

116th Session

Judgment No. 3286

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mrs E. S. against the International Atomic Energy Agency (IAEA) on 28 July 2011 and corrected on 21 October, and the second complaint filed on 28 July 2011 and corrected on 21 October, the Agency's single reply of 6 February 2012, the complainant's single rejoinder of 4 May and the IAEA's single surrejoinder of 8 August 2012;

Considering Articles II, paragraph 5, and VII 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 and the pleadings may be summed up as follows:

A. The complainant joined the IAEA in March 2007 under a three-year fixed-term appointment as Head of the Applied Radiation Biology and Radiotherapy Section within the Division of Human Health (NAHU) in the Department of Nuclear Sciences and Applications (NA). She was recruited at grade P-5 and her appointment was subject to a one-year probationary period.

On 30 January 2008 the Director of the Division of Human Resources (MTHR) informed the complainant that, under the terms of the probationary policy, the Director General had decided to confirm her appointment. He nevertheless added that the Director General was concerned by the apparent performance issues identified by her supervisor and expected that these matters be addressed. The same day the complainant wrote to the Director of MTHR alleging that she was harassed by her supervisor, Mr A., the Director of NAHU. She indicated that, during an interview in November 2007, he shouted at her in front of other members of the panel and an applicant. She added that, that same month, he had asked her to resign saying it would save her from the embarrassment of being fired as her secretary had complained about her behaviour several times. He also entered her office, in January 2008, shouting obscenities and threatening not to approve anything coming from her or her Section.

On 31 January 2008 the complainant's supervisor wrote to the Director of MTHR filing a formal complaint of harassment against her. He contended that she had intentionally distorted some of the comments he made and that she had made false statements in order to build false arguments tarnishing his reputation. In turn the complainant filed a formal complaint of harassment against him on 1 February 2008. The complainant's supervisor separated from service in June 2008, and a new Director of NAHU was appointed in the autumn of 2008.

The Director of MTHR wrote to the complainant on 7 May 2009 two memoranda. The first one concerned her grievance about the investigation of her harassment complaint. In the second memorandum the Director recalled in detail the meetings the complainant had, either with him or her supervisor, concerning her performance. He noted in particular that members of her team had complained to him about her behaviour, alleging for instance that she had taken credit for work performed by others. But also that she had made accusations of serious wrongdoing against five out of six of her staff. He informed her that, in his view, she did not meet the Agency's

performance expectations regarding leadership, professionalism and management, and that he had advised the Deputy Director General in charge of NA and the Director of NAHU to issue her with a formal warning, in line with the requirements of Staff Rule 3.06.4 on unsatisfactory performance. The complainant replied on 8 May to the Director of MTHR that his allegations of unsatisfactory performance were not substantiated and that no constructive meetings had taken place with the staff allegedly complaining of her behaviour. She asked that a meeting be held with them and that subsequently a proper investigation be conducted. She asked that, in the meantime, all files relating to that matter remained open.

By a letter of 20 May 2009, which the complainant received on 27 May, the Director of MTHR informed her that her appointment would expire on 3 March 2010, in accordance with her letter of appointment and Staff Rule 3.03.1. On 13 October 2009 the complainant wrote to the Director General stating that she had not yet received a notice that her appointment would be extended as she expected in light of paragraph (C)(2) of Staff Rule 3.03.1, according to which an initial appointment may be extended for a period of two years if there is a continuing need for the services of the staff member and his/her performance and conduct continues to meet the required level. She added that it was unclear if the absence of notification was related to the fact that her performance review reports for 2007 and 2008 were outstanding. She asked him to inform her if a decision had already been taken concerning the extension of her appointment.

The complainant wrote again to the Director General on 11 December 2009 requesting “clarification and resolution” with respect to the Agency’s failure to process her formal complaint of harassment, its failure to complete her performance review reports for 2007 and 2008, and the decision not to extend her appointment. She alleged that the non-extension decision was taken in breach of paragraph (C)(2) of Staff Rule 3.03.1 given that she had “three years of excellent service”. The Director General replied, in a letter of 18 December 2009, that the non-extension decision was made on

20 May 2009 on the ground of unsatisfactory performance, which was in line with paragraph (C)(2) of Staff Rule 3.03.1. He also noted that several discussions had already taken place between her, the Director of NAHU, the Director of MTHR and the representative of the Staff Council regarding her allegations of harassment, and that, during the last meeting held on 21 July 2009, she requested that MTHR kept “the file open for the time being” but that no further action be taken. On that basis, the Director General indicated that he could not see what other actions could be taken on her allegations of harassment.

