

**112th Session**

**Judgment No. 3104**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms G. C. against the International Atomic Energy Agency (IAEA) on 7 January 2010 and corrected on 26 February and 10 March, the IAEA's reply of 17 June, the complainant's rejoinder of 23 September and the Agency's surrejoinder dated 17 December 2010;

Considering Articles II, paragraph 5, and VII 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 United States national born in 1952, joined the Agency in 1995 as a Clerk/Typist. In 2000 she was assigned to the Department of Technical Cooperation (TC) and in 2002 she was given permission to work from home two days per week in order to care for a family member who was ill. On 1 October 2003 she began a one-year fixed-term temporary assistance contract for the post of Project

Clerk in the Division of Programme Support and Coordination (TCPC), in TC. She was subsequently granted a two-year contract extension on 1 October 2004 and a further two-year extension on 1 October 2006. In August 2007 her work-from-home arrangement was discontinued.

From September 2007 to March 2008 the complainant was on sick leave. Upon her return to work, she was informed that Ms S. had been hired as her temporary replacement and that Ms T. had taken over as her new supervisor. In June 2008 the Division of Human Resources (MTHR) reminded the Director of TCPC that she was required to submit a proposal regarding the extension of the complainant's contract. On 27 August 2008 the Acting Director of MTHR advised the complainant that she would be offered a six-month contract extension, i.e. from 1 October 2008 to 31 March 2009. She added that TC was in the process of reviewing the staffing needs of TCPC to meet future programmatic demands and that the Agency would be able to discuss with her any implications arising from this review before the end of September 2008.

On 4 September the complainant asked the Director General to review the decision to offer her a six-month contract extension and she requested a two-year extension instead. By a letter of 24 October 2008 the Acting Director General replied that the six-month extension had been considered appropriate in light of the expected outcome of the staffing review that was under way. He committed to providing a response to her request as soon as that review had been completed.

From October 2008 to February 2009 the complainant was absent on either sick leave or annual leave. In an e-mail of 2 December 2008 to MTHR, she asked to be granted a disability pension and sought procedural guidance in that respect. The Director of MTHR replied on 5 December, advising her as to the steps to be followed regarding her request for a disability pension. He also informed her that thematic projects in TCPC would be phased out and that her functions would therefore no longer be required. Consequently, her employment would cease on 31 March 2009. The complainant wrote back to the Director of MTHR on 10 December, arguing that thematic planning was not being phased out but merely redefined, that under the pretext

of reorganisation her responsibilities had been handed over to Ms S. and that her state of health was the reason her contract had not been extended. She also asserted that she had been subjected to harassment and mobbing over a period of several years. In his replies of 14 December 2008 and 15 January 2009, the Director of MTHR assured the complainant that the non-extension of her contract was due to programmatic priorities and not her health problems. He denied that her responsibilities had been handed over to Ms S. and explained that, although thematic planning would remain as a function, it would follow an approach which would no longer require the type of support that she provided. By a letter of 27 January 2009 the Director General confirmed the decision to offer her a six-month contract extension and to allow her employment to cease upon its expiry, i.e. on 31 March 2009.

On 13 February 2009 the complainant appealed that decision before the Joint Appeals Board, asking that she be granted a two-year extension of her contract. She also made allegations of harassment and mobbing. In its report of 5 August 2009 the Board found in particular that the complainant's case had been characterised by a changing working environment which had proven detrimental and discriminatory as far as her employment opportunities were concerned. It considered that her background and skills were sufficiently diverse to enable her to provide clerical support to TC's various research and project-related needs. It recommended that the Director General reverse his decision and offer her instead a two-year contract extension.

By a letter of 15 October 2009, which constitutes the impugned decision, the Director General notified the complainant of his decision not to accept the Joint Appeals Board's recommendation, *inter alia* because, in his view, thematic planning had indeed been discontinued in TC with effect from 2009 and, as a result, her functions were no longer programmatically needed. Her appointment had therefore been allowed to expire according to its terms. On 11 November 2009 the complainant asked the Director General to reconsider his decision but she was advised on 12 February 2010 that the matter would not be reconsidered.

