

**119th Session**

**Judgment No. 3413**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. I. against the International Atomic Energy Agency (IAEA) on 12 April 2012 and corrected on 27 June, the IAEA's reply of 8 October, the complainant's rejoinder of 17 December 2012 and the IAEA's surrejoinder of 16 April 2013;

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 2002. From October 2004 to July 2010 she was assigned to a post of Project Management Assistant in the Department of Safeguards.

On 27 July 2010 she submitted a detailed written report to the Division of Human Resources (MTHR) and the Deputy Director General of Safeguards (DDG-SG) alleging that, on 21 July 2010 her direct supervisor, Mr B., had sexually harassed her and requested the administration's direct intervention. The complainant also filed a complaint with the local police and contacted the UN Security Chief. On 27 July she visited the Vienna International Center (VIC) Medical Service, a joint medical service for the benefit of staff members of some international organisations based in Vienna, which referred her to a specialist in psychiatry, psychosomatic and psychotherapeutic

medicine. From 28 July to 19 November 2010 she was placed on certified sick leave.

On 28 July the complainant had a meeting with the DDG-SG during which they discussed her allegations. On the following day, the DDG-SG informed the complainant that he had forwarded her report to the Director of the Office of Internal Oversight Services (OIOS). He also informed her that she would be transferred to another position in the Department of Safeguards in order to ensure a safe professional environment upon her return to work.

The Acting Director of the Division of Human Resources (DIR-MTHR) reviewed the complainant's report under Paragraph 2 of the "Procedures to be Followed in the Event of Reported Misconduct" contained in Appendix G to the IAEA Staff Regulations and Staff Rules. DIR-MTHR considered that further investigation was required and submitted the report to the Director of OIOS (DIR-OIOS) under the terms of reference contained in the OIOS Charter (AM.III/1) and the "OIOS Procedures for the Investigation of Staff Members" (AM.III/4), and asked OIOS to report back to him the findings of the investigation.

In a letter of 4 November to the Director General, the complainant asked for his intervention in the matter in order to ensure an impartial work environment and a timely response to her report of 27 July on the part of the IAEA. The Director General replied on 22 December 2010, indicating that the OIOS investigation was expected to be concluded in early 2011, that all investigations were conducted in an impartial and confidential manner, and that MTHR remained ready to provide her with any additional assistance.

The complainant returned to work in her new position on 22 November on a part-time basis. On 23 December she filed a claim for compensation under Appendix D to the Staff Regulations and Staff Rules for medical expenses in connection with a service-incurred illness sustained on 21 July 2010. She was informed on 27 December 2011 that these medical expenses would be reimbursed and that the sick leave taken in connection with that illness would be reinstated.

By a Memorandum of 11 May 2011 DIR-OIOS informed the complainant that, following the investigation into the allegations against her supervisor, the evidence obtained was not found to substantiate the reported misconduct and the matter was considered closed by OIOS. She was further informed that the decision by OIOS did not preclude the reopening of the investigation should further evidence come to light.

By a Memorandum of 23 June 2011 the complainant requested a copy of the OIOS report, excluding the parts that contained confidential information. She also requested a confirmation that all the witnesses proposed by her had been interviewed, as well as the names of the persons who reviewed her medical statement submitted to OIOS on 20 May 2011. The acting Director of OIOS denied her requests on 30 June on the ground that the information requested was confidential pursuant to Paragraph 6 of the “OIOS Procedures for the Investigation of Staff Members” which provides that “OIOS investigators will maintain the confidentiality of all investigative matters in order to protect the integrity of the investigative process”.

By a Memorandum of 22 July 2011 the complainant requested the Director General to review the decision to close the OIOS investigation into her allegations of sexual harassment as unsubstantiated, on the ground that the conclusions of OIOS were not objective and that the investigation was not properly conducted. She noted that the investigation took almost twelve months, but that the witness interviews only took place in December 2010, which had enabled her direct supervisor to influence colleagues with regard to their cooperation with the investigation. Two of her colleagues identified as witnesses had not been interviewed and her medical report had not been reviewed by a specialist. She considered that the investigation had been superficial and had disregarded essential evidence. She also alleged that the OIOS had allowed the Management to participate in acts of retaliation and mobbing. She maintained that, as the initiator of the case, she should have access to the information requested.