On 23 December 2009 the complainant filed an appeal with the Joint Appeals Board (JAB), and a further appeal on 17 January 2010. She challenged the decision not to extend her appointment and the decision not to investigate her harassment complaint. She criticised the Agency for not following applicable rules on assessing alleged unsatisfactory staff performance and for failing to initiate the resolution process with respect to her performance review reports for 2007 and 2008.

On 26 January 2010 the complainant wrote a memorandum to the Director of the Office of Internal Oversight Services (OIOS) requesting that an investigation be initiated to prove that the accusations of misbehaviour made against her by the Director of MTHR in his memorandum of 7 May 2009 were false.

In its report of 30 March 2011 the JAB considered that the Administration had failed to investigate properly the harassment complaint filed by the complainant in early 2008, as required under Appendices E and G to the Staff Regulations and Staff Rules. It had also failed to give her clear indications as to how her complaint would be dealt with. The Board added that even though the supervisor concerned had separated from service in June 2008, the Agency was responsible for his actions considering that his actions may still have adverse consequences on the complainant. It also held that the Administration had failed to follow applicable rules concerning the assessment of the complainant’s performance, in particular by not ensuring that her performance review reports for 2007 and 2008 were completed in a timely manner. Regarding the complainant’s

alleged unsatisfactory performance, the JAB found that it was unclear whether the process conducted by the Administration was a formal or an informal one. It therefore recommended that the Director General reconsider his position concerning the assessment of her performance and her harassment allegations. It further held that the complainant did not contest the letter of 20 May 2009, by which she was informed that her appointment would expire on 3 March 2010, within the prescribed two-month time limit, and consequently recommended rejecting the appeal as time-barred insofar as she challenged the decision not to extend her appointment.

By a letter of 28 April 2011 the Director General notified the complainant that he had decided to reject her appeal as time-barred insofar as it concerns the decision not to extend her appointment. Regarding her harassment complaint and “the review of [her] performance”, he had decided to forgo comment pending consideration by OIOS of the memorandum of 26 January 2010 she sent to the Director of OIOS. He nevertheless added that by asking the JAB to consider the issue of unsatisfactory performance she had exceeded the scope of her initial request. The Director General added that the performance review reports for 2007 and 2008 had finally been completed. That is the decision the complainant impugns in her first complaint before the Tribunal.

On 15 June 2011 the Director of OIOS informed the complainant that the screening process concerning the issues she raised in her memorandum of 26 January 2010 was completed. He explained that the screening process started only after the JAB had issued its report in late March 2011 and that OIOS reviewed all supported evidence. It found that the “accusations” made by the Director of MTHR in his memorandum of 7 May 2009 were not malicious. In its view, the memorandum merely showed that the Administration had documented a series of facts concerning her performance to support its view that she was not performing satisfactorily.

By a letter dated 11 July 2011 the Director General notified the complainant that, on the basis of OIOS’ review, he found no basis to accept the JAB’s recommendation that he reconsider the harassment

allegations. Consequently, he decided to uphold his decision of 18 December 2009 that the actions taken by the Administration regarding her harassment complaint were proper and consistent with her instructions at the time. He also confirmed his earlier decision that her claims concerning unsatisfactory performance were irreceivable as she did not raise them in her original request for review of 11 December 2009. He held that the JAB improperly considered that matter. That is the decision the complainant impugns in her second complaint.

