

**S. (No. 15)**

*v.*

**IAEA**

**127th Session**

**Judgment No. 4091**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifteenth complaint filed by Ms H. S. against the International Atomic Energy Agency (IAEA) on 12 August 2016 and corrected on 28 October 2016, the IAEA's reply of 13 February 2017, the complainant's rejoinder of 19 May and the IAEA's surrejoinder of 24 August 2017;

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 primarily challenges the amount of compensation offered to her by the IAEA in respect of a harassment complaint.

The complainant, a former staff member of the IAEA, separated from service for health reasons on 31 July 2013. In a letter of 27 January 2014 to the Director General she submitted a complaint of harassment against several staff members and former staff members and she sought, among other things, compensation in the amount of 100,000 euros. By a letter of 20 February 2014 the Director General informed the complainant that the Office of Internal Oversight Services (OIOS) was conducting an assessment of her complaint.

In its final investigation report dated 17 February 2016 the OIOS concluded that six of the incidents reported by the complainant could be considered as harassment under paragraph 4 of Administrative Manual Part II, Section 17, Appendix E (AM.II/17, E). The complainant was so informed by a letter of 29 March from the Director of the OIOS.

By a letter of 25 May 2016 the Director of the Office of Legal Affairs (OLA) informed the complainant that the Director General had decided to accept in full the findings of the OIOS and that he proposed to award the complainant compensation, in addition to reasonable legal costs, in full and final settlement of all claims arising from the matter. That is the impugned decision.

Between 25 May and 24 October 2016 the parties pursued settlement negotiations regarding, among other things, the quantum and conditions of the Director General's abovementioned settlement proposal but they were unable to reach an agreement.

By a letter of 17 May 2017 the complainant submitted additional information to the OIOS and requested that it re-open its investigation, in particular in relation to her allegation regarding her early retirement, and issue a supplemental report. On 15 August 2017 the OIOS issued an addendum to its final investigation report in which it reaffirmed its conclusion on that allegation.

The complainant requests the Tribunal to set aside the impugned decision. She seeks material and moral damages in the amount of 100,000 euros and costs.

The IAEA asks the Tribunal to determine an appropriate award of compensation in view of the findings of the OIOS. In its surrejoinder it asks the Tribunal to order the complainant to pay the IAEA's costs on the grounds that she has disclosed privileged information. In the alternative it requests the Tribunal, for the same reason, not to award costs in the complainant's favour.

## CONSIDERATIONS

1. The complainant impugns the Director General's decision, conveyed to her by letter of 25 May 2016, regarding the harassment complaint she submitted to the Director General in January 2014. In that complaint, the complainant detailed a number of allegations of harassment that occurred during the period of time just prior to her June 2009 transfer from the Department of Safeguards to the Department of Technical Cooperation, Division of Africa (TCAF), while she was a staff member in TCAF, and in relation to her separation from service for health reasons in July 2013. The allegations were variously directed at thirteen former and serving staff members.

2. The OIOS completed its investigation of the harassment complaint and issued a final investigation report in February 2016. In the report, given the temporal overlap and the interrelatedness of many of the allegations, the OIOS grouped the specific issues and actions the complainant characterized as constituting harassment into fifteen "allegations". The OIOS concluded that six of the fifteen allegations were substantiated and constituted harassment under paragraph 4 of AM.II/17, E. The IAEA accepts the OIOS's findings of harassment and acknowledges they reflect administrative shortcomings that caused the complainant personal humiliation. The IAEA acknowledges that the complainant is entitled to compensation for the substantiated claims of harassment.

3. The complainant requests oral proceedings. However, the briefs and evidence submitted by the parties are sufficient to enable the Tribunal to reach an informed decision. The complainant's application for oral proceedings is therefore rejected.

4. Before considering the complainant's submissions in relation to the allegations of error on the part of the OIOS, it is convenient to deal with two other issues. Some background is required to provide a context for the discussion to follow. In the 25 May 2016 impugned decision, the Director of OLA informed the complainant of the Director

General's decision to accept in full the OIOS's findings. Relevantly, the letter also stated the following: "without prejudice, the Director General wishes to offer you a financial sum [...], in addition to reasonable legal costs, on the provision of invoices, in full and final settlement of all claims arising from this matter".

5. In his reply of 9 June 2016 the complainant's counsel took the position that the offer of settlement was premature and observed:

"While I understand the Agency's desire to settle this matter, it cannot avoid taking a final decision and in good faith make the payment of damages for proven harassment contingent upon my client's agreeing to a settlement waiving her rights to further appeal, and without having the benefit of the OIOS report."

He also reiterated his earlier request that the Director General take a final decision after which the complainant could be willing to consider a possible settlement to avoid a further appeal to the Tribunal.

6. In her 12 July response to the complainant's counsel, the Director of OLA repeated the Director General's decision of 25 May in which he accepted in full the OIOS's findings. The Director added:

"Further to his decision to accept the findings of OIOS and having considered the amount of financial compensation requested by you in your letter of 27 January 2014, the Director General determined that the financial sum of 40,000 [euros], in addition to reasonable legal costs, on the provision of invoices, is reasonable compensation for the issues addressed by OIOS in its report."

