

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. (No. 3)

v.

IAEA

120th Session

Judgment No. 3490

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms H. S. against the International Atomic Energy Agency (IAEA) on 31 July 2012 and corrected on 23 October 2012, the IAEA's reply of 4 February 2013, the complainant's rejoinder of 19 July, the IAEA's surrejoinder of 23 October 2013, the complainant's additional submissions of 31 January 2014 and the IAEA's final comments of 14 March 2014;

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 may be summed up as follows:

Facts relevant to this case are to be found in Judgment 3188, delivered on 6 February 2013. Suffice it to recall that the complainant, who joined the IAEA in 1984 as a clerk/typist, was assigned on 1 March 2003 to the Office of the Director of the Division of Concepts and Planning (SGCP), in the Department of Safeguards, as a Senior Office Clerk at grade G-5.

As a result of additional responsibilities entrusted to her following that assignment, she initiated in March 2004 the process for obtaining an updated job description. One year later, on 24 March 2005, she

submitted a draft updated job description to her supervisor, the Director of SGCP, for “review/editing”. The Director indicated in the complainant’s performance review for 2005 that she intended to “have [the complainant’s] post evaluated for upgrading”.

In July 2007 three G-6 Administrative Assistant posts were advertised in the Department of Safeguards. The complainant applied for all three, but in January 2008 she was informed that she had not been selected for any of these posts. On 1 February 2008 she reiterated her request for an updated job description of her post, arguing that the job description she had did not reflect all the duties that she had carried out since her assignment to the Office of the Director of SGCP. She also requested an immediate transfer outside the SGCP. This request was accepted and she was transferred with effect from April 2008.

On 29 April 2008 the complainant addressed to the Director General her request for an updated job description, claiming that the absence of a proper job description had negatively affected her chances of succeeding in competitions for higher-level posts. Finally, an updated job description for her former post was issued on 2 December 2008.

On 28 August 2009 the complainant asked the Director of the Division of Human Resources (MTHR) to reclassify retroactively her former post at the G-6 level and to pay her the difference between a G-5 and a G-6 salary for the period from 1 March 2003 until 31 March 2008. The Director replied on 14 September 2009 that her request could not be granted because the job description of her former post had been reviewed and approved by MTHR with no change to its grade, and the complainant herself had confirmed her agreement with that decision. Moreover, she had not submitted a request for its reconsideration within one month of its receipt, as required by the Administrative Manual.

By a memorandum of 20 October 2009, the complainant asked the Director General to reverse the decision rejecting her request for a reclassification of her former post and for compensation and to award her moral damages. In her memorandum she explained that she was informed for the first time of a decision regarding the classification of

her former post through the Director of MTHR's communication of 14 September 2009 and that she had therefore sought from the Deputy Director General of the Department of Management a "reconsideration of the reclassification decision". In his reply of 27 November 2009, the Director General agreed to conduct a review of the classification level of the post under Staff Rule 12.01.1 and to revisit her other claims once that review had been completed. An external classification consultant, Ms W., was contracted to conduct a job evaluation of the post and, on 3 August 2010, the complainant was informed of Ms W.'s finding that the functions of her former post did not warrant a classification at the G-6 level and of MTHR's decision to accept this finding.

On 31 August 2010 the complainant requested reconsideration of this decision pursuant to paragraph 34 of the Administrative Manual, Part II, Section 3 (AM.II/3). She also requested that she be provided with copies of Ms W.'s desk audit and classification report. She then sought a review of the reclassification decision by the Director General but he replied that he would await the outcome of the reconsideration under paragraph 34 of AM.II/3 before responding to her request.

On 27 October 2010 the complainant was informed that her request for reconsideration was granted and the matter referred to the Classification Review Committee (CRC). However, instead of being provided with Ms W.'s desk audit and classification report, she was informed that these two documents would be provided directly to the CRC.

Meanwhile, the complainant engaged the services of another classification consultant, Ms V.-M., who concluded on the basis of her job evaluation that the complainant's former post merited a G-6 classification level.

On 14 June 2011 the complainant was notified of the CRC's finding that the classification of her former post at the G-5 level had been correct and of the Deputy Director General's decision to accept this finding. On 6 July 2011 the complainant requested that the Director General review the Deputy Director General's decision in accordance with Staff Rule 12.01.1(D). In the event that her request was denied,

she asked the Director General to allow her to file a complaint directly with the Tribunal.

Following the Director General's rejection of her request for review and for a waiver of the internal appeal procedure on 4 August 2011, the complainant lodged an appeal with the Joint Appeals Board (JAB) on 29 August 2011. In her supplemental statement submitted to the JAB on 6 October 2011 she asked that her former post be reclassified at grade G-6 with retroactive effect from 1 March 2004 and that she be paid the difference in salary and other emoluments between the G-5 and the G-6 grade level as from the same date, together with interest, that she be transferred to a G-6 post, and that she be paid moral damages and costs. In addition, she asked to be provided with copies of Ms W.'s classification report and the CRC's report.

The JAB issued its report on 29 March 2012. It found that the Administration had given the complainant's request for an updated job description due consideration and that there was no indication that any rule had been violated in the process. It thus recommended the dismissal of the complainant's appeal, which was accepted by the Director General, who notified his decision to the complainant by a letter of 27 April 2012. That is the impugned decision.

In her complaint brief the complainant asks the Tribunal to set aside the impugned decision and to order that her former post be classified at grade G-6 level with retroactive effect from March 2003, when she first requested an upgraded job description. She also asks the Tribunal to order the production of relevant documents, including the classification report of the external classifier, Ms W. She claims material damages in an amount equal to the difference in salary between a G-5 and a G-6 grade post, taking account of all step increases, for the period from March 2003 to the present, together with interest. She also claims moral damages, including for the delay, and costs.

The IAEA asks the Tribunal to dismiss the complaint in its entirety. It produces for the first time together with its reply Ms W.'s desk audit report but omits to produce the evaluation record, which is referred to in the classification report and which forms part thereof. It also

submits that the claim for the production of “relevant documents” is too general.

In her rejoinder the complainant expresses serious reservations as to whether the report produced by the IAEA in its reply is indeed Ms W.’s classification report. She considers that a “late partial production” of Ms W.’s classification report justifies a significant award of moral damages.

The IAEA produces the evaluation record of Ms W.’s classification report in an annex to its surrejoinder, explaining that it was unintentionally omitted from the classification report produced with its reply. However, in her additional submissions the complainant insists on the lack of evidence regarding the authorship of the classification report produced by the IAEA.

CONSIDERATIONS

1. On 27 April 2012 the Director General dismissed the complainant’s appeal from the decision not to grant her request for the retroactive reclassification of her former Senior Office Clerk post from the G-5 to G-6 grade. The decision was based on the fact that the classification of the post had been reviewed twice: first, in the job evaluation exercise conducted by an independent consultant and, second, by the Classification Review Committee (CRC) and both reviews confirmed that the post was properly classified. The Director General also endorsed the JAB’s findings that the complainant was accorded all the reconsideration she requested, the process was properly followed and none of the IAEA’s rules were breached in the process.

2. A review of the somewhat complex chronology of the complainant’s various requests for reconsideration of the classification of her former post is unnecessary. The complexity appears to stem in part from the fact that at the time the complainant made the initial request for reconsideration, she no longer held the post and the post had ceased to exist. Additionally, her requests for reconsideration in

these circumstances did not fit easily into the process contemplated in the Administrative Manual.

3. At this point, it is noted that the scope of this complaint is limited to the complainant's August 2009 request for the retroactive reclassification of her former post. The matter of the delay in relation to obtaining a new job description and the consequences of that delay have been dealt with and remedied in Judgment 3188 and are beyond the scope of the present complaint.

4. Two main issues arise in this complaint. The first concerns documents: the IAEA's refusal to disclose material documents to the complainant and the alleged failure on the part of the JAB and the CRC to consider the desk audit report in the course of their respective reviews. The complainant claims that neither body had a copy of the desk audit report at the material time. In her complaint, the complainant asked the Tribunal to order the production of "relevant documents including the classification report of the external classifier, Ms [W.]". In the proceeding before the Tribunal, the IAEA produced the desk audit report (namely the classification report of the external classifier) for the post with its reply and submitted that this rendered the claim moot. This plea will be the subject of further discussion below.

5. During the process leading up to the internal appeal, the complainant made a number of requests for documents. In his 3 August 2010 decision noted above, the Director of the Division of Human Resources (MTHR) stated that the evaluation "concluded that the job at no time warranted a G-6 rating. The job was found to have evolved over time. However, the added financial and programme functions were not determined to meet the threshold to merit a G-6 rating." In a 31 August 2010 memorandum to the Deputy Director General of the Department of Management (MT), the complainant requested a reconsideration of the decision on the ground that the conclusions of the classification consultant showed serious errors of fact. She pointed out that her subsequent request to the Director of MTHR for copies of the materials considered by the external

classification consultant, so that she could assess whether additional errors had been made, was denied and asked that the materials, including the classification report, be provided to the CRC. In his 27 October 2010 reply, the Deputy Director General advised that the requested review would be carried out. However, he denied her request for the documents on the basis that the review was a review of the post and not her personal performance and added that the relevant materials would be provided to the CRC for evaluation.

6. On 14 June 2011 the complainant was informed that the Deputy Director General of MT had considered “the findings of the CRC and ha[d] decided to accept the conclusion that *there were no omissions or distortion of fact in the MTHR classification exercise and that the post was correctly classified as a G-5 post*”.

7. The complainant wrote to the Director General requesting that he review this decision. She pointed out that she was “hampered in providing reasons for the errors made by the classification consultant (Ms W.) who provided the opinion on which the decision was taken since [she] ha[d] not been provided with copies of the classification and/or desk audit report(s)”. She added that she had not been provided with a copy of the CRC report and raised a number of issues concerning the technical capabilities of the CRC and its assessment. She asked for copies of the materials considered by Ms W. and the CRC and copies of their reports. Lastly, she asked for a waiver of the internal appeal requirement to permit her to lodge a complaint directly with the Tribunal.

8. The Director General advised the complainant that he agreed with the findings of the CRC that the post was correctly classified and that the classification would remain unchanged. Although he enclosed a copy of the CRC report, he denied her request for the desk audit report on the ground that it contained privileged information. He also refused her request to proceed directly to the Tribunal.

9. The complainant filed an appeal with the JAB. At the time she made her submissions to the JAB, she did not have a copy of the

desk audit report. Thus, she asked the JAB to obtain a copy of that report so as to give her an opportunity to comment on the report. This did not occur.

10. As stated above, the IAEA submitted a desk audit report with its reply to the present complaint, however, this was undated and the name of the external classifier was not indicated. Under the heading “Recommendation” the report states “Classification of the current duties using the Classification Standards for the General Service Category in Vienna as approved by the International Civil Service Commission in July 1986 resulted in the G-5 level as per the attached Evaluation Record. It is therefore recommended that post [post number] remain at the present level.” However, the “Evaluation Record” was not attached.

11. In response to the complainant’s assertion that the production was partial and incomplete, the IAEA maintained that it was under no obligation to disclose the desk audit report. However, as it was relied upon in the Tribunal proceedings, it was produced. The IAEA acknowledged that the evaluation record was unintentionally omitted from the desk audit report and submitted it as an attachment to the surrejoinder. However, the submitted attachment was a 25 November 2008 document entitled “Evaluation statement for GS posts” prepared by an MTHR officer.

12. In response to an e-mail communication from the Tribunal’s Registry to the IAEA pointing out that the newly submitted document did not appear to be an evaluation record, the IAEA stated that it was sent to the Tribunal in error. Supported by e-mails from Ms W. and the Director MTHR, the IAEA explained that due to the unusual circumstances of the preparation of a desk audit spanning a number of years, the evaluation records were included in the final line of the “classification summary for each year”. As well, the evaluation statement sent in error concerned an earlier classification review conducted in 2008.