By a letter of 23 August 2011 the Director General dismissed her request, stating that the issues raised by her had been thoroughly and

properly investigated within an appropriate time-frame, and that it was in accordance with applicable regulations that she had not been provided with a copy of the report. The Director General had reviewed the matter and had found nothing in her letter of 22 July to support re-opening the investigation. She lodged an appeal in September 2011, raising various issues that, in her view, supported the re-opening of the OIOS investigation. In its report of 14 December 2011, the Joint Appeals Board (JAB) recommended that the Director General dismiss her appeal, on the ground that the investigation appeared comprehensive and not deficient in any respect and its conclusions appeared reasonable and well-founded. It found that she had correctly not been provided with a copy of the OIOS investigation report. The JAB concluded that, while the investigation had shown that Mr B.'s general behaviour was a matter that needed to be addressed, it found that this had been done by MTHR.

In his final decision of 18 January 2012 the Director General agreed with the JAB's findings and its recommendation that the OIOS investigation be regarded as concluded. That is the impugned decision.

B. The complainant contends that the impugned decision is tainted with procedural irregularities. Referring to the Tribunal's case law, she submits that the OIOS investigation was not prompt. She was denied due process, because her requests that OIOS interview witnesses with a good knowledge of the situation were denied. Pursuant to Paragraphs 6 and 9(c) of the "OIOS Procedures for the Investigation of Staff Members", all persons involved in an OIOS investigation have the duty to preserve the confidentiality of all the information discussed. As she is also bound by confidentiality, she denies that the IAEA's confidentiality requirements justify her not being provided with the OIOS investigation report. The JAB's report's findings and conclusions are based on the OIOS report, which was not made available to the complainant. The attachments to the JAB's report have equally not been made available to her. The impugned decision, which is based on a vitiated JAB report, is therefore illegal. The decision is also tainted with an error of law, as she was not invited to attend the witnesses' interviews or given the possibility to comment

on their testimonies, and she was not even provided with any record of the interviews. The complainant submits that clearly false conclusions were drawn by the JAB. Both the JAB and the Director General failed to take into account four essential elements, which give high credibility to the complainant's report of sexual harassment, including Dr V.'s report of 28 August 2011, which contradicts the statement contained in the JAB's report.

She asks the Tribunal to quash the impugned decision and to refer the case back to the IAEA in order for an investigation to be conducted in compliance with the Tribunal's general principles. She claims moral damages, as well as costs.

C. In its reply the IAEA submits that the complaint is receivable, except for her plea that the Agency breached the adversarial principle, which she did not raise in the internal appeal proceedings. The decision not to re-open an investigation conducted by an international organisation is discretionary and subject to only limited review. The IAEA asserts that there are no grounds to review the impugned decision. Concerning the alleged procedural irregularities, it submits that the time required to complete the OIOS investigation was reasonable as it conducted a comprehensive, thorough review of the facts and had to interview many witnesses. It explains that the OIOS investigator had to delay the initiation of the investigation pending the notification from the local authorities as to whether they would bring formal charges against Mr B. It was consistent with the confidentiality objectives of Paragraph 6 of the "OIOS Procedures for the Investigation of Staff Members" for the complainant not to be provided with a copy of the investigation report. In closing the investigation, OIOS acted in accordance with Paragraph 29 of the "OIOS Procedures for the Investigation of Staff Members", given that there were no direct witnesses that could corroborate the complainant's allegations. The decision taken, therefore, constituted a correct exercise of its discretion and no error of law was committed. The IAEA took immediate action to assist the complainant and acted in accordance with its Staff Regulations and Staff Rules and its Policy on the "Prevention and Resolution of Harassment Related Grievances and Appointment of

Mediators” contained in Appendix E to the Staff Regulations and Staff Rules. The complainant errs in arguing that OIOS did not observe the adversarial principle, which does not apply to OIOS. Allowing her to be present during the investigative work would contravene the IAEA’s rules. It denies that false conclusions were drawn by the JAB. Concerning the complainant’s argument that four essential elements were not taken into account, her allegations in this regard either are unsubstantiated or were taken into account by the JAB.

