Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B.

v.

IAEA

133rd Session **Judgment No. 4465**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. B. Jr. against the International Atomic Energy Agency (IAEA) on 15 February 2019 and corrected on 29 March, the IAEA's reply of 11 July, the complainant's rejoinder of 4 December 2019 and the IAEA's surrejoinder of 11 March 2020;

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 decision to cease paying boarding assistance for his son following amendments to the education grant scheme.

The complainant joined the IAEA in 2005. At the material time he held a grade P-5 post. On 9 February 2017 staff members were informed that, following a recommendation of the International Civil Service Commission (ICSC) which had been approved by the United Nations General Assembly, the Director General had approved, with effect from the school year in progress on 1 January 2018, amendments to the education grant scheme.

On 22 September 2017 the complainant wrote to the Director General explaining that the recent changes to the education grant scheme (specifically, removing boarding assistance and the elimination

of the travel grant) caused his family significant financial hardship. He therefore requested that pursuant to Staff Rule 5.04.1(F)(2) he be exceptionally granted for the 2017-2018 academic year boarding assistance for his eldest son enrolled in university since 2014.

On 31 October 2017 the Director of the Division of Human Resources replied to the complainant that, according to the above-mentioned Staff Rule, boarding assistance could exceptionally be granted only for children attending an educational institution at the primary or secondary level, which was not the case of his son.

The complainant requested the review of that decision, which was rejected by the Director General on 19 December 2017. He lodged an appeal with the Joint Appeals Board on 30 January 2018.

In its report of 25 October 2018 the Joint Appeals Board, which had heard the complainant on 18 May, noted that the wording of Staff Rule 5.04.1(F)(2) limited its application to cases of boarding assistance at the primary and secondary level. Nevertheless, it concluded that the application of the new "compensation package" had an immediate and relatively seriously detrimental effect on staff members in the position of the complainant. Consequently, it recommended that some reasonable financial bridging arrangements be provided to staff in the complainant's position in order to lessen the impact of the revised education grant scheme. It added that the question whether the amendment breached the complainant's acquired rights was a matter which should be addressed by the Tribunal.

On 20 November 2018 the Director General informed the complainant that he had decided to reject the Joint Appeals Board's recommendation because, as mentioned in the decision of 19 December 2017, the complainant's request fell outside the scope of his discretionary authority. As there was no basis to reverse his decision of 19 December 2017, he had decided to dismiss the appeal. He nevertheless concurred with the Board's view that the issue of breach of acquired rights should be addressed by the Tribunal. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to order that he be reimbursed, with interest, the boarding and travel expenses he incurred for the academic year 2017-2018, and to decide that the education grant scheme in force prior to the amendments remain in effect under his employment contract with the IAEA. He seeks moral damages, as well as costs.

The IAEA asks the Tribunal to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. The complainant is a member of the staff of the IAEA. He is based at the Agency's headquarters in Vienna, Austria, a category H (headquarters) duty station. He is an American and Australian citizen. His country of home leave is the United States of America. He joined the Agency in 2005 and, at that time, had two children aged 5 and 9. In 2017 one of these children, a son, was attending a university in the United States of America and had been doing so since 2014. The son started his fourth year of tertiary study in September 2017.

2. These proceedings relate to the operation of provisions in the IAEA's Staff Regulations and Staff Rules concerning Education Grants: Staff Regulation 5.04 and Staff Rule 5.04.1. Until at least 2017 these provisions (the former Rule) conferred, in specified circumstances, benefits in relation to children of staff attending university including boarding assistance and travel expenses. The provisions were amended and, relevantly, no benefit was payable in relation to a child attending university for the expenses last mentioned. The complainant sought exceptional approval for payment of boarding assistance for his son at university under Staff Rule 5.04.1 in its new form (the new Rule) on 22 September 2017.

