

**R. (No. 4)**

**v.**

**IAEA**

**131st Session**

**Judgment No. 4345**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr R. R. against the International Atomic Energy Agency (IAEA) on 26 February 2018 and corrected on 9 June, the IAEA's reply of 24 September 2018, the complainant's rejoinder of 6 February 2019 and the IAEA's surrejoinder of 20 May 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 extend his temporary reassignment.

The complainant joined the IAEA in April 2013. In June 2015 he was granted a three-year fixed-term appointment as Information Architect, at grade P-3, in the Systems Development and Support Group (SDSG) of the Nuclear Information Section (NIS) in the Department of Nuclear Energy (NE). As there were tensions within the team, he was reassigned in December 2015 to the Office of the Deputy Director General in the NE Department (O/DDG-NE) to join the newly created Nuclear Systems Support Group.

On 30 March 2017 the Acting Director of the Division of Human Resources wrote to the complainant noting that his reassignment to the Nuclear Systems Support Group had ended on 28 February 2017 and

that he had been on sick leave since 1 March. She encouraged him to discuss appropriate work arrangements for his return from sick leave, in particular given that he had filed complaints of harassment against staff members in both his area of reassignment and in the area of his original post. She added that the Division of Human Resources would continue its efforts to identify a suitable post for him. On 27 April the complainant, who understood that he had been reassigned to his original post of Information Architect in NIS, asked the Director General to review that decision on the grounds that it did not take into consideration his interests and dignity; he stressed that he had made formal complaints of harassment against his supervisors and feared retaliation as he would continue to report to them. He added that he had not been officially informed of the reasons for reassigning him and that the decision-making process concerning that reassignment was not transparent.

On 25 May the Director General replied that, since the complainant was on sick leave, the Division of Human Resources had not had an opportunity to discuss with him the implications of the end of his temporary reassignment and that no decision had been made in that respect. He added that he was willing to extend the complainant's temporary reassignment to the position of Nuclear Support Systems Analyst and that the administrative details would be provided to him upon return from sick leave. He would be placed under the direct supervision of Mr H., against whom he had not raised any allegations of harassment. The Director General added that, as indicated to him in February 2017, no administrative decision had yet been taken concerning his performance and that upon return from sick leave he would continue to work under the performance improvement plan communicated to him in December 2016.

On 23 June 2017 the complainant wrote a letter to the Director General arguing that, contrary to the Director General's statement, some internal documents indicated that he had been reassigned to his original post of Information Architect as of 1 March. Since the Director General had not reviewed that decision nor provided any redress for the injury sustained, he informed the Director General that he would file an appeal with the Joint Appeals Board (JAB) against that decision. He requested the Director General to review the decision to continue his temporary assignment as Nuclear Support Systems Analyst upon return from sick leave on the grounds that there was a "foreseeable risk of injury" towards him, given that a staff member had manifested intent

to cause him harm. He also asked the Director General to consider his letter as a formal complaint of misconduct against Ms R., who was working in the Division of Human Resources. Lastly, he asked the Director General to take a final decision, which he could appeal directly before the Tribunal, concerning his alleged unsatisfactory performance and the decision to initiate the performance improvement plan in December 2016.

The Director General replied on 10 July 2017 that the extension of his temporary reassignment as Nuclear Support Systems Analyst under the supervision of Mr H. was confirmed, and that the Division of Human Resources had been instructed to correct the oversight in the system. The Director General noted in particular that the complainant had already filed a formal complaint of misconduct against Ms R. on 1 June 2017 and that the matter had been referred to the Office of Internal Oversight Services (OIOS), but said that he would also forward the letter of 23 June to OIOS for further review. He also noted that the complainant had acknowledged that some of his claims were the subject of other pending appeals and therefore considered that the complainant should await the outcome of these appeal procedures.

In August, the complainant filed an appeal with the JAB against the Director General's decision of 10 July alleging violation of the Standards of Conduct for the International Civil Service, breach of duty of care, breach of due process in relation to the failure to communicate to him "secret documents" that were communicated to his supervisors and that may have been taken into account not to extend his fixed-term appointment, and breach of the duty to inform him adequately of the reasons for the reassignment decision. He also alleged that he was the victim of institutional harassment.

In its report of 30 October 2017, the JAB noted that the Director General had given assurances that the IAEA was undertaking continued efforts to identify a suitable assignment for the complainant. It also observed that the complainant would no longer work under the supervision of Mr K. against whom he had alleged harassment, but under the supervision of Mr H.; this constituted a substantive "different organizational setting". The JAB therefore concluded that the IAEA had satisfied its obligations towards the complainant, and recommended that the Director General dismiss the appeal.