D. In her rejoinder the complainant presses her pleas. She adds that nothing in the Tribunal’s case law prevents her from introducing a new plea, as opposed to a new claim for relief. The complainant underlines that it is immaterial that local authorities did not bring formal charges against Mr B. and that this does not prevent conducting a timely internal investigation. She maintains that the adversarial principle does apply to the OIOS and that, accordingly, she should have at least been able to see the testimonies of the witnesses interviewed.

E. In its surrejoinder the IAEA maintains its position in full.

#### CONSIDERATIONS

1. The complainant alleges that on 21 July 2010 she was sexually harassed by her direct supervisor, Mr B. Both were then employees of the IAEA working in Austria. She says in her brief she was sent home by the VIC Medical Service because of her “unhealthy emotional condition”. This is not challenged by the IAEA in its reply. On 27 July 2010 she was referred by the VIC Medical Service to a psychiatrist. From 28 July to 19 November 2010, the complainant was on certified sick leave. On 27 December 2011, the complainant was informed that the Director General, on the recommendation of the Joint Advisory Board on Compensation Claims, had decided that the medical expenses claimed in connection with the “service incurred illness which you had sustained on 21 July 2010”, be reimbursed. She was also informed that the sick leave taken in connection with the service-incurred injury had been reinstated.

2. On 27 July 2010 the complainant lodged a complaint with the DIR-MTHR and also with the DDG-SG alleging that she had been sexually harassed on 21 July 2010 and detailing the circumstances surrounding the harassment. She also complained to the Police Directorate of Vienna. The internal complaint led to an investigation by the Office of Internal Oversight Services (OIOS). On 11 May 2011, the Director of OIOS (DIR-OIOS) wrote to the complainant saying that “the investigation was not found to substantiate the reported misconduct”. This conclusion was followed by the observation that “[t]he matter is therefore considered by OIOS to be closed. This decision does not preclude the reopening of the investigation should further evidence come to light”. The complainant says in her brief that she did not receive this communication until 7 June 2011. On 23 June 2011 the complainant wrote to the DIR-OIOS seeking a copy of the OIOS report (though the complainant accepted this would exclude parts that contained confidential information of others), confirmation that witnesses she had proposed to be interviewed, had been interviewed and the names of people who reviewed the medical statement submitted to OIOS on 20 May 2011. This request was declined on 30 June 2011.

3. On 22 July 2011, the complainant requested the Director General to reverse the administrative decision to close the OIOS investigation. This request was declined by letter dated 23 August 2011. The complainant then appealed to the Joint Appeals Board (JAB) by letter dated 20 September 2011. The JAB reported to the Director General on 14 December 2011 recommending that the original decision that the OIOS investigation be regarded as concluded, be maintained. This recommendation was accepted by the Director General who, on 18 January 2012, wrote to the complainant saying that her appeal was dismissed. This is the impugned decision.

4. Four matters should be noted about the JAB report. The first is that the JAB noted in its report that Mr B. admitted having raised his voice and even having sworn while speaking about the complainant’s work performance on 21 July 2010 but absolutely denied having touched her in any way or having been drunk. The second is that the

JAB noted that the OIOS report had indicated that of relevance was that there had been professional conflict between the complainant and Mr B. The third is that the JAB also noted that the OIOS had expressed doubts about the credibility of the testimony of both the complainant and Mr B.

5. The fourth matter is significant. In the report the JAB dealt with an allegation that the OIOS had ignored her medical file as well as reports from her doctors. The JAB noted that an official in OIOS, Mr K., who did not conduct the original investigation but had been briefed by his predecessor, had been presented with a medical report by the complainant which he read. The report, attached to the JAB report, was from Dr V. and was dated 28 August 2011. Mr K. told the JAB (as it recounts in its report) that the report “had not created any new evidence, but simply repeated what the [complainant] had already stated”. In its report the JAB then said:

“The Board noted that the report stated that the [complainant] was traumatised but that the examining doctor was unable and unwilling to speculate about the cause.”

6. However what Dr V. said in this report (English translation) after discussing the testing and treatment the complainant had undergone included the following:

“Therefore one must attribute high credibility to the patient’s statements on the events she suffered. As also described in psychotraumatological professional literature, the patient’s statements are completely related to reality and therefore also to be assessed as being objectively correct.

Both in the admission stage, as well during the whole treatment, no tendencies of confabulation could be perceived.”

7. What is important about this report is that Dr V. was expressing the considered professional view that, in the context of how the complainant presented to him (as a professional specialist in psychiatry, neurology and psychotherapy), what she had said about her experience on 21 July 2010 was likely to be correct.

8. Of course, this opinion would only be one factor in a mix of factors to be considered in an assessment of whether the complainant's account, on the one hand, or Mr B.'s account, on the other, was correct (or that one or both were deficient in some respects). Nonetheless Dr V.'s report is a credible and material piece of evidence. It was wrong for the JAB to say that the examining doctor (Dr V.) was "unable and unwilling to speculate about the cause". Not only did Dr V. not say this in his report of 28 August 2011 either expressly or impliedly, he was saying the opposite. That is, he was saying that the account of the complainant of the events on the day in question was likely to be correct and thus likely to have identified the cause of her psychiatric illness. This is all the more significant because Dr V.'s assessment of the complainant commenced just days after the incident of 21 July.

9. This is a serious and fundamental flaw in the approach of the JAB and, as a consequence, a flaw of the same character in the impugned decision and requires that that decision be set aside. It may be accepted that this medical report post-dated the OIOS report. However it is to be recalled that the OIOS had said that the decision to close the investigation did not preclude its reopening should further evidence come to light. There is little reason to doubt that this medical report was evidence of a character which would warrant reopening of the investigation and this should have been recognised by the JAB in formulating its recommendation to the Director General.

10. In these proceedings, the complainant sought that the impugned decision be set aside and that the matter be referred back to the IAEA. The above analysis warrants such an order being made. The complainant also seeks moral damages. Sexual harassment of a staff member in the workplace is a serious violation of her or his rights and is all the more

egregious if the harassment is by a senior staff member. An apparently bona fide complaint of sexual harassment has to be investigated promptly and thoroughly. Equally it has to be reinvestigated if circumstances warrant further investigation. In the present case, the IAEA's failure to reinvestigate involves a serious breach of its duty towards the complainant. Even if the sexual harassment had not occurred, the pursuit of the allegation would doubtless have been traumatic for the complainant. The trauma would have been compounded by the failure to reopen the investigation as she requested. Of course if the sexual harassment had occurred then almost certainly the trauma caused by the failure to reopen the investigation is likely to have been significant. In the Tribunal's view, the complainant is entitled to moral damages of substance. They are assessed in the sum of 20,000 euros.

11. It is unnecessary to deal with other detailed arguments raised by the complainant save to say that, because the OIOS report was provided to and relied on by the JAB, a redacted copy of the report should have been provided to the complainant. It is also unnecessary to deal with a limited challenge of the IAEA to the receivability of the complaint.

12. The complainant is entitled to costs in the sum of 4,000 euros.

#### DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The matter is remitted to the IAEA to further investigate the complainant's complaint of sexual harassment.
3. The IAEA is ordered to pay the complainant moral damages in the amount of 20,000 euros.
4. It shall also pay her 4,000 euros in costs.

In witness of this judgment, adopted on 31 October 2014, Mr Giuseppe Barbagallo, 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 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