

## NINETY-SECOND SESSION

***In re Bolaños***

**Judgment No. 2113**

The Administrative Tribunal,

Considering the complaint filed by Mr Alvaro Bolaños against the International Atomic Energy Agency (IAEA) on 13 November 2000 and corrected on 26 January 2001, the IAEA's reply of 9 May, the complainant's rejoinder of 19 June and the Agency's surrejoinder of 28 August 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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

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

A. The complainant, a Colombian who was born in 1938, joined the Agency in June 1984 as an Area Officer at grade P.3 in the Latin America Section of the Division of Technical Assistance and Co-operation of the Department of Technical Co-operation. He was given a fixed-term appointment for two years which was extended six times. His appointment ended on 30 November 1999, when he retired.

On 9 February 1987 the Head of the Latin America Section drafted a memorandum assigning projects to staff. The complainant inferred from a handwritten annotation at the bottom of the memorandum that he was to have the same duties and responsibilities as another official in the section who was at grade P.4. A request for the upgrading of his post submitted in August 1993 and again in December 1996 was rejected.

By a memorandum of 5 March 1999 the complainant asked the Director General to reconsider his case and upgrade him to P.4 as from February 1987. By a letter of 6 July 1999 the Director General replied that, according to a report he had requested from the Division of Personnel and the Department of Technical Co-operation, the complainant's claim was time-barred because in the past he had signed numerous contract extensions, including the most recent one dated 29 April 1998, without ever objecting to his grade. The report also said that his substantive duties remained unchanged and that occasional assignment to higher level duties was a normal part of his work. Upgrading depended on a regular and recurring increase in responsibilities. By a letter of 3 August 1999 the complainant asked the Director General to reconsider the Division of Personnel's finding. But the Director General replied on 13 September that he saw no reason to rescind the decision of 6 July not to upgrade his post, and that the complainant should have gone to the Joint Appeals Board within one month of receiving notification of that decision. On 17 September the complainant lodged an appeal with the Joint Appeals Board against the Director General's decision of 13 September 1999.

In its report of 30 June 2000 the Board found that the memorandum of 9 February 1987 had not assigned the complainant to higher-level duties and responsibilities. It saw the fact that he challenged neither his initial appointment nor its extensions as evidence that he had accepted the terms and conditions of his employment in good faith. It recommended rejecting the appeal, which the Director General did in a letter of 21 July 2000, the impugned decision.

B. The complainant pleads irregularities, breach of the Staff Rules and Regulations and abuse of authority. He observes that before joining the Agency he spent fifteen years performing duties similar to those for which he was recruited, some of the time on a P.4 post. And it was P.4 duties and responsibilities that the Agency assigned to him right from the start, as all his performance reports show. Indeed, his supervisors acknowledged as much and

thought he should be promoted to P.4. Had he challenged the classification of his post on signing his contract, he would have run the risk of losing the appointment.

He observes that the Agency could have settled the matter by simply appointing him to a P.4 post that fell vacant in his section in 1989. But instead, rather than putting it up for competition the Agency gave it to a staff member who lacked the necessary experience, then finally transferred it to another section.

What the Director General conveyed to him on 6 July 1999 were his comments, not a decision, which was why the complainant wrote to him again on 3 August. He contends that the Director General took his decision of 13 September 1999 on the strength of confidential information which was kept from him in breach of the principle of clarity which underpins the rule that staff are to be treated fairly. He alleges that the Administration tried to prevent him from filing an appeal.

He received the letter of 21 July 2000 on 1 August but the Joint Appeals Board's recommendation was not enclosed. The Board's report reached him only on 28 August 2000. He objects to it on the ground that it contains inconsistencies and mistakes. He therefore concludes that the Board's recommendation lacks foundation and that his case has not been treated impartially.

Lastly, he observes that for over twenty years the Agency has been applying a "zero growth" policy, maintaining the same budget however many employees it may need. Numerous officials have been "sacrificed" to the policy, the Agency having failed to classify their posts properly. He cites incidents involving the Director of his division which, he says, had a part in the decisions that affected him adversely. He points out that even though the Agency treated him unfairly he did not let that impair his performance.

He seeks the quashing of the decision of 21 July 2000 as notified to him on 28 August 2000, the Director General's decision of 13 September 1999 and the report of the Joint Appeals Board. He also asks the Tribunal to acknowledge and confirm the Agency's breaches of the Staff Rules and Regulations and its reliance on arbitrary decisions, failure to follow due process, abuse of authority, and that it took measures to undermine the rights of the staff and their means of redress. He claims material damages in an amount equal to the difference between the remuneration and benefits he received as a P.3 official and what he would have received at grade P.4 between 1987 and 1999, or else an equivalent lump-sum payment reckoned on the basis of his last salary. He claims 30,000 United States dollars in moral damages and 5,000 dollars in costs.

