

R. (No. 2)

v.

IAEA

130th Session

Judgment No. 4301

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R. R. against the International Atomic Energy Agency (IAEA) on 19 February 2018 and corrected on 22 March, the IAEA's reply of 11 July, corrected on 12 July, the complainant's rejoinder of 25 October 2018 and the IAEA's surrejoinder of 4 February 2019;

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:

The complainant challenges the decisions to withdraw a vacancy notice and re-advertise it, and the *ad interim* appointment of a colleague in the meantime.

The complainant joined the IAEA in April 2013 under a temporary assistance contract, holding grade P-3. He worked in the Systems Development and Support Group (SDSG) of the Nuclear Information Section (NIS) in the Department of Nuclear Energy (NE) with Mr A.A., who also held a P-3 position.

In late 2014, the complainant applied for the P-4 position of SDSG Coordinator (vacancy notice 2014/195). In early 2015, Mr A.A. was appointed as Acting Group Leader in SDSG, thus becoming the complainant's first-level supervisor. Some tensions arose in the Group

and the complainant was transferred on 1 December 2015 to another position in the NE Department, and then again, in April 2016.

In September 2016 the complainant wrote to the Division of Human Resources (MTHR) enquiring about the status of his application for the position of SDSG Coordinator. He was informed that the selection process was put on hold due to the review of the internal centralised IT Services in the NE Department. On 6 October he was informed that vacancy notice 2014/195 had been withdrawn on 15 September. The vacant position was re-advertised on 3 November 2016 in vacancy notice 2016/0640, but the job title was modified to SDS Group Leader and different education requirements were listed. The complainant applied for this vacancy.

On 11 November 2016 the complainant requested the Director General to review the decisions to withdraw vacancy notice 2014/195 and issue vacancy notice 2016/0640. He also challenged the appointment of Mr A.A. in an acting capacity for the position of SDSG Coordinator advertised in vacancy notice 2014/195, as from early 2015. The request for review was rejected, and the complainant filed an appeal with the Joint Appeals Board (JAB) on 7 January 2017. A few weeks later, he was placed on certified sick leave.

After having heard the complainant, the JAB issued its report on 30 October 2017. It recommended that the Director General dismiss the appeal on the grounds that the decisions to withdraw vacancy notice 2014/195 and issue vacancy notice 2016/0640 were valid programmatic decisions; the complainant had provided no convincing evidence that this was not the case. The JAB found that the appeal was time-barred insofar as the complainant contested the decision to appoint Mr A.A. in an acting capacity for the position advertised in vacancy notice 2014/195.

On 24 November 2017 the Director General informed the complainant that he had decided to endorse the JAB's recommendations and dismissed his appeal. The Director General considered that the Administration was entitled to perform a restructuring exercise and to issue, cancel or subsequently re-issue a vacancy notice. The contested decisions were taken for valid programmatic reasons. The claim concerning the "acting appointment" of Mr A.A. was time-barred as the complainant was aware, at the latest on 25 July 2016, that Mr A.A. was Acting Group Leader (when Mr A.A. signed his Performance

Review Report in that capacity) and he filed the request for review only on 11 November 2016, after the expiry of the time limits set in Staff Rule 12.01.1(D). This is the impugned decision.

The complainant asks the Tribunal to set aside the “impugned decisions”. He seeks an award of material damages in an amount equivalent to the special post allowance he would have received had he been appointed Acting Group Leader, plus an amount equivalent to what he would have earned had he been selected for the position of SDSG Coordinator from 1 January 2016 until the date of the delivery of the judgment, with interest. In addition, he claims 50,000 euros for “diminished income”, plus 30,000 euros for loss of valuable pension benefits in relation to his retirement. He also claims moral damages and “consequential” damages. Lastly, he claims costs and interest.

The IAEA asks the Tribunal to reject the complaint as irreceivable on the ground that the complainant has no cause of action to contest decisions concerning the appointment of another staff member. It submits that the complaint is otherwise devoid of merit.

CONSIDERATIONS

1. The complainant impugns the Director General’s final decision of 24 November 2017 to endorse the JAB’s recommendation of 30 October 2017 and to dismiss his 7 January 2017 appeal. He had appealed against the rejection of his request to review the following decisions:

- (a) the withdrawal of vacancy notice 2014/195 for which he had applied;
- (b) the re-advertising of the vacant position under vacancy notice 2016/0640 with a modified job title (from SDSG Coordinator to SDS Group Leader), and with different educational requirements (from “Advanced University degree (or equivalent) in computer science or related field” to “Master’s Degree – Advanced university degree in nuclear engineering or engineering science combined with information technology”) that he did not possess; and
- (c) the assignment of Mr A.A. as “Acting SDSG Coordinator”, also referred to as Acting Group Leader, as of early 2015.

2. In the impugned decision, the Director General endorsed the JAB's conclusion regarding the withdrawal of vacancy notice 2014/195 and its re-advertising under vacancy notice 2016/0640. Specifically, the JAB found that the Administration was entitled to perform a restructuring exercise, and to issue and thereafter cancel, or subsequently re-issue, a vacancy notice, provided that there had been no abuse of authority. It concluded that these two decisions were taken for valid programmatic reasons.

3. The Director General also endorsed the JAB's conclusion that the complainant's 11 November 2016 request for review of the decision to temporarily "appoint" Mr A.A. as Acting Group Leader was time-barred. The Director General observed that, as noted by the JAB, the complainant was made aware of that decision at the latest when Mr A.A. signed his 2015 Performance Review Report (PRR) as Acting Group Leader on 25 July 2016. Thus the Director General concluded that the complainant's request for review exceeded the two-month time limit prescribed by Staff Rule 12.01.1(D) for contesting decisions.

4. The complainant bases his complaint on the following grounds:

- (a) The decisions to withdraw vacancy notice 2014/195, and hold a new competition under vacancy notice 2016/0640, were tainted by arbitrary decision-making.
- (b) The Agency breached its procedures with regard to restructuring and recruitment.
- (c) The IT centralization in the NE Department had no actual effect on the position in question, requiring any changes to the job description or job title.
- (d) The Agency breached its duty of good faith, and acted with bias and prejudice against him.
- (e) As he was not properly informed of Mr A.A.'s assignment as "Acting SDSG Coordinator", his request for review of that decision cannot be considered time-barred.
- (f) The Agency breached its duty of confidentiality by storing his request for review on a document management system which was accessible to other staff members without his consent.

5. Concerning vacancy notices 2014/195 and 2016/0640, the complainant maintains that the modification of the job title of the vacant position referred to in these vacancy notices, and the suspension of the recruitment process, were decisions that were not taken in the interest of the Agency for valid programmatic reasons. In essence, the complainant suggests that these decisions were adopted to favour Mr A.A., who did not meet the requisite educational requirements listed in vacancy notice 2014/195, but did for vacancy notice 2016/0640. In support of his argument, the complainant cites two judgments of this Tribunal which, according to him, establish that the burden of proving the effective existence of the organization's interest underlying every appealed decision lies with the Administration. He contends that, in the present case, the JAB has not shown that the valid programmatic reasons for the contested decisions existed. This is not a new claim, as the Agency submits; it is an argument to further support the allegations the complainant raised before the JAB. In any case, the argument is not convincing. The two judgments he cites regarded individual decisions, respectively the abolition of a post (Judgment 3688, consideration 18) and the non-extension of a contract (Judgment 3586) for financial reasons. In the present case, the two decisions originally contested (the withdrawal of vacancy notice 2014/195 and the re-advertising of the vacant post under vacancy notice 2016/0640) are not individual decisions and were taken "for programmatic reasons", as the Director General concluded in his final decision. Accordingly, the present case is not comparable to those cited by the complainant, which concerned individual decisions, and which were taken for financial reasons that could be exactly identifiable and scientifically measurable. A decision concerning the advertising of a position, such as the two decisions presently contested by the complainant, is discretionary and may only be set aside if it was taken in breach of a rule of form or procedure; or if it was based on an error of fact or of law, if some essential fact was overlooked; or if there was an abuse or misuse of authority; or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgments 3299, under 6, 2861, under 83, and 2850, under 6). The complainant has not proved the existence of any of these defects affecting the decisions to withdraw vacancy notice 2014/195 and to re-advertise the vacant position under vacancy notice 2016/0640 with a modified job title.

