

The Administrative Tribunal,

Considering the complaint filed by Mr H.F. against the International Atomic Energy Agency (IAEA) on 9 August 2005, the IAEA's reply of 24 October, the complainant's rejoinder of 25 November 2005 and the Agency's surrejoinder of 1 February 2006;

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 is a United States national born in 1944. In 1997 he was appointed to the post of Head of the Arabic Translation Section of the IAEA, at grade P.5. At the material time he was temporarily assigned to the post of Senior Arabic Analyst in the Iraq Nuclear Verification Office.

By a memorandum of 2 August 2004 Ms M., the Acting Director of the Division of Personnel, reported to the Acting Deputy Director General in charge of the Department of Management on the complainant's alleged misconduct against certain staff members and his alleged involvement in two hit-and-run car accidents in 2000 and 2002, and recommended that the case be submitted to the Joint Disciplinary Board, which would consider the appropriate disciplinary measure to be imposed on the complainant. The Acting Deputy Director General in charge of the Department of Management decided to follow Ms M.'s recommendation. At the time the complainant filed his complaint with the Tribunal, the proceedings before the Board were still pending.

The complainant sent a memorandum to the Director of the Division of Personnel on 12 April 2005 complaining that Ms M.'s statement, in her memorandum of 2 August 2004, that he "consistently formulate[d] his correspondence with colleagues in a superior and impolite manner", was "offensive" and amounted to harassment. The Division of Personnel acknowledged receipt of his memorandum on 13 April 2005. Asserting that the Agency "ha[d] not responded to his claim" of 12 April 2005, he lodged a complaint with the Tribunal on 9 August 2005 challenging the "implicit decision" of the Director of the Division of Personnel to reject his harassment complaint.

B. The complainant alleges that he had been subjected to harassment since 25 March 2003, when the then Acting Director of the Division of Personnel asked him to clarify comments he had made two months earlier regarding a *Note Verbale* sent by the Austrian Federal Ministry for Foreign Affairs concerning his alleged involvement in a "traffic incident" on 18 September 2002. He points out that this request was made one day after he had informed the Office of Internal Oversight Services (OIOS) of "hiring irregularities" committed by the Division of Personnel. He asserts that although he provided the Division of Personnel with the "needed clarification", the Director of the Division of Personnel asked the OIOS to investigate the matter further, simply because he had "presented similar arguments" in connection with another "traffic incident" which had occurred more than two years earlier. The complainant draws attention to the fact that on both occasions his insurance company rejected the claim of the other party on the grounds that there was no evidence that his car had been involved in the incident.

As regards the statement to which he objects, contained in the memorandum of 2 August 2004, he points out that, according to staff notice SEC/NOT/1922, an offensive remark constitutes harassment even if said only once. As he found Ms M.'s statement offensive, he formally accused her of harassment in his memorandum of 12 April 2005. He argues that by not responding, the Agency is in fact giving "legitimacy" to the use of "offensive language" when referring to him; in so doing it has failed in its duty to treat him with dignity and avoid causing him undue and unnecessary injury. On these grounds he claims moral damages and costs.

C. The IAEA has confined its reply to the issue of receivability. After recalling the relevant provisions of Article VII(1) and (3) of the Statute of the Tribunal, it contends that the complaint is irreceivable because the complainant

has neither challenged a final decision nor exhausted internal remedies. Indeed, he did not file an appeal with the Joint Appeals Board; nor did he request that the Director General waive the jurisdiction of the Joint Appeals Board before filing a complaint with the Tribunal, as required by Staff Rule 12.02.1.

The Agency points out that the Director of the Division of Personnel did reply to the complainant's memorandum of 12 April 2005 by a memorandum of the following day, to which the complainant did not respond. Neither did he enquire as to the status of his harassment complaint.

It considers that the complainant was "unduly hasty" in drawing the conclusion that he would not receive any response as to the substance of his memorandum of 12 April 2005. Citing Staff Rule 11.01.1(B), it states that harassment, if proven, constitutes misconduct. Accordingly, upon receipt of a written report alleging harassment, the Director of the Division of Personnel is required to follow the procedure set out in the Staff Regulations and Staff Rules. Since the complainant had filed a similar complaint of harassment against another staff member in 2004, there is no doubt, according to the Agency, that he was aware of that procedure and knew that he did not have a final decision on his harassment complaint.

