

106th Session

Judgment No. 2769

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G.L. B. against the International Atomic Energy Agency (IAEA) on 14 August 2007 and corrected on 14 September, the IAEA's reply of 21 December 2007, the complainant's rejoinder of 25 February 2008 and the Agency's surrejoinder of 6 May 2008;

Considering Articles II, paragraph 5, and VII 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, a French national born in 1948, joined the IAEA on 6 November 2000 under a three-year fixed-term contract as Section Head at grade P-4 of the Experts and Training Section in the Division for Africa and East Asia and the Pacific within the Department of Technical Cooperation. His appointment was extended twice. In September 2005 he was offered a final one-year extension until 5 November 2007, which he accepted.

Following an e-mail exchange in which another staff member had used offensive language, the complainant asked the Administration to take appropriate action, as a result of which the staff member sent a message of apology to the complainant. On 13 May 2004 he requested that a formal investigation be undertaken as he considered that the content of the e-mail exchange still cast doubt on his performance and on that of his Section. By a letter of 28 July 2004 he was advised that the Deputy Director General in charge of the Department of Management had decided that the case should be closed. The letter pointed out that the complainant had received an apology for the incident, that neither his performance nor that of his Section warranted an investigation, and that the matter would be better addressed in the context of the performance reviews of the staff members concerned.

As a result of the reorganisation of the Department of Technical Cooperation in 2005, five Divisions were established within the Department with two Sections each and the posts of Section Heads at grade P-5 were advertised through vacancy notice No. 2005/080. Responding to the vacancy notice, the complainant applied for one of these posts. On 13 January 2006 he was informed that he had been reassigned to the post of Programme Management Officer in one of the Sections of the Division for Africa. When it was subsequently announced that the posts of Section Heads had been filled, the complainant requested by a memorandum of 11 July that the Director General review the decision concerning the appointments to those posts. He contended in particular that, although he possessed the relevant qualifications and experience, he had not been invited to an interview with the Selection Panel because his appointment was due to expire in less than two years. Having received no reply from the Director General, he filed an appeal with the Joint Appeals Board on 15 August 2006. That same day, the Acting Director General informed him in writing that his request for review was rejected. He noted that, in view of the large number of meritorious candidates, the Department of Technical Cooperation had rightly decided that the duration of appointments held by candidates was a relevant consideration.

On 17 August 2006 the complainant asked that the investigation into the above-mentioned exchange of e-mails be “reopened”; he

alleged that the fact that one of the members of the Selection Panel was directly concerned by the unresolved matter had been prejudicial to his application. His request was rejected on the grounds that he had not provided new and material information that justified reopening the matter. On 22 January 2007 he asked the Director General to review this decision as well as that of 28 July 2004, but he was informed by a letter of 2 March 2007 that his request was rejected.

In its report of 30 March 2007 the Joint Appeals Board found that the complainant's application under vacancy notice No. 2005/080 had not been sufficiently evaluated and that his professional standing had been adversely affected by the exclusion of his application. It recommended that his appointment be extended at his current grade at least until he reached the age of 60, and that consideration should be given to the possibility of an extension to 62 years of age. On 21 May 2007 the Director General provided the complainant with a copy of the report of the Board and informed him that he had decided not to endorse its recommendations. In his opinion, the complainant's application had been sufficiently considered, his professional standing had not been damaged in view of the confidentiality of the selection process and there was no basis upon which to extend his appointment beyond the maximum seven-year tour of duty; he therefore dismissed the appeal. That is the impugned decision.

B. The complainant contends that the Director General failed, in his decision, to provide adequate reasons for departing from the Joint Appeals Board's findings and recommendations. He submits that the evaluation of his application is tainted with errors of fact and law, and breach of administrative due process, and that his application for the post of Section Head was not properly and sufficiently considered. As the evaluation sheet shows, among the three persons in charge of evaluating his application, the first evaluator rated him as "not qualified" on the basis that he was serving under a final extension of his appointment, the second evaluator rated him as "qualified" but made scathing comments about his experience and abilities, and the third evaluator did not rate him at all.