C. The Agency replies that the complaint is irreceivable. The complainant waited until 5 March 1999, almost a year after he signed his last contract extension, before challenging the grade the Agency gave him on appointing him in 1984. His claim is therefore time-barred. Having received the Director General's final reply to his appeal on 6 July 1999, he ought to have challenged it within one month of that date, but he did not go to the Joint Appeals Board until "almost three months later". And although he asserts that he received the Director General's final decision on 1 August 2000, not until 13 November 2000 did he challenge it before the Tribunal. His complaint is therefore irreceivable under Article VII(2) of the Tribunal's Statute.

Citing Judgment 1808 (*in re Mesfin*), the Agency submits that the complainant's plea about his performance should be dismissed, since "grading turns on the duties of the post, not on the quality of performance". The transfer of a P.4 post from the Latin America Section to another section was a separate decision, unrelated to the issue of grading. As to the alleged shortcomings and mistakes in the Joint Appeals Board's report, they are immaterial: this complaint is about the Director General's final decision and not the Board's deliberations. His allegation of an incident involving the Director of his division should also be dismissed, as he offers no evidence in support. The same goes for his argument concerning the "zero growth" policy as it is pure speculation. Lastly, the Agency points out that a job evaluation study carried out in the Department of Technical Co-operation between October and December 1998 indicated that the complainant's post should be maintained at grade P.3.

D. The complainant rejoins that the Agency's pleas are devoid of merit. Its decisions showed procedural flaws, mistakes of fact and of law, misuse of authority and prejudice. They also overlooked essential facts and drew mistaken conclusions from the evidence.

As to receivability, he maintains that his extensions of appointment were not actionable administrative decisions within the meaning of the Staff Rules but merely "offers in the legal sense". He points out that since his supervisors had been promising since 1987 to get his post upgraded, he saw no need to take any other action. He could not

appeal until he got a final and express decision from the Director General, and he received one only on 13 September 1999. The Board having raised no objection to receivability, his appeal was in time. Similarly, the Board's report, which should have been sent with the letter of 21 July 2000, reached him only on 28 August. Consequently, that was the date from which the time limit started to run, so he did comply with the time limit set in Article VII of the Tribunal.

On the merits the complainant observes that he raised the matter of the quality of his performance simply to disprove any notion that his work was at the root of the Agency's failure to take proper and timely action. In his submission there was no reason to transfer to another section the P.4 post he could have applied for. He sets out to prove that he did suffer discrimination and unfair treatment because of the incident involving the Director of his division. He alleges breach of process in the treatment of his requests for reclassification.

E. In its surrejoinder the Agency presses its pleas. It maintains that the classification procedures were correctly followed from start to finish. The complainant is mistaken in his assertion that the letters extending his appointment contain no decisions about his grade. As to the transfer of the P.4 post, it was a regular transfer under the Agency's Administrative Manual. Lastly, for several of his pleas the complainant offers not a shred of evidence.

## CONSIDERATIONS

1. The complainant served the IAEA from 24 June 1984 until 30 November 1999, when he retired. He was recruited at grade P.3 and asked the Agency several times to upgrade his post to P.4 or appoint him to some other post at that level, but to no avail.
2. On 5 March 1999 he asked the Director General to organise a thorough review of his case and to upgrade his post to P.4 as from February 1987, the date on which he was first assigned duties and responsibilities at P.4 level. The Director General replied on 23 April 1999 that he had sent on his request to the Division of Personnel, which would examine his case in consultation with the Department of Technical Co-operation. The Director General informed the complainant on 6 July that he had received a report from the two departments concerned. He said that the complainant's appeal was time-barred for although he had signed numerous contract extensions specifying that his grade was P.3, he had not challenged any of them. Furthermore, he had been asked to do work of a higher level only occasionally and for short periods, his substantive duties remaining unchanged. In conclusion the Director General said that a recent job classification study in the Department of Technical Co-operation showed that an upgrading of his post was not warranted, but that the Administration had several times expressed its appreciation of his work.
3. In a letter of 3 August 1999 to the Director-General the complainant asked for a review of that position. The Director General replied on 13 September 1999 that he saw no reason to upgrade the post and that he should have gone to the Joint Appeals Board. The complainant filed an appeal on 17 September 1999, in which he reproduced all his previous arguments and claimed the quashing of the decision notified in the Director General's letter of 13 September 1999.
4. The Board met eleven times and considered all aspects of the case. On 30 June 2000 it recommended upholding the decision of 13 September 1999 not to upgrade the complainant's post to P.4. More generally, it advised the Administration to make its classification procedures more transparent and to avoid writing contradictory statements and raising false hopes in staff performance reports.
5. The complainant has come to the Tribunal seeking the quashing of the Director General's decision of 21 July 2000 to uphold the one of 13 September 1999 not to upgrade his post. He also asks the Tribunal to quash the report of the Joint Appeals Board and to acknowledge recurrent breach of the Staff Rules and Regulations by the Agency. He claims redress of various kinds, including compensation equal to the difference between the salary and benefits he would have received between 1987 and 1999 at grade P.4 and those he actually received at grade P.3.

