

**A.**  
**v.**  
**IAEA**

**131st Session**

**Judgment No. 4343**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. K. A. against the International Atomic Energy Agency (IAEA) on 5 March 2019 and corrected on 3 April, the IAEA's reply of 10 July, the complainant's rejoinder of 2 September and the IAEA's surrejoinder of 24 December 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 decision to demote him by two grades as a disciplinary measure for harassment.

The complainant joined the IAEA in 1997 at the P-4 level. At the material time, he was serving as a Section Head at the D-1 level. On 17 June 2016 a formal complaint of harassment was filed against him by one of the members of his Section, Mr H. The complainant was Mr H.'s second-level supervisor. Referring to events dating back to 2013, Mr H. alleged, in particular, that the complainant had repeatedly made inappropriate, belittling comments about his performance, both to him and to others; that he had abusively opposed his requests for leave, including sick leave, and queried his timesheet entries; that he had sought to block the extension of his fixed-term contract on two occasions; and that he had planned to move his office to a location where it would be

difficult for him to carry out his functions effectively. Mr H. requested a formal investigation of his claims, in accordance with paragraph 1 of Appendix G to the Staff Regulations and Staff Rules (hereinafter “Appendix G”), which sets out the “Procedures to be followed in the event of reported misconduct”. The matter was referred to the Office of Internal Oversight Services (OIOS) for investigation on 27 June 2016.

On 20 September 2017 the complainant was informed by the Director of OIOS that he was the subject of an investigation for harassment. He was interviewed by the OIOS investigators on 4 October 2017, and on 10 October he provided additional information concerning some of the events mentioned during the interview. On 4 December 2017 OIOS sent him a draft investigation report, inviting him to respond within ten days. This deadline was extended at the complainant’s request and he submitted his comments on 4 January 2018.

On 5 January 2018 OIOS sent its final investigation report to the Director of the Division of Human Resources (MTHR), together with the complainant’s comments on the draft report. OIOS found that the complainant had “failed to comply with his obligations as a senior staff member and supervisor by engaging in a pattern of harassment against Mr [H.] and by making very inappropriate remarks about him and about others”. It therefore recommended “that appropriate action be taken”.

In accordance with paragraph 3 of Appendix G, the Director of MTHR forwarded a copy of the final investigation report to the complainant and invited him to comment within two weeks. Having received the complainant’s comments on the final investigation report, she forwarded the case file to the Deputy Director General for Management (DDG-MT), recommending that the Joint Disciplinary Board (JDB) be convened. On 4 May 2018 DDG-MT referred the case to the JDB for advice as to the appropriate disciplinary measure(s).

By a memorandum of 8 May 2018, the Director of MTHR informed the complainant that the case had been referred to the JDB and provided him with a copy of the file submitted to that body. After hearing the complainant and one other staff member, the JDB submitted its report to the Director General on 8 November 2018. The JDB concurred with the conclusions of OIOS on the allegations set out in Parts A and B of the final investigation report, namely, that inappropriate comments had been made by the complainant directly to Mr H., and that inappropriate comments about Mr H. had been made by the complainant to other staff members.

On that basis, the JDB concluded that the complainant “should no longer be in a managerial position in which he could continue such behaviour towards his subordinates”. Although it shared the concerns expressed by OIOS concerning the complainant’s management style, the JDB found that the remaining matters mentioned by Mr H. did not constitute harassment. The JDB recommended that the complainant be subjected to the disciplinary measure of demotion, and that consideration be given to removing him from his managerial functions.

In response to a request from the Director General for clarifications, the Chair of the JDB indicated in a letter of 27 November 2018 that the JDB had established beyond reasonable doubt that misconduct, in the form of harassment, had occurred with respect to the allegations mentioned in Parts A and B of the OIOS report, but that there was insufficient evidence to establish beyond reasonable doubt that misconduct, in the form of harassment or in any other form, had occurred with respect to the other allegations examined in the report. She provided additional information concerning the aspects that the JDB had viewed as aggravating or mitigating factors, and specified that the JDB considered that demotion to the P-4 level would be appropriate.

