

## NINETY-SEVENTH SESSION

Judgment No. 2325

The Administrative Tribunal,

Considering the complaint filed by Mr A. F. against the International Atomic Energy Agency (IAEA) on 10 June 2003, the IAEA's reply of 15 September, the complainant's rejoinder of 15 October 2003, the Agency's surrejoinder of 19 January 2004, and the comments on the complaint submitted by Mr F. on 29 January 2004 at the request of the Tribunal;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Bangladeshi national born in 1943, joined the IAEA in 1974. In a normal career progression, he received a number of promotions and transfers. Now retired, at the material time he was a Safeguards Analyst at grade P.4 in the Section for System Studies, Division of Concepts and Planning, in the Department of Safeguards.

On 14 September 2000 Vacancy Notice No. 2000/060 was issued for the post of Senior Safeguards Analyst at grade P.5. The complainant applied for the post within the application deadline of 3 January 2001. On 8 August 2002 the Head of the Recruitment Unit, Division of Personnel, wrote to the complainant to inform him that his application for the post had not been successful. The complainant wrote to the Director General on 28 August requesting a review of the administrative decision not to appoint him to the post in question. He also made allegations of harassment against his supervisors, the Head of Section and the Division Director. Having received no reply he wrote to the Secretary of the Joint Appeals Board on 8 October, stating that he wished to file an appeal against the decision not to select him for the post in question. On 10 October the Director General replied to the complainant, upholding the decision not to select him for the post. The complainant pressed his appeal on 11 October 2002.

On 11 September 2002 the complainant wrote again to the Director General, elaborating on his allegations of harassment and asking the latter to take appropriate action. On 8 October the Director General replied that the complainant could either await the launching of the mediation process described in the newly released Guidelines on Prevention and Resolution of Harassment-Related Grievances, or alternatively, file an official harassment complaint directly with the Office of Internal Oversight Services (OIOS). On 11 October the complainant wrote to the Secretary of the Joint Appeals Board stating that he felt his case was serious enough to be taken up by the Board.

On 18 November 2002 the complainant wrote again to the Director General, saying that he had been a victim in recent incidents showing continued discrimination and bullying in his working environment which has caused injury to his personal and professional dignity. He requested the Director General to take measures to redress the situation. Having received no response, on 9 January 2003 the complainant wrote to the Secretary of the Joint Appeals Board stating that he wished to appeal. The Acting Director General replied on 20 January 2003, referring the complainant once again to the Guidelines on Prevention and Resolution of Harassment-Related Grievances. On 23 January, following a meeting with the Joint Appeals Board regarding the receivability of the appeals, the complainant sent his two appeals related to harassment to the OIOS for an investigation into his allegations.

The Joint Appeals Board held nine meetings between November 2002 and February 2003, during the course of which it interviewed the complainant and several other staff members. In its report dated 11 March 2003 on all three of his appeals, the Board concluded from a review of the selection process as well as other events subsequent

to it, that there was no indication of any discrimination or unfairness in the manner in which the complainant's application had been dealt with. It also concluded that there was no evidence of a campaign of "character assassination" or abuse of authority such as alleged by the complainant. It recommended that the appeal of 8 October 2002 be dismissed, but considered that the length of time which had elapsed between the appointment of the successful candidate to the post and the formal notification to the complainant that his application had been unsuccessful, to be unreasonable. It also found that it was premature to bring the two appeals relating to harassment issues before the Board. On 20 March 2003 the Director General informed the complainant that he had decided to endorse the Board's recommendations. That is the impugned decision.

Upon conclusion of its investigation, the OIOS issued its Final Investigation Report dated 24 July 2003 in which it concluded that the complainant's allegations of harassment were unsubstantiated.

B. The complainant argues that there has been a breach of the duty of care and sound management. The decision informing him that he was not selected came 15 months after the post was occupied by the selected candidate. But Administrative Manual Part II, Section 3, Paragraph 69, stipulates that unsuccessful candidates should be "promptly" informed by the Director of the Division of Personnel. He submits that, by such a long delay, the IAEA has "unlawfully" protected the selected candidate and has adversely infringed the complainant's rights since, even if the appointment were proved to be unlawful and void, he could no longer apply, having reached the age of retirement. Furthermore, he did not receive a full copy of the Joint Appeals Board report; although he requested the missing documents, his request was denied.

He submits that the selection process was flawed. An evaluation of the candidates was carried out by the Head of Section but this individual changed the terms of the competition unlawfully. He alleges that all steps taken after this point were equally flawed because, by endorsing the Head of Section's evaluation, each individual or body concerned had failed to detect that the former had set his own criteria for evaluating the candidates. Furthermore, the Joint Appeals Board failed to conduct an objective investigation and there were procedural violations as well as a wrong appraisal of material facts made by the Director General.

He makes several allegations of prejudice against him by his supervisors, and he contends that this prejudice influenced the selection process. He describes what he terms to be a "pattern of victimization". He contends that his expertise and experience related to the functional requirements specified in the vacancy notice and that, had the competition been fair, he would have been the selected candidate.

He requests the Tribunal to quash the impugned decision and declare the appointment in question without merit and void. He asks to be awarded the post in question "with retroactive date" and if that is not possible, to be awarded the difference in salary and "other privileges" together with interest. He claims material and moral damages, each equal to 15 months "take home pay", plus interest. He also claims costs.

C. In its reply the Agency recalls that an appointment decision is discretionary and, under the Tribunal's case law, can be quashed only under exceptional circumstances. None of these circumstances exists in the case at hand. It submits that the decision was not flawed and that the selection process was conducted in strict application of the relevant rules. In addition, it points out that the Tribunal has often stated that it will not substitute its own assessment of candidates for that of an organisation's relevant selection body.

It submits that the complainant's application was duly considered on five separate occasions, first by the Head of Section, then the Division Director, two separate panels, and finally by the Director General. The complainant was rated as "qualified" for the post, but three other candidates were rated as "well-qualified". It is from this latter group that the successful candidate was selected. It notes that the complainant has provided no proof that there was any concerted effort to favour one candidate over another one.

Regarding his allegations of prejudice, the Agency notes that these were carefully investigated by the OIOS, which concluded that these were unsubstantiated.

Responding to the issue of the 15 month delay, the IAEA asserts that this did not cause him any injury. Not only had the complainant been well aware of the appointment of the successful candidate, but it notes that he never inquired into the status of his application during this time, thus making no attempt to mitigate any potential loss or injury.

D. In his rejoinder the complainant states that he has never been provided with the evaluation report used in the selection process, so he questions the Agency's assertions that the process was based strictly on objective criteria. He maintains that the IAEA did not abide by the terms of the vacancy notice, as required by the case law. Furthermore, he asserts that the Director General did not take proper account of the Joint Appeals Board's report; he endorsed it on the same day he received it. The Administration committed a breach of procedure because it sent him an incomplete copy of the report, infringing his right to defence.

E. In its surrejoinder the IAEA notes that the complainant has not submitted any argument liable to change the Agency's position. It asserts that the complainant is confusing the minimum requirements stated in the vacancy notice with the criteria to be taken into account when actually selecting a candidate for a given post. While the former are clearly set out in the vacancy notice, the latter might include other skills equally important for the job.

F. The selected candidate was given the opportunity to comment on the complaint before the Tribunal. He contests certain facts asserted by the complainant.

## CONSIDERATIONS

1. The complainant challenges the decision, taken on 20 March 2003 by the Director General, to follow the recommendations contained in the Joint Appeals Board's report. He submits that the unexplained delay (of 15 months) before he was informed of the outcome of the selection process constitutes a breach of the duty of care and a breach of the duty of sound management. He contends that he was not given a fair hearing by the Joint Appeals Board (who refused him access to the personnel files of the other candidates) and that there was a procedural violation and wrong appraisal of material facts by the Director General. He argues that the selection process was flawed on several counts. He alleges that the criteria applied differed from those established in the vacancy notice. He says that, had the competition been fair, he would have been selected. He alleges personal prejudice against him. He asks the Tribunal to quash the selection decision and to declare the appointment of the selected candidate null and void. He asks to be awarded the post with retroactive effect, but if that is not possible, then to be awarded compensation for the difference in salary and benefits between the post he held and the one in question, plus interest. He claims material and moral damages in the amount of 15 months "take home pay" on each count, plus interest. He also claims costs.

2. The Tribunal's case law is settled that when selecting candidates for a vacant post the Director General of an organisation (or his representative) has a considerable level of discretion. Since the appointment of a particular individual to a given post is at the discretion of the Director General, such a decision is only subject to a limited review by the Tribunal and the Tribunal will not replace the organisation's assessment of the applicant with its own. Indeed, the Tribunal has held consistently in the past (see Judgment 2040, under 5) that:

"a decision [...] to make an appointment is a discretionary one and as such is subject to only limited review. It may be quashed only if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence. Moreover, the Tribunal will exercise its power of review with special caution in such cases and will not replace the organisation's assessment of the candidates with its own."

3. In the case at hand, contrary to what the complainant alleges, the selection process was conducted in strict application of the relevant rules. Indeed, the complainant's application had been considered in five instances, namely by his Head of Section, the Division Director, the P.5 Selection Panel (comprised of the Deputy Director General in the Department of Safeguards and all Division Directors), the Joint Advisory Panel on Professional Staff, and the Director General himself. All of them considered the complainant as merely "qualified" for the post in question, whereas in the end another candidate who was rated as "well qualified" was appointed to the post. The selection criteria applied did not vary in any significant respect from the requirements of the vacancy notice.

4. The Board found that the complainant had introduced no convincing evidence to support his allegations of fatal procedural irregularities. That situation did not change before the Tribunal. Assertion, though many times repeated, does not, without more, constitute proof. Moreover, there is nothing to suggest that the privileged information which the complainant requested is of a kind that might reveal procedural or other irregularity in the selection process. Thus, there is nothing to justify the Tribunal's calling upon the Agency to produce it for inspection.

5. On the issue of alleged prejudice against the complainant by his Head of Section and his Division Director, there is likewise no persuasive evidence. The allegations have been carefully reviewed by the OIOS which found, as did the Joint Appeals Board, that all of them were unsubstantiated. It is not the role of this Tribunal to reweigh the evidence before the Joint Appeals Board unless it is shown that the latter has acted unreasonably or has committed some palpable and overriding error. There is no such showing here.

6. There is one point, however, on which the complainant is clearly right. As found by the Board, the delay of some 15 months between the selection of the successful candidate and the notification to the complainant thereof was unreasonably long. The Agency's argument to the effect that the complainant was implicitly aware of his non-selection because he knew that someone else had been placed on the post is not acceptable. It had the duty to inform the complainant in a timely manner of his non-appointment. The Agency has failed in its obligation to deal with the complainant in good faith and, while such failure can in no way affect the validity of the selection process itself, it does entitle the complainant to a nominal award of moral damages which the Tribunal fixes at 500 euros. The complainant is also entitled to an award of costs, commensurate with his limited success on the merits, in the amount of 100 euros.

## DECISION

For the above reasons,

1. The impugned decision is set aside only to the extent of ordering the Agency to pay to the complainant damages in the amount of 500 euros.
2. The Agency shall pay him 100 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet