

**109th Session**

**Judgment No. 2910**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs A. S. against the International Atomic Energy Agency (IAEA) on 28 August 2008 and corrected on 27 November 2008, the IAEA's reply of 10 March 2009, the complainant's rejoinder of 16 June, the Agency's surrejoinder of 18 September, the complainant's additional submissions of 9 November and the IAEA's final comments thereon of 24 November 2009;

Considering Article II, paragraph 5, 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 former staff member of the IAEA. With effect from 21 July 2003 she was appointed under a one-year fixed-term contract to the post of Secretary, at grade G-4, in the Office of Internal Oversight Services (OIOS). In March 2004 the Head of the Internal Audit Section, who was the complainant's direct supervisor, wrote to the then Director of OIOS, Mr Z., and recommended not to extend her appointment beyond its expiry date on the grounds that her

performance had not improved in spite of his warnings. Later that same month the Director of OIOS informed the Division of Personnel that he supported the recommendation not to extend the complainant's appointment. On 29 April he requested that her post be abolished and replaced by another one, indicating that she would be advised to report to the Division of Personnel with a view to being redeployed. Nonetheless, on 13 May 2004 the complainant was offered a two-year extension of her appointment. She was notified a few days later of her temporary reassignment to the post of Clerk in the Recruitment Unit with retroactive effect from 10 May.

In the meantime, the complainant had spoken to the President of the Staff Council regarding an incident which had occurred on 5 May and which, in her view, constituted harassment on the part of her supervisors. The President had advised her that he would try to mediate a solution and seek an apology from them. By a memorandum of 29 June 2004 the complainant submitted a written report to the Division of Personnel. She stated that on the morning of 5 May the Head of the Internal Audit Section had come to her office and asked her why she had not reported to that Division, as instructed, in order to be given another assignment. Shortly thereafter, the Director of OIOS had asked her to go to the Division of Personnel immediately and, as she was telling him that she had an appointment with an official in the Division later that morning, he had shouted at her and made threatening comments. She considered that she had been subjected to harassment and she requested that an investigation be instituted for reported misconduct as defined in Staff Rule 11.01.1(B). Having enquired on 14 September 2004 about the status of her request for investigation, she was informed a week later that the matter was still under review.

In mid-November 2004 she was contacted by telephone by an official from the Division of Personnel and was asked whether she would accept a written apology from the Director of OIOS as a resolution of the matter. On 21 December the latter wrote to the complainant. Referring to the incident of 5 May, he stated: "I would like to assure you that I had no intention of causing you any distress

in any respect and I regret that you misunderstood my intentions or comments”.

The complainant again enquired about the status of her request for investigation on 3 April 2006. The Director of the Division of Personnel replied on 12 April that, during the telephone conversation in November 2004, she had said that she would accept an apology from the Director of OIOS as a resolution of the matter. Consequently, in view of the letter of 21 December 2004, the matter had been deemed to be settled and no further action had been taken. The complainant objected on 12 June 2006 that she had not agreed to the resolution of the case and she requested that the investigation for misconduct be reopened. In July her appointment was extended until 31 March 2007. On 31 August 2006 she enquired once again about the status of her request for the reopening of the investigation and on 13 December she wrote to the Secretary of the Joint Appeals Board, drawing attention to the fact that she had received no response from the Division of Personnel. The Director of that Division replied on 19 December 2006 that, in his opinion, the Agency had taken reasonable steps to address her request of 29 June 2004 and that no new fact warranted the reopening of the investigation.