B. The complainant contends that the facts and legal issues at stake in her two complaints are overlapping and should therefore be joined. She contests the Director General's finding that her claim regarding the decision not to extend her appointment was irreceivable as time-barred. She indicates that it was not stated in the letter of 20 May 2009 from the Director of MTHR that the Director General had made a decision regarding the extension of her appointment. The letter merely provided information as to the expiry date of her appointment and therefore should not be considered as a notice of non-extension. She contends that she was first notified of the non-extension decision by the memorandum of 25 November 2009, in which her supervisor stated that neither him nor the Deputy Director General of NA had "any authority to change the decision inherent in the letter to [her] from [the Director of] MTHR [...] dated 2009-05-20". She adds that, if the Tribunal considers that the letter of 20 May 2009 was an administrative decision, the prescribed time limit to challenge it should be waived because of the exceptional circumstances she faced. Indeed, she suffered stress and anxiety as a result of the Administration's way of dealing with her case and had to seek medical assistance from May to July 2009 in that respect. She adds that she received "mixed messages" from management which show that the situation was unclear. For instance, in a memorandum of 7 May 2009, the Director of MTHR informed her that he had advised her supervisor to give her a formal warning of her shortcomings but none was ever issued.

She also objects to the Director General's conclusion that her claim concerning the Administration's failure to follow the procedures concerning unsatisfactory performance is irreceivable. She submits that, in her request for review, she referred to the communications and meetings she had with MTHR about her performance review reports for 2007 and 2008, which also encompassed her alleged unsatisfactory performance. Consequently, her request for review could objectively be interpreted as challenging the Administration's failure to follow the procedures concerning unsatisfactory performance.

On the merits, she contends that the decision not to extend her appointment was flawed. It was unlawful to apply the sanction of non-extension given that her performance review reports for 2007 and 2008 had not yet been completed and the procedures in the event of unsatisfactory performance had not been followed. On that last matter, she emphasises that, according to paragraphs (A) and (B) of Staff Rule 3.06.4, a staff member whose performance is unsatisfactory shall, as a first step, be given a written warning, then regular supervisory meetings shall be scheduled at least on a monthly basis and minutes of these meetings shall be placed in the staff member's personal file. Paragraphs D and E provide that a staff member who does not meet the required level of performance within three months shall be given a second warning and if no improvement is forthcoming in the next three months different measures may be taken against her/him, including not extending his/her contract. The complainant further indicates that, according to the Tribunal's case law, an organisation's comments regarding a warning must be so worded as to leave the staff member concerned in no doubt as to its seriousness and the fact that failure to improve may incur non-extension of his or her appointment. She emphasises that she was given no formal warning and that she received unclear information as to whether she was performing satisfactorily or not.

The complainant criticises the Agency for not having investigated her internal complaint of harassment. She alleges that the Director of MTHR's refusal to follow applicable procedures in that respect

deprived her of the opportunity to prove her allegations, and constituted abuse of authority. She points out that, according to the case law, an organisation must investigate thoroughly an accusation of harassment, which is a serious matter, and shall protect the victim. She alleges procedural error in that the Director of MTHR did not act on her internal complaint of harassment in breach of Appendix G to the Staff Regulations and Staff Rules, according to which he is responsible for submitting the matter to the Deputy Director General, Head of the Department of Management, who will then determine the measures to be taken. She nevertheless acknowledges that, in the present case, the Director of MTHR, whom she accused of harassment, was not in a position to review the matter, but argues that another staff member could have undertaken the initial review foreseen by Appendix G. She asks the Tribunal to confirm the JAB's findings that the Director General's statement on 18 December 2009 that "it [was] difficult to see what further action [could] be taken" with respect to her allegations of harassment is unacceptable. She also seeks "personal rehabilitation and re-establishment of her professional reputation" contending that she was humiliated by the actions taken by the Administration and that she suffered severe emotional stress in that respect.

Lastly, she alleges undue delay in completing her performance review reports for 2007 and 2008 and contends that the Agency has failed to investigate the allegations of misconduct which were made against her in these reports.

The complainant asks the Tribunal to set aside the impugned decisions and to award her material damages in an amount equivalent to the salaries and benefits she would have received had her appointments been extended for two years. The material damages should also include the payment of an amount equivalent to the shares the Agency would have paid to the United Nations Joint Staff Pension Fund if her appointment had been extended for two years, together with interest from due dates. She seeks further material damages for "loss of enhanced earning capacity and diminished job prospects"

together with moral damages and exemplary damages. In addition, she seeks costs. Lastly, she asks that any adverse material be removed from her personnel file.