6. In his grounds for complaint, listed under 4(a), (b), (c) and (d) above, the complainant contends that the two contested decisions were taken in violation of the rules of procedure with regard to restructuring and recruitment. The complainant also alleges that a series of elements of fact prove “beyond a preponderance of the evidence” that the withdrawal of vacancy notice 2014/195 (for which the complainant, but not Mr A.A., had applied) and the re-advertising of the vacant position under vacancy notice 2016/0640 (with a modified job title and with different educational requirements, that Mr A.A. possessed but the complainant did not) are unlawful, being tainted by bias and prejudice, and were in breach of good faith and mutual trust.

7. The Tribunal finds that there was no procedural defect in the proceedings which led to the organizational decisions to withdraw the vacancy notice and re-advertise the contested position, and the complainant did not prove that these decisions were tainted by bias and prejudice, or were made in breach of good faith and mutual trust. These two organizational decisions were taken for valid programmatic reasons. As the Agency explains, there was a general restructuring of the NE Department, with effect from 1 January 2016, set forth in document SEC/DIR/235, which led to the creation of the Division of Planning, Information and Knowledge Management (NE-PIK). The Nuclear Information Section (NIS), to which the SDSG belonged, was one of the three Sections of the new Division NE-PIK. In parallel there was the carrying out of a plan to reorganize the IT Services within the NE Department which gave rise to the amended job description advertised under vacancy notice 2016/0640. According to the complainant, neither the restructuring set forth in document SEC/DIR/235, nor the reorganization of IT Services within the NE Department could affect the functions of SDSG Coordinator. The complainant states that in the proceedings before the JAB, Mr S., his second-level supervisor, “admitted that SDSG was left out of any consideration of possible NE IT centralization ‘since Group’s tasks were very specific and different from others, focusing solely on [the International Nuclear Information System] and the IAEA Library’ [...] and [...] explained that the ‘modification of the university specialization was simply fine-tuned and brought in to line with the determination of the’ NE Department, and to ‘strengthen its core human potential and expertise concentrating more on nuclear energy specialists who have exposure

to special areas of position requirements.” The complainant draws the conclusion from Mr S.’s explanation that “the amendment to the educational requirement was made based on capricious and arbitrary considerations”. He also argues that he was the only internal candidate who had applied for the position advertised under vacancy notice 2014/195 and that the re-advertised position required a degree he did not possess. These arguments are not convincing.

8. The Tribunal finds that the programmatic reasons on which the changes to the job description in the re-advertised vacancy notice were based are valid. Specifically, the change of the educational requirements, from “Advanced university degree in computer science or related field” to “Master’s Degree – Advanced university degree (or equivalent) in nuclear engineering or engineering science combined with information technology” that the complainant did not possess, is consistent with the organizational choice to strengthen the core human potential and expertise of the NE Department. The choice to give greater importance to the essential activity of the Agency concerning nuclear energy, in the organization of ancillary activities that support the main activity, is an exercise of the power of the Agency to organize its activity. The explanation given by the JAB, based on the findings that emerged in the appeal proceedings, is convincing and cannot be described as arbitrary. The same contested criterion, as Mr S. noted in his response to a JAB’s request, was applied to the positions of Nuclear Support Systems Coordinator, advertised in vacancy notice 2016/0559, and Nuclear Knowledge Management, Section Head, advertised in vacancy notice 2017/0133. As the JAB concluded, the contested changes were intended to satisfy the need to strengthen the core human potential and expertise of the NE Department concentrating more on nuclear energy specialists whose positions require special areas of knowledge. The modification of the university specialization was consistent with the pursued objective. It is not within the Tribunal’s competence to review the organizational programmatic choices of the Agency. The complainant’s arguments based on Mr S.’s statements to the JAB, quoted above under 7, that “SDSG was left out of any consideration of possible NE IT centralization ‘since Group’s tasks were very specific and different from others’” do not undermine the conclusions that the modification of the university specialization was consistent with the pursued objective and, accordingly was done

for valid programmatic reasons. In this regard, the Tribunal observes that the quoted statements by Mr S. were in response to the JAB's questions regarding the reasons for the delay of two years between the issuance and the re-issuance of the vacancy notice. Mr S. described the considerations that were raised concerning the possible centralization of IT activities within the NE Department; the clear response given by Mr S. to the JAB's express question on the justification for changing the educational requirements leaves no doubt.

