

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

D. M.

v.

IAEA

121st Session

Judgment No. 3608

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. D. M. against the International Atomic Energy Agency (IAEA) on 21 January 2013 and corrected on 26 April, the IAEA's reply of 19 August, the complainant's rejoinder of 18 November 2013 and the IAEA's surrejoinder of 25 February 2014;

Considering Article II, paragraph 5, 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 challenges the final administrative decision of the Director General in which he dismissed her internal appeal challenging the decision not to pay her moral damages for harassment and for injury to her dignity and reputation.

The complainant, who at the material time served with the IAEA at the P-4 level, employed Ms T. (a national of Nepal) in August 2009 as a housekeeper and nanny at her home in Vienna, Austria. Ms T. received a *Legitimationskarte* (hereinafter "a legitimation card") from the Austrian authorities by virtue of her employment with the complainant and in line with the Headquarters Agreement between the IAEA and the Republic of Austria; the issuance of the legitimation

card was processed by the IAEA's visa section in the Division of General Services.

On 8 June 2010 a member of the IAEA Administration informed the complainant that Ms T. was expected to attend an interview with an official of the Austrian Federal Ministry for European and International Affairs (hereinafter "the Ministry") on 14 June 2010, which she did. In an e-mail of 15 June the complainant informed the Administration that Ms T. was expected to attend another interview at the Ministry and she asked for clarification on a number of issues. Exchanges ensued variously between the complainant, the IAEA and the Austrian authorities regarding, in particular, the necessity for Ms T. to attend further interviews with Ministry officials.

Ms T.'s legitimation card expired at the end of October 2010. On 29 November the complainant was informed by the Administration that a new legitimation card was ready for Ms T. and that it could be picked up at the Ministry.

In November 2010 the complainant received notice of criminal charges against her under the Austrian criminal code provisions prohibiting human trafficking.

On 20 December the complainant sent a memorandum to the Director General in which she requested that the IAEA protect her rights and interests in the matter and, in particular, that it take action to clarify with the Austrian authorities the whereabouts of Ms T. (who had apparently been taken away by Austrian officials on 10 December) and the extent of her current responsibilities for Ms T., given that she no longer knew where she was. She further requested the IAEA to voice its dissatisfaction with the Austrian authorities regarding the manner in which the matter had been dealt with and to ask what further action would be taken and what evidence they possessed of her alleged wrongdoing.

In an e-mail of 21 March 2011 to the Administration the complainant requested that Ms T.'s legitimation card be cancelled.

Following exchanges between the IAEA and the Austrian authorities, on 2 May 2011 the Director General replied to the

complainant's memorandum and explained that the Austrian authorities had cancelled Ms T.'s legitimation card. He further explained that as she no longer had any connection with Ms T. by virtue of her employment with the IAEA, no further action on the part of the IAEA was required.

A criminal trial was held in July 2011 and the complainant was acquitted of all charges.

By a memorandum of 1 August 2011 to the Director General the complainant requested moral damages in the amount of 50,000 euros for the failure by the IAEA to meet its duty of care towards her given the degree of harassment and emotional and psychological suffering she and her family had been subjected to and given her mistreatment by certain IAEA officials.

On 31 August the Director General informed the complainant that he saw no basis upon which to grant her financial compensation. She requested a review of that decision on 31 October and on 17 November the Director General maintained it. On 14 December 2011 the complainant lodged an appeal with the Joint Appeals Board (JAB). In its report of 28 September 2012 the JAB found that the IAEA had not violated any Staff Regulation or Staff Rule in its handling of the matter and it recommended in particular that the Director General maintain his original decision and dismiss the appeal. By a letter of 23 October 2012 the Director General dismissed the complainant's appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. She seeks moral damages in the amount of 50,000 euros, costs and legal fees and any other relief the Tribunal deems just and proper.

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

CONSIDERATIONS

1. The complainant commenced working with the IAEA in 1987. In August 2009 she commenced employing Ms T., a national of Nepal, as a housekeeper and nanny. The complainant was then living

in Austria. In mid-2010, this employment relationship was under investigation by the Ministry. In November 2010, the complainant received notice of criminal charges against her under the Austrian criminal code prohibiting human trafficking. These charges related to the complainant's employment of Ms T. She was acquitted of these charges in a criminal trial in July 2011.

Various staff of the IAEA were involved in or associated with the investigation of the complainant by the Austrian authorities and after her acquittal, she wrote to the Director General on 1 August 2011 claiming moral damages in the sum of 50,000 euros. This sum was claimed for what the complainant then described as a failure on the part of the IAEA in its duty of care towards her, harassment and emotional and psychological pressure and suffering, and maltreatment by certain officials of the IAEA. This request was refused on 31 August 2011 and a request by the complainant for a review of that decision was unsuccessful. On 14 December 2011 the complainant lodged an internal appeal with the JAB. On 28 September 2012 the JAB recommended to the Director General that the appeal be dismissed. It further recommended that the IAEA should ensure that, when dealing with specific problems arising with the host country authorities, a clear focal point within the Administration should be identified in order to coordinate communication and action. On 23 October 2012 the Director General accepted both recommendations and, accordingly, dismissed the complainant's appeal. This is the impugned decision.

2. Before referring to some aspects of the complainant's arguments before the Tribunal, it is desirable to say something about the report of the JAB. It records that the JAB held a number of meetings between April and September 2012. In May 2012 it met with the complainant who was accompanied by the President of the Staff Council. At that time the JAB had the benefit of the complainant's memorandum of 14 December 2011 initiating the appeal with four annexures (one of which was her initial written request for compensation of 1 August 2011) together with a detailed account of her complaint and surrounding facts submitted to the JAB on 21 February 2012. A further document was submitted by the complainant on 10 May 2012

setting out, in great detail, particulars of the conduct complained of and identifying the IAEA officials who had allegedly engaged in the conduct. This document also set out what the IAEA should have done and what the consequences of the action actually undertaken had been under the general heading of intimidation, harassment and failure to meet legal requirements.

