

## NINETY-SEVENTH SESSION

Judgment No. 2340

The Administrative Tribunal,

Considering the complaint filed by Ms A. S. against the International Atomic Energy Agency (IAEA) on 25 April 2003 and corrected on 10 June, the IAEA's reply of 21 August, the complainant's rejoinder of 2 October 2003 completed by an addendum dated 16 December 2003, and the Agency's surrejoinder of 12 January 2004;

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, an Austrian national born in 1948, joined the IAEA in 1978 as a Procurement Clerk in what is now known as the Field Procurement Section.

In the summer of 2002 the complainant indicated, on a form circulated to staff members for their vacation plans, that she was planning to take extended annual leave in December. On 27 September her supervisor informed her that he could not approve her leave and asked her to reschedule it after 18 December. On 19 November he informed her that he could approve leave of up to five working days in December.

On 27 November 2002 the complainant sent a memorandum to the Director General requesting that she either be paid as overtime, or be allowed to carry over 13 days of her annual leave, which would be forfeited at the end of the year, because the exigencies of her service would not permit her to take extended leave and she would be in excess of the maximum number of leave days that one could carry over from year to year. In the same memorandum she also requested an investigation into unfair treatment to which she said she had been subjected. The complainant was notified by the Director of the Division of Personnel on 7 January 2003 that the issues raised in her correspondence of 27 November 2002 would be reviewed and that she would be contacted "in due course". On 16 January 2003 the same Director informed her that her request for an investigation had been forwarded to the Office of Internal Oversight Services (OIOS) for action, but that her request for either payment or carry over of her annual leave had been denied. On 24 January the complainant addressed, to the Director General, a request for review of the refusal to consider 9.5 days of her working days as overtime.

On 18 February the Director of OIOS wrote to the complainant's supervisor to inform him that OIOS was conducting an investigation based on the complainant's memorandum of 27 November 2002. The complainant was sent a copy of this correspondence. On 21 February 2003 the Acting Director General informed the complainant that a consolidated determination regarding her request for review of the decision concerning payment or carry-over of annual leave, as well as her grievance against her supervisor, would be made once the investigation by OIOS had been finalised. On 7 April the Acting Director of Personnel wrote to the complainant to provide her with a status of her case, informing her that OIOS had a number of ongoing cases and that hers would be dealt with as soon as possible.

By a memorandum of 10 June 2003 the complainant informed the Director General that she had filed "a preliminary claim" with the Tribunal, in order that it not be time-barred, and that she would be interested in a settlement out of court. She says she is challenging the implied rejection of her claims dated 27 November 2002, 24 January and 21 February 2003.

B. The complainant contends that in December 2002 she "was coerced to work 9.5 days without pay as [her] excess leave was forfeited at the end of the year" and she was denied payment for them. She argues that there was

no reason for her supervisor to refuse her vacation request and in particular, it was not justified by any work requirements. She asserts that she “had fallen victim to ill-treatment and victimisation some 15 years ago” and that there have been adverse comments made in her Performance Review Report for 2001, which contradict her appraisals for the three previous years. In her opinion these comments arose as retaliation for her own comments under the section entitled “Feedback to supervisor”. She asked for an investigation into her allegations but, according to her, no investigation has been conducted, nor has any effective remedy been taken to prevent any recurrence.

She asks the Tribunal to declare all false remarks void and stricken from her records. She requests the payment of 9.5 days overtime and 100,000 euros for moral damages. She also claims legal costs.

C. In its reply the Agency notes that the alleged harassment and denial of annual leave are still under investigation. Consequently, her complaint is not receivable. Not only has she filed her complaint before the investigation could be completed, but she also never filed an appeal before the Joint Appeals Board, thus there has not yet been an administrative decision which can be impugned. Nor did she ask the Director General to waive the jurisdiction of the Board so that she could appeal directly to the Tribunal.

The IAEA recognises that Tribunal precedent permits a complainant to appeal directly to the Tribunal when no final decision has been made by the organisation within a reasonable time. It submits that in the circumstances of this case, there has been no unreasonable delay on its part. In fact, when the complainant filed her complaint on 25 April 2003 she was well aware that the matter was under internal investigation. It is only proper that the type of allegations made by the complainant be thoroughly investigated and that such an investigation requires due diligence to ensure that all the appropriate information is collected and reviewed. The Agency foresees the investigation of her case to be finalised “within the next few weeks”.

D. In her rejoinder the complainant elaborates on the two issues at the core of her complaint: her request for compensation for 9.5 days of annual leave and the second, which she characterises as the major one, concerning defamation, harassment and abuse of authority. She submits that the IAEA had not taken action on her grievances within the 60-day time limit set out under Article VII, paragraph 3, of the Tribunal’s Statute, therefore she was justified in filing her complaint in order to protect her rights. Furthermore, she has not been notified of any decision on her investigation, even though the Agency said in its reply that her case was to be finalised within the next few weeks.

Even though her initial request was to have a full and proper inquiry carried out by the IAEA, in view of the time elapsed and continuing events, she wants the Tribunal to deal with her complaint under Article VII(3). She submits that there is sufficient written proof to establish that she was subjected to unjustifiable and unfair treatment, undue suffering and injury.

By an addendum of 16 December 2003 she produces the final report of the investigation as well as her rebuttal to the report.

E. In its surrejoinder the Agency presses its objections to receivability. It reiterates the steps it took to address the complainant’s allegations and it points out that the complainant was kept informed along the way. It provides the finalised report by the OIOS dated 18 November 2003 and it notes that the OIOS concluded that the 9.5 days of annual leave were forfeited in accordance with the statutory provisions in force at the Agency. The report indicated that, since 1999, the complainant’s supervisor had been asking her not to take extended annual leave at the end of the year and had informed her on 27 September 2002 that he would not be able to approve her request for extended annual leave in December of that year. The OIOS found no evidence of harassment or mobbing.

On 9 January 2004 the Director General informed the complainant that he had reviewed the matter and that he had found the OIOS investigation to have been conducted in a fair and objective manner. Therefore, he had decided that her allegations were unfounded and devoid of merit.

## CONSIDERATIONS

1. On 13 August 2002 the complainant, a Senior Procurement Clerk, wrote to the Deputy Director General of the Department of Technical Co-operation requesting a resolution inquiry in connection with her Performance

Review Report for 2001 where she accused her supervisor of “mobbing” her. In denying this charge, the supervisor stated that the complainant’s perception of certain aspects of the Section’s work was very much biased and incorrect and that she had had disputes with all her supervisors in the past for the same reasons, namely, disobedience and non-acceptable conduct.

2. On 10 October the same Deputy Director General informed the complainant that he had sought advice on how to conduct a resolution inquiry in connection with her 2001 Performance Review Report. The recommendation was that he should first formally seek further clarification as her request had not identified any specific areas for resolution. An exchange of correspondence ensued, each party listing the issues which they wanted to have investigated.

3. In her memorandum of 27 November 2002 to the Director General concerning her 13 days of annual leave the complainant requested an investigation of unfair treatment, such as being coerced to work without pay, disciplinary action imposed without due process, and refusal to take notice of Staff Rule 7.01.1(B) which provides, in part that “[a]nnual leave may be taken only when authorized, but the personal circumstances and preferences of the staff member shall, as far as possible, be considered”. On 16 January 2003 the Director of the Division of Personnel denied her request regarding her leave on the grounds that it was in contravention of Staff Regulation 7.01. He also informed her that her request for an investigation into the allegations of unfair treatment by her supervisor had been forwarded to OIOS.

4. On 24 January 2003 the complainant asked the Director General to review that decision, contending that since she had not been permitted to take leave, she had worked for “9.5 working days without pay”. She then resubmitted her request that these days be considered as overtime and that payment be made to her.

5. The Acting Director General replied on 21 February that a consolidated determination regarding payment or carry-over of the complainant’s annual leave beyond 2002, as well as her request for a resolution inquiry regarding her 2001 Performance Review Report and the investigation of a grievance against her supervisor would be made once the investigation by OIOS had been finalised.

6. On 25 April 2003 the complainant filed a complaint with the Tribunal, which she corrected on 10 June asking that all false remarks be declared void and stricken from the records. She requests the payment of 9.5 days overtime, compensation for damages in the amount of 100,000 euros, and legal costs. She informed the Director General on 10 June that, pursuant to Article VII(3) of the Tribunal’s Statute, she had filed “a preliminary claim” with the Tribunal so that it would not be time-barred. She requested that she be given the final decision regarding the payment of overtime and added that she would be interested in a settlement out of court.

7. On 30 June the Acting Director General answered that he would make a final decision as soon as OIOS had completed its investigation.

8. In its submissions the Agency contends that the complaint is irreceivable since the complainant did not file an appeal before the Joint Appeals Board prior to appealing to the Tribunal as required by Staff Rule 12.02.1. Therefore, there has not yet been an administrative decision to contest. Nor did she request the Director General to waive the jurisdiction of the Board before making a direct application to the Tribunal.

9. The Tribunal finds the complaint irreceivable under Article VII(1) of its Statute inasmuch as there was no final decision to be impugned and the complainant has not exhausted the internal means of redress open to her. As the Agency has repeatedly pointed out to the complainant, the issues she had raised were still under investigation by the OIOS and the Director General would render a decision upon its completion.

10. The complainant may not invoke Article VII(3) of the Tribunal’s Statute for her premature filing of her complaint on the grounds that the Agency has failed to take a decision thereon within 60 days from the notification of the claim. The Tribunal is satisfied that there has been no unreasonable delay on the part of the Agency in resolving the complainant’s claims as it has reasonably complied with the necessary steps in launching an investigation with the proper department. It has not been remiss in notifying the complainant of the status of her claims pending investigation.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Florida Ruth P. Romero

Catherine Comtet