B. The complainant argues that the impugned decision is tainted with errors of fact and of law, unequal treatment and discrimination. She contends that, contrary to the argument put forward by the Agency, thematic planning was not phased out as a function in TCPC and that, in any event, as her responsibilities were of a generic nature and not solely linked to thematic planning, and as there was a clear need for clerical support in TC, her skills could have been usefully employed for a wide range of services. Relying on the conclusions of the Joint Appeals Board, she also contends that Ms S., who was hired as her temporary replacement, was not only assigned duties which formed part of her job description but was moreover retained in those duties, while she – the complainant – was told that her functions would cease to exist. In order to support her allegation of unequal treatment and discrimination she points to the Board’s finding that she was treated less favourably than other staff members.

The complainant accuses the IAEA of breach of procedure. Indeed, under the applicable rules and the Agency’s practice, proposals for extension of contracts must be forwarded by division directors through department heads to MTHR six months before contract expiry and must be accompanied by supporting evidence, such as performance appraisals. In cases where the normal progression of contractual periods is not followed, the advice of the Joint Advisory Panel on General Service Staff must be requested before a decision is taken. In her case, however, despite the reminder that had been sent to the Director of TCPC already in June 2008, the proposal for her contract extension was submitted at the end of August 2008, i.e. one month before her contract was due to expire, and only after the Staff Council President had intervened. Even though the proposal recommended a short extension, it was not considered by the Joint Advisory Panel on General Service Staff, nor was it accompanied by a recent performance appraisal, because the Agency had failed to complete her performance appraisal review for 2007. She asserts that, as her two previous extensions were for two years and she had rendered excellent service throughout her tenure, she had a legitimate

expectation that she would be granted a further two-year extension of contract. She considers the impugned decision to be part of the harassment and mobbing that she suffered and she reproaches the Agency for failing to conduct an investigation into her allegations in that respect. She believes that her health problems were the reason that she was not offered a two-year contract extension. In her view, the IAEA failed to act in good faith and to fulfil its duty of care towards her.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement. She claims material damages equivalent to what she would have earned had she remained in the employ of the Agency from 1 April 2009 to the date of her reinstatement, together with interest from due dates. She also claims moral damages in the amount of 25,000 euros and costs in the amount of 10,000 euros.

C. In its reply the IAEA submits that the complainant has failed to exhaust internal remedies in respect of her allegations of harassment and mobbing, because she did not raise this issue in her request for review to the Director General and, as a result, it was not subject to internal review. Consequently, the complaint is irreceivable in that respect. As regards its failure to conduct an investigation, it notes that no formal request for such investigation was ever submitted by the complainant.

On the merits, it argues that the decision to offer her a six-month extension of contract was based on purely programmatic considerations and was in no way linked to her state of health. In particular, the review undertaken in TCPC in 2008, which was part of the overall restructuring of TC announced in 2005, led to the decision to phase out thematic planning activities effective 2009. As a result, the project to which the complainant had been assigned was discontinued and there was no longer a need for the functions she had previously performed. In addition, the Agency points out that the complainant was the holder of a fixed-term temporary assistance contract and therefore had no expectation of an extension corresponding to the contract progression for regular fixed-term staff.

According to the defendant, the impugned decision was taken in the proper exercise of the Director General's discretionary authority regarding appointment decisions and may thus be reviewed by the Tribunal only on limited grounds. The IAEA denies any breach of procedure and explains that the rules and policies on contract extension relied upon by the complainant in her submissions do not apply to temporary assistance contracts. In effect, extension of temporary assistance contracts is not subject to any particular notice period, nor does it fall within the competence of the Joint Advisory Panel on General Service Staff. Emphasising the various efforts it made to assist the complainant to find another post, the Agency rejects the accusations of bad faith and failure to fulfil its duty of care.

D. In her rejoinder the complainant asserts that her complaint is receivable in its entirety. She argues that she did raise the issue of harassment and mobbing in both her request for review and her subsequent correspondence with the Administration. In any event, the Tribunal's case law authorises her to raise a new plea at any stage in the process, including before the Tribunal. In her view, the Administration was under an obligation to take action regarding her allegations of harassment and mobbing in accordance with the applicable rules. As regards the Agency's reliance on the overall restructuring of TC, the complainant refers to the case law in support of her argument that abolition of a post must result in staff reduction rather than the replacement of the incumbent. In that connection, she draws the Tribunal's attention to vacancy notice No. 2009/242 for the post of a Communication Clerk and contends that the appointment of Ms S. was extended with a view to her carrying out the duties of that post. She refutes the contentions that thematic planning ceased as a function and that she was assigned to a single project, emphasising the generic nature of her responsibilities. She asserts that her contract was a fixed-term contract subject to the IAEA Staff Regulations and Staff Rules.