C. The IAEA has no objection to the request for joinder. It contends that the complaint is irreceivable insofar as it concerns the decision not to extend the complainant's appointment. On 27 May 2009 she received the non-extension decision of 20 May and, pursuant to Staff Rule 12.01.1(D)(1) had until 27 July 2009 to appeal it, which she did not; her complaint in that respect is therefore time-barred. It asserts that she knew the expiration date of her appointment from the time she received her letter of appointment. Moreover, the letter of 20 May expressly referred to her separation indicating that she was invited to contact the Division of Human Resources if there was any information she needed concerning "arrangements for [her] separation". It adds that, on 19 May, the complainant's supervisor informed her orally of the decision not to extend her appointment. The IAEA further submits that the claim concerning alleged failure to follow unsatisfactory performance procedures exceeds the scope of the request for review the complainant submitted to the Director General on 11 December 2009 and is therefore also irreceivable.

On the merits, the IAEA indicates that the non-extension decision was made in line with applicable rules and that it was clearly stated in the complainant's letter of appointment that she was appointed under a three-year fixed-term contract which carried no expectation of renewal or of conversion to another type of employment. It adds that non-extension decisions are discretionary. Regarding the alleged failure to follow unsatisfactory performance procedures, it contends that the claim must fail because such procedures were never formally initiated.

It rejects the allegations of harassment as unsubstantiated but asserts that they were taken seriously and handled in a prompt manner: first through an informal approach and then by OIOS that investigated the matter. The latter concluded that the allegations

were not substantiated and found no misconduct on the part of the Agency. The IAEA contends that the conduct complained of could not be reasonably characterised as harassment as described in the Administrative Manual.

The IAEA asserts that it acted in good faith to resolve the issues relating to the complainant's performance review reports for 2007 and 2008, and that the alleged delay in that respect is partly due to the complainant's failure to reply to some of the proposals made by the Director of MTHR.

The IAEA contends that the complainant's request that any adverse material be removed from her personnel file is moot as there is no adverse material in her personnel file that could possibly be removed. It also submits that the claim for material damages should be dismissed because she had no reasonable expectation of renewal as clearly indicated in the letter of appointment. The claim for moral damages should also be dismissed as she did not prove that she suffered grave injury pursuant to the Agency's actions.

D. In her rejoinder the complainant contends she was stigmatised and victimised because she had made allegations of harassment against her supervisor. Replying to the Agency's contention that her allegations of harassment were unsubstantiated, she reiterates that her supervisor asked her to resign in order to avoid the embarrassment of being fired, that he humiliated her in front of other staff members, that he shouted obscenities at her and threatened not to approve anything coming from her or her office, and tore a paper she was writing. She denies being responsible for any delay regarding the resolution process of her performance review reports for 2007 and 2008 and emphasises that the JAB held that it found no reason for the Administration's failure to activate the resolution process at an earlier stage.

E. In its surrejoinder the IAEA maintains its position. It reiterates with respect to the claim of harassment that the complainant did not set out in full the nature, circumstances and details of her claim.

CONSIDERATIONS

1. The complainant commenced working with the IAEA in 2004. Effective 4 March 2007, she took up a three-year fixed-term contract to fill the position of Section Head, Applied Radiation Biology and Radiotherapy Section, Division of Human Health (NAHU). The appointment was subject to a one-year probationary period. The appointment was to expire on 3 March 2010 and in the letter of appointment the complainant was told the appointment “does not carry any expectancy of renewal or of conversion to any other type of appointment”.

2. As it transpired, the contract ran its term but was not renewed. At the time of her appointment, the complainant’s immediate supervisor was Mr A., the Director of NAHU. Tensions developed in the working relationship between the complainant and Mr A. That had certain consequences discussed in more detail later.

3. On 18 December 2009, the Director General wrote to the complainant. The letter addressed three matters. The first was a request by the complainant that a complaint she had made of harassment by Mr A. be dealt with. The second was a request that the complainant’s performance review reports for 2007 and 2008 be resolved. The third was the non-renewal of the complainant’s contract. The complainant was not satisfied with this response and, on 23 December 2009, lodged an appeal to the JAB.