On 16 February 2007 the complainant requested the Director General to review the decision of 19 December 2006 and to award her 35,000 euros in moral and punitive damages. The Acting Director General informed her on 15 March 2007 that it was considered that the decision to close her case had been taken in December 2004 and that the response of 19 December 2006 did not constitute an “administrative decision” subject to appeal under Staff Regulation 12.01. Thus, her request for the reopening of the investigation was time-barred. The complainant, whose appointment had in the meantime been further extended until 3 March 2008, submitted an appeal to the Joint Appeals Board, in which she reiterated her claim for moral and punitive damages. In its report of 12 March 2008 the Board found that her request of 29 June 2004 had not been properly dealt with and that no “administrative decision” had been taken in December 2004. It therefore recommended that the complainant’s request be addressed in accordance with the procedures

laid down in Appendix G to the Staff Regulations and Staff Rules. It also recommended that the Administration revise those procedures to ensure that, in the case of informal resolution of grievances of harassment and misconduct, the staff member concerned would sign a written communication indicating his or her agreement to the resolution. By a letter of 30 May 2008, which constitutes the impugned decision, the complainant was informed that the Director General had decided to endorse the Board's recommendations and that he had therefore instructed the Administration to take "appropriate action".

The complainant filed her complaint with the Tribunal on 28 August 2008. That same day her counsel approached the Agency to discuss the possibility of a settlement. The IAEA responded on 16 October that it was pursuing the matter in accordance with the procedures laid down in Appendix G. Towards the end of 2008 the complainant enquired about the status of her request for the reopening of the investigation. She was informed by letter of 15 September 2009 that the investigation had been completed and that, as it had not been possible to contact Mr Z., the former Director of OIOS, and in view of the response obtained from the Head of the Internal Audit Section, it had been decided to close the case.

B. The complainant submits that the Joint Appeals Board and subsequently the Director General erred in law in failing to award her moral damages for breach of due process. She notes in this respect that the Board did find that the Agency had not followed the procedures laid down in Appendix G and that she had made a specific claim for damages in relation to those breaches during the internal appeal proceedings.

She also submits that the Board and the Director General further erred in law in failing to rule on the merits of her claim for moral damages for the harassment she was subjected to by her supervisors. She contends that the Agency admitted that their conduct on 5 May 2004 constituted harassment, and that this is evidenced in particular by her rapid reassignment to another unit after the incident. The

seriousness of the harassment is, in her opinion, amplified by the fact that she was pregnant at the time.

She asks the Tribunal to set aside the impugned decision to the extent that it did not award her damages for harassment and to decide on its own whether she is entitled to such damages. She claims material and moral damages in the amount of 35,000 euros, as well as punitive damages for the Agency's "coordinated effort to deprive [her] of her right to due process". Lastly, she claims 15,000 euros in costs.

C. In its reply the Agency contends that it did follow its own procedures in considering the complainant's request of 29 June 2004. It denies that there was a coordinated effort to deprive her of her right to due process, stressing that it considered in good faith that the matter had been settled with the letter of 21 December 2004. It was convinced that the complainant wished to pursue an informal resolution of the matter as she had first raised the issue with the President of the Staff Council and had later confirmed, during her conversation with the official of the Division of Personnel in November 2004, that she would accept an apology from the Director of OIOS as a resolution of the matter. Further, in offering her a contract extension in spite of her supervisors' recommendation to the contrary and in reassigning her promptly to a different unit, the Agency took actions to protect her from "a difficult work environment".

The IAEA argues that the complainant failed to establish before the Joint Appeals Board that she was entitled to an award of moral damages for harassment. It considers that the Director General demonstrated his good faith by accepting the Board's recommendation to the effect that the complainant's request of 29 June 2004 be addressed in accordance with the applicable procedures and points out that, even if the harassment were established, she would not necessarily be entitled to compensation: firstly, because she had been reassigned to a different unit in May 2004, and thus could no longer be subject to the alleged harassment; secondly, because it is not possible to punish Mr Z., the Director of OIOS at the material time, as he has

left the Agency; and lastly, because the circumstances of the case are not of a nature which would normally give rise to financial compensation.

D. In her rejoinder the complainant submits that the Agency's failure to provide information on the course of the investigation into her allegations of harassment constitutes a continuing breach of her right to due process. She notes in this respect that, unlike Mr Z., the Head of the Internal Audit Section is still employed by the Agency, and that, according to the Tribunal's case law, the failure to investigate allegations of harassment warrants an award of damages. She contends that the incident of 5 May 2004 was in fact the culmination of a harassment campaign which started in the autumn of 2003 and which resulted in the abolition of her post. She also contends that during the telephone conversation in November 2004 she indicated that she could not consider an apology as a resolution of the matter until she had actually received such an apology.

E. In its surrejoinder the IAEA maintains its position. It argues that, at all times, the complainant was aware that the investigation was ongoing. It submits that, since the investigation is now completed and the case closed, the complainant's claims for a ruling by the Tribunal on the merits of her allegations of harassment and for an award of moral damages should be rejected. It adds that a review of the decision of 15 September 2009 cannot take place in the context of this complaint.

F. In her additional submissions the complainant withdraws her claim for a ruling by the Tribunal on the merits of her allegations of harassment but maintains the claim for damages in relation to the breach of due process. She points out that she was denied access to the investigation file and that she has already initiated an appeal against the decision of 15 September 2009.

G. In its final comments the Agency acknowledges the complainant's withdrawal of her claim.

## CONSIDERATIONS

1. Although in her complaint the complainant sought damages for alleged harassment on the part of her direct supervisor and Mr Z., the then Director of OIOS, she has withdrawn her request that the Tribunal rule on the merits of that claim in these proceedings on the basis that the claim will fall for decision only after completion of the internal appeal proceedings relating to harassment. Accordingly, the only remaining issues are whether the complainant is entitled to moral damages for the IAEA's failure to follow the proper procedures in dealing with her allegation of harassment and to costs.

2. The alleged harassment occurred in the early part of 2004, culminating in an incident on 5 May 2004. The complainant spoke to the Director of the Division of Personnel shortly afterwards. She also spoke to the President of the Staff Council, who indicated that he would try to bring about an informal resolution of the matter by obtaining an apology from the complainant's supervisors. However, as almost two months had elapsed and no apology had been received, on 29 June 2004 the complainant submitted a written report under Appendix G to the Staff Regulations and Staff Rules, alleging harassment on the part of her supervisors and requesting that an investigation be instituted for misconduct.

3. The complainant went on maternity leave in early August 2004. On 14 September she enquired about the progress of the investigation. The Division of Personnel replied by asking the complainant to be patient and assuring her that she would be advised in due course.

4. In mid-November an official of the Division of Personnel contacted the complainant by telephone. The content of the telephone

conversation is a matter of dispute between the parties. The official asked the complainant whether she would be satisfied with a letter of apology from Mr Z. The complainant maintains that she replied that it would depend on the content of such a letter. The IAEA counters that the complainant stated that a letter of apology would be satisfactory.

5. In a letter of 21 December 2004 the Director of OIOS assured the complainant that he “had no intention of causing [her] any distress in any respect and [that he] regret[ted] that [she had] misunderstood [his] intentions or comments”. The Joint Appeals Board later found that the IAEA “Administration had no part in the drafting or sending of the letter” and that “it was not clear that the letter as sent was a sufficient resolution [of] the complaint”. The complainant states that she did not view it as such.

6. The complainant returned from maternity leave on 29 January 2006 and on 3 April enquired about the status of the investigation into her allegation of misconduct. On 12 April the Director of the Division of Personnel responded that the complainant had indicated during the telephone conversation in November 2004 that she “would accept an apology from Mr [Z.] to settle the matter”, and that “[i]n view of the resolution of the matter in the manner [she] had agreed to, no further action was taken in relation to [her] complaint”.

7. On 12 June 2006 she replied that she had not agreed to the resolution of the case and she expressed concern that no action had been taken. She requested that the investigation be reopened. She reiterated that request on 31 August and sent a reminder on 13 December. On 19 December 2006 she was informed that the case had been closed and that no new and material information had been discovered, which could warrant the reopening of the investigation.