### *Receivability*

6. Insofar as the complainant is seeking the quashing of the Joint Appeals Board's report, his claims are irreceivable because the Board has authority to make only recommendations, not decisions. In support of his claims against the Director General's decision the complainant is no doubt entitled to cite procedural flaws in the Joint Appeals

Board's treatment of his case. That plea will be addressed below in the discussion on the merits. His claim to the quashing of the Board's recommendation, however, fails.

The same applies to his claim to a review of his career since 1987, the date when the work of his section was reorganised. As the Agency points out, the complainant had had the opportunity to challenge in time the refusal to upgrade his post; but on six occasions - most recently on 29 April 1998 - he accepted the contract extensions offered to him without objecting to the fact that they were offered at the same grade.

However, the Tribunal will entertain on the merits his claim to the quashing of the decision of 21 July 2000 to uphold the one of 13 September 1999 refusing to upgrade the post.

The Agency submits first that the complaint is out of time because it was filed on 13 November 2000, in other words more than ninety days after the decision was notified - on 1 August 2000. The evidence shows, however, that the notification was incomplete because it did not include the Joint Appeals Board's recommendation, which was to have been attached to it. The complainant did not get the Board's report until 28 August 2000.

Secondly, as the Agency rightly points out, the decision of 13 September 1999, challenged before the Board, largely upholds the one of 6 July. But unlike the latter it states formally that, on the basis of all the evidence, the Director General "[saw] no reason to reclassify the post". That was the final and challengeable decision, and the complainant appealed against it within the time limits, as the Board concluded after thorough investigation.

### *The merits*

7. What prompted the present dispute was the complainant's memorandum of 5 March 1999 seeking reconsideration of his case with a view to reclassification of his post. The Administration agreed in its letter of 23 April 1999 to re-examine the matter. Though he was not entitled to seek a review of his whole career, there was nothing to prevent the complainant challenging his grade and, if his claim was warranted, seeking compensation.

8. The complainant alleges several flaws in the Joint Appeals Board's report. But his pleas on that score cannot be sustained. The way the Board's secretary was appointed and the way the investigation was conducted disclose no flaws liable to affect the report or influence the impugned decision. As to the alleged inconsistencies or mistakes the complainant picked up in the Board's lengthy report, even if proven they could have no bearing on the lawfulness of the recommendation.

9. The complainant mentions several times that his work was found to be good, and the Agency does not demur. That, however, is immaterial to the grading of his post (see Judgment 1808). He also asserts that the Agency could have had several opportunities to assign him to a P.4 post. But to take up his plea would imply reviewing decisions that went unchallenged and which may not be cited in support of claims against the decisions taken in 1999 not to upgrade his post.

10. The gist of the complainant's argument is that he performed P.4-level duties, that his supervisors acknowledged as much several times in the course of his career and that the Agency should therefore upgrade his post accordingly. The Joint Appeals Board, however, which examined the case very thoroughly found no flaws in the classification procedure, and the Tribunal endorses that finding. It should be added that a job evaluation study was carried out between October and December 1998 in the Department of Technical Co-operation, which looked at P.3 posts such as that of the complainant. The Director General approved the findings of that study on 19 March 1999; they afford no grounds for doubting that the complainant's post was correctly graded.

11. As to his pleas challenging the Agency's impartiality and recounting incidents which he sees as evidence of discrimination and unfair treatment, they are mere allegations and cannot be sustained. What would appear to be beyond doubt is that his work was appreciated. Indeed the Director General said so in his letter of 6 July 1999. In all likelihood his good performance appraisals were what prompted expectations that his duties and his post might be upgraded to P.4.

12. Lastly the complainant objects that a number of documents were disclosed neither to him, nor to the Joint Appeals Board nor to the Tribunal. He sees that as discriminatory and as a breach of the Staff Rules and Regulations and good faith. The Agency refutes the plea citing, appositely, the rules on protection of information about other members of staff. As to the rest, there is nothing in the evidence to suggest any breach of the rule that proceedings must be adversarial.

13. It follows that the complainant's claim to the quashing of the decisions he challenges cannot succeed. Nor, therefore, can his claims to compensation for the injury caused by the flaws he alleges.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

*(Signed)*

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet