Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. (No. 14)

v.

IAEA

(Application for interpretation and execution)

124th Session **Judgment No. 3821**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for interpretation and execution of Judgment 3491 filed by Ms H. S. on 18 December 2015 and corrected on 18 February 2016, the reply of the International Atomic Energy Agency (IAEA) of 22 June, the complainant's rejoinder of 10 October 2016 and the IAEA's surrejoinder of 16 January 2017;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 3491, delivered in public on 30 June 2015, in addition to other relief, the Tribunal ordered the IAEA to "reinstate the complainant's sick leave for the swimming therapy taken during the currency of the gym membership".

2. On 18 December 2015 the complainant filed the present application for interpretation and execution asking the Tribunal: (i) to clarify and conclude that Judgment 3491 requires the IAEA to reinstate her sick leave days, as set forth in consideration 11 of the judgment; (ii) to find that the IAEA has not executed Judgment 3491; and (iii) to order the IAEA to pay her as material damages the commutation of

7.75 days of annual leave, together with interest at the rate of 5 per cent per annum from 30 June 2015, on the ground that she was obliged to use her annual leave to engage in swimming therapy, since sick leave was not granted for that purpose. She claims moral damages and costs.

3. The IAEA submits that as Judgment 3491 has been fully executed and the present application exceeds the scope of an application for interpretation and execution, it is irreceivable. As the Tribunal observed in Judgment 3723, under 2, "[a]n application for execution of a judgment is, by definition, premised on the contention that the judgment in question has not been properly executed. Determining whether or not that contention is correct plainly involves an examination of the merits of the application. Hence the receivability of an application for execution cannot be challenged by the defendant organisation on that basis."

As this observation is equally applicable to the present case, the IAEA's receivability argument is rejected.

4. The complainant submits that between August 2011 and May 2012 she was engaged in swimming therapy for a total of 62 hours and 35 minutes or 7.75 days. In the complaint form, in addition to other relief, the complainant asks the Tribunal to order the IAEA to "pay as material damages commutation of 7.75 days of annual leave, on the grounds that [she] was obliged to utilize her annual leave to engage in swimming therapy since sick leave was not granted for that purpose". As an aside, in her rejoinder, the complainant acknowledges that arguably this time period extends beyond the "currency of the gym membership" contemplated in the Tribunal's order, in which case the amount of time to be reinstated would be 30 hours and 24 minutes.

5. The IAEA points out that at the relevant times the periods of swimming therapy were recorded as late arrivals and not as sick leave. Following the delivery of Judgment 3491, the IAEA retroactively recorded these periods as sick leave. For reasons that will become evident, a recital of the IAEA's various calculations and the recording of the reinstated sick leave is unnecessary.

6. In her pleadings, the complainant acknowledges that the time spent for swimming therapy was not deducted from her annual leave and that the sick leave for the swimming therapy was fully reinstated. Nonetheless, the complainant maintains that the retroactive reinstatement of sick leave subsequent to the Tribunal's order and well after her separation from the IAEA resulted in a change of the legal circumstances at the time of her separation on 31 July 2013. The complainant claims a balance of sick leave remaining on her account that is impossible for her to exhaust as she is separated from service. Thus, she seeks material damages in an amount equal to the number of days of reinstated sick leave calculated on the basis of her daily net base salary and emoluments during her last month of service. In this regard, it is observed that, if a staff member's appointment is terminated for health reasons, paragraph 5 of the Procedures Concerning Disability set out in Administrative Manual, Part II, Section 7, Annex 1, requires that "the staff member shall first be allowed to exhaust his/her paid leave".

7. The Tribunal's reasons and conclusion in Judgment 3832, also delivered in public on this date, are determinative of the outcome of the present application. In this earlier complaint, the complainant claimed that at the time of her separation on 31 July 2013 she had at least 124.5 days of regular sick leave entitlement remaining. She submitted that the IAEA's decision to exhaust her annual leave in place of permitting her to exhaust her non-service incurred sick leave deprived her of the value of the commutation of 60 days of annual leave. At consideration 6 of Judgment 3832, the Tribunal stated:

> "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."

8. Contrary to her assertion, it is clear that at the time of her separation the complainant had exceeded and exhausted all her sick leave entitlements under both Appendix D and Staff Rule 7.04.1. Accordingly, her application for interpretation and execution of Judgment 3491 will be dismissed.

DECISION

For the above reasons,

The application is dismissed.

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