8. On 16 February 2007 the complainant requested that the Director General review the decision of 19 December 2006 and that

he award her 35,000 euros in moral and punitive damages. She also requested that the Director General consent to a complaint being filed directly with the Tribunal in the case of a negative decision. These requests were denied on 15 March 2007.

9. The complainant submitted an appeal to the Joint Appeals Board. She requested that it “recommend to the Director General that [she] be paid moral and punitive damages in the amount of 35,000 [euros]” as well as her costs.

10. In a report dated 12 March 2008 the Board agreed with the complainant that Mr Z.’s letter to her did not constitute an appropriate apology and found the IAEA’s position “unsatisfactory in a number of respects”. Given that a formal allegation of misconduct had been submitted, the IAEA was responsible “to ensure that the matter had been properly dealt with” in accordance with the applicable rules and procedures. In this case, this included “tak[ing] positive steps to contact the [complainant]” and to ensure that she considered that the matter had been resolved, rather than taking her silence as a sign that it was. The Board recommended that the allegation be investigated according to the applicable procedures, and that these procedures be revised to ensure that any informal resolution of a grievance of harassment or misconduct (such as an apology) be recorded in writing.

11. On 30 May 2008 the Director General informed the complainant that he had accepted and would take appropriate action with regard to the Joint Appeals Board’s recommendations. The complainant challenges this decision insofar as it rejected her claims for moral damages and for costs.

12. The Tribunal observes that, despite the Director General’s decision, the IAEA continues in its pleadings to attempt to rationalise its actions and to excuse its inaction on the basis of the complainant’s silence. In its policy on “Prevention and Resolution of Harassment Related Grievances” set out in staff notice SEC/NOT/1922, the

Agency states that it is committed to ensuring a workplace environment free from any form of harassment, that harassment in the workplace will not be tolerated and that it will be dealt with by the appropriate administrative or disciplinary action. The staff notice also encourages staff members to address incidents of harassment in accordance with the policy.

13. The complainant was entitled to have her grievance dealt with in accordance with the policy and the procedures laid down in Appendix G to the Staff Regulations and Staff Rules. The Agency's failure to do so constitutes not only a breach of its own policy and rules but, as well, a breach of its duty of care towards the complainant. In Judgment 2636 the Tribunal pointed out that this duty includes the obligation to ensure that allegations of harassment are "properly and promptly investigated". The Agency seeks to avoid responsibility for the delay that occurred between 21 December 2004, when the complainant received a letter from the Director of OIOS, and 3 April 2006, when she enquired about the status of her request for investigation. However, it was for the Agency, not the complainant, to ensure that the matter was properly and promptly investigated. Moreover, and even if informal methods of resolution are to be explored, it is important that the facts be promptly ascertained to avoid any possibility that an investigation will be compromised by delay. Further, and no matter what was said in the telephone conversation in mid-November 2004, it was for the Agency to ascertain positively whether the allegations of harassment had been resolved by the letter received by the complainant, not simply to assume that it had been. The course taken in the present case deprived the complainant of a timely opportunity to prove her allegations and, also, put any investigation at risk. In addition, that course also indicated a failure to treat the allegations with the seriousness they deserved and was, thus, an affront to the complainant's dignity. The complainant is entitled to moral damages in the amount of 10,000 euros and her costs for these and the internal appeal proceedings in the amount of 3,000 euros.

DECISION

For the above reasons,

1. The decision of the Director General of 30 May 2008 is set aside to the extent that it rejected the complainant's claims for moral damages for failure to observe proper procedures and for the costs of the internal appeal proceedings.
2. The IAEA shall pay the complainant moral damages in the amount of 10,000 euros.
3. It shall also pay the complainant's costs of these and the internal appeal proceedings in the amount of 3,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet