S. (No. 9)

v.

IAEA

124th Session **Judgment No. 3832**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Ms H. S. against the International Atomic Energy Agency (IAEA) on 18 December 2013 and corrected on 15 April 2014, the IAEA's reply of 18 August, the complainant's rejoinder of 6 November 2014 and IAEA's surrejoinder of 12 February 2015;

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 not to pay accrued annual leave as part of her separation entitlements.

By a letter of 1 March 2013 the complainant was informed by the IAEA Administration that it had been decided to award her a disability benefit payable under Article 33 of the Regulations of the United Nations Joint Staff Pension Fund (UNJSPF). In addition, the Director General had authorized the termination of her contract (with effect from the close of business on 31 July 2013) for health reasons. In accordance with the requirement of the UNJSPF that a participant must exhaust the paid leave due to them before commencement of the payment of a disability benefit, she would be placed on annual leave during the last months of her service in order to exhaust her accumulated annual leave

days prior to her separation from service; the expected start date of her annual leave would be notified to her in due course. By another letter of the same date she was notified of the estimates of her separation entitlements, her disability benefit, and her early retirement benefit in the event that she wished to take a lump sum together with a reduced pension.

On 14 March 2013 the complainant asked the Administration to confirm that she would not be separated from service until she had exhausted her sick leave entitlements in addition to her annual leave. In the absence of a reply, on 2 May she asked the Director General to review and reverse the decision of 1 March and to recalculate the effective date of the termination of her appointment taking into account all of her remaining leave entitlements. By a letter of 3 May from the Administration the complainant was informed that the termination date of her appointment had been determined after taking into account all of her sick leave and annual leave entitlements. In accordance with standard procedures, she had been placed on annual leave from 17 April to 31 July 2013. On 21 May the Administration responded to the complainant's request of 2 May and reiterated that the date of the termination of her appointment had been set after taking into account all of her leave entitlements.

On 30 May 2013 the complainant filed an appeal with the Joint Appeals Board (JAB) in which she challenged the decision to set 31 July 2013 as the date of the termination of her appointment on the grounds that the Administration had failed to take into account her sick leave entitlements.

In June 2013 the complainant was admitted to hospital for surgery unrelated to service-incurred injuries which she had previously sustained (for two days) and subsequently for pain treatment in respect of a service-incurred injury, for a total of 10 days.

The JAB issued its report on 19 July 2013. It concluded that the IAEA had properly taken into account the complainant's sick leave entitlements in calculating the date of the termination of her appointment and it recommended that the Director General dismiss the appeal. The Director General endorsed that recommendation and the complainant

was so informed by a letter of 26 July 2013. She did not appeal that decision before the Tribunal.

In a letter of 6 August 2013 the complainant informed the Director General that she had not received a notice of her actual separation entitlements; she requested an itemised list which was to include commutation of unused annual leave in the amount of 73 days as this amount had not been included in the estimate of her separation entitlements dated 1 March 2013. On 30 August she was informed by the Administration that her leave balance upon separation from service was nil and that she was not entitled to commutation of annual leave.

By a letter of 8 October 2013 the complainant was provided with the final calculation of her separation entitlements which did not include commutation of annual leave. On 21 October she requested the Director General to confirm that the internal appeal procedures applied to former staff members; in the event that they did she sought a review of the decision of 8 October to the extent that it denied commutation of her annual leave. By a letter of 18 November 2013 the Director General referred to the complainant's letter of 21 October and stated that he had no objection if she wished to bring an appeal directly to the Tribunal, subject to the Tribunal's Statute and Rules. That is the decision that the complainant identifies on the complaint form as the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. She seeks a lump sum payment for commutation of annual leave, with interest. She also claims moral damages and costs.

The IAEA requests the Tribunal to dismiss the complaint in its entirety. In its surrejoinder it asks the Tribunal to order the complainant to pay costs.

CONSIDERATIONS

1. During the course of her employment with the IAEA, the complainant suffered a number of injuries that were recognized as service-incurred and which led to the complainant being awarded a disability pension under Article 33 of the UNJSPF Regulations. Article 33 relevantly provides that the payment of the disability pension

shall commence on the "expiration of the paid leave due to the participant". The Tribunal notes that this Article is consistent with the IAEA's procedures set out below.

2. The complainant claims that at the time of her separation from service, using the IAEA's calculations, she had at least 124.5 days of sick leave entitlement remaining under Staff Rule 7.04.1(C). She submits that the IAEA's decision to exhaust her annual leave in place of permitting her to exhaust her sick leave entitlement under Staff Rule 7.04.1(C) deprived her of the value of the commutation of 60 days of annual leave.

3. Although this complaint is filed against a decision refusing the complainant's claim for commutation of her annual leave, the resolution of this claim also involves the interpretation of the IAEA's provisions regarding sick leave. Accordingly, a review of the relevant regulatory provisions governing sick leave generally and service-incurred illness and injury is necessary. Staff Rule 7.04.1(A) relevantly establishes the entitlement to sick leave for staff members who cannot perform their duties because of illness or injury. Staff Rule 7.04.1(C)(3), applicable to the complainant, states that the staff member:

> "[...] shall be granted sick leave of up to nine months on full pay, and of up to nine months on half pay in any period of four consecutive years, taking into account the period of four consecutive years preceding the date of the request for leave."

Part II, Section 7, Annex I, of the IAEA Administrative Manual, entitled "Procedures Concerning Disability", relevantly states at paragraphs 4 and 5:

> "4. If the staff member is incapacitated for work that is reasonably compatible with his/her abilities owing to injury or illness constituting an impairment to health which is likely to be permanent or of long duration, [the Director of the Division of Human Resources] may initiate termination action.
>
> 5. If termination action is contemplated under paragraph 4 above, the staff member shall first be allowed to exhaust his/her paid leave. [...]"

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" (Appendix D), at Article 17(a), sets out the payments due to a staff member for absences from duty as the result of a service-incurred illness or injury. It reads:

> "17(a) An official who suffers illness or injury within the scope of these rules shall be entitled during his/her absence from duty by reason thereof, to continue to receive the same salary and allowances as he/she would have received had he/she remained on duty, including any annual increment which he/she is awarded. These payments shall continue for a period of eighteen months from the first day of such absence or in case of intermittent absence, these payments shall not continue for more than eighteen months in any period of four consecutive years."

Article 18 states:

> "Absences from duty falling under the scope of Article 17 shall be considered sick leave. However, any such absences will not be charged to the sick leave entitlement under Staff Rule 7.04.1(C) and Special Staff Rule for Short-Term Staff 7.04.01(A)."

4. The question of legislative interpretation referred to in consideration 3, above, centers on whether a staff member who has suffered a service-incurred illness or injury and has exhausted the maximum period of sick leave of eighteen months provided for under Article 17(a) of Appendix D, can use any remaining sick leave entitlement under Staff Rule 7.04.1 for a service-incurred illness or injury. The IAEA contends that "paid leave" in paragraph 5 of the Procedures Concerning Disabilities refers to any accrued annual leave, and with respect to service-incurred injuries, to any accrued sick leave entitlements under Appendix D. It submits that on a plain reading of Appendix D, in particular the wording of Article 17, a staff member is entitled to payment of a full salary for a maximum of eighteen months in any period of four consecutive years. The IAEA argues that the meaning of the phrase "payments shall not continue for more than eighteen months" is unambiguous and limits the total entitlement to sick leave for a service-incurred injury to that provided for in Article 17. It rejects the complainant's position that Article 18 confirms that

unused sick leave under Staff Rule 7.04.1 may be used for absences relating to service-incurred injuries. Article 18 states that absences for service-incurred injuries "will not be charged to the sick leave entitlement under Staff Rule 7.04.1(C)". In the IAEA's view, reliance on Article 18 ignores the specific maximum period of eighteen months' sick leave provided for in Article 17.

5. It is observed that the IAEA refers to only a part of the sentence in Article 17(a) of Appendix D on which it bases its interpretation. The complete sentence reads: "*[t]hese payments* shall continue for a period of eighteen months from the first day of such absence or in case of intermittent absence, *these payments* shall not continue for more than eighteen months in any period of four consecutive years." (Emphasis added.) Read in the context of the entire provision, the words "these payments" clearly refer to the payment of the "salary and allowances" in the first sentence of that provision. While Article 17(a) limits the payment of salary and allowances under that provision to eighteen months, there is nothing in the provision that in any way can be construed as precluding access to unused sick leave under Staff Rule 7.04.1 for a service-incurred illness or injury once the entitlement under Article 17(a) has been exhausted. As to Article 18, it simply clarifies that absences under Article 17(a), that is, absences due to service-incurred illness or injuries, cannot be charged to the entitlement under Staff Rule 7.04.1. In fact, what appears to have happened in the present case, albeit apparently erroneously, is that the total number of sick leave days that were characterised by the IAEA as Appendix D sick leave far exceeded the complainant's entitlement to sick leave under Appendix D. As will become evident, there is no need to determine how or why this occurred.

6. For the four-year period at issue, the complainant was entitled to the payment of the sick leave benefit under Appendix D for 378 days and, pursuant to Staff Rule 7.04.1, she was entitled to 283.5 sick leave days at full pay for a total of 661.5 days (a month is taken to be 21 working days in the Staff Rule). In fact, over the course of the four-year period, the complainant took 685.6 days of certified sick leave,

of which 527 days were recognized under Appendix D as related to her service-incurred injuries and the remaining 158.6 were recognized as certified sick leave under Staff Rule 7.04.1(C). Based on the Tribunal's interpretation of the relevant provisions set out above, once the complainant had exhausted the 378 sick leave days to which she was entitled under Appendix D the remainder of the sick leave days related to service-incurred illness or injury, that is, 149 days, should have been recognized as sick leave under Staff Rule 7.04.1. Thus, in the four-year period, the complainant would have had 307.6 sick leave days recognized under Staff Rule 7.04.1 and the maximum 378 days recognized under Appendix D. It also follows that regardless of whether the sick leave days the complainant took were accounted for by the IAEA under Appendix D or Staff Rule 7.04.1, as of 17 April 2013, that is, the date upon which she was placed on annual leave, the number of recognized sick leave days taken by the complainant exceeded her combined entitlement under Appendix D and Staff Rule 7.04.1. As well, at that date, the complainant had only unused annual leave which had to be exhausted by the date of the termination of her contract under paragraph 5 of the Procedures Concerning Disability and was in fact exhausted. It follows that at the date of the termination of her contract the complainant had been fully compensated for her unused annual leave. A consideration of the remaining submissions is unnecessary in the circumstances and the complaint will be dismissed.

7. In the circumstances, no costs will be awarded to either party.

8. The IAEA requests that the Tribunal join the present proceedings with the proceedings regarding another complaint filed by the same complainant. As it has not been shown that the complaints raise similar issues of fact and law, this request is rejected.

DECISION

For the above reasons,

The complaint is dismissed, as is the IAEA's counter-claim.

In witness of this judgment, adopted on 9 May 2017, Mr Giuseppe Barbagallo, Vice-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 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