4. On 17 January 2010 the complainant lodged a further appeal to the JAB against what was described in her appeal as the decision of the Director of MTHR of 5 January 2010 not to investigate the complainant’s harassment claim and related matters.

5. The JAB reported to the Director General on 30 March 2011. It recommended the Director General reconsider his position in relation to the complainant’s complaints about harassment and the

review of her performance as it concluded neither had been dealt with satisfactorily by the Administration. In relation to the complainant's complaint concerning non-extension of her contract, the JAB concluded the appeal had been time-barred.

6. On 28 April 2011, the Director General wrote to the complainant indicating that he agreed that the appeal in relation to the non-extension of her appointment was time-barred. As to the harassment and performance review matters, the Director General indicated he would respond after certain matters had been addressed by OIOS. This decision is impugned by the complainant in this Tribunal in a complaint lodged on 19 July 2011. On 11 July 2011, the Director General wrote to the complainant rejecting the JAB's recommendation to reconsider the harassment complaint and the complaint about the review of the complainant's performance. This decision is impugned by the complainant in this Tribunal in a complaint lodged on 28 July 2011. Given that the two complaints are based on a substantially common matrix of facts, they should be joined.

7. The IAEA argued that in two respects the complaints are not receivable. It is desirable to consider this issue at the outset. The first question is whether the complaints are receivable insofar as they challenge a decision not to extend the complainant's initial three-year appointment. This question is predominantly one of fact. On the IAEA's account of the facts in its reply, it said that on 19 May 2009 the complainant met with the Director of NAHU who conveyed personally to the complainant the decision not to renew her appointment. In her rejoinder, the complainant said she did not recall the particular substance of the meeting then referred to case law concerning verbal advice. Again, on the IAEA's account of the facts, the complainant was hand-delivered a letter by the Director of NAHU on 27 May 2009. The letter was from the Director of MTHR and was dated 20 May 2009. This was not contested by the complainant. The letter read:

“As you are aware, in accordance with clause 2 of your Letter of Extension for Fixed Term Appointment and Staff Rule 3.03.1, your contract with the Agency expires on 3 March 2010. About one month before the expiration of your contract, you will be sent the required clearance certificate to enable you to complete the formalities of your separation.

If there is any information you would need to know concerning the arrangements for your separation, you are invited to contact the Division of Human Resources (x21040) who would be pleased to give such assistance and advice as you may require. In the attached Annex, an outline of our procedures is given for your convenience.

Meanwhile, I wish to take this opportunity to thank you for your valuable contribution to the activities of this Agency and to wish you success in all your future endeavours.”

8. One other document should be mentioned. On 13 October 2009 the complainant sent a memorandum to the Director General. It read, in part:

“My contract expires on March 3, 2010, and I have to date not received any notice whether my contract will be extended as expected per Staff Rule 30.03.1.C2 [...].

If a decision on my contract extension has already been taken, please advise me of the same in writing and please provide me with the reasons for such decision.”

9. The IAEA argued that the letter of 20 May 2009 received by the complainant on 27 May 2009 constituted written notice of the decision not to extend her contract for the purposes of the IAEA Staff Regulations and Staff Rules. Rule 12.01.1(D)(1) required the complainant to commence an appeal within two months from the time she received notification of the decision in writing. The JAB concluded the complainant had not complied with this requirement and her internal appeal was time-barred. If this conclusion was correct then the complainant failed to exhaust internal remedies and her complaints, insofar as they relate to the extension of the contract, are not receivable by operation of Article VII(1) of the Tribunal’s Statute (see Judgment 840, consideration 2).

10. The Tribunal notes the submission made by the complainant in these proceedings that the JAB failed to deal with a request to waive the time limit. It is true this issue was not mentioned by the JAB in its report. However the submission the complainant made to the JAB involved nothing more than the bare assertion that the circumstances were exceptional (which, if they had been, would have enlivened the power to waive). In the absence of argument or reasoning from the complainant as to why the circumstances were exceptional, the JAB could not be expected to have necessarily dealt with the question of waiver in its report. It cannot be inferred that it failed to deal with the request.