The defendant asserts that it is the practice of the Director of the Division of Personnel to inform a complainant of the outcome of his or her internal complaint once disciplinary proceedings are finalised or in the event that the case against the staff member is closed. Thus, by a letter of 9 August 2005 the Director of the Division of Personnel informed the complainant that the Deputy Director General in charge of the Department of Management had concluded that no harassment had occurred. The complainant acknowledged receipt of that letter on 24 August 2005 on returning from sick leave.

Citing the case law, the IAEA observes that where no final decision has been taken, only in exceptional circumstances may the requirement to exhaust internal remedies be set aside, and only in cases where on the evidence the Organization seems unlikely to reach a decision within a reasonable time. It submits that a "reasonable time" has not elapsed in the case at issue and that, consequently, the complaint is irreceivable.

D. In his rejoinder the complainant maintains that his complaint is receivable. He argues that since he had not received any notification, in writing or otherwise, of an administrative decision taken with respect to the accusation of harassment made in his memorandum of 12 April 2005 by the time he filed his complaint with the Tribunal, he could not have asked the Director General to review a decision of which he was not aware. Consequently, he asserts, he was in no position to file an appeal with the Joint Appeals Board.

He disputes that the memorandum of 13 April 2005 from the Director of the Division of Personnel was a reply to his "claim" of 12 April 2005. He argues that it was a mere acknowledgement of receipt, which can hardly be construed as an explicit administrative decision within the meaning of Staff Rule 12.01.1.

In his view he had every reason to doubt that a decision would be reached in the case at hand within a reasonable time. Indeed, in the other case mentioned by the Agency he received a reply from the Administration 57 days after having lodged a complaint for harassment. In the present case, he waited more than twice that time, i.e. 119 days, before filing his complaint with the Tribunal.

E. In its surrejoinder the Agency maintains its view that the complaint is irreceivable.

## CONSIDERATIONS

1. On 12 April 2005 the complainant, an IAEA staff member, formally accused the Acting Director of the Division of Personnel of harassment because she had described his manner with colleagues as being "impolite", a word which he considered to be offensive. Invoking Article VII(3) of the Tribunal's Statute he now appeals directly to the Tribunal against the "implied" rejection of his claim.

2. The complainant states, wrongly, that he received no reply to his claim; in fact, as the record clearly shows, he received a formal acknowledgement of receipt the following day. Even if he had not, however, his complaint to the Tribunal, filed on 9 August 2005, is manifestly irreceivable.

3. In the first place, the complainant's memorandum of 12 April 2005 was not a "claim" against the Agency within the meaning of Article VII(3); it was a charge against a fellow worker which required the organisation to

investigate and respond appropriately. More importantly, an accusation of harassment is a charge of misconduct under the Agency's Staff Regulations and Staff Rules. It is a serious matter and requires that an international organisation both investigate the matter thoroughly and accord full due process and protection to the person accused. The completion of such steps would be very difficult within 60 days and, if the matter is referred to the Joint Disciplinary Board, it may take a great deal longer. The complainant does not allege that the Agency failed to respect its own internal rules for the investigation of the charge. There can be no presumption of rejection of the accusation flowing from the mere passage of time. The complainant was fully aware of the applicable procedure for he had, not long before, filed an almost identical charge against another fellow worker, which had culminated in a decision of the Director General confirming a recommendation of the Joint Appeals Board (see Judgment 2553 delivered concurrently herewith). In fact, the complainant's accusation in the present case was investigated by the Administration and dismissed by a decision of 9 August 2005, well within the time frame set by the applicable rules. That decision has not been put in issue by this complaint.

4. As the Tribunal's case law makes clear, Article VII(3) of the Statute constitutes an exception to the general rule established in Article VII(1) that a complaint may only be brought against a final decision and that the complainant must first exhaust any internal means of redress (see Judgment 1455). The only final decision in this file is the one rendered on 9 August 2005. Prior to that date there was not and could not have been any "implied" decision for the complainant to impugn and the internal means of redress were still pending. From 9 August 2005 there was an express decision but the complainant has not challenged it.

5. The complaint is irreceivable.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet