

The Administrative Tribunal,

Considering the fourth complaint filed by Mr A.F. against the International Atomic Energy Agency (IAEA) on 3 September 2004 and corrected on 24 September, the Agency's reply of 20 December including Mr A.C.'s comments of 10 November 2004, the complainant's rejoinder of 18 March 2005 and the IAEA's surrejoinder of 28 April 2005;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who joined the IAEA in 1974, retired on 30 June 2003. Facts concerning his career are given in Judgment 2325, delivered on 14 July 2004, on his first complaint.

On 15 July 2002 the Agency issued vacancy notice 2002/052 for the grade P.5 post of Unit Head, Division of Operations C, in the Department of Safeguards. On 24 February 2003 the Head of the Recruitment Unit, in the Division of Personnel, wrote to the complainant informing him that his application had not been successful. Mr A.C. was appointed to the post in question. By a letter of 1 April the complainant requested that the Director General review the administrative decision not to select him for the post. He emphasised that no reasons had been given for the decision and that he had been the victim of a "character assassination and defamation campaign" orchestrated by his Head of Section together with his Division Director with a view to blocking his career advancement. Having received no reply, the complainant appealed to the Joint Appeals Board on 27 May 2003. By a letter of 2 July 2003, the Director General notified the complainant that he upheld the decision not to select him for the post of Unit Head.

In its report of 5 April 2004, the Joint Appeals Board concluded that the selection process had been properly undertaken and recommended to the Director General that he uphold the contested decision. In a letter of 19 April 2004, received by the complainant on 14 June 2004, the Director General informed him that he had decided to follow the Board's recommendation. That is the impugned decision.

B. The complainant contends that the internal appeal procedure was tainted with inexplicable delays and irregularities. He complains that he was "forced to initiate the appeal process without knowing [the] exact reasons for [his] failed candidature". He points out that it was only on 2 July 2003 that the Director General replied to his request for a review of the decision not to select him, which was more than two months after the statutory deadline of one month. According to him, both the Joint Appeals Board and the Director General did their utmost to "paralyse" his appeal by delaying his case as long as they could. He also complains that he was kept in the dark about the final outcome of his appeal for almost two months. He states that it was only after twice making enquiries with the Board's secretariat that he was finally informed, in a letter of 7 June 2004, that the Director General had issued a final decision on 19 April 2004, which was sent to him at the time with a copy of the Board's report. He further alleges that the Director of the Office of Legal Affairs tried to damage his reputation by informing the Tribunal, during the proceedings for his first and second complaints, about matters relating to the present case, and also by trying to influence the Joint Appeals Board, thus obstructing due process. The complainant contends that the particularly long period of more than 14 months taken by the Agency to process his appeal was in breach of Article XII of the Provisional Staff Regulations and that he was caused "extra injury" by the "unlawful and improper" manoeuvring of the Director of the Office of Legal Affairs. He concludes that the Agency failed in its duty of care towards its staff.

The complainant further submits that the selection process was flawed. He maintains that the evaluation sheet appended to the report of the Joint Appeals Board contains a mistake insofar as it does not mention one of his

university degrees. He also notes that his age is mentioned in two places in the evaluation sheet and contends that age was a factor taken into consideration to reject his candidature. He further deduces from the sheet that the requirements stated in the vacancy notice were deviated from during the selection process, which indicates to him that there were “hidden” requirements rendering any objective assessment of candidates impossible, and that the principle of equal treatment was breached. He adds that it was contrary to paragraph 60 of section 3, part II, of the IAEA’s Administrative Manual not to call him for an interview. According to him, the authorities in charge of the selection process exceeded the scope of their discretionary power.

The complainant asks the Tribunal to quash the impugned decision and to declare the selection, and hence the appointment to the post he had applied for, null and void. He also claims material and moral damages as well as costs.

C. In its reply the IAEA contends that the Director General’s delay in responding to the complainant’s request for review of 1 April 2003 resulted from a careful reconsideration of the case. It submits that as the Joint Appeals Board operates independently, the Agency could not influence the scheduling of the Board’s work and therefore cannot be held responsible for the time taken by the Board to deal with the complainant’s appeal. It considers the delay unfortunate but not excessive in the light of the large number of appeals then pending before the Board. It further contends that the complainant has not established that any breach of Article XII of the Staff Regulations occurred. With regard to the period of two months during which the complainant was not informed about the outcome of his appeal, the defendant states that as soon as it became aware that the complainant had not received the Director General’s final decision it sent him a copy without delay. It assumes that the letter of 19 April 2004 was lost in the post.

Regarding the alleged undue interference by the Director of the Office of Legal Affairs, the IAEA states that members of the Joint Appeals Board do not have access to the pleadings submitted by the Agency in the context of a case lodged with the Tribunal. The complainant’s allegations of so-called “unlawful and improper” manoeuvring are therefore clearly unfounded.

The defendant contends that there were no procedural irregularities in the selection process, as the Joint Appeals Board in fact concluded, and points out that the complainant himself raised no objection in this respect either in his request to the Director General for review or in his internal appeal. It recalls that the Director General was not entirely bound by the selection requirements given in the vacancy notice and retained a certain level of discretion. Regarding the fact that one of the complainant’s university degrees had been omitted from the evaluation sheet, the Agency indicates that educational qualifications were not taken into account in determining whether a candidate should be considered as “well qualified”, “qualified” or “not qualified” for the advertised post. The Agency adds that, since the complainant was not included among the five persons considered to be “well qualified”, the issue of his age was irrelevant. It adds that only the candidates considered to be “well qualified” were called to an interview.

In his comments, Mr A.C. states that he would not like to discuss the complainant’s qualifications nor how the latter was rated in the competition. He further considers that by dint of his own experience he meets the requirements of the post of Unit Head to which he has been appointed.

D. In his rejoinder the complainant reiterates his pleas. He notes that the defendant does not explain why he was not given the reasons for the decision not to select him for the post. He further points out that the documents submitted to the Tribunal are not stamped “confidential” and that it is therefore difficult for the Agency to affirm that its pleadings were not consulted by the Joint Appeals Board. The complainant observes that the Agency has not proved that it took the necessary steps to ensure that he received the Director General’s final decision. He concludes that the IAEA has continued to obstruct and delay the appeal process until the last moment.

He submits that in view of the failure to mention one of his university degrees, he is justified in wondering whether other essential facts concerning him may have been overlooked during the selection process. In his opinion, moreover, an evaluation sheet which is incomplete must be deemed invalid.

E. In its surrejoinder the Agency maintains its position. Regarding the alleged interference by the Director of the Office of Legal Affairs in the work of the Joint Appeals Board, it recalls that the Board has denied that any such interference took place. It further maintains that the complainant has shown no evidence that the selection process was flawed.

CONSIDERATIONS

1. The complainant, who joined the IAEA in 1974, retired on 30 June 2003. Facts concerning his career with the Agency are given in Judgment 2325, to which reference is made.

2. In his fourth complaint, the complainant impugns the decision of 19 April 2004 by which the Director General, endorsing the recommendation of the Joint Appeals Board, confirmed the decision not to select him for the post of Unit Head, Division of Operations C, in the Department of Safeguards.

3. In a letter dated 24 February 2003 the complainant was informed that his application for the above-mentioned post had not been successful. Having received no reply to his request for review, he lodged an appeal with the Joint Appeals Board on 27 May. On 23 June 2003 he agreed to the composition of the Board as notified on 20 June.

On 2 July the Director General, responding to the request for review, informed the complainant that he upheld the decision not to select him for the post of Unit Head.

When the complainant enquired about the state of progress of his appeal, the Secretary of the Joint Appeals Board replied on 31 July that, due to the relatively large number of pending appeals, the Board had yet to be convened. On 20 October the Secretary replied to the further enquiry the complainant had submitted on 12 October, stating that “[d]ue to the large number of pending appeals the Board [had] not yet been able to take up [the] matter”. Having asked, without success, to be given an expected date, the complainant sent a further reminder on 21 December 2003. On 16 February 2004 he was called to attend a meeting of the Board which was held on 24 February 2004.

On 31 May 2004 the complainant reminded the Secretary of the Joint Appeals Board that his case had been pending for over a year and asked him whether the Board’s report had been submitted to the Director General. As he received no reply he sent a further reminder enquiring about the status of his appeal.

In a letter dated 7 June 2004, received by the complainant on 14 June 2004, the Director of the Division of Personnel informed him that the Director General had sent him a letter dated 19 April 2004 together with the Board’s report. In that letter, the Director General had informed him that he had decided to follow the recommendation of the Joint Appeals Board and accordingly to uphold the decision not to select him for the post of Unit Head.

4. The complainant contends that the internal appeal proceedings were flawed by underhand manoeuvring, inexplicable delays and irregularities.

He points out that the Director General did not reply to his request for a review of the decision to reject his candidature until two months after the statutory one-month deadline.

In his view, the Director of the Office of Legal Affairs interfered in the proceedings, “in breach of established norms and ethics of law”, by informing the Tribunal, during the proceedings for his first and second complaints, about matters relating to the present case and by trying to influence the Joint Appeals Board, thereby obstructing due process. He adds that the Board kept the case pending for nine months after the appeal was filed. He therefore concludes that both the Board and the Director General did their utmost to “paralyse” his appeal. He denounces the fact that he was not informed of the final outcome of the appeal for almost two months.

He accuses the defendant of having failed in its duty to ensure that his appeal would be dealt with within a reasonable time. He also contends that the extraordinarily long period of more than 14 months taken to process his appeal was in breach of Article XII of the Provisional Staff Regulations and that the “unlawful and improper” manoeuvring by the Director of the Office of Legal Affairs caused him “extra injury”. He concludes that the Agency failed in its duty of care towards its staff.

The complainant further submits that the selection process was flawed. He maintains that the evaluation sheet appended to the report of the Joint Appeals Board contains a mistake insofar as it does not mention one of his university degrees. He also notes that his age was mentioned twice in the evaluation sheet and contends that it was

taken into consideration in rejecting his candidature. He also deduces from the sheet that the requirements stated in the vacancy notice were deviated from during the selection process, which proves, according to him, that there were “hidden” requirements rendering any objective assessment of candidates impossible and that the principle of equal treatment was breached. He contends that the authorities in charge of the selection process exceeded the scope of their discretionary power and violated the provisions of paragraph 60 of section 3, part II, of the Administrative Manual by not calling him for an interview.

The complainant asks the Tribunal to quash the decision of 19 April 2004, declare the selection, and hence the appointment to the post he applied for, null and void, and award him compensation for material and moral injury as well as costs.

The defendant requests that the Tribunal dismiss all the complainant’s claims, on the grounds that he has failed to demonstrate that the decision not to appoint him to the post in question was wrong in law or in fact.

5. The Tribunal recalls that, as it has often held, an appointment by an international organisation is a discretionary decision, which may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence. The Tribunal will in such cases exercise its power of review with special caution, its function being not to judge the candidates on merit but to allow the organisation full responsibility for its choice (see in particular Judgment 2163, under 1).

6. In this case the decision was taken by the competent authority and the evidence on file reveals no fatal flaw, so that the complainant’s arguments in this respect are unfounded.

Indeed, the fact that one of the complainant’s university degrees was not mentioned in the evaluation sheet could not have caused him injury since, as the defendant rightly points out, educational qualifications were not taken into account in determining whether a candidate should be considered “well qualified”, “qualified” or “not qualified” for the post of Unit Head.

The complainant has not shown that there were, as he maintains, “hidden requirements” that rendered any objective evaluation of the candidates impossible. Therefore, the argument that the principle of equal treatment was breached cannot stand. Similarly, the complainant has failed to show that the authorities in charge of the selection procedure exceeded the scope of their discretionary power and breached paragraph 60 of section 3, part II, of the Manual. It appears from the submissions that the only candidates called to an interview were those considered “well qualified”, which was not the complainant’s case. There was therefore no breach of paragraph 60. With regard to the complainant’s age, since he was not among the candidates recognised as “well qualified”, that factor did not need to be taken into account. The untimely interference by the Director of the Office of Legal Affairs alleged by the complainant and aimed, in his view, at influencing the Joint Appeals Board could not, even if it had occurred, have affected the internal appeal procedure in any way, since the Board members do not have access to submissions filed by the defendant in the context of a case that is brought to the Tribunal.

7. From the account of the facts provided under 3 of this judgment, however, the Tribunal concludes that the internal appeal proceedings were not conducted with due diligence or with the care owed by an international organisation to its staff. The complainant had reason to believe that the Agency was making every effort to hamper the proceedings to prevent them from being concluded within a reasonable time. He was not informed of the final outcome of his internal appeal until nearly two months after the Director General had taken his final decision. Moreover, the latter replied to the complainant’s request for review more than three months after the request was submitted, and only after an appeal had been lodged with the Joint Appeals Board. The Tribunal concludes from the above that the complainant suffered moral injury. In view of the fact that the complainant has already had to endure delays attributable to the defendant which were censured in Judgment 2325, compensation for this further injury shall be set at 5,000 euros.

8. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The IAEA shall pay the complainant the sum of 5,000 euros in compensation for moral injury.
2. It shall also pay him 2,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Seydou Ba

Catherine Comtet