11. The Tribunal said in Judgment 2573, consideration 10, that notification of non-renewal or non-extension of a contract is simply notification that the contract will expire according to its terms. Such notification is to be treated as a decision having legal effect for the purposes of Article VII(1) of its Statute. This proposition is not inconsistent with Judgment 607, consideration 5, on which the complainant relies. The notification must be of a decision taken by a competent authority.

12. In the present case the letter of 20 May 2009 did not say, expressly, that a decision had been made not to extend the complainant's contract that she plainly knew was going to expire on 3 March 2010 unless a decision was made to place her on a further contract or otherwise extend the employment. However, the letter of 20 May 2009 could only have been understood, construed objectively (see Judgment 2739, consideration 13), as notification that the contract would not be extended beyond 3 March 2010. Twice there is reference to the complainant's separation following a reference to the date on which the contract was to expire. Further there is the salutation at the end of the letter wishing the complainant well in her future endeavours. Commonly such a salutation is made when a person is leaving an organisation. The letter came from the Director of MTHR.

13. It is true that the complainant later wrote asking to be informed of any decision about the extension of the contract. It is not clear what motivated her to write it. The complainant may have simply been insisting on a level of formality that she considered appropriate. However, even if, in the probably unlikely event, she had not understood what she had been told in the letter of 20 May 2009, it did not result in the letter not being notification in writing that the contract would not be extended. Also, it must be accepted that there is a long line of authority that in the event of a non-renewal of a fixed-term appointment, the staff member is entitled to an explanation as to why the contract was not being renewed (see, for example, Judgment 2104, consideration 6). However, Rule 12.01.1(D)(1) is engaged when a staff member is given written notice of the decision. If, as is the situation in this case, no reasons were given in the notice then that may ultimately have been an issue the complainant could have ventilated in an internal appeal had it been made in time. It could also have been a basis for the JAB to have waived the time limit, had the point been made that the notice of the decision was not accompanied by reasons (see Judgment 1230, consideration 3).

14. Accordingly, the IAEA's contention that the complaints, insofar as they seek to impugn the decision not to renew her contract, are not receivable should be accepted.

15. The IAEA also argued that the complaints, insofar as they allege a failure to follow unsatisfactory performance procedures, raised an issue that was not raised nor addressed in the internal appeal. The appeal procedures commenced with a request by the complainant to the Director General to reconsider three matters in a memorandum dated 11 December 2009. The failure to follow unsatisfactory performance procedures was not a matter expressly referred to in the memorandum. The Director General in his response of 18 December 2009 (referred to earlier) addressed the three matters the complainant had raised but did not refer to unsatisfactory performance procedures. In the complainant's memorandum of 23 December 2009 initiating

her appeal to the JAB she referred to the alleged failure of the IAEA to, effectively, activate the unsatisfactory performance procedures. This issue was alluded to in her second memorandum to the JAB of 17 January 2010. The topic of the way in which the IAEA addressed claims of the complainant's unsatisfactory performance was addressed by the JAB in a section of its report on more than three pages. In its conclusions, the JAB said that the issue of unsatisfactory performance on the part of the complainant was not addressed satisfactorily. The Director General, in his second impugned decision of 11 July 2011, expressed the view that the issue concerning the unsatisfactory performance procedures had not been raised with him in December 2009, and had been "improperly considered by the JAB".

16. The Tribunal does not have the submissions made by the IAEA to the JAB. In its report, the JAB does not note, let alone deal with, any argument made to the JAB that the appeal, insofar as it related to procedures concerning claims of unsatisfactory performance, was not receivable. Also, the IAEA did not, in its submissions to this Tribunal, say that such a submission was made to the JAB. It can be inferred it was not. Having regard to the fact that the issue of compliance with procedures concerning claims of unsatisfactory performance was expressly raised by the complainant and dealt with by the JAB, she has exhausted her internal rights of appeal. This is to be contrasted with a case where the internal appeal was out of time but nonetheless was still dealt with by the appeal body (see Judgment 2297, consideration 13). This aspect of the complaints is receivable.