13. This case illustrates very well the negative consequences flowing from an unfounded refusal to make the requisite disclosure. It is well established in the case law that a “staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him”. Additionally, “[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality” (see Judgment 2700, under 6; see also Judgment 3264, under 15).

14. A consideration of the legitimacy of the claim of privilege in this case is unnecessary. The fact of the voluntary production of the desk audit report without any redactions alone completely undermines the claim of privilege. The desk audit report was the key document on which the decision not to reclassify the post was based. The IAEA was under an obligation to disclose the report to the complainant and to do so in a timely manner. The failure to provide the complainant with a copy of the desk audit report at the time the decision was taken left the complainant in a position of not being able to meaningfully assess whether an appeal should be taken from the decision and left her both in the internal appeal and in her submissions to the Tribunal guessing whether the decision was based on a reviewable error. Moreover, the carelessness surrounding the production of the aforementioned documents in the Tribunal proceedings left the complainant guessing about what was contained in the referenced evaluation record and confused by the erroneously substituted evaluation statement that pertained to an earlier classification review. The complainant’s evident mistrust and frustration in her pleadings is understandable. With respect to the remaining documents requested, it is observed that the complainant only presses her claim for any documents relevant to the internal classification review conducted in 2008 and moral damages for the late and incomplete disclosure. As the request is framed in very general terms and the complainant has failed to identify the relevance of those documents to the matters currently in issue, no further production will be ordered.

15. Turning to the allegation that the JAB erroneously failed to consider the desk audit report in the exercise of its mandate, as the complainant points out, the desk audit report does not appear in the “List of Attachments” to the JAB report. Additionally, there are no direct references to it in the JAB report other than the observation that the Director General refused to provide the complainant with a copy of the desk audit report on the ground that it contained privileged information. The JAB only noted “the results of the review”, as stated by the Director of MTHR to the complainant in a 3 August 2010 memorandum, that “[t]he job was found to have evolved over time. However, the added financial and programme functions were not determined to meet the threshold to merit a G-6 rating”. The JAB also cited the Deputy Director General of MT’s statement in a 27 October 2010 letter to the complainant regarding the work of the classification consultant (Ms W.) that she had conducted “a detailed in-depth review [...] involving numerous interviews, data gathering and analysis of detailed information provided by you and others”. Most telling, is the absence of any direct observations about the content of the desk audit report by the JAB. Based on the above, the only reasonable inference that can be drawn is that the JAB did not consider the report in arriving at its recommendation.

16. It is also clear from a reading of the report that the JAB confined its inquiry to a review of the adequacy of the administrative process and whether any IAEA rule had been breached, as reflected in the JAB’s conclusion at paragraph 34 of the report. It reads:

“The Board noted that, in terms of process, the administration had given the issue of job description grading all the appropriate re-consideration that the Appellant had requested. The process was properly followed and there was no indication that any Agency rule had been breached in the process.”

17. At this point it is observed that the JAB made no comment regarding the scope of its competence to deal with the decision under appeal and to advise the Director General, as contemplated in Staff Rule 12.01.1(A). As stated in Staff Rule 12.01.1(C)(1), the JAB “shall be competent to hear appeals by staff members against administrative

decisions alleging the non-observance of the terms of appointment”. Unlike the limitation found in Staff Rule 12.01.1(C)(2) that excludes from the JAB’s consideration a particular substantive question in certain types of cases, there is no similar regulatory limitation in cases involving the classification or reclassification of a post. Nor is the JAB precluded from considering any of the limited grounds for review by the Tribunal of decisions involving classification or reclassification articulated in the case law (see consideration 19 below). Moreover, although hampered by not having a copy of the report, the complainant specifically challenged the desk audit in her submissions to the JAB.