The complainant also contends that there is no established practice within the Agency according to which the length of appointments held by internal candidates is to be taken into account in the evaluation of their applications. If such a practice exists, it is unlawful and it was applied in breach of the principle of good faith. It was not mentioned in vacancy notice No. 2005/080, nor did the Agency advise him about it upon receipt of his application. The practice was also inconsistently applied and resulted in unequal treatment, as other staff members who were subject to the maximum seven-year tour of service were interviewed for posts in the Department of Technical Cooperation, and he himself was interviewed for a post in another Division during the same period. Moreover, the Director General's decision of 21 May 2007 is not based on such practice.

The complainant alleges bias on the part of the evaluators as well as the managers of the Department of Technical Cooperation, in particular the Director of the former Division for Africa and East Asia and the Pacific. The fact that he could not clear doubts on his performance explains subsequent actions taken by the Administration, such as the abolishment of his post and his demotion to a post with inferior responsibilities and no supervisory function.

The complainant asks the Tribunal to set aside the impugned decision. He points out that, since he was appointed after 1990, his retirement age is 62 according to Staff Regulation 4.05. He submits that as a result of the impugned decision he lost valuable pension benefits as he could not reach the minimum five years of participation in the United Nations Joint Staff Pension Fund and a valuable opportunity to be considered for the post of Section Head at grade P-5. He therefore claims material damages in an amount equal to the salary, including pension benefits and other emoluments, he would have earned had he been appointed to the post of Section Head at grade P-5 from 6 November 2007 until 5 November 2010. He also claims moral damages and costs.

C. In its reply the Agency challenges the receivability of the complaint to the extent that it is based on alleged bias. It argues that, since the complainant failed to raise that point in his request for review

of 11 July 2006 or before the Joint Appeals Board, he did not exhaust internal remedies.

On the merits the IAEA asserts that the complainant's application was duly and sufficiently considered. Only candidates who had been rated as "well qualified" by the first and second evaluators were assessed by the third one. In fact, the Agency gave more consideration to the complainant's application than it should have since he was assessed by the second evaluator although the first evaluator had rated the complainant as "not qualified".

It also asserts that the practice of taking into account the length of appointment held by internal candidates was justified by the needs of the Department of Technical Cooperation and the Agency's interest in ensuring stability and continuity in the operations of that Department following the 2005 reorganisation. Unlike other staff members who were interviewed the complainant had received a final extension of his appointment. That extension was one of the relevant factors in assessing his suitability for the post of Section Head. At the time of the selection process he only had one-and-a-half years remaining before reaching the maximum seven-year tour of service provided for in the Staff Regulations and Staff Rules.

The IAEA challenges the relief sought by the complainant. In its view the Board's recommendation that the complainant's last appointment be extended at the same grade is incongruent as it bears no relation to the issues raised in the internal appeal and in the complaint. It notes in this respect that the complainant has not requested that the selection process be annulled or that his application be reconsidered, but seeks material damages equivalent to what he would have earned had his appointment been extended until he had reached statutory retirement age. The Agency submits that the complainant's pension situation has no bearing on his unsuccessful application. Further, there is no basis for awarding him damages. Even if the selection process had been conducted differently, there is nothing to suggest that the complainant would have been appointed to a post of Section Head. Nor was there any impact on his professional standing since the selection process was not made public.

D. In his rejoinder the complainant maintains his pleas. He avers that he did raise the issue of bias before the Joint Appeals Board but left it to the Board to investigate the matter and to make a finding in that respect. In any event, according to the case law he is free to raise new pleas before the Tribunal. He emphasises that nothing in the Staff Regulations and Staff Rules authorised the Department of Technical Cooperation to put an end to the evaluation process after the first and second evaluators had provided their ratings, particularly as the third evaluator's rating was a determining factor in identifying internal candidates who should be interviewed and recommended. The Agency's concern for continuity and stability could have been addressed by granting him an exception to the maximum seven-year tour of service. As to the relief sought, he points out that he unsuccessfully requested that the Director General review the decision concerning the appointments to the posts of Section Heads. Since he has now retired, he does not have any interest in the quashing of the appointments but he claims that he is entitled to seek remedy for the injury he suffered.

E. In its surrejoinder the IAEA maintains its position. It adds that the length of appointments held by internal candidates is one of many legitimate considerations that may be taken into account in evaluating applications. The fact that it is unwritten is immaterial, provided that it is applied evenly to all candidates.