17. The first matter to address is the complainant's contention that the Administration failed to investigate her harassment complaint. In both the complainant's notice of appeal of 23 December 2009 and her notice of 17 January 2010 she raised the failure to investigate. Quite reasonably, the JAB understood that to be the issue raised by the complainant on the question of harassment. The Tribunal notes that this alleged failure to investigate the harassment complaint was carefully considered, at length and in detail, by the JAB and it

concluded that the Administration had not adequately investigated the complainant's claim of harassment. As the complainant correctly observed in her brief, it is not the role of the Tribunal to reweigh the evidence before the JAB unless it is shown that the latter acted unreasonably or has committed some palpable or overriding error (Judgment 2325, consideration 5). In its reply, the IAEA submitted that the conduct complained of could not be reasonably characterised as harassment as described in its Administrative Manual. This question whether she was the subject of harassment was taken up by the complainant in her rejoinder and by the IAEA in its surrejoinder. But the question of whether the complainant was harassed is not the issue arising in the proceedings in this Tribunal particularly having regard to the subject matter of the internal appeal and it was not incumbent upon the complainant, as the IAEA submitted (relying on Judgments 2851, 2866 and 2879), to set out the nature, circumstances and details of her harassment claim. The complainant's complaint concerns process and those details are not relevant. This is not a case where arguably those details might be relevant because the complaint of harassment was demonstrably vexatious or frivolous.

18. In the impugned decision of the Director General of 11 July 2011, he said that in the light of the consideration by OIOS of issues raised by the complainant in a memorandum of 26 January 2010, he found no basis for accepting the recommendation of the JAB to reconsider the issue of the complainant's harassment complaint. The investigation of OIOS was undertaken after the JAB reported to the Director General in March 2011. The results of OIOS' further investigation were communicated to the complainant in a letter of 15 June 2011. In that letter the Director of OIOS noted that the complainant had, by memorandum dated 26 January 2010, requested OIOS "to prove that the accusations in the [memorandum] 2009-05-07 from the [Director of] MTHR [were] false".

19. However, there was a fundamental difficulty in the Director General effectively rejecting the JAB's recommendation on the basis of the subsequent investigation by OIOS. The difficulty flows

from the fact that the Director of MTHR sent the complainant two memoranda on 7 May 2009, not one. One concerned the complainant's grievance about the investigation of her harassment complaint. The other related to the complainant's performance and, over six pages, detailed concerns about the complainant's performance and related issues. It is obvious that the complainant, in her memorandum of 26 January 2010, was asking OIOS to investigate what was said in the second of these memoranda and not the first. So much is apparent from the subject matter generally and particularly six quotations in the complainant's memorandum, at least four that came directly from the 7 May 2009 memorandum concerning performance. So the OIOS investigation did not address the question of whether the harassment complaint had been properly investigated. In the result, the Director General's reliance on the OIOS investigation provided no basis for rejecting the JAB recommendation about the harassment complaint (based on a failure to adequately investigate) that was well founded.

20. The impugned decision of the Director General of 11 July 2011, insofar as it decided that no further steps should be taken in relation to the complainant's harassment complaint, should be set aside. However, given that the complainant is no longer employed at the IAEA, that the person against whom she originally made the claim of harassment is also no longer employed at the IAEA and that these reasons of the Tribunal vindicate her complaint that the harassment claim was not adequately investigated, the Tribunal sees no utility in making any order requiring the further investigation of her harassment complaint. The complainant is nevertheless entitled to moral damages for the failure of the Administration to investigate her complaint. An appropriate sum is 15,000 euros.

21. The second matter to address is the complainant's contention that the Administration failed to follow the unsatisfactory performance procedures. Again the Tribunal notes that this alleged failure to follow the unsatisfactory performance procedures was carefully considered, at length and in detail, by the JAB. It concluded that the

Administration had not done so. Again we note that it is not the role of the Tribunal to reweigh the evidence before the JAB unless it is shown that the latter acted unreasonably or has committed some palpable or overriding error. In its reply, the IAEA submitted that this aspect of the complainant's complaint was not receivable. This argument has already been rejected earlier in this decision. It also submitted that the unsatisfactory performance procedures were never formally initiated by the IAEA. Apart from that submission, the IAEA did not seek to deal with the reasoning and conclusion of the JAB. However, as the JAB noted, the complainant had clearly requested that the unsatisfactory performance procedures be invoked. What is clear is that grave concerns were expressed, at least by the Director of MTHR, about the performance of the complainant.