18. It follows from the JAB’s failure to obtain and consider evidence central to the claim that its conclusion and recommendation are tainted by an error of law. As the Director General adopted the conclusion and accepted the recommendation, his decision is also tainted by an error of law (see Judgment 2742, under 40).

19. The second issue is whether the decision not to retroactively reclassify the complainant’s former post involved a reviewable error. Recently in Judgment 3273, under 6, the Tribunal had occasion to reiterate that “an evaluation or classification exercise is based on the technical judgment to be made by those whose training and experience equip them for that task. It is subject to only limited review. The Tribunal cannot, in particular, substitute its own assessment for that of the organisation. Such a decision cannot be set aside unless it was taken without authority, shows some formal or procedural flaw or a mistake of fact or of law, overlooks some material fact, draws clearly mistaken conclusions from the facts or is an abuse of authority (see, for example, Judgment 2581).”

20. At this point, it is recalled that the complainant’s job description for her former post was updated on 2 December 2008. Subsequently, on 28 August 2009, the complainant wrote to the Director of MTHR requesting a retroactive reclassification of her post to grade G-6. This request was based on the new 2 December 2008 job description. In his response of 14 September 2009 denying the request, the Director of

MTHR advised the complainant that her former post had “a job description review approved by MTHR on 2008-12-01 with no change to the title or grade level”. He explained that “[a]ll job description reviews are classified prior to MTHR approval to ensure consistency in the classification system”. He also explained that, as she had not sought a reconsideration of the decision within one month, her request was out of time.

21. However, at the time of her 28 August 2009 request, the complainant did not know that as part of the registration of the new job description, a review of the job classification had been done by an MTHR officer. An exchange of correspondence between the complainant and the Deputy Director General of MT and the complainant and the Director General ensued. On 27 November 2009 the Director General informed the complainant that, as she had not been aware that the classification of her former post had been reviewed in 2008 at the time the new job description was issued, he had decided that there should be a “review of the classification level” and that the review would be conducted by an independent consultant.

22. In a 3 August 2010 memorandum to the complainant, the Director of MTHR advised that following the decision of the Director General that there should be a review of the classification level of her former post as per the provisions in AM.II/3, paragraph 32, the post had been subject to a job evaluation by MTHR’s designated classification officer, Ms W., in accordance with the International Civil Service Commission (ICSC) common job classification standards. The conclusion reached in the job evaluation was that the “job at no time warranted a G-6 rating”.

23. The only report stemming from the above process is Ms W.’s desk audit report. Under the heading “Methodology” the report states in relevant part:

“For the purpose of this desk audit the agreed job description dated 1 January 2008 will be considered as the basis for the functions performed for the period from 2003 to April 2008, when the post became vacant. Confirmation

of duties assigned and performed has been done using Performance Review Reports (PRRs) as these reports are produced yearly and reflect any changes in the work assigned. This report will indicate whether the duties outlined in the job description are consistent with the available PRRs.

The purpose of this desk audit is therefore to: 1) Identify/Confirm the ongoing functions carried out during the above period by comparison with the available facts, and; 2) Evaluate the ongoing functions using the Classification Standards for the General Service Category in Vienna as approved by the International Civil Service Commission in July 1986.”

24. The process and the report are fundamentally flawed for a number of reasons. At the time the complainant requested the reclassification of her former post, the only review of the classification level of the post with the new job description was the one done at the time of the registration of the new job description. Given that this was the classification review of which the complainant was unaware, it would appear that when the Director General on 27 November 2009 ordered the “review of the classification level” he contemplated that it would be a review that would usually take place at this point in the registration of a new job description. However, this is not what occurred.

25. Although in his letter of 3 August 2010 the Director of MTHR states that the post had been subject to a “job evaluation” because the Director General had directed that “there should be a review of the classified level of [the complainant’s] post as per the provisions in AM.II/3, paragraph 32”, this was not in fact what the Director General had ordered. Instead, he had simply ordered a review of the classification level at the time of the registration of the new job description.

26. A job evaluation and a classification review at the time of the registration of a new job description are very different actions. This may account for the preparation of the desk audit report and the approach adopted in that report.

27. As stated in paragraph 17 of AM.II/3, the “objective of job classification is to ensure that the posts carrying equivalent responsibilities and major duties are classified in the same category and at the same grade in the established salary scales”. Thus, the review of the classification of an existing post arising from a new job description is to ensure that the post is classified in the same category and at the same grade as posts having equivalent responsibilities and major duties.

28. The purpose of the review was not to identify and confirm “ongoing functions” and new or extended responsibilities and duties. That exercise had already been done and agreed to as set out in the 2 December 2008 job description. The purpose of the classification consultant’s review was to ascertain whether the duties and responsibilities of the post as set out in the 2 December 2008 job description warranted a reclassification of the post in accordance with the common classification standards established by the ICSC.

29. Second, even if this part of the desk audit report is ignored, the classification of the duties and responsibilities of the post was done by reference to a 1 January 2008 job description and not the 2 December 2008 job description at issue.

30. Having so concluded, a consideration of the additional errors raised by the complainant is unnecessary. The complainant asks the Tribunal to order the retroactive reclassification of the post at the G-6 level effective March 2003 and to order the IAEA to pay material damages equivalent to the salary differential between a G-5 and a G-6 grade post taking into account step increases effective March 2003. First, the reclassification of a post is clearly beyond the competence of the Tribunal as the authority to do so rests exclusively with the Director General and as delegated. Second, granting the request for the material damages would amount to the Tribunal substituting its own assessment for that of the competent authority contrary to well settled case law (for example, see Judgments 2284, under 9, and 3284, under 12).

31. As the Director General's decisions of 27 April 2012 and 4 August 2011 are based on a fundamentally flawed process and involve an error of law, they will be set aside. The IAEA will be ordered to have the job classification of the complainant's former post based on its 2 December 2008 job description reviewed by an independent classifier within three months of the delivery of this judgment. If the review results in a reclassification of the post to grade G-6, the IAEA will be obliged to pay the complainant the salary differential between a G-5 and G-6 grade, taking into account step increases, effective March 2003, plus interest at 5 per cent per annum.

32. As to the claim for moral damages for the delay in the reconsideration of the reclassification and the internal appeal process, it is observed that the entire process from the complainant's initial request for reclassification to the Director General's final decision took approximately two years and seven months. However, it must also be observed that the internal appeal itself only took seven months. Given that during this period of time the JAB considered three separate appeals from the complainant that resulted in a single report, it cannot be said that there was unreasonable delay in the internal appeal process. However, having regard to the straightforward nature of the reclassification request based on the new job description, a delay of two years is unreasonable. There are two particularly inordinate delays in the reclassification process: the period of eight months for the classification review and the seven months for the CRC review.

33. The complainant is also entitled to moral damages for the IAEA's breach of its duty to disclose at a minimum, the key document on which the decision was based. The IAEA's assertion that the disclosure of the desk audit report with its reply renders the claim moot ignores the underlying rationale for the timely disclosure of material evidence. This does not remedy the injury resulting from the breach.

34. In light of the above, the IAEA will be ordered to pay the complainant moral damages in the amount of 15,000 euros also

for the delay and the breach of the duty to disclose material evidence. The complainant is also entitled to costs in the amount of 4,000 euros.

35. Lastly, the complainant's assertion that the Director General's refusal to waive the jurisdiction of the JAB constitutes a breach of trust is rejected. The Staff Regulations and Staff Rules impose no obligation on the Director General to waive the jurisdiction of the JAB in specific cases.

DECISION

For the above reasons,

1. The Director General's decisions of 27 April 2012 and 4 August 2011 are set aside.
2. The IAEA shall, within three months of the delivery of this judgment, have the job classification of the complainant's former post reviewed by an independent classifier based on the 2 December 2008 job description.
3. The IAEA shall pay the complainant moral damages in the amount of 15,000 euros.
4. It shall also pay the complainant costs in the amount of 4,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2015, 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 30 June 2015.

GIUSEPPE BARBAGALLO

DOLores M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