

The Administrative Tribunal,

Considering the complaint filed by Ms E. M.-C. against the International Atomic Energy Agency (IAEA) on 9 September 2005 and corrected on 3 October 2005, the IAEA's reply of 11 January 2006, the complainant's rejoinder of 24 March and the Agency's surrejoinder of 2 May 2006;

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 is a Polish national born in 1953. She worked for the Agency from 1982 to 1984 and from 15 April 1986 to 30 September 1987. She rejoined the Agency in 1994, first on short-term appointments and then, as from 1 January 1999, under a fixed-term appointment at grade G.5, as a Data Clerk in the Special Projects Unit of the Division of Nuclear Installation Safety, which belongs to the Department of Nuclear Safety and Security. Following a reorganisation of that Department, effective as from 1 September 2003, the Special Projects Unit became the Policy and Programme Support Section.

On 9 October 2003 the Division of Personnel asked the Division of Nuclear Installation Safety to make a recommendation on the extension of the complainant's appointment, which was due to expire on 30 June 2005. Noting that the duties of her post were to be redefined, her supervisors recommended on 19 November that, "for programmatic reasons", her appointment should not be extended. On 8 December 2003 the Joint Advisory Panel on General Service Staff met to consider this recommendation and approved it, although certain members of the Panel expressed reservations.

By a letter dated 16 March 2004 the Director of the Division of Personnel informed the complainant that as a result of a reorganisation within the Department of Nuclear Safety and Security her services as Data Clerk would no longer be required. Consequently, upon a recommendation made by her supervisors, the Joint Advisory Panel had decided that her appointment, expiring on 30 June 2005, would not be extended. The Director added that the decision was based solely on programmatic reasons and should not be regarded as a reflection of her performance, and she encouraged the complainant to apply for other vacant posts in the Agency.

By a memorandum of 4 May 2004 the complainant requested that the Director General review the administrative decision not to extend her appointment. She pointed out that in their recommendation her supervisors had stated that the duties of her post were to be redefined. She did not understand how a decision could be made about her extension before those duties had been redefined, particularly since her performance was not in question. In the event that the Director General decided to maintain the decision, she requested that he allow her to appeal directly to the Tribunal. She also asked to be provided with copies of any documents considered by the Joint Advisory Panel, together with the Panel's report. The Director General replied on 9 June that he maintained the decision and rejected her request to appeal directly to the Tribunal. In addition, he informed her that the documents she had requested were classified as "Privileged Information" and could not be made available to her. On 5 July 2004 the complainant appealed to the Joint Appeals Board against the decision of 16 March 2004 not to extend her fixed-term appointment.

Meanwhile, in November 2003 the complainant had applied for the post of Safety and Security Information Assistant in the Safety and Security Co-ordination Section of the Department of Nuclear Safety and Security. She was rated provisionally as "qualified" and interviewed in early 2004. The Acting Head of the Recruitment Unit of the Division of Personnel informed her in a letter of 13 April 2004 that a decision had been taken "not to make an appointment against [the] vacancy". By a memorandum dated 10 June the complainant asked the Director General to reverse the decision not to fill the post, and to assign her to it. The Director General replied on 16 July that after

a shortlist of candidates had been drawn up and interviews conducted, it had been determined that no candidate fully met the requirements of the post, so the vacancy had been withdrawn in order to review those requirements; in the interim “a candidate [had] been identified from the Temporary Assignment Programme (TAP) to temporarily assist the Safety and Security Co-ordination Section”. As he believed that all the candidates’ qualifications had been carefully and fairly reviewed, he upheld the decision not to make an appointment. The complainant appealed against this decision to the Joint Appeals Board on 3 August 2004. Her two appeals were joined at her request.

In a memorandum dated 24 May 2004 the complainant was informed by an official of the Division of Personnel that the Director of Personnel had approved the reclassification of her post to grade G.6, under the functional title of “Software Developer”; the reclassification was retroactive from 1 January 2003.

In its report signed on 20 and 22 April 2005 the Joint Appeals Board considered that the complainant had been treated differently from her colleagues in a number of aspects. Noting that the complainant’s colleagues had made allegations of harassment against her, it found that the problems she had experienced within her Division might have played a part in the decision not to renew her contract. The Board concluded that the decision had not been taken for “purely programmatic reasons” and that there appeared to be a continuing need for the complainant’s services within the Agency. Concerning the vacant post, it noted that the review of the job description did not appear to have taken place and that the person identified to assist in the post temporarily had been provisionally rated as “not qualified” during the original evaluation process. Furthermore, that person had then been “exceptionally” appointed to the post without a new vacancy notice being advertised. Although the Board acknowledged that it was not in a position to evaluate the extent to which the duties of the post overlapped with the complainant’s skills, it nevertheless believed that “insufficient consideration” had been given to her candidacy. The Board recommended that the complainant be offered employment in a post suitable to her experience and skills and that her appointment be extended for five years “according to the normal contractual progression”.

In a letter of 14 June 2005 the Director General informed the complainant that he agreed with the Board’s conclusion that there was a continuing need for her services in the Agency and with its recommendation that she should be offered alternative employment. He indicated that she was being offered the post of Software Developer in the Department of Management, Division of Information Technology, Business Solutions Section, under a two-year “Fixed Term Temporary Assistance” appointment as from 1 July 2005. However, he disagreed with the Board’s recommendation that her appointment be extended for five years on the grounds that there was no automatic “normal contract progression” as asserted by the Board. Regarding her candidacy for the vacant post, he informed her that in the absence of any evidence that the recruitment process was flawed he was dismissing the appeal. That is the impugned decision.

B. The complainant contends that the decision not to extend her appointment was based on mistakes of fact and was taken in breach of the duty of care owed to her by the Agency. She alleges that the “programmatic reasons” cited in the above-mentioned decision were merely used to hide the real reason, namely to get rid of an unwanted staff member, which did not constitute a lawful ground for dismissal. She submits that there was “an abuse (or misuse) of authority” because the decision was the result of prejudice and bias on the part of certain managers in her Division who wanted to get rid of her.

She points out that, according to the Joint Appeals Board’s report, the Joint Advisory Panel that met to consider the recommendation concerning her extension of appointment not only recorded reservations about that recommendation but also recommended that efforts be taken to find her alternative employment. She asserts that the refusal to provide her with a copy of the Panel’s minutes or its report is a breach of her right to due process.

The complainant also contends that the decision not to offer her the vacant post in the Safety and Security Co-ordination Section was tainted with a “breach of administrative due process” and with abuse of authority. It was also taken in breach of the principle of equal opportunity. She argues that withdrawing the vacancy notice and then filling the post without competition with a candidate who had been provisionally rated “unqualified” amounted to changing the terms of competition.

She further contends that several decisions taken in her regard breached the Agency’s duty “to act in good faith and not to cause her unnecessary personal distress”. She says that despite the Joint Advisory Panel’s recommendation to find her alternative employment the Agency did nothing until it became apparent that her internal appeal would succeed.

The complainant asks the Tribunal to quash the decision of 14 June 2005, to award her moral damages in the amount of 50,000 euros and to order that she be given a contract of employment of five years' duration as from 1 July 2005 in a post suited to her experience and skills. She also claims costs.

C. In its reply the Agency maintains that the decision not to extend the complainant's appointment was taken for "programmatic reasons" as a consequence of the reorganisation of the Department of Nuclear Safety and Security. The functions of the complainant's post were transferred to another division and absorbed within the functions of other occupied posts. The IAEA considers that, when functions are transferred from one division to another, management has the discretion to determine which posts are to be abolished, as long as the decision is not based on an improper motive. Furthermore, the decision being discretionary, the Tribunal's power of review is limited. The Agency contends that it observed all applicable rules and procedures, gave the complainant reasonable notice and clearly explained its reasons. The decision was taken in the Agency's interest and is not tainted with any mistake of fact or law.

It notes that there is no suggestion by the Joint Advisory Panel that the "programmatic reasons" did not exist or were used to hide another reason. It has, exceptionally, attached to its reply an excerpt of the Panel's minutes but points out that, as these are normally classified as confidential, there was no requirement to provide them to the complainant earlier. According to the Agency, there were objective grounds for not offering the complainant an extension of her appointment until an alternative post had been identified. Although it recognises that the complainant's current post may not be exactly what the complainant would like, the IAEA considers that the post matches her qualifications and experience. Furthermore, it is the only suitable post that has become available since the complainant was first advised that her appointment would not be extended. It adds that a post cannot be created for the sole purpose of accommodating the complainant. The Agency asserts that there is no automatic "normal contractual progression" as suggested by the Joint Appeals Board, and that there was no basis for the complainant to be offered a five-year extension. There was no recommendation to that effect from her supervisors and the matter had not been considered by the Joint Advisory Panel. There has been no misuse of authority.

On the issue of the complainant's non-appointment to the vacant post she wanted, the Agency recalls that the Board acknowledged that it was not in a position to evaluate the extent to which the complainant's skills overlapped with the duties of the post. It submits that there is no evidence of any irregularities or flaws in the recruitment process, and none that the complainant was "well-qualified" for the post. The fact that the post was ultimately filled ten months later does not form any basis for the conclusion that the complainant's application was not properly considered during the earlier recruitment process.

Lastly, the Agency submits that there has been no breach of good faith and that the complainant has been "treated appropriately".

D. In her rejoinder the complainant refers to a second complaint that she has filed and asks the Tribunal to join it with the present one.

Noting that the Agency has finally produced an excerpt of the minutes of the Joint Advisory Panel's meeting, she points out that this does not remedy the breach of due process committed by withholding the information earlier. She submits that if the Agency had been acting in good faith it would have offered her the post of Safety and Security Information Assistant and provided her with training, if necessary. She contends that she has been subjected to harassment and that the Joint Appeals Board had even noted that fact, albeit without calling it harassment.

The complainant argues that there was no "programmatic reason" for abolishing her post and she cites the Tribunal's case law to show that proper procedure was not followed.

E. In its surrejoinder the Agency states that it would not object if the Tribunal were to join the two complaints, although it does not consider the two cases to be linked.

It denies that it has acted in bad faith and submits that the complainant has failed to establish any personal prejudice or malice against her.

CONSIDERATIONS

1. The complainant, who is a Polish national, had several short-term appointments at the IAEA from 1982 onwards, before being recruited, on 1 January 1999, under a six-month fixed-term contract as Data Clerk in the Division of Nuclear Installation Safety, which now belongs to the Department of Nuclear Safety and Security. Her appointment was extended for one year as from 1 July 1999, for two years as from 1 July 2000 and then for three years as from 1 July 2002. Following a reorganisation of the Department, effective as from 1 September 2003, the Division of Personnel asked the managers of the division in which the complainant was employed to make a recommendation on the extension of her appointment beyond the date on which it was due to expire, i.e. 30 June 2005. They recommended that, “for programmatic reasons”, her appointment should not be extended. On 8 December 2003 the Joint Advisory Panel on General Service Staff approved this recommendation. On 16 March 2004 the Director of the Division of Personnel informed the complainant that her appointment would not be extended and that this decision was “solely based on programmatic reasons and should in no way be regarded as a reflection of [her] performance”. This decision was upheld by the Director General who, on 9 June 2004, rejected the complainant’s request that he review the decision. She appealed to the Joint Appeals Board on 5 July 2004.

2. The complainant had previously applied for the position of Safety and Security Information Assistant in the Safety and Security Co-ordination Section, but on 13 April 2004 she was notified that a decision had been taken “not to make an appointment against [the] vacancy”. On 16 July 2004 this decision was upheld by the Director General who stated that, as no candidate had fully met the requirements of the post, the vacancy had been withdrawn to allow for a review of those requirements and that a candidate identified from the Temporary Assignment Programme would temporarily assist in the Section in question. As the complainant felt that she had been unfairly treated, she also appealed against this decision to the Joint Appeals Board on 3 August 2004.

3. The Board joined her two appeals and, after holding six meetings and conducting many hearings, issued a carefully reasoned recommendation in which it concluded that:

- the decision not to extend the complainant’s appointment had not been taken on the basis of purely “programmatic reasons”;
- given the complainant’s skills, good performance record and the experience she had acquired during her many years of service in the Agency, there appeared to be a continuing need for her services;
- “insufficient consideration” had been given to her candidacy for the vacant post; and
- the Agency should take steps to offer her alternative employment.

The Board recommended that the Agency offer her a post suited to her experience and skills and that her appointment be extended for five years, “according to the normal contractual progression”.

4. In a decision of 14 June 2005 the Director General followed only a small part of that recommendation. He acknowledged that the Agency still needed the complainant’s services and that she should be offered alternative employment, and he proposed to assign her to the Business Solutions Section as from 1 July 2005, in a post carrying the same grade and involving the same kind of functions as her current post. However, he limited this new “Fixed Term Temporary Assistance” appointment to two years and dismissed the complainant’s appeal concerning the withdrawal of the vacancy notice for the post for which she had applied.

5. The complainant challenges before the Tribunal the decision of 14 June 2005. Moreover, she has filed a second complaint seeking the rescission of a disciplinary measure imposed on her by decision of 2 August 2005, and she asks the Tribunal to join that complaint with the present one, filed against the decision of 14 June 2005. The Tribunal will not join them: although some of the complainant’s submissions are common to both cases – to wit those concerning some of the Agency staff members’ animosity towards her and the bad faith shown by the Agency – the pleas and claims of the two complaints are, for the most part, different and the ruling on the first complaint has no bearing on the ruling to be given on the second. The application for joinder is therefore rejected.

Renewal of the complainant’s contract

6. The complainant contends that the decision of 16 March 2004 not to extend her appointment beyond 30 June 2005 was not based solely on reasons connected with the reorganisation of the Department in which she was working, but was also the result of the animosity of her superiors and colleagues who wanted to be rid of her and who even harassed her. In her opinion the decision to grant her a two-year contract as Software Developer in the

Business Solutions Section of the Division of Information Technology violated the statutory provisions according to which she was entitled to a five-year extension, and she objects to the fact that the requirements for this post do not tally with her experience and skills. In addition, she submits that the Agency violated her rights by refusing to send her a copy of the report of the Joint Advisory Panel on General Service Staff, some of whose members, as noted by the Joint Appeals Board, had indicated that the Agency should assist her in finding alternative employment.

7. The complainant is certainly right with regard to the latter point. On 4 May 2004 she asked to be given a copy of a number of documents including the Joint Advisory Panel's report. This request was refused on 9 June 2004. The Agency has produced before the Tribunal an excerpt of the minutes of the Panel's meeting of 8 December 2003, as a result of which the complainant has been able to consult that document and to have at her disposal more information than the mere analysis thereof by the Joint Appeals Board. This late disclosure does not remedy the irregularity committed by the Agency, for it is well settled (see, for example, Judgments 1815, under 5, and 2315, under 27) that "[t]o ensure due process both in internal proceedings and before the Tribunal, the staff member must get any items of information material to the outcome". In the instant case, consulting the Joint Advisory Panel's report, even if it was in principle confidential, was instructive for the complainant, and some of its content was liable to influence the outcome of her claims since it discloses that some members of the Panel expressed reservations, and even showed some concern about the solution finally adopted, and that they suggested that the Agency should help the staff member to find alternative employment. This procedural irregularity does not in itself call into question the lawfulness of the impugned decision, but it must be borne in mind when assessing the injury which the complainant claims to have suffered, as will be made clear under 11.

8. In the instant case, the main question is that of whether there were genuine "programmatic reasons" justifying the decision not to extend the complainant's appointment and subsequently to assign her to the Business Solutions Section. The reorganisation of the Department of Nuclear Safety and Security is described in a memorandum dated 28 August 2003, which announced inter alia the creation of two new sections; the complainant was transferred to one of these, the Policy and Programme Support Section in the Division of Nuclear Installation Safety. On 19 November 2003 the Section Head and the Director of the Division explained the reasons why the complainant's appointment should not be extended. The Tribunal, which has constantly held that reorganisation measures allow the heads of international organisations to abolish redundant posts, can interfere with the competent authorities' appraisals only on limited grounds, such as an error of fact or of law. But those grounds do not exist in the present case. Even if within the division in which the complainant worked there were certainly personal disagreements, which probably led the managers to take into account the strained relations between staff members when assigning them to the newly created sections, it cannot be said that the authors of the recommendation of 19 November 2003 were guided by any animosity towards the complainant. There is no doubt that she was qualified enough, as is evidenced by numerous items in the file, and that she had a sufficiently wide range of skills, so that the Director General was ultimately led to assign her new duties in accordance with the Joint Appeals Board's recommendation. But in exercising his discretion, he was not bound to offer her a five-year appointment at the end of her three-year appointment, as recommended by the Board, or indeed a three-year appointment, as suggested by a member of the Joint Advisory Panel, given that no recommendation to that effect had been made by her supervisors and that the post to which she was appointed was a temporary assistance post financed from a biennial budget. Had it been maintained, the decision to terminate the complainant's appointment could have been regarded as unlawful in the circumstances of the case; on the other hand, the decision to grant her a two-year contract is not unlawful.

The refusal to appoint the complainant to the post of Safety and Security Information Assistant

9. On 24 November 2003 the complainant applied for this post together with 27 other internal candidates. She was rated as being "qualified" for the post and invited to an interview, as were five other candidates. But the Administration took the view that none of the candidates was "well-qualified" for the post and the vacancy notice was withdrawn. It was decided that the job description would be reviewed, after which the post would be re-advertised. In the end, according to the Joint Appeals Board, the post was given to a candidate who had initially been rated as "not qualified", the job description was not reviewed and the post was not re-advertised.

10. Like the Joint Appeals Board, the Tribunal can only register its surprise with regard to the conditions in which the post in question was filled. The withdrawal of the vacancy notice was not unlawful insofar as it appeared that no candidate was sufficiently qualified for the post. Moreover, there is no evidence that the complainant would

have been selected if the post had been re-advertised, and she does not directly challenge the appointment of the successful candidate. Nevertheless, her objection to the fact that the withdrawal of the vacancy notice – which, as the Director General stated on 16 July 2004, was meant to allow for a review of the requirements of the post – was not followed by the publication of a new vacancy notice which would have given her an opportunity to try her luck again, is well founded. There are no grounds for setting aside the decision to withdraw the vacancy notice, since this decision was not unlawful and did not reveal any bad faith or prejudice on the part of the Agency; however, the manner in which the selection procedure was conducted and abandoned caused the complainant moral injury for which she is entitled to claim compensation.

11. The Tribunal rejects the argument that the Agency acted in bad faith, and notes that the latter has actually admitted that it was wrong to delay the date on which the complainant was promoted, with retroactive effect from 1 January 2003, to grade G.6, but it considers that, for the reasons set forth under 7 and 10 of this judgment, compensation should be awarded for the moral injury suffered by the complainant and that on that head the Agency should be ordered to pay her the sum of 5,000 euros.

12. Since she partially succeeds, the complainant is entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The IAEA shall pay the complainant 5,000 euros in compensation for the moral injury she suffered.
2. It shall also pay her 2,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Agustín Gordillo

Giuseppe Barbagallo

Catherine Comtet