A redacted copy of the OIOS report was attached to the letter.

7. The first issue concerns the complainant's contention that the IAEA acted in bad faith by making the payment of the damages for the substantiated claims of harassment conditional on the complainant waiving her right of appeal. The complainant states that on 9 June 2016 the IAEA was informed that it was inappropriate to make the payment of damages conditional on a waiver of her right to appeal. Thus, on receipt of the letter of 12 July, she assumed that the IAEA had withdrawn the condition in keeping with the Tribunal's case law as stated in Judgment 2715, under 13, which reads as follows:

“With respect to the compensation already awarded by the decision of 5 July 2006, which allegedly had not been paid when the rejoinder was filed, the Tribunal draws attention to the fact that the Secretary General’s letter of 2 October 2006 contained an unlawful clause which should definitely be censured, in that its purpose was to make the actual payment of the sum in question subject to an undertaking from the complainant that he would renounce all means of appeals.

An international organisation commits a serious breach of the general principles of law by violating, through such conduct, international civil servants’ right of appeal, especially to the Tribunal.”

The complainant adds that she does not consider that the letter of 12 July was sent in error. She understood the letter to mean that the IAEA had withdrawn the condition imposed for the payment of the compensation for the substantiated claims of harassment and had determined that for the proven harassment the complainant should be paid the amount stated plus reasonable costs.

8. The IAEA disputes the complainant’s assertion of bad faith. It argues that Judgment 2715 is distinguishable on its facts and has no application to the present case. The Tribunal agrees that the complainant’s reliance on Judgment 2715 is misplaced. In Judgment 3867, under 5, the Tribunal stated:

“[...] the complainant submits that the clauses contravene the general principles of law because they have the effect of depriving him of the right to bring a complaint of harassment or abuse of power. However, in the context of a settlement, as is the case here, the infringement of an official’s right to appeal or file a complaint is not unlawful. On the contrary, it is entirely acceptable for an official to waive such rights in return for the benefits gained from the settlement. This is, furthermore, common practice in the context of separation agreements [...].

In this respect, the complainant’s reliance on Judgment 2715, in which the Tribunal emphasised that an international organisation had acted unlawfully in making payment of a sum due to an official contingent on his relinquishing all means of appeal, is misplaced. In that case, pressure was improperly brought to bear on the official in return for nothing but the organisation’s honouring of its own duties. That situation bears no comparison with the case of a clause in a settlement agreement providing for an official to receive benefits negotiated with him.”

In a somewhat unusual manner, the 25 May 2016 letter communicated two things: the decision acknowledging liability for the substantiated claims of harassment and a settlement proposal for the amount of compensation payable to the complainant conditional on the complainant waiving all rights of appeal. Although the IAEA could have dealt with the settlement proposal differently, the proposal itself was not unlawful and does not constitute bad faith.

9. The second issue stems from the IAEA's request that the Tribunal strike from the record the parties' communications, disclosed by the complainant, concerning their negotiations to determine the amount of the compensation payable to the complainant for the harassment. For reasons that will become evident, a consideration of this request is unnecessary.

10. Despite the misunderstanding regarding the 12 July letter, it soon after became apparent to the complainant that the amount of the compensation stated in the 25 May 2016 letter was a without prejudice offer to settle the litigation. As such, it is inadmissible in this proceeding and will be disregarded.

11. Turning to the merits of the complaint, in her brief, the complainant submits that the OIOS investigator apparently applied the wrong standard of proof, that is, beyond a reasonable doubt, in assessing her allegations and evidence rather than the preponderance of evidence standard. The relevant part of the report does not support this position. It reads:

“139. OIOS is not of the opinion that ‘a *long series of examples of mismanagement and omissions*’ by the Agency occurred in the case of [the complainant]. However, the identified delays in the processes, technical oversights and the unfortunate situations are at least examples of flawed management decisions which amount to harassment.

140. Therefore, OIOS concludes that the evidence adduced shows that six of the incidents reported by [the complainant] (findings 1, 4, 5, 9, 14 and 15) can be considered as harassment under paragraph 4 of AM.II 17, Appendix E, as these were procedural shortcomings which caused [the complainant] personal humiliation.

141. These harassment incidents also constitute misconduct as defined in AM II/1, Rule 11.01.1. [...]”

It is observed that the standard of “beyond a reasonable doubt” is not stated anywhere in the report. The complainant has not identified anything in the report that could possibly indicate that the wrong standard was applied.

12. The complainant submits that the OIOS investigator erred in finding that the other nine allegations were unsubstantiated as he did follow the applicable law in assessing these allegations. The complainant notes that harassment is defined at paragraph 4 of AM.II/17, E as “any conduct or comment [...] on either a one-time or continuous basis that demeans, belittles or causes personal humiliation” and includes “undermining or isolating people”. The complainant emphasizes, as the Tribunal explained in Judgment 2553, under 6, that a very broad definition of harassment “requires reasonable interpretation and application to the circumstances of each particular case” that includes “an examination of all the surrounding circumstances”. The complainant maintains that the OIOS investigator erred by failing to consider all the surrounding circumstances related to her allegations. In particular, the investigator failed to take into account the full circumstances in assessing whether the officials in TCAF were given adequate information about her health at the time of her transfer to that division; all the circumstances surrounding a 19 October 2011 meeting; and all the circumstances that ultimately led to the termination of her appointment for health reasons. These assertions are rejected.

13. It is evident from reading the report that the investigator was cognisant of the complainant’s history regarding her health, functional limitations in her capacity to carry out certain tasks and the need to attend appointments for ongoing treatment. In assessing the adequacy of the information provided to TCAF, the investigator relevantly took into account that information concerning medical conditions is not included in job descriptions, that work-related health requirements are only communicated to the Director or Section Head concerned and that the procedure carried out by the Division of Human Resources (MTHR) was in keeping with the applicable regulations.

14. As to the alleged surrounding circumstances concerning the 19 October 2011 meeting, the complainant contends that the investigator failed to take into account that the final minutes, prepared by the Director of MTHR and the Vienna International Centre Medical Director, were not endorsed or accepted by her. She also claims that the investigator had not read her version of the minutes. As a result, the investigator found that three of the four items on the meeting agenda were resolved to the complainant's satisfaction based on the meeting minutes issued by MTHR and not the complainant's amended version. It must first be observed that the complainant's original grievance was that finalizing the minutes took longer than a month and that she never received the final version. In the report, it is acknowledged that it took an additional six days to finalize the minutes due to the time taken to circulate the draft minutes and the complainant's comments to the other attendees at the meeting and to include their comments. The Tribunal finds that, having given the complainant the opportunity to provide her account of the meeting, there was no requirement that she endorse or accept the final version of the minutes. Additionally, the complainant has not provided any information that could support her assertion that the investigator did not read her version of the minutes.

15. The complainant's assertion that the investigator was not aware of the circumstances of the termination of her appointment for health reasons is without foundation. The investigator reviewed the documentation surrounding her termination for health reasons, including material submitted by her counsel during the course of the present proceedings, as reflected in the addendum to the OIOS report.

16. The complainant also contends that she was not given an opportunity to respond to hurtful comments made by a witness. This contention is unfounded. The OIOS report specifically refers to the interaction of the witness with the complainant. To give the complainant an opportunity to clarify issues concerning her allegations, the complainant was invited for an interview and subsequently, because she was unable to attend the interview due to health concerns, she was given two detailed questionnaires to which she responded.

17. In addition to the above unfounded submissions concerning reviewable error on the part of the investigator, in her pleadings, the complainant disputes a number of the findings in the report and also maintains that the investigator assessed related allegations in isolation, ignored evidence that showed the humiliation she suffered during the time she worked in TCAF and did not properly consider her allegations concerning her breakdown during a 27 January 2012 Joint Appeals Board hearing. In effect, the complainant is asking the Tribunal to reweigh the evidence. As stated in Judgment 3593, under 12, the Tribunal has consistently held:

“[...] that it is not the Tribunal’s role to reweigh the evidence before an investigative body which, as the primary trier of fact, has had the benefit of actually seeing and hearing many of the persons involved, and of assessing the reliability of what they have said. For that reason such a body is entitled to considerable deference. So that where in the present case the Investigation Panel has heard evidence and made findings of fact based on its appreciation of that evidence and the correct application of the relevant rules and case law, the Tribunal will only interfere in the case of manifest error.”

(See also Judgments 3995, under 7, 3882, under 13, and 3682, under 8.)

18. It is observed that in her harassment complaint, the complainant advanced multiple allegations of harassment against a number of individuals that spanned a long period of time. The resulting investigation was complex and included numerous witness interviews, a review of extensive documentation and a consideration of the relevant rules and the applicable case law. The findings in the report reflect a comprehensive, objective review of all the allegations of harassment and a careful, thoughtful weighing of the evidence. In the absence of any reviewable error, the complainant’s claims are unfounded and the complaint will be dismissed.

19. As noted at the outset, the IAEA acknowledges that the complainant is entitled to moral damages for the six founded allegations of harassment. Accordingly there is no reason to disturb the IAEA’s determination of the appropriate amount of compensation to be paid to the complainant as a result of the allegations of harassment that were substantiated.

20. The IAEA's counterclaim for costs for the unauthorized disclosure of documents concerning the negotiations to determine the amount of the compensation will be dismissed.

#### DECISION

For the above reasons,

1. The complaint is dismissed. In making this order the Tribunal is proceeding on the basis that the IAEA will pay the complainant 40,000 euros and reasonable legal costs on the provision of invoices as determined in the letter of 12 July 2016 unless these amounts have already been paid.
2. The IAEA's counterclaim for costs is dismissed.

In witness of this judgment, adopted on 2 November 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, Mr Michael F. Moore, Judge, Sir Hugh A. Rawlins, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

YVES KREINS

DRAŽEN PETROVIĆ