On 23 May 2012 the JAB met with the Director of the Division of Human Resources. On 1 June 2012 the JAB met with the former Director of the Office of External Relations and Policy Coordination (EXPO) and another official who had also been working in EXPO and was an individual whose conduct the complainant had criticised. There were three further meetings referred to by the JAB in its report and each occurred in the presence of the complainant and a representative of the Staff Council. The first was on 28 June 2012 involving, again, the aforementioned official of EXPO and also two other officials whose conduct had been criticised by the complainant. The second meeting was on 10 August 2012 when the JAB met with an official who had been an IAEA “SOS Colleague” who had been involved in taking Ms T. and a translator to a meeting with the Ministry on 10 December 2010 where, in the street, officials of the Ministry intercepted the group and took Ms T. away. The third meeting was on 13 September 2012.

3. Over three and a half pages of tightly typed text, the JAB considered and analysed the claims of the complainant. It then set out several relevant conclusions. First it rejected the complainant’s contention that the IAEA prejudged the matter in favour of the Ministry. It did, however, note that some indiscreet comments may have been made by members of the Administration concerning the complainant’s situation. Nonetheless it was satisfied that the complainant had received reasonable sympathy and support from the IAEA for her predicament and what support the IAEA could provide had, in fact, been provided. The JAB did not find that any of the IAEA’s Rules or Regulations had been violated. It rejected the suggestion that the IAEA had put its resources at the service of the Ministry or acted as its executive arm. The JAB concluded that there had been no failure on

the part of the IAEA in its duty of care towards the complainant or that there had been maltreatment of her by IAEA officials. It also found that there had not been any action on the part of the IAEA that resulted in any loss to the complainant. While acknowledging that the IAEA had a clear interest in protecting the rights and interests of itself and its staff vis-à-vis the host country, the JAB concluded that the IAEA had not been in a position to independently investigate whether the Ministry's allegations against the complainant were correct or not. Lastly, the JAB observed that there had been a degree of lack of coordination between different IAEA offices in dealing with the matter and that that was partly explained by the fact that different officials dealt with the Ministry at different levels and on different aspects of the same issue. This observation led to the recommendation concerning the need for a clear focal point to coordinate communication and action.

4. In her legal brief, the complainant simply asserts that the JAB erred in fact and in law in finding "that the Agency complied with its duty of care and good faith" without any critical analysis of the JAB's reasoning or contesting, with reasons, any of its findings. That assertion is made after a repetition of the circumstances and experiences of the complainant that had been considered by the JAB. The complainant cites a number of authorities of the Tribunal in support of her contention that the conduct of the IAEA violated or failed to respect her rights and interests. However the authorities cited are, at best, tangentially relevant to the facts disclosed in this matter. At base, the complainant was confronting a situation where Austrian officials believed there was material to suggest she had engaged in a criminal conduct. Indeed, as noted earlier, she was ultimately charged though the proceedings were unsuccessful resulting in her acquittal. The IAEA could not stand in the way of that investigation in order to immunise the complainant against the consequence of how the Austrian authorities viewed her actions.

5. The complainant seeks to erect an argument that some of the conduct of other IAEA staff was, or was at least arguably, harassment

and the IAEA was under an obligation to investigate. However, as the IAEA argues in its reply and surrejoinder, it took such steps as were appropriate in the circumstances.

6. Insofar as the complainant alleges a failure by the IAEA to investigate, it must be accepted that international organisations have a clear duty to investigate claims of harassment. The Tribunal has repeatedly said that this needs to be done and it is important that it be done (see, for example, Judgments 3413, under 10, 3365, under 26, 2910, under 13, 2973, under 16, and 2642, under 8). If there is a procedure for investigating claims of harassment in the applicable Staff Regulations or Staff Rules or guidelines, it should be followed.

In the complainant's memorandum of 1 August 2011 claiming damages, she set out the conduct which justified the claim. She used the word "harassment" twice. On the first occasion she said "the staff members who were dealing with this matter inside the IAEA treated me in a manner which can only be interpreted as a tacit presumption of guilt and which at times verged on harassment". To say that conduct at times verged on harassment does not involve a clear allegation of harassment and could not reasonably, in this case, be viewed as a claim of harassment which required investigation. Rather, it was, in a sense, an acceptance by the complainant that although the conduct of the staff members was, in her opinion, reprehensible it did not constitute harassment.

A staff member claiming harassment need not articulate the claim with the clarity or precision that might be expected of a lawyer drafting pleas. Any claim reasonably understood as raising an allegation of harassment must be investigated. However, that is not the position in this matter.

While the second reference to harassment in the memorandum was more direct, it almost certainly was a reference to the conduct of the Austrian authorities and not the officials of the IAEA. Accordingly, the IAEA has not breached its duty towards the complainant by failing to investigate an allegation of harassment.

7. The report of the JAB manifests a comprehensive and thoughtful consideration and evaluation of the evidence and whether any of the conduct about which the complainant is aggrieved can be characterised as harassment, a breach of the IAEA's duty of care or as otherwise unlawful. It is now settled jurisprudence of the Tribunal that in some circumstances reports of internal appeal bodies warrant "considerable deference" (see, for example, Judgments 2295, consideration 10, and 3400, consideration 6). The JAB's conclusions are rational and balanced. The Tribunal agrees with them. Accordingly the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