3. This claim was rejected on 31 October 2017 by the Director of the Division of Human Resources on the basis that the new Rule did not authorise the payment of boarding expenses, even exceptionally, for a child in an educational institution at the post-secondary level. The impugned decision challenged in these proceedings is a decision of the Director General of 20 November 2018 dismissing an internal appeal against an earlier decision of 19 December 2017 rejecting the complainant's request. The complainant asserts, as he did in the internal proceedings, that his right to payment under the former Rule was an acquired right but in the proceedings before the Tribunal he argues, additionally, that the new Rule had an unlawful retroactive effect. He also argues that the IAEA breached its duty of care towards him.

4. It is convenient to commence by considering the argument about breach of an acquired right. The amendment to Staff Rule 5.04.1 had its genesis in a decision of the United Nations (UN) General Assembly recently discussed in Judgment 4381. Changes were made to salary and benefits of Professional and higher categories of staff in the UN common system mostly arising from a proposal of the ICSC in 2012 to undertake a review of the compensation package of the staff in the UN common system in those categories and a decision of the UN General Assembly in 2013 requesting that the review be undertaken. The 2015 ICSC Annual Report contained a detailed discussion of what emerged from that review and proposals for the future involving changes to salary structures and benefits payable to staff in the UN common system. Those proposals were adopted by the UN General Assembly in December 2015.

5. One change made involved the introduction of a unified salary scale eliminating the distinction between staff who were single and those with dependents. For those staff with dependents who would suffer significant reductions in their salary as a result of the introduction of the unified salary scale, transitional allowances were introduced. This change was the subject of Judgment 4381 in which the Tribunal concluded there was no breach of an acquired right.

6. In Judgment 4381, the Tribunal discussed acquired rights. The Tribunal observed that the concept of breach of acquired rights has its genesis in the first decision given on 15 January 1929 by this Tribunal, then called the Administrative Tribunal of the League of Nations. In that decision *(In re di Palma Castiglione v. International Labour Office)*, the Tribunal held: “The Administration is at liberty to establish for its staff such regulations as it may see fit, provided that it does not in any way infringe the acquired rights of any staff member.” Over the decades since, the basis for recognising and protecting acquired rights has evolved and, in particular, principles developed for demarking what are and are not such rights.

7. In Judgment 4381, the Tribunal quoted the applicable legal principles as summarised in Judgment 4195, consideration 7:

> “According to the case law, ‘[i]n Judgment 61 [...] the Tribunal held that the amendment of a rule to an official’s detriment and without his consent amounts to breach of an acquired right when the structure of the contract of

appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment' (see Judgment 832, under 13). Judgment 832, under 14 (cited in part, below), poses a three-part test for determining whether the altered term is fundamental and essential. The test is as follows:

(1) What is the nature of the altered term? 'It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.'

(2) What is the reason for the change? 'It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.'

(3) What is the consequence of allowing or disallowing an acquired right and the effect it will have on staff pay and benefits, and how do those who plead an acquired right fare as against others?"

8. Also, as the Tribunal observed in Judgment 4028, consideration 13, international civil servants are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered though, depending on the nature and importance of the provision in question, staff may have an acquired right to its continued application.

9. As noted earlier, the contested changes to Staff Rule 5.04.1 arose from a review by the ICSC of the compensation package of the staff in the UN common system in the Professional and higher categories. In its 2015 Annual Report, the ICSC explained in relation to boarding expenses for tertiary students:

"111. The provision of support for staff in relation to education at the tertiary level, which is not a mandatory part of a child's education, was examined as part of the review. Based on a comparison of the cost of the comparator's scheme with that of the common system, that is, comparing 100 per cent of reimbursement for the primary and secondary education levels with that of 75 per cent of the cost from the primary to tertiary education levels, it was concluded that the costs of the two schemes were largely comparable. With that in mind and in view of the importance of the education grant in attracting and retaining staff, it was considered preferable to maintain tertiary level education within the scheme.

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> 113. In order to address concerns regarding organizational responsibility for tertiary education, it is proposed that the provision of boarding-related financial support at the tertiary level be discontinued, which would make the system more cost-effective. At the same time, the Commission recommends updating the eligibility criteria for support at the tertiary level, with the grant payable up to the end of the school year in which the child completes four years of post-secondary studies or attains the first post-secondary degree, whichever is earlier, subject to the upper age limit of 25 years.
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> [...]
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> 331. The Commission recalled the proposal to limit the provision of assistance with boarding expenses. For staff serving at headquarters duty stations in particular, where adequate schools within commuting distance existed, the provision of assistance with boarding expenses was difficult to justify. Against that background, it was recalled that the option to completely exclude boarding assistance from the scheme had been considered but subsequently rejected. Since staff in the field often did not have access to an adequate local school, there was a strong case for granting support in such situations."

The ICSC's reasons for the proposed changes to the education grant scheme impugned in these proceedings were rational, logical and credible. They did not involve the general elimination of the benefit but its recasting with modifications of how, when and why the benefit would be paid. The adoption of the proposed changes by the IAEA was in conformity with obligations arising from membership of the UN common system. This is a valid reason for change (see Judgment 1446, consideration 14), at least in the absence of any apparent unlawfulness attending the change either procedurally or substantively.

10. The Tribunal's case law recognises that the alteration of a benefit can operate to the detriment of staff and this, of itself, does not constitute the breach of an acquired right. It plainly did operate to the complainant's detriment in the present case. A further element was needed, as discussed in the opening paragraph of the quotation in consideration 7: the complainant must demonstrate that the structure of the employment contract was disturbed or that the modifications impaired a fundamental term of appointment in consideration of which he accepted employment. The complainant has not established, to the Tribunal's satisfaction, that either element exists in the present case in relation to the changes impugned in these proceedings.

11. The next issue is whether Staff Rule 5.04.1 as amended operated retroactively and unlawfully, a plea raised by the complainant in his rejoinder. In order to deal with this plea there is an initial difficulty in ascertaining when the amendments to Staff Rule 5.04.1 commenced to operate. In his decision of 19 December 2017 rejecting the request to reconsider the decision not to grant the benefit claimed by the complainant, the Director General said: "[a]s you are aware, I approved amendments to the education grant scheme of the Agency to take effect from 1 January 2018" adding "with respect to the school year in progress on that date". Having regard to similar statements from the IAEA including in its reply, the complainant contends the date on which the amendments took effect was 1 January 2018. This is not accepted by the IAEA in its surrejoinder. It relies on Secretariat Directive SEC/DIR/253 entitled "Review of the Education Grant Scheme for Staff in the Professional and Higher Categories", dated 9 February 2017, which declares in the "Introduction" and under the heading "Operative Paragraphs" that the amendments were made "with effect from the school year in progress on 1 January 2018 (i.e. the school year 2017/2018)". This same formulation appears in a later section headed "Effective Date". It is not possible on the material before the Tribunal to identify with certainty when the amendments commenced to operate. The Circular does not specify a date of effect, as the Organisation took the view that what was relevant was the school year to which these new arrangements would apply. In these circumstances, no purpose would be served by further considering the issue of retroactive application, particularly given that the complainant succeeds on another ground.

12. The final issue raised by the complainant is whether the IAEA breached its duty of care. It is convenient to note at the outset that the Joint Appeals Board, which considered the complainant's internal appeal, made two observations in its report of 25 October 2018 which are of relevance. The first observation was:

> "[...] that the application of the new compensation package has had an immediate and relatively seriously detrimental effect on staff members in the position of the [complainant], who had enrolled his son in third-level education on the basis of an education grant package to which he was contractually entitled at the time of his appointment in 2005 and which had continued in substance unchanged until the 2017-2018 academic year, by which time the [complainant]'s son had already been in third level education for three full academic years."

13. The second observation was that the complainant could expect to lose approximately 10,000 United States dollars in board and lodging claims and 3,000 dollars for education grant travel. It was against this background that the Joint Appeals Board concluded that the IAEA administration should have provided some bridging arrangements for staff in the position of the complainant "such that the immediate effects of the new policy would be introduced in a more gradual fashion". It recommended that the IAEA do so. This recommendation was rejected by the Director General in his impugned decision.

14. The principle relied on by the complainant was discussed by the Tribunal in Judgment 3373. That case concerned the outsourcing of certain functions of a security team of an organisation at a particular location in circumstances where the outsourced functions had been performed by members of its security staff for 15 years. In the result, staff had lower remuneration because there had been a reduction in the flat-rate shift allowance, loss of an allowance for stand-by duty and a reduction in overtime reducing the average weekly hours of work. The Tribunal noted that the organisation was entitled to restructure including by requiring staff to accept a new or different method of organising continuous service. However, the Tribunal observed that the organisation had to ensure, in accordance with its duty of care owed to its staff, that the implementation of the arrangements did not place staff in financial difficulty, as it had for the complainant. The Tribunal concluded that the organisation should pay the complainant an indemnity *ex aequo et bono* referable to the amount he would otherwise have earned (but for the changes) in the preceding three years. The rationale for the indemnity was stated by the Tribunal to be to "enable the complainant to adjust to his changed financial circumstances". The Tribunal rejected a claim by the complainant that he should be fully compensated until his salary reached the level of remuneration he had received immediately before the changes.

15. The IAEA disputes that it has breached its duty of care. It points to the notice staff were given of the proposed changes and to the fact that it was implementing a decision of the UN General Assembly (adopting a recommendation of the ICSC) which stated that "the revised education grant scheme shall be introduced as of the school year in progress on 1 January 2018". It also points to the fact that at all material

times Staff Regulation 5.04(a) itself has provided that "[t]he Director General shall establish terms and conditions under which an education grant shall be available to an internationally recruited staff member serving outside his/her recognized home country, with respect to each dependent child [...] in accordance with the terms and conditions established by the International Civil Service Commission". But neither the UN General Assembly decision nor the provisions of Staff Regulation 5.04 and Staff Rule 5.04.1 precluded the adoption of a mechanism to ameliorate the effect of the changes on members of staff who would suffer immediate and significant financial hardship in circumstances where there was no realistic option for the staff member but to have the child complete the course of education much earlier determined.

16. Moreover it has to be borne in mind that one of the objectives of the education grant scheme, as identified in the preamble to the provisions themselves (see Staff Regulation 5.04(a) on both the former and new Regulation), is to "facilitate the child's re-assimilation in the staff member's home country [...]". It could reasonably be expected that the benefits payable under the scheme would often relate to education in the staff member's home country away from the duty station where the staff member and her or his family were resident. It could also reasonably be expected that such education would involve travel and boarding costs borne by the staff member at least in the absence of the scheme itself.

17. In the present case, the complainant embarked upon the tertiary education of his son at a university in the United States of America in 2014. This was the complainant's home country and involved travel and boarding. By the time the amendments were made to the education grant scheme, the son had completed three of the four years of his course at that university. The complainant had no real option to alter these arrangements in order to reduce the significant financial burden arising from the amendment to the scheme.

18. The IAEA breached its duty of care to the complainant, as that expression is currently used in the Tribunal's case law, and the complainant is entitled to damages. In its findings, the Joint Appeals Board assessed those damages in the sum of 13,000 dollars. The Tribunal finds no

reason to dispute this figure. He is entitled to costs assessed in the sum of 8,000 dollars.

DECISION

For the above reasons,

1. The impugned decision of 20 November 2018 is set aside.
2. The IAEA shall pay the complainant 13,000 United States dollars in damages.
3. The IAEA shall pay the complainant 8,000 dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2021, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

CLÉMENT GASCON

DRAŽEN PETROVIĆ