CONSIDERATIONS

1. As a result of the reorganisation of the Department of Technical Cooperation during the course of 2005, the complainant's post was abolished and he was informed on 13 January 2006 that he had been reassigned to the post of Programme Management Officer in one of the Sections of the Division for Africa. The complainant considers this to be a demotion and attributes it to events involving another staff member in 2004.

2. The IAEA challenges the receivability of those portions of the complaint alleging bias. It characterises these allegations as a claim based on harassment and mobbing and argues that they are irreceivable as they were not raised in the complainant's request for review of 11 July 2006 or before the Joint Appeals Board.

3. The Tribunal finds that the allegations of bias are pleas in relation to the complaint against the selection process and do not constitute a separate claim. Accordingly, the Agency's plea of irreceivability fails. However, the Tribunal also finds that the complainant's pleas of bias must fail for lack of foundation. His primary assertion of bias is based upon an inappropriate e-mail sent to him by another staff member who was not involved in the selection process for vacancy notice No. 2005/080. Beyond the assertion of bias, the complainant's allegations concerning the Director of the former Division for Africa and East Asia and the Pacific within the Department of Technical Cooperation are not substantiated by any evidence and this Director was not among those evaluating his application under the above-mentioned vacancy notice.

4. As to the merits of the case, it is well established in the case law that an appointment decision being discretionary in nature will only be set aside "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" (see Judgment 2393, under 11). It follows that a decision based on the unequal treatment of complainants is subject to the Tribunal's scrutiny.

5. In his letter of 15 August 2006 the Acting Director General explained that, while in general internal candidates should be interviewed if they are rated as qualified for a post, each hiring Department or Division has discretion as to the number of candidates interviewed. Concerning the complainant's application, he wrote:

“On this occasion the Agency was in the fortunate position to have a large number of meritorious candidates. Accordingly, the Department of Technical Cooperation determined that the period during which the appointee might hold the position before leaving the Agency was a relevant consideration. Accordingly, after careful deliberation, it was decided not to proceed with your application. [...] Other staff members, who also applied for these posts and who were on final contracts, were also not interviewed.”

6. The complainant argues that two other staff members who were in the Division were interviewed despite the fact that they were subject to the maximum seven-year tour of service. The Joint Appeals Board rejected this argument on the basis that the two individuals who were interviewed did not hold, like the complainant, a final extension of appointment.

7. According to the IAEA, the rationale for excluding qualified candidates with less than two years to retirement, or on final extension of appointment, or being rotated “shortly”, was to provide stability and continuity in the operations of the Department of Technical Cooperation. Given the stated rationale for excluding applicants from the selection process, the fact that the two applicants who were interviewed were not on the same type of appointment as the complainant is irrelevant. Regardless of the nature of the appointment, the two candidates who were interviewed were expected to leave the Agency within relatively the same time frame as the complainant. In these circumstances, the complainant was not treated equally and the Tribunal concludes that the Board erred in law. Although the Director General did not specifically address the question of unequal treatment, the selection process was fundamentally flawed and his decision dismissing the appeal must be set aside. Accordingly, consideration of the remaining issues raised by the complainant is unnecessary. As the complainant’s appointment has expired, the matter will not be remitted for a redetermination.

8. In addition to an order setting aside the impugned decision, the complainant seeks material damages equivalent to what he would have earned had he been appointed to the post of Section Head at grade

P-5, including pension benefits and other emoluments, for a period of three years from 6 November 2007, moral damages, and costs.

9. As it cannot be confirmed but for the flaw in the selection process that the complainant would have been appointed to the post of Section Head, this aspect of the claim for material damages is rejected. The complainant, however, lost a valuable opportunity to be properly considered for the said post. Given the number of well-qualified candidates, the complainant is adequately compensated for the lost opportunity and unequal treatment by an amount of 5,000 euros. Since the complainant has failed to establish any damage to his professional reputation, his claim for relief in that respect is rejected. Having had a measure of success, the complainant is entitled to costs in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The Director General's decision of 21 May 2007 is set aside.
2. The IAEA shall pay the complainant 5,000 euros.
3. It shall pay him 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 31 October 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron
Agustín Gordillo
Dolores M. Hansen
Catherine Comtet