

**G. M.**

**v.**

**IAEA**

**129th Session**

**Judgment No. 4207**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. G. M. against the International Atomic Energy Agency (IAEA) on 4 August 2017 and corrected on 8 September 2017, the IAEA's reply of 2 January 2018, the complainant's rejoinder of 20 April and the IAEA's surrejoinder of 25 July 2018;

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 impugns the Director General's decision to endorse the conclusion of the Office of Internal Oversight Services (IOS) that it was unable to make a conclusive determination on her sexual harassment claim and to reject her related request for damages.

The complainant joined the IAEA in 2001. At the material time she was a Team Assistant, at grade G-4, in the Safety Assessment Section, Division of Nuclear Installation Safety, Department of Nuclear Safety and Security. In January 2015 Mr A. was appointed in the same section as a Senior Safety Officer, at grade P-5. In February 2015 the complainant reported to her Acting Head of Section that she had been subjected to sexual harassment by Mr A. In March 2015 her new Acting Section

Head reported the complainant's allegations of sexual harassment to the Division of Human Resources (MTHR) and organised a meeting with an official from MTHR. Having declined mediation initiatives, the complainant submitted, by an email of 11 March 2015, a report to the Director of MTHR detailing the incidents which, in her view, substantiated her sexual harassment claim. On 19 March 2015 she re-submitted that same report to the Director of MTHR and requested a formal investigation into her claim of sexual harassment. On 19 April 2015 the Director of MTHR forwarded the complainant's report to the Director of OIOS for investigation.

OIOS issued its Final Investigation Report on 31 August 2015 concluding that it could not make a conclusive determination in the case and recommending that Mr A. be provided with training on the IAEA harassment policies. By an email of 14 September 2015, the complainant was informed that the investigation had been concluded and that the Final Investigation Report had been sent to the Director of MTHR. In early December 2015 the Director of MTHR asked OIOS to provide clarification as to whether it had considered in the investigation of the case any sick leave taken by the complainant in connection with the alleged harassment and any relevant medical report. On 18 December 2015 OIOS issued a first Addendum to its Final Investigation Report. Noting the complainant's statements on 9 and 16 December 2015 that her sick leave from 11 to 13 February 2015 was related to the alleged harassment by Mr A., that she had recently taken additional sick leave as a result of Mr A.'s conduct, and that she did not wish to provide to OIOS any private medical information at that point, OIOS concluded in the first Addendum that it did not see the need to conduct an additional interview with Mr A. or change the conclusions of the Final Investigation Report.

In a memorandum of 1 March 2016, the complainant provided the Deputy Director General, Head of the Department of Management (DDG-MT), with a detailed chronology of all of her previous requests to the Administration for the conclusion of the OIOS investigation and urged the DDG-MT to exercise her leadership and take the necessary steps to provide her with the OIOS Report. Having received the summaries

of two medical reports on the complainant, OIOS issued, on 11 July 2016, a second Addendum to the Final Investigation Report, in which it concluded that there was inadequate evidence upon which it could properly be concluded that the complainant's harassment was established beyond a reasonable doubt. While acknowledging that the summary of one medical report was "indicative of the complainant suffering a medical condition that [might] somehow be related to her experience with Mr [A.], this along with all other facts and evidence reviewed by OIOS [did] not meet the requisite standard to adequately support a complaint of misconduct or harassment beyond reasonable doubt". Considering, therefore, that the conclusions of the Final Investigation Report should stand, OIOS recommended that Mr A. be promptly provided with harassment training, that he be formally counselled on the standards of conduct required of a senior staff member at his level, and that attention be given to ensure that Mr A. and the complainant were not located in the same work space.

On 27 January 2017 the complainant wrote to the Director General requesting that the results of the investigation be provided to her without further delay, that the Administration take appropriate action against Mr A. and immediate measures to remove him from her vicinity, that any form of retaliation and impediments to her career development cease, and that she be adequately compensated for moral and material injury stemming from the Administration's failure to protect her from sexual harassment and retaliation, and to address her complaint of harassment without excessive delay. By a letter of 31 January 2017, the Director of MTHR communicated to the complainant the DDG-MT's decision to resolve the case by issuing a letter of warning to Mr A. and by directing him to undergo training on the IAEA's harassment policies. In a memorandum of 27 February 2017, the Director of MTHR responded in detail to the complainant's communication of 27 January, rejecting her request for compensation and noting that the time taken to complete the investigation was a reflection of the time needed to investigate her allegations thoroughly while taking into account relevant developments after the reporting of harassment.

On 30 March 2017 the complainant wrote to the Director General to request a review of the decision to “close the harassment complaint procedure, as the Agency, based on the OIOS Report, erred in not finding [her] allegations of misconduct were proven beyond a reasonable doubt” and not to award her material and moral damages for harassment, “as notified [to the complainant] in the letter of 31 January 2017 (impliedly) or in the [memorandum] of 27 February 2017 (expressly), as the case may be”. The complainant asked to be paid damages and costs, and to be provided with a redacted copy of the Final Investigation Report. She also asked the Director General to allow her to file a complaint directly with the Tribunal. By a letter of 28 April 2017, which constitutes the impugned decision, the Director General informed her that he had decided to maintain the decisions communicated to her in the letter of 31 January and the memorandum of 27 February 2017. The Director General also informed her in that letter of his decision, further to her request, to waive the internal appeal process. A redacted copy of the Final Investigation Report was provided to the complainant under cover of the 28 April 2017 letter.

The complainant asks the Tribunal to set aside the impugned decision, to find that Mr A. sexually harassed her, and to award her 125,000 euros in material and moral damages and 20,000 euros in costs. She also asks the Tribunal to order the IAEA to produce the entire OIOS investigation file, and to audit, review and amend its procedures for resolving sexual harassment complaints in order to protect victims of sexual harassment from retaliation.

The IAEA asks the Tribunal to dismiss the complaint in its entirety.

## CONSIDERATIONS

1. This complaint arises from the complainant’s claim of sexual harassment by Mr A., a senior staff member to whom she was assigned to provide administrative support. The claimed harassment began in early January 2015 shortly after Mr A. joined the IAEA and continued for approximately six weeks. The complainant reported the harassment to her Acting Section Head on 20 February 2015 and met with a staff

counsellor on 23 February. The latter advised the complainant that she should mediate the problem. Subsequently, on 9 March, the complainant informed the new Section Head of the sexual harassment. The following day the Section Head and an official from MTHR met with the complainant. At the meeting, the Section Head recommended that the complainant take assertive training and the MTHR official advised her to be less friendly.

2. On 11 March 2015 the complainant sent an email to the Director of MTHR in which she described Mr A.'s persisting pattern of unwelcome behaviour that made her feel uncomfortable and unsafe; the meetings that had taken place with her supervisors and an official from MTHR; and the conclusions she had reached in the circumstances. The complainant concluded, in relevant part, that the mediation process was not a suitable option for her, as it was insufficient to protect her from retaliation that added to her existing high level of stress, and that the formal investigation procedure could provide her with better protection and help her to feel safe again both at work and outside the office. On 19 March, by a memorandum addressed to the Director of MTHR, the complainant submitted a request for a formal investigation as provided in the IAEA's policy and procedures for the "Prevention and Resolution of Harassment Related Grievances and Appointment of Mediators" (Appendix E to Part II, Section 17, of the Administrative Manual). On 19 April, the Director of MTHR reported to OIOS that Mr A. was alleged to have harassed the complainant. Following the receipt of the report, OIOS initiated an investigation into the report of possible misconduct.

3. On 31 August 2015, OIOS issued its Final Investigation Report. Under the heading "Findings" at paragraphs 56 to 58, the OIOS Report states:

"56. As it is often the case in sexual harassment complaints, there are no independent witnesses. As such, evidence must be adduced which tends to show the respective credibility of the principals.

57. In this case, the evidence adduced shows that [the complainant] has been consistent in her reporting of the details of the incidents, including to her colleagues, and to OIOS. Because OIOS verified her account, which was corroborated by her colleagues, and considering that there was no evidence

of ulterior motive on her part, OIOS finds [the complainant's] complaint against Mr [A.] credible and made in good faith.

58. On the other hand, considering Mr [A.'s] vehement denials, his explanations of the incidents, including his apology to [the complainant], coupled with the fact that no independent witness was present during the incidents; OIOS cannot make a conclusive determination in this case.”

At paragraph 60 of the Final Investigation Report, OIOS concluded:

“Considering the above and as already stated in para 58, OIOS cannot make a conclusive determination in this case. Therefore, OIOS in accordance with [Appendix G to the Staff Regulations and Staff Rules (Part II, Section 1, of the Administrative Manual)] (procedures to be followed in the event of reported misconduct) [will] send the report to [the Director of] MTHR for any further action.”

On 14 September 2015, OIOS informed the complainant that the investigation was closed and the Final Investigation Report had been sent to the Director of MTHR.

4. Ultimately, after the complainant had made several inquiries to the Administration and OIOS regarding the status of her claim of sexual harassment, in a 27 January 2017 memorandum the complainant sought the intervention of the Director General in the processing of her claim of harassment. In the memorandum, the complainant summarized the fears and concerns she had been experiencing following her reporting of the claim of harassment and asked, among other things, that she receive the results of the investigation without further delay.

5. On 31 January 2017 the Director of MTHR informed the complainant of the DDG-MT's decision concerning her sexual harassment complaint. The letter states that the DDG-MT determined that the complainant's allegations of sexual harassment against Mr A. would be dealt with pursuant to paragraph 4(c) of Appendix G and, accordingly, Mr A. would receive a letter of warning “regarding his behaviour”. Additionally, in the letter of warning, Mr A. would be reminded of his managerial responsibilities, including his responsibility in relation to familiarity with the Staff Regulations and Staff Rules, and administrative issuances; would be strongly advised to uphold their provisions and would be directed to undergo training to familiarize himself with the

IAEA's sexual harassment policies. In relevant part, the 31 January decision states:

"OIOS found that the evidence showed that you have been consistent in your reporting of the details of the incidents, including to your colleagues, and to OIOS. OIOS further considered that your complaint against Mr [A.] was credible and made in good faith.

Nevertheless, considering Mr [A.]'s strong denials, coupled with his explanations of the incidents, and the fact that no independent witness was present during the alleged incidents, OIOS considered that there is inadequate evidence upon which it could properly be concluded that the complaint of harassment, as defined under paragraphs 4 and 5 of [Appendix E], is established beyond a reasonable doubt."

6. The complainant submitted a request for review of the DDG-MT's 31 January 2017 decision to the Director General. In his 28 April 2017 decision, the Director General, in relevant part, stated:

"I note in particular that, as you have been informed, OIOS conducted a thorough investigation into your report of alleged harassment by Mr [A.]. However, having fully considered all of the evidence before it, including interviews conducted with you, Mr [A.] and 16 witnesses, OIOS was not able to 'make a conclusive determination' that harassment had occurred. This being the case, [the] DDG-MT determined that the case should be resolved under paragraph 4(c) of Appendix G to the Staff [Regulations and Staff] Rules, 'Procedures to be Followed in the Event of Reported Misconduct' and Mr [A.] was issued with a letter of warning regarding his behaviour. [...]

Further to the result of the OIOS investigation that did not 'make a conclusive determination' that harassment had occurred, no breach of your rights was identified and your request of 27 January 2017 for compensation for alleged material or moral damages in connection with the reported harassment was denied. I have also decided to maintain that decision, which was communicated to you in the letter of 27 February 2017 from [the Director of MTHR]."

Subsequently, on 30 May 2017, the complainant wrote to OIOS requesting the production of "copies of the transcripts of any witness statements/interviews, the electronic recordings, and any other written or electronic evidence considered by the OIOS during its investigation" in order to protect her due process rights. OIOS rejected this request "to protect the integrity of the investigative process". In her complaint, the complainant impugns the Director General's 28 April 2017 decision.

7. In summary, the complainant submits that the OIOS's findings and conclusions are based on manifest errors and, having accepted the OIOS's findings and conclusions, the Director General's decision is tainted by those manifest errors. The complainant also submits that the IAEA breached the principle of good faith and mutual trust in failing to promptly and adequately respond to her complaint, to take actions to protect her from further potential harassment, and to take a timely decision.

8. The IAEA submits that it has complied with all applicable Staff Regulations and Staff Rules, and procedures regarding claims of sexual harassment. The IAEA also submits that at all times it acted in good faith and treated the complainant with due care. The IAEA maintains that the resolution of the case pursuant to paragraph 4(c) of Appendix G was a reasonable outcome, taking into account the due process and duty of care owed to Mr A. and the complainant respectively.

9. In response to the complainant's submissions of manifest errors by OIOS and the Director General's subsequent adoption of its findings and conclusions, the IAEA takes the position that having regard to the OIOS's operational independence, as provided in the OIOS Charter, the Director General was constrained by the findings and conclusions of the OIOS Report and by the standard of proof necessary to establish harassment identified by OIOS, namely, beyond a reasonable doubt. It is convenient to address this submission at this point. It is observed that the operational independence of OIOS, as provided for in the OIOS Charter, concerns the independence of its internal operations. It does not in any way constrain or implicate the Director General's decision-making authority nor does it preclude judicial review of the OIOS's findings and conclusions underpinning a Director General's final decision. Accordingly, this submission is unfounded.

10. However, it must also be observed that it is well settled in the case law 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 [an investigative body] 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 Judgment 3593, consideration 12).

11. The key issue in the present complaint centres on the manner in which the IAEA responded to the complainant’s claim of sexual harassment and her requests. The IAEA’s policies regarding harassment are found in Appendix E, entitled “Prevention and Resolution of Harassment Related Grievances and Appointment of Mediators” (Appendix E). Appendix E provides that any conduct constituting harassment “will not be tolerated and will be dealt with in a manner consistent with the severity of the infraction, including appropriate administrative or disciplinary action”. Appendix E defines the conduct that constitutes harassment and, in particular, sexual harassment and also sets out the respective responsibilities and expectations of staff members and managers/supervisors.

12. Relevantly, Appendix E provides that a complaint of harassment may be resolved by the “Informal approach”, the “Mediation procedure”, and the “Formal investigation procedure”. Appendix E encourages staff members to make use of the mediation procedure. However, if a satisfactory solution is not arrived at in the mediation procedure, or if the staff member considers that mediation is inappropriate or will be unsuccessful, Appendix E provides that “the aggrieved staff member may initiate action in accordance with paragraph 1 of the ‘Procedures to be followed in the event of reported misconduct’” (Appendix G).

13. Paragraph 1 of Appendix G states that “[a]ction with respect to misconduct of a staff member” may be initiated in several ways, including upon receipt by the Director of MTHR of a written report from a staff member. As reflected in its title, Appendix G establishes the procedures consisting of an investigation process and a disciplinary

process to deal with reported misconduct by a staff member. Thus, the report of an aggrieved staff member made pursuant to paragraph 1 of Appendix G, as contemplated in Appendix E, is a report of possible misconduct and initiates the processes in Appendix G. The purpose of Appendix G is to determine whether the subject staff member is guilty of the reported misconduct, in this case sexual harassment, which may result in the imposition of a disciplinary measure for the misconduct. Relevantly, other than being the initiator of an action, there are no other references to the reporter of the possible misconduct in Appendix G.