On 24 November 2017 the Director General informed the complainant of his decision to dismiss his appeal regarding the extension of his temporary reassignment as Nuclear Support Systems Analyst. He noted that the complainant's allegations of harassment against certain colleagues had been rejected as unsubstantiated. The Director General further observed that the complainant had raised numerous "other claims" before the JAB, including concerning his alleged unsatisfactory performance, secret documents and the alleged decision to reassign him to his original post, and that he had acknowledged that these "claims" were the subject of other pending appeals. The Director General consequently held that the complainant should await the outcome of the appeal procedures. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. He seeks an award of material damages for the economic loss suffered in salary deductions, as a consequence of his being on sick leave, from the date of the contested reassignment until the expiry of his appointment on 31 May 2018; plus compensation *ex aequo et bono*, in an amount equivalent to two years' salary at the "level and grade" he held before "being separated", for loss of the opportunity to have his appointment extended and the concomitant loss of the opportunity to develop his career under more favourable conditions. He also seeks moral and exemplary damages, together with the payment of interest at the rate of 5 per cent per annum. Lastly, he claims costs.

The IAEA asks the Tribunal to reject the complaint as partly irreceivable for failure to exhaust internal means of redress or because certain "issues" are the subject of parallel proceedings, and otherwise devoid of merit.

## CONSIDERATIONS

1. The complainant impugns the Director General's decision, dated 24 November 2017, to accept the recommendation of the JAB to dismiss his appeal against the extension of his temporary reassignment as Nuclear Support Systems Analyst in O/DDG-NE under the supervision of Mr H. on the following grounds:

- (a) the impugned decision is flawed as no proper justification was given for the decision;

- (b) the impugned decision is flawed as it endorses a flawed JAB recommendation, which included errors of law and fact;
- (c) abuse of authority in the decision to maintain his temporary reassignment rather than finding him a post outside of the NE Department;
- (d) breach of his contract as the IAEA infringed fundamental terms of his employment, his fundamental human rights, and did not act in its interests;
- (e) violation of the rules concerning the maximum duration of a temporary reassignment; and
- (f) institutional harassment.

He also states that “the Agency has egregiously failed to fulfil all the necessary requirements of good governance, good faith and concomitant duty of care towards him” and “failed to enact reasonable measures to prevent foreseeable harm resulting from a conduct for which it is solely liable”.

2. The complainant raises several issues which relate to decisions which are challenged under other pending appeals and complaints, such as the alleged transfer back to his original post and secret documents. The Tribunal considers those issues to be outside the scope of the present complaint and shall focus only on matters related to the impugned decision of 24 November 2017 and the relevant facts and procedures leading to that decision.

3. The complainant claims that the final decision was vitiated by the failure to state the grounds upon which it was taken. He asserts that the Director General needed to explain how the continuation of his temporary reassignment was meant to specifically address the complainant’s concerns regarding alleged mobbing and harassment. The Tribunal observes that in the letter of 25 May 2017, the Director General expressly acknowledged the complainant’s concern regarding his return to his original post as Information Architect in the SDSG organizational area and noted that as the complainant had been on sick leave since 1 March 2017, the Division of Human Resources had not had the opportunity to discuss the implications of the end of the complainant’s temporary reassignment with him personally. He added that no decision had been made in this regard. The Director General went on to inform the

complainant of his willingness to continue the complainant's temporary reassignment as Nuclear Support Systems Analyst in O/DDG-NE. He stated that, due to the complainant's concerns regarding the allegations of harassment he made against several staff members working in the NE Department, he would be placed under the direct supervision of Mr H. following his return from sick leave. As the Director General's letter of 10 July 2017 reiterated the motivation of the 25 May 2017 letter and maintained its continued application, and the impugned decision of 24 November 2017 confirmed the terms of the 10 July 2017 letter, the Tribunal finds that the motivation given in those letters fully justified the decision to maintain the complainant's temporary reassignment in O/DDG-NE under the direct supervision of Mr H. upon his return from sick leave. It is clear from the evidence presented that the IAEA was willing to look into alternative work arrangements for the complainant (and indeed had already proven this twice by allowing his original temporary reassignment, and by changing his direct line of supervision), but as he remained on sick leave until the expiry of his contract, it had no opportunity to discuss any further potential arrangements with him. Considering the above, the Tribunal finds that the IAEA properly fulfilled its duty of care towards the complainant and respected his dignity by taking reasonable steps to remove him from working directly under the supervision of staff members against whom he had filed complaints.

4. The complainant claims that the internal appeal procedure and the JAB's recommendation are vitiated by errors of law. He asserts that the JAB failed to conduct preliminary inquiries on the organizational setting where he was reassigned, his medical documentation, his allegations of institutional harassment, and the IAEA's efforts to identify a suitable new assignment for him. He also submits that the JAB failed to fairly assess the facts and reached a mistaken conclusion in noting an inconsistency in his actions with regard to his simultaneous appeals. The JAB can determine itself what materials are relevant to the consideration of the appeal at hand, and whether and when additional inquiries are necessary in order to provide a reasoned recommendation in reviewing the decision which was challenged in the context of a request for review under Staff Rule 12.01.1(D)(1). In the present case, the JAB found that the submissions provided sufficient information to allow it to reach a reasoned recommendation. The fact that the JAB did not request copies of the medical documentation mentioned by the complainant in his

submissions, cannot be considered a flaw in the present case. Nothing prevented the complainant from submitting any documents which he considered essential to his appeal. In any case, the JAB found that the change in the complainant's direct supervisor, from Mr K. (against whom the complainant had made allegations of harassment) to Mr H., was "clearly a substantively different organizational setting". The JAB also noted that the Director General had assured the complainant of ongoing efforts to find him a suitable assignment outside the NE Department and indicated that "any such further assignment [could] be finalized only when the [complainant] return[ed] from sick leave and engage[d] with the administration on this matter".

5. The complainant contests the JAB's assessment that the change in supervisor was sufficient to provide a safe and healthy work environment as the complainant would be expected to continue working in the same department as Mr K. The Tribunal observes that, as mentioned above, the IAEA's efforts to identify a suitable new work arrangement for the complainant were hindered by the complainant's continued sick leave. The complainant appears to believe that the IAEA's duty of care requires it to provide him with a new post every time he requests one. In addition to the fact that such assumption is mistaken, the Tribunal notes that the complainant does not provide any evidence that suitable vacant posts matching his work experience and related criteria, were identified but denied to him by the IAEA. The Tribunal therefore finds that the IAEA did not breach its duty of care and stresses that it is not always possible to cater to the needs of each individual employee, as the product or result of the work being done is often justifiably considered a higher priority over the individual's personal interests (see Judgments 2587, under 10, 3192, under 22, 3447, under 11, and 4316, under 18). The Tribunal finds that the complainant's work situation as a whole was considered and therefore neither the JAB nor the Director General made errors of law.

6. The complainant contends that the impugned decision is vitiated by abuse of authority, stating, inter alia, that "the transfer decision was in fact nothing more than a device, recklessly disguised as a discretionary measure, to effect an unjustifiable removal of the complainant from the workplace, by forcing him onto extended sick leave, on reduced pay, until the very expiry of his contract". This contention is unsubstantiated

and the Tribunal's consistent case law holds that bad faith cannot be assumed; it must be proven (see, for example, Judgments 4261, under 10, 4161, under 9, 3154, under 7, 3902, under 11, and 2800, under 21). The Tribunal finds that the decision to continue the complainant's temporary reassignment was taken in consideration of the complainant's situation with regard to his allegations of misconduct and harassment both in his original post and against staff members in O/DDG-NE. By changing the complainant's direct supervisor, the Director General properly responded to the complainant's request for a safe and healthy work environment as much as was possible considering the lack of availability for further transfer outside of the NE Department at the time.

7. The claim that the IAEA violated the maximum duration of temporary reassignment is unfounded. As the IAEA explains, it was done to provide the complainant with a proper administrative position taking into account his harassment grievances.

8. The complainant contends that he suffered institutional harassment. This claim is unfounded. According to the Tribunal's case law, decisions which appear to be managerially justified when taken individually, can amount to institutional harassment when the accumulation of repeated events of mismanagement or omissions, for which there is no reasonable explanation, deeply and adversely affect the staff member's dignity and career objectives (see, for example, Judgments 3250, 4111 and 4243). In the present case, the actions taken by the IAEA were managerially justified, reasonable under the circumstances, and lawful. The complainant has not provided any convincing evidence to the contrary. In light of the above considerations, the complaint is irreceivable in part and unfounded in its entirety and must be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 22 October 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 7 December 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