22. It is true, as the IAEA pointed out in its surrejoinder, that as early as February 2008 and up to January 2010, there was correspondence sent to the complainant indicating that performance issues were being addressed informally and that the IAEA was not proposing to formally invoke the unsatisfactory performance procedures. However, as the JAB pointed out, the complainant faced a genuine dilemma. Concerns were being raised about her performance but she was unable to have those issues addressed in a formal context.

23. Unsatisfactory performance procedures were addressed by Rule 30.6.4. That rule was found in Regulation 3.06, "Performance Management System". The stated purpose of the system "is to enhance accountability and organizational effectiveness through improved work planning, communication, evaluation and staff development, and to facilitate performance-related personnel decisions". It is a system obviously designed to benefit both the Agency and staff. Rule 3.06.4(a) requires poor performance to be addressed immediately. While the initial step of a meeting between the supervisor and the staff member is intended to be informal, thereafter the steps are formal, commencing with a "first formal written warning specifying the problem with the staff member's performance" which must be sent if the staff member does not meet the required level of

performance within a reasonable period of time after the initial meeting. The expression “reasonable period of time” is said, in the Rule, to be normally a period of one to three months.

24. Certainly in this case, it is no answer to a contention that the unsatisfactory performance procedures were not followed, for the IAEA to say that they were never formally initiated. The procedures themselves required that they be initiated by the taking of formal steps, within a comparatively short period from the manifestation of poor performance. While the Rule would not have been intended to operate with absolute rigidity, what occurred in the present case went well beyond the bounds of any flexibility the Rule might accommodate.

25. Even if the complainant was perceived to be a difficult staff member to deal with and was perceived to have been performing unsatisfactorily in fairly fundamental ways, she was entitled to have the unsatisfactory performance procedures followed and probably well before the decision was taken not to renew her contract, it can be inferred, in May 2009. It is impossible to discount the real possibility that these unresolved performance issues informed the decision not to extend or renew the complainant’s contract. While non-extension of a contract is one of the outcomes contemplated in Rule 3.06.4, that outcome arises after a series of steps designed to address the unsatisfactory performance. The complainant is entitled to moral damages for the failure of the IAEA to follow the prescribed procedures and those damages are assessed in the sum of 20,000 euros. However there is no basis for awarding material damages, as the complainant sought, on the assumption that the complainant’s contract would have been extended. It may not have been even if the unsatisfactory performance procedures had been followed to the letter.

26. The last issue concerns the completion of the complainant’s performance review reports for 2007 and 2008. Again, in carefully considered and detailed reasons, the JAB explained its conclusion that

the resolution of the 2007 and 2008 performance review reports had been delayed. There is no basis for the Tribunal to gainsay this conclusion. Ultimately, the IAEA argued in its reply that this issue is moot because the report had been completed by the time these proceedings were commenced in the Tribunal. Even so, the complainant requested the Tribunal to direct that these reports be removed from the IAEA's records. However it is inappropriate to make such an order in circumstances where the essential complaint is one of delay.

27. The complainant sought exemplary damages on the basis that the JAB found, as described in the complainant's brief, that "the errors made in this case were owing to lack of adequate management leadership". No analysis was made by the complainant to demonstrate that there had been bias, ill will, malice, bad faith or other improper purpose, being the bases upon which exemplary damages might be awarded (see, for example, Judgment 3092, consideration 16). This aspect of the complainant's pleas should be rejected.

28. The complainant is entitled to a costs order given her substantial success in these proceedings.

DECISION

For the above reasons,

1. The impugned decision of 11 July 2011 is set aside to the extent explained above.
2. The IAEA shall pay the complainant a total amount of 35,000 euros as moral damages.
3. The IAEA shall pay the complainant 6,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 6 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet