rules, nor an established practice, or a principle of general application, requiring the IAEA to extend a staff member's contract because she or he is on sick leave at the expiry of the contract, the IAEA was not obliged to extend the complainant's contract to cover his sick leave.

11. In considering whether the IAEA breached a duty of care by separating the complainant from service while he was on sick leave, the Tribunal has examined the social protection available to the complainant under the IAEA Staff Regulations and Staff Rules. In the present case, with respect to the complainant's alleged incapacitation, he had the option of submitting a request for a determination of his incapacitation in accordance with Annex I to AM.II/7 and the Regulations and Rules of the UNJSPF, in order to receive a disability benefit. As the IAEA Staff Regulations and Staff Rules provide staff members with ample social protection in the event of incapacitation, the complainant's allegation that there is a gap between the IAEA's internal laws and the standards of the UN common system is unfounded. His reliance on Section 3.9 of ST/AI/2005/3 "to fill the gap" is misplaced. The Tribunal finds that the duty of care was not breached when the IAEA refused the complainant's request to extend his contract to cover his sick leave. The Tribunal further notes that the complainant has made a claim for compensation for recognition of a service-incurred illness, and that his complaint concerning the refusal to grant him damages in connection with that claim is still pending before the Tribunal.

12. Additionally, Judgment 3353, consideration 26, cited by the complainant, is irrelevant to the present case. It dealt with the question of the reasonableness of the notice and held that the principle of good faith required an organisation to inform a staff member in advance of any action that it might take which might impair a staff member's rights or rightful interests.

13. The complainant's final plea is therefore unfounded and there is no evidence to prove that he suffered injury as a result of the matters contested in this complaint.

14. The complainant's allegation of institutional harassment is outside the scope of the present complaint.

15. In another judgment given this session, Judgment 4701, the Tribunal has addressed the question whether two of the judges of this panel should recuse themselves. It was decided that they should not.

16. In light of the above, the complaint must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 19 May 2023, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