By a letter of 4 December 2018, the Director General informed the complainant of his final decision on the case. The Director General concurred with the conclusions reached by the JDB with regard to the two allegations that were found to constitute harassment, and he noted that this conduct also constituted a failure to observe the standards of conduct for international civil servants set out in Appendix A to the Staff Regulations and Staff Rules. Whilst he did not entirely agree with the JDB’s analysis of the aggravating or mitigating factors that might be relevant, he accepted its recommendation that the complainant be demoted by two grades, to the P-4 level, with immediate effect. The Director General observed that this measure necessarily entailed removing the complainant from his supervisory responsibilities as Section Head, which the Director General considered to be “entirely appropriate in the circumstances of this case”. That is the impugned decision.

The complainant tendered his resignation on 6 December 2018 and left the IAEA that same day.

In his complaint, he asks the Tribunal to set aside the impugned decision and to order the IAEA to restore him to the D-1 level for the purposes of his separation payments and repatriation grant, which were

paid at the P-4 level. He also seeks the removal of adverse remarks from his personnel file and the provision of “a standard reference letter”. He claims material damages in the amount of 25,000 euros for procedural breaches; moral damages in the amount of 50,000 euros for delays in the investigation, denial of due process and damage to his health and professional reputation; costs in the amount of 5,000 euros; and any other damages the Tribunal deems appropriate.

The IAEA asks the Tribunal to dismiss the complaint in its entirety as devoid of merit.

### CONSIDERATIONS

1. The complainant seeks an order setting aside the impugned decision of 4 December 2018. The Director General therein accepted the JDB’s recommendation to demote the complainant from grade D-1 to P-4 with immediate effect and to remove him from his function of Section Head. This was done on the ground that it had been proved, beyond reasonable doubt, that he had engaged in harassment against Mr H., thereby failing to observe the standards of conduct of an international civil servant, as required by Staff Rule 1.05.1 and set out in Appendix A to the Staff Regulations and Staff Rules, including the obligation not to engage in harassment, as well as the obligation to ensure a harmonious workplace based on mutual respect. The Director General concluded that the complainant’s actions amounted to misconduct under Staff Rule 11.01.1(A).

2. Staff Regulation 1.05 states as follows:

“Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity which is incompatible with the proper performance of their duties with the Agency. They shall avoid any action and, in particular, any kind of public pronouncement, which may adversely reflect on their status [...] While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status.”

Staff Rule 1.05.1, which is under the rubric “Standards of conduct”, states as follows:

“Staff members shall observe the standards of conduct expected of an international civil servant, as laid down in these Rules and in the Standards of Conduct for the International Civil Service contained in Appendix A to these Rules. Failure to do so may result in disciplinary measures in accordance with Staff Regulation 11.01.”

Staff Regulation 11.01, which is under the rubric “Misconduct”, states as follows:

“The Director General may impose such disciplinary measures as are in his/her opinion appropriate on staff members whose conduct is unsatisfactory. He/she may summarily dismiss a staff member for serious misconduct.”

Staff Rule 11.01.1(A) states as follows:

“Misconduct is defined as ‘failure by a staff member to comply with his or her obligations under the Statute of the Agency, the Staff Regulations and Rules or other administrative issuances, or to observe the standards of conduct expected of an international civil servant’.”

Under Staff Rule 11.01.1(B)(4) and (9), misconduct includes harassment and acts or behaviour that may discredit the Agency.

3. In arriving at the decision referred to in consideration 1 of this judgment, the Director General agreed with the JDB’s conclusion, which accepted the findings of OIOS, that the testimonies of witnesses corroborated the following two allegations of harassment that Mr H. made against the complainant:

- A. The allegation that the complainant made inappropriate comments directly to Mr H. in that he made about 20 humiliating and degrading comments to Mr H. in the laboratory during 2013, and other similar comments in 2014 and 2015.
- B. The allegation that the complainant belittled Mr H. in his absence by using inappropriate and impolite language to describe him to other staff members at meetings in January 2014 and February 2016.

The Director General also agreed with the JDB that the evidence before him proved beyond reasonable doubt that, by those actions, the complainant had engaged in harassment that amounted to misconduct.

4. Regarding the Tribunal’s purview in a case in which a disciplinary decision is challenged, the following has been stated, in Judgment 3872, consideration 2, for example:

“Consistent precedent has it that decisions which are made in disciplinary cases are within the discretionary authority of the executive head of an international organization and are subject to limited review. The Tribunal will interfere only if the decision is tainted by a procedural or substantive flaw (see Judgment 3297, under 8). Moreover, where there is an investigation by an investigative body in disciplinary proceedings, the Tribunal’s role is not to reweigh the evidence collected by it, as reserve must be exercised before calling into question the findings of such a body and reviewing its assessment of the evidence. The Tribunal will interfere only in the case of manifest error (see Judgment 3757, under 6).”

5. The complainant challenges the impugned decision on the following grounds:

- (1) The Director General did not reach a reasonable conclusion based on all the facts.
- (2) There were breaches of procedure and due process.
- (3) The sanction of demotion by two grades was disproportionate to the alleged misconduct.

6. Regarding ground 1, it should be recalled that the complainant bears the burden of proving that there was manifest error in the contested fact-finding. The complainant alleges that the Director General’s decision is, in effect, tainted by erroneous fact-finding by OIOS and/or the JDB. He argues that OIOS did not take into consideration his denials to the allegations or other aspects of his evidence or comments which he made during the investigation and on the draft report. However, as the Tribunal stated in Judgment 3640, consideration 23, the fact that denials were not deemed convincing does not in any way imply that they were not duly taken into consideration.

It bears observing that according to paragraphs 2, 20, 23 and 24 of the OIOS Procedures for the Investigation of Staff Members (hereinafter “the OIOS Procedures”), OIOS’s investigative process is administrative in nature and may include interviews of witnesses, as occurred in the present case. In the Tribunal’s view, this process was conducted fairly, as paragraph 11 of the OIOS Procedures required. The complainant was interviewed and had an opportunity, pursuant to paragraph 30 of the OIOS Procedures, to comment upon the draft investigation report. He states that once he received that report, in which the allegations were more specific, he was able to provide extensive comments as well as documentary evidence (prior to the issuance of the final report). This procedure was

in keeping with paragraph 11c) of the OIOS Procedures, paragraph 4 of Appendix G, as well as with the Tribunal's case law (see, for example, Judgment 4311, consideration 4). It is true that, as the complainant points out, OIOS made very few changes to its draft investigation report after having received his comments. However, in the impugned decision, the Director General referred expressly to the complainant's comments on the investigation report, as well as the comments he had provided subsequently in the context of the disciplinary proceedings under Appendix G. In the result, the complainant has not established that his rebuttals were not duly taken into account, or that the Director General did not reach a reasonable conclusion based on all the facts. Accordingly the complainant's first ground must be rejected.

7. The complainant alleges, in ground 2, that OIOS and the JDB failed to follow set procedures. Regarding OIOS, the complainant argues that, in violation of paragraph 17 of the OIOS Procedures, the OIOS investigation was essentially complete before he was informed of it. However, this argument fails. Paragraph 17 states that "DIR-OIOS will use his or her discretion to determine when the subject of an investigation should be notified of the investigation, taking into account the nature of the alleged irregularity and the level of evidence that needs to be collected". This provision permits the Director, OIOS, to determine when the complainant was to be informed, as long as the complainant's right to be heard is respected. That right was respected in the present case.

8. The complainant also argues that OIOS did not attempt to establish all the relevant facts based solely on the complaint of Mr H., as it also proceeded to investigate matters that were not part of Mr H.'s complaint, based on unsubstantiated allegations and hearsay. This argument also fails. As the IAEA points out, it was within the discretion of OIOS to consider evidence of alleged inappropriate comments by the complainant against other staff members, as it did, as this is a legitimate means to corroborate the allegations of misconduct which were made against the complainant. Indeed, it is firmly established in the case law that the question of whether or not harassment has occurred must be determined in the light of a careful examination of all the objective circumstances surrounding the events complained of by the alleged victim (see Judgment 3640, consideration 14, and the case law cited therein). Alleged instances of similar conduct involving other staff members

would plainly be relevant in this respect. The complainant's further arguments that there were significant discrepancies between Mr H.'s complaint and the allegations as formulated by OIOS, and that OIOS did not establish the facts for all the allegations, fail to appreciate that OIOS's process is merely an investigative one to establish the facts. The Tribunal is satisfied that OIOS conducted an adequate investigation based upon its mandate.

9. The question then is whether the complainant was denied due process in the JDB's proceedings, with particular reference to paragraph 9 of Appendix G, which relevantly states as follows:

"[...] The proceedings of the [JDB] shall be consistent with due process, the fundamental requirements of which are that the staff member concerned has the right to know the allegations raised against him or her; the right to see or hear the evidence against him or her; the right to rebut the allegations and the right to present countervailing evidence and any mitigating factors. If the Board decides to hear oral testimony, the staff member should be invited to be present [...] If the Chairperson decides that the Board or one of its members should take testimony by deposition, telephone, or other means of communication, such testimony shall be shared with the staff member concerned for comment or rebuttal."

10. The impugned decision to impose the disciplinary sanction of demotion against the complainant was based only on the allegations examined in Parts A and B of the OIOS final investigation report. The Director General accepted the JDB's conclusion that it had assessed the evidence applying the standard of proof beyond reasonable doubt that the complainant had engaged in harassment of Mr H. with respect to the above-mentioned allegations which constituted misconduct under Staff Rule 11.01.1(B)(4). Thereby, the Director General endorsed the findings of the JDB and, by extension, those of OIOS which the JDB merely recalled. The JDB noted that the complainant had asked for transcripts of the witness interviews and that OIOS had denied his request on the grounds that the witnesses feared retaliation.

11. The JDB interviewed the complainant and Ms V. It provided the complainant with the minutes of her interview on which he commented. The JDB indicated that it sought clarification on several matters, including the records of OIOS' interview of Mr M., and clarification of which witnesses referred to in the OIOS investigation report were or had been working in the complainant's Section and which were from outside the

Section. In relation to the allegations listed in Parts A, B and C of the investigation report, the JDB sought clarification as to which witnesses actually witnessed the referred circumstances/events and which witnesses heard about referred circumstances/events from Mr H. The JDB explained that OIOS had supplied the record of its interview with Mr M. but had refused to provide the other information concerning witnesses that it had requested. Nor had it provided the transcripts of the other witness interviews. In its “Conclusions”, the JDB stated:

“31. The Board notes that several of the allegations mentioned by Mr [H.] depended, for their verification and credibility, on the testimonies of the witnesses interviewed by OIOS.

32. As such, and as far as the Board could corroborate facts and the testimonies of witnesses, the Board concurs with the conclusions in [the] OIOS Investigation Report with regard to the [...] allegations [discussed in Parts A and B of the OIOS report].”

12. It is however apparent that the only information available to the JDB concerning the witness statements was the very brief summary provided by OIOS in the relevant parts of the final investigation report. The question to be determined is whether the complainant was sufficiently informed of the content of the witness statements to be able to challenge that evidence and, more generally, to defend himself adequately.

13. The Tribunal’s case law accepts that there may be situations in which an organization can refuse to provide the subject of disciplinary proceedings with the transcripts of witness interviews without committing a breach of due process. An example is provided by Judgment 3640, where the issue of the need to reconcile the requirements of due process with the confidentiality of harassment investigations was dealt with in considerations 17 to 22. In that judgment, the Tribunal recalled its case law according to which “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” and, “under normal circumstances, such evidence cannot be withheld [by this authority] on the grounds of confidentiality (see Judgment 2229, under 3(b)), to which Judgment 3295, under 13, refers”. In consideration 20, the Tribunal observed that, “as is expressly indicated by the use of the terms ‘as a general rule’ and ‘under normal circumstances’ [...], the case law in question does allow some exceptions to the principle which it establishes”. The Tribunal held that:

“[W]here disciplinary proceedings are brought against an official who has been accused of harassment, testimonies and other materials which are deemed to be confidential pursuant to provisions aimed at protecting third parties need not be forwarded to the accused official, but she or he must nevertheless be informed of the content of these documents in order to have all the information which she or he needs to defend herself or himself fully in these proceedings. As the Tribunal has already had occasion to state, in order to respect the rights of defence, it is sufficient for the official to have been informed precisely of the allegations made against her or him and of the content of testimony taken in the course of the investigation, in order that she or he may effectively challenge the probative value thereof (see Judgment 2771, under 18).”

14. It is therefore necessary to consider whether the evidence in the present case shows that the complainant was sufficiently informed of the content of the witness statements, even though they were not shared with him, as there would have been “a serious breach of due process” if he had not been so informed (see Judgment 3137, under 6).

15. When OIOS interviewed the complainant, it informed him of the statements, listed in Part A of its report, which Mr H. alleged the complainant had made to him. OIOS also informed him that witnesses W1, W2 and W10 confirmed that they witnessed the complainant’s inappropriate remarks. OIOS repeated this in relation to the Part B allegations and informed the complainant that witnesses W1 and W2 had confirmed that he had belittled Mr H. by using alleged inappropriate, impolite language and strong words to describe Mr H. to Mr M. and others. In the Tribunal’s view, OIOS had sufficiently informed the complainant of the essential contents of those testimonies in order to respect his rights of defence. In the JDB’s proceedings, the complainant was in possession of OIOS’s report which summarised the relevant testimonies. He had an opportunity to challenge those testimonies when the JDB interviewed him. He also had an opportunity to provide comments on the minutes of the JDB’s interview of Ms V. Accordingly, ground 2 is unfounded.

16. Regarding ground 3, the complainant argues that the disciplinary measure of demotion by two grades, from D-1 to P-4, with immediate effect, was disproportionate to the alleged misconduct.

Staff Rule 11.01.2(A) lists the disciplinary measures which can be imposed on staff members. The scale of disciplinary measures from most to least severe is: summary dismissal, dismissal, demotion, fine, suspension without pay, and written censure. The sanction imposed upon the complainant was therefore fairly serious. The JDB had, pursuant to the requirement of paragraph 10(f) of Appendix G, considered aggravating and mitigating factors in recommending that the complainant should be demoted.

17. The Tribunal's case law states as follows, in Judgment 4244, consideration 4, for example:

“[...] Regarding the severity of the sanction, the Tribunal's case law has it that ‘[t]he disciplinary authority within an international organisation has a discretion to choose the disciplinary measure imposed on an official for misconduct. However, its decision must always respect the principle of proportionality which applies in this area’ (see, for example, Judgments 3971, consideration 17, 3953, consideration 14, 3944, consideration 12, and 3640, consideration 29).

[...]”

18. The Tribunal does not accept the complainant's submission that in deciding to demote him by two grades, the Director General's conclusions on the aggravating factors were unreasonable. In the impugned decision, the Director General noted the aggravating and mitigating factors which the JDB had identified in recommending that the complainant be demoted. He noted its statement that a lack of a clear reporting line between the complainant, as Section Head, and the Director of the Division, as well as the current administrative structure contributed to a lack of accountability and transparency in the Division. The Director General however did not consider this to be an aggravating or mitigating factor nor an excuse for the complainant's harassing behaviour. He also did not consider the fact that seven witnesses told OIOS that they were unaware of the complainant's behaviour, and two testified to the complainant's positive work and contributions, to be either aggravating or mitigating factors. This was on the basis that all staff members are expected to perform well. The Director General did not accept that the fact that several of the incidents which led to the allegations of harassment against the complainant revealed work performance shortcomings on the part of Mr H. was relevant in assessing mitigating and aggravating factors. This was on the basis that the complainant's work entailed

addressing such shortcomings and did not excuse the complainant's behaviour. The Director General however agreed with the JDB that the length of the complainant's experience at a senior managerial level was an aggravating factor.

19. Additionally, whereas the Director General considered that the length of the complainant's prior satisfactory service and unblemished record could, in principle, be mitigating factors, he concluded that these factors were outweighed by other factors, including the serious incidents of harassment which were complained of. He also considered it an aggravating factor that as a senior staff member the complainant was expected to act as a role model, and that he had failed to express remorse for the incidents at any time. The Tribunal finds that based on the foregoing, the disciplinary sanction of demotion by two grades, imposed by the Director General in the exercise of his discretionary authority, was not disproportionate. Ground 3 is therefore unfounded, and, in the premises, the complaint will be dismissed in its entirety.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