14. A claim of harassment and a report of misconduct based on an allegation of harassment are distinct and separate matters. A claim of harassment is a claim addressed to the organization the resolution of which only involves two parties, the organization and the reporter of the harassment. In contrast, a report of alleged misconduct, based on an allegation of harassment, triggers the Appendix G procedures, a process that is directed at the culpability of the staff member in question and potentially the imposition of a disciplinary measure. In this process, the two parties are the organization and the staff member in question. In this process, the reporter of the misconduct, a potential victim of the harassment, is a witness and not a party in the proceedings.

15. It is observed that there are no specific provisions in the IAEA's Staff Regulations and Staff Rules that articulate a comprehensive procedure to deal with a claim of harassment of the type first discussed in the preceding consideration. In the absence of a lawful comprehensive procedure within the IAEA's Staff Regulations and Staff Rules to deal with a claim of harassment, the IAEA had to respond to the complainant's claim of harassment in accordance with the Tribunal's relevant case law. It is well settled in the case law that an international organization has a duty to provide a safe and adequate working environment for its staff members (see Judgment 2706, consideration 5, citing Judgment 2524). As well, "given the serious nature of a claim of harassment, an international organization has an obligation to initiate the investigation itself [...]" (see Judgment 3347, consideration 14). Moreover, the investigation must be initiated promptly, conducted thoroughly and the facts must be

determined objectively and in their overall context. Upon the conclusion of the investigation, the complainant is entitled to a response from the Administration regarding the claim of harassment. Additionally, as the Tribunal held in Judgment 2706, consideration 5, “an international organisation is liable for all the injuries caused to a staff member by their supervisor acting in the course of his or her duties, when the victim is subjected to treatment that is an affront to his or her personal and professional dignity” (see also Judgments 1609, consideration 16, 1875, consideration 32, and 3170, consideration 33). Thus, an international organization must take proper actions to protect a victim of harassment.

16. In the present case, as noted in consideration 2, in her 11 March 2015 claim of harassment the complainant described in detail Mr A.’s persistent pattern of unwelcome behaviour that made her feel uncomfortable and unsafe. The complainant submitted a request for a formal investigation on 19 March 2015, because she feared retaliation by Mr A. and she believed that it could provide her with better protection and help her to feel safe again at work and outside the office. This request initiated the Appendix G procedures. However, Appendix G is designed to deal with the alleged misconduct of a staff member and not with the protection of a staff member alleging harassment. The fact that the complainant requested a formal investigation did not absolve the IAEA of its obligations in the case law in relation to a claim of harassment.

17. Although the complainant’s supervisors were aware of her allegations of sexual harassment, as was the Director of MTHR upon receiving the complainant’s detailed account of Mr A.’s “persistent pattern of unwelcome behaviour that made her feel uncomfortable and unsafe”, no action was taken by the Administration to address these concerns until the complainant requested the formal investigation. Although the purpose of the investigation was to determine whether there was sufficient evidence to support a finding of misconduct, the OIOS conducted a thorough investigation and issued the Final Investigation Report in a timely manner. Despite the complainant’s numerous requests to be informed about the outcome of the investigation in relation to her claim of harassment and the IAEA’s response to her claim, no action

was taken other than to give the complainant an update on the status of the ongoing Appendix G procedure.

18. The Tribunal concludes that the IAEA could have and should have given the complainant a decision regarding her complaint of harassment within a reasonable time following the completion of the investigation on 31 August 2015. Rather than reacting promptly in relation to the complainant's claim of harassment, the Administration held this claim in abeyance pending the completion of the Appendix G procedure and a determination as to whether misconduct was committed. The fact that the Appendix G procedures were still ongoing did not in any way preclude the IAEA from responding to the complainant's claim of harassment. According to the record, the Director of MTHR received the 31 August 2015 Final Investigation Report in mid-September. Allowing a reasonable amount of time for the Administration to respond to the complainant's claim of harassment, the complainant should have received a decision regarding her claim no later than 30 November 2015. However, the complainant did not receive a decision until 31 January 2017. The unjustified delay of fourteen months is inexcusable and unreasonable and caused the complainant significant harm. As reflected in the complainant's communications to the Administration and the Director General, this delay caused the complainant significant distress, a feeling of isolation and stigmatization, fear for her personal security and worry about the continuation of her employment.

19. In his 31 January 2017 decision, the DDG-MT acknowledged the OIOS's finding that the evidence showed that the complainant was consistent in her reporting of the details of the incidents to her colleagues and to OIOS; and that based on its verification of the complainant's account and, as there was no evidence of ulterior motive on the part of the complainant, OIOS found that the complainant's complaint of harassment against Mr A. was credible and was made in good faith. However, by taking into account Mr A.'s strong denials, his explanations concerning the incidents, and the absence of an independent witness during these incidents, the DDG-MT accepted the OIOS's finding

that there was inadequate evidence to conclude that the complaint of harassment was established beyond a reasonable doubt.

20. Having regard to the distinction mentioned in consideration 14, above, between a claim of harassment and a report of misconduct based on an allegation of harassment, the DDG-MT's decision concerning the complainant's claim of harassment is fundamentally flawed. The DDG-MT proceeded on the assumption that an allegation of harassment by the aggrieved staff member must not only be borne out by specific acts, the burden of proof being on the reporter of the harassment, but must also prove that the alleged perpetrator of the harassment acted with intent. This in turn resulted in the DDG-MT incorrectly applying the "beyond a reasonable doubt" standard of proof in his consideration of the complainant's claim of harassment. It is noted that the Tribunal has specifically rejected this assumption that intent on the part of the alleged perpetrator is required in order to establish harassment (see, for example, Judgments 2524, consideration 25, 3233, consideration 6, and 3692, consideration 18, and the case law cited therein). The Tribunal's case law states that the applicable standard of proof for a finding of harassment in a case such as this is not "beyond a reasonable doubt" but a less onerous standard (see Judgment 3725, consideration 14).

21. As the Director General maintained the DDG-MT's decision in his 28 April 2017 decision, his decision is tainted by the same flaws and will be set aside. Given the passage of time, remitting the matter to the IAEA is not a viable option. The Tribunal finds that there is sufficient evidence and information in the pleadings for the Tribunal to make an informed decision. Taking into account the OIOS's conclusion that based on its findings, detailed at consideration 3 of this judgment, that the complainant's complaint of sexual harassment was credible and made in good faith; that no finding was made regarding the credibility of Mr A.'s denials; that a decision was made that Mr A. would be warned about his "behaviour"; and notwithstanding the fact that there was no independent witness present during the incidents, which is not uncommon and does not undermine the credibility of the complaint, the Tribunal finds that the complaint of sexual harassment is substantiated.

In view of this finding, a consideration of the complainant's request for the production of the documentary evidence in the investigation is unnecessary.

22. As the complainant has not provided information in support of her request for material damages, this claim for relief will be dismissed. However, she is entitled to an award of moral damages in the amount of 25,000 euros for the harassment, the inexplicable, unreasonable delay and the significant harm she suffered due to this delay. The complainant is also entitled to costs in the amount of 7,000 euros. The complainant's request that the IAEA be ordered to audit, review and amend its procedures for resolving sexual harassment complaints is beyond the scope of the Tribunal's competence and will be dismissed.

#### DECISION

For the above reasons,

1. The Director General's 28 April 2017 decision and the DDG-MT's decision of 31 January 2017 are set aside.
2. The IAEA shall pay the complainant moral damages in the amount of 25,000 euros.
3. The IAEA shall pay the complainant costs in the amount of 7,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 6 November 2019, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President, Mr Giuseppe Barbagallo, Judge, Mr Michael F. Moore, Judge, Sir Hugh A. Rawlins, Judge, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

PATRICK FRYDMAN

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

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