9. The complainant's allegations that the Agency breached its procedural rules were raised for the first time before the Tribunal and neither the Director General nor the JAB had the opportunity to comment on them in the internal appeal proceedings. However, the Tribunal finds these allegations to be unfounded. Regarding the general restructuring of the NE Department, set forth in document SEC/DIR/235, the complainant does not raise any specific allegation to show the unlawfulness of that document. The complainant's allegations that the amendment of the job description violated the norm referred to in paragraph 39 of part II, Section 3, of the Administrative Manual (Design of a job description), do not consider that the procedures set out in paragraph 39, as contended by the Agency, are designed for encumbered positions, as indicated by the wording of the first paragraph ("before assigning significantly different functions or responsibilities to a staff member"). Accordingly, those procedures were not applicable to the changes made to the job description in question, as the position was not encumbered at the relevant time. Regarding the alleged violation of paragraph 60 (job description for purposes of recruitment action) of part II, Section 3, of the Administrative Manual, the Tribunal is satisfied that it is evident from the documents in the file relating to the Director General's decisions, Mr S.'s responses to the JAB, and the recruitment process for vacancy notice 2016/0640, that the Director General and MTHR took all the necessary steps before advertising vacancy notice 2016/0640 with the changed, contested job description.

10. The complainant raises a number of allegations from which he infers personal prejudice and bias against him. These allegations are of no moment in light of the conclusion reached under consideration 8 above, that the changes of the job description in vacancy notice 2016/0640 were the result of the exercise of the power of the Agency

to organize its activity. The allegations are irrelevant to the issue of the lawfulness of the contested decisions. The complainant has not proven that the decisions to withdraw vacancy notice 2014/195, and to hold a new competition under vacancy notice 2016/0640, were tainted by arbitrary decision-making, bias and prejudice, or that they were not taken for valid programmatic reasons or were unlawful for breach of any Agency's provisions.

11. Irrespective of the consideration of the complainant's cause of action to contest the assignment of Mr A.A. as Acting Group Leader, the Tribunal finds, as did the Director General in the impugned decision when he endorsed the JAB's findings, that the complainant's appeal was time-barred. The Director General observed that the JAB had noted that the complainant had been made aware of the decision to temporarily assign Mr A.A. as Acting Group Leader with effect from early 2015 at the latest, when Mr A.A. signed the complainant's 2015 PRR in his acting capacity on 25 July 2016 (this circumstance is not contested). The JAB concluded that the complainant's request for review exceeded the two-month time limit prescribed by Staff Rule 12.01.1(D)(1) for contesting decisions. The complainant alleges that the fact that he knew that Mr A.A. had become his supervisor was not sufficient knowledge that Mr A.A. had been appointed as "Acting SDSG Coordinator". The complainant observes in this regard that Mr A.A. was using the different title of Group Leader and that MTHR, replying to his September 2016 enquiry about Mr A.A.'s position, had responded that it would not have been appropriate to comment on the status of another staff member. The complainant's allegation is not convincing considering that SDSG was a small unit and there was no other position in the Section for which the complainant should report rather than the P-4 position of SDSG Coordinator and the complainant's request about Mr A.A.'s position appears to be an attempt to circumvent the rule of the time limit to appeal. Moreover, the fact that Mr A.A. had become the acting first-level supervisor of the complainant constituted the source of the tensions between the complainant and Mr A.A., who had already complained, by an e-mail of 19 April 2015, that the complainant did not respect his role as a supervisor. The Tribunal considers that the Agency correctly concluded that the complainant had become aware that Mr A.A. had been in an acting capacity more than two months before his 11 November 2016 request

for review, which, accordingly was time-barred. However, the Tribunal finds that the Agency's response to the complainant's enquiry regarding Mr A.A.'s position, that MTHR could not comment on the status of another staff member, was incorrect. The Agency did not sufficiently justify confidentiality.

12. Regarding the claim that the Agency breached its duty of confidentiality by storing the complainant's 11 November 2016 request for review on a document management system which was accessible to other staff members, the complainant on 2 February 2017 sent an e-mail to the Director of MTHR reporting the breach of confidentiality. The complainant did not raise this issue during the proceedings before the JAB, whose composition had been notified to him on 3 February 2017. It is therefore irreceivable in the present complaint.

13. In light of the above considerations, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 July 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