E. In its surrejoinder the Agency maintains its position on the receivability of the complainant's allegations of harassment and mobbing. It argues that the complainant is seeking substantive relief in

respect of these allegations and that they therefore amount to claims, which must be subject to internal review before being raised before the Tribunal. It notes that not only did the complainant fail properly to raise the issue of harassment or mobbing in her request for review to the Director General and her subsequent correspondence with the Administration, she also never requested a review of her grievances under Appendix G to the Staff Rules or staff notice SEC/NOT/1922 on the Prevention and Resolution of Harassment Related Grievances and Appointment of Mediators.

### CONSIDERATIONS

1. The complainant joined the Agency in 1995 and worked under various short-term appointments. On 1 October 2003 she began working as a Project Clerk in the Department of Technical Cooperation (TC) in the Division of Programme Support and Coordination (TCPC) on a one-year fixed-term temporary assistance contract, which was extended twice for two-year periods and was allowed to expire on 31 March 2009, after a final contract extension of six months. In her complaint she impugns the Director General's decision of 15 October 2009 dismissing the internal appeal in which she challenged both the decision to grant her a contract extension of only six months and the programmatic reasons that were given for that decision. The Joint Appeals Board found in her favour and recommended that she be given a two-year contract extension.

2. The complainant impugns the Director General's decision of 15 October 2009 on the grounds that it is tainted with procedural flaws, errors of fact and law, and breach of the Agency's duty of good faith, care and mutual trust. She requests the Tribunal to set aside the impugned decision and to order her reinstatement. She claims

material damages equivalent to what she would have earned if she had remained employed by the IAEA in the period from 1 April 2009 to her date of reinstatement, including all salaries, allowances, emoluments, and entitlements, plus interest from due dates. She also claims moral damages in the amount of 25,000 euros and costs in the amount of 10,000 euros.

3. With respect to her plea that the impugned decision is based on errors of fact and law, the complainant states that prior to leaving on certified sick leave, she was notified that there would be an increase in the workload and that the work would need to be distributed evenly throughout the department. She asserts that, after she returned from sick leave, she was given very little work while Ms S., her temporary replacement, continued working on duties previously assigned to her or on tasks that she would normally have been asked to handle, and that Ms S. received a contract extension to continue carrying out those duties and tasks, while she was offered a contract extension of only six months. In his letter of 15 October 2009 the Director General justified his decision not to follow the Joint Appeals Board's recommendation by stating that, in accordance with a recommendation of the Office of Internal Oversight Services to discontinue thematic planning activities, the project on which the complainant served as Project Clerk was not included in the TC programme for 2009-2011 and therefore "[as her] functions were no longer programmatically required, [her] appointment was permitted to expire according to its terms". He went on to say that "[he] disagree[d] with the [Board's] suggestion that these functions [were then] being performed by another staff member" and that "any thematic planning activities that [the complainant might] have observed in the first months of 2009 [were] temporary residual functions of a discontinued project". The Tribunal notes however, that in an e-mail regarding a project that the complainant had been working on prior to her period of certified sick leave, Ms T., her supervisor, told her that she would "handle [the project] in the same way [she had done] in [the complainant's] absence". This shows that the



complainant's duties were not reassigned to her upon her return from sick leave but were being performed by other staff members.

4. The Joint Appeals Board unanimously found, *inter alia*, that Ms S., the complainant's temporary replacement, remained after the complainant's return, continued carrying out duties that would have normally been assigned to the complainant and had her contract extended; that it was unclear that thematic planning was in fact discontinued; that the complainant's job description was generic in nature and not specialised, and that therefore the complainant could have fulfilled various clerical functions and duties in TC. The Tribunal notes that, not only was the complainant's job description general in nature, but thematic planning was listed as just one of many aspects of the job and Ms T., the complainant's supervisor, even stated in an e-mail dated 2 September 2008 that the complainant's thematic planning duties did not require more than 30 per cent of the time as per her job description. Even if thematic planning was to be discontinued, there were many other duties the complainant could have performed. The Tribunal is of the opinion that the reasons given for renewing the complainant's contract for only six months, and then allowing it to expire without further renewal, are not substantiated by the facts. As in cases dealing with the abolition of posts, it is important to note whether or not the functions of the post ceased to exist and if the abolition resulted in a reduced number of staff. In this case, the functions appear to have continued. What is more, a new post with thematic planning functions was advertised on 28 November 2008, after the complainant had been informed that she would receive a six-month contract extension. There was no clear reasoning provided as to why the temporary replacement was retained while the complainant was not, given that they apparently shared similar work skills and experience and there was an obvious continued need for clerical support in TCPC due to the increased workload. The Tribunal considers that no error has been shown in the Joint Appeals Board's findings and, considering its in-depth study of the case and the Agency's insufficient substantiation of the decision to extend the

complainant's contract for six months, it is reasonable to conclude that the impugned decision was made for reasons other than those stated by the Agency. As such, the decision is flawed and must be set aside.

5. The complainant claims that the Agency breached its duty of good faith, care and mutual trust towards her. She asserts that she was a victim of mobbing and harassment, which the Agency did not investigate, and that furthermore she was not treated with dignity and care. The Agency contests the receivability of the complainant's allegations of harassment, stating that, as she did not follow the prescribed procedures in this respect, she did not exhaust all internal means of redress and cannot therefore now bring the claim before the Tribunal. However, the Tribunal finds that the harassment claim is receivable and founded insofar as it is an element which vitiates the impugned decision. It is a relevant fact that was raised but which was not considered in taking the final decision.

6. The Tribunal will not decide whether or not the complainant was in fact a victim of harassment. It considers instead that her claims of mobbing and harassment were not properly dealt with, in breach of the Agency's duty of care. On several occasions, and particularly in her letter to the Director General of 4 September 2008 requesting a review of the decision to award her a contract extension of only six months, the complainant raised the issue of her harassment. The Agency contends that her letter regarded mainly her contract extension, that she "did not request that the Director General examine any of these circumstances in the context of harassment", that "the terms 'harassment', 'abuse', and 'mobbing' appear nowhere in that document" and that "[a]s a consequence, the Director General did not consider the issue of harassment in her case, neither with regard to its substantive existence nor in order to examine whether procedures to address such had properly been followed". However, the Tribunal notes that in the above-mentioned letter, her comment that "it is my humble perception that my current chain of supervisors are pursuing a strategy to actively force me out of the Agency, thus

behaving without considering the impact on me, my family and the Agency culture of good leadership and management” clearly addressed a work situation in which she felt she was at an unfair disadvantage with regard to her supervisors.

Moreover, in her letter of appeal to the Joint Appeals Board, dated 13 February 2009, the complainant was even more specific, stating:

“I have also been a victim of mobbing, threats and harassment by colleagues. I can provide documentation and proof of this allegation. I am in a poor mental and physical health status and the deterioration of my health condition and subsequent extensive [certified sick leave] consumption have, in my opinion, been the main factor of denying me a contract even though it is denied officially, it has been said to me in an unofficial manner.”

The Agency had therefore a duty to initiate the process for dealing with the complainant’s allegations of harassment, by notifying her of the need to file an official request for an investigation pursuant to the relevant provisions and by referring her to the specific department which processes such claims, for example. Regardless of whether or not the claim was made as the main subject of the letter or as a subsidiary topic, the fact that it was included at all required that it be addressed in the Agency’s response, not only so that the complainant could have the protection of the investigation, but also so that her supervisors could be afforded the same protection – harassment investigations serve also to protect the accused against false accusations. Furthermore, the Tribunal notes that the fact that the complainant was not given enough work upon her return from sick leave, which led her to feel marginalised and humiliated, offended her dignity and constitutes an element of the breach of duty of care.

7. In view of the above, the impugned decision must be set aside to the extent that it did not provide a contract extension of two years. In these circumstances, it is unnecessary to consider whether the Agency was obliged to consult the Joint Advisory Panel on General Service Staff before deciding to renew the complainant’s

contract for only six months. In light of the time that has passed and the administrative difficulty in reinstating the complainant, the Tribunal will award material damages in an amount equivalent to what she would have earned had her contract been extended for two years, including all salaries, allowances, emoluments, entitlements and pension benefits, plus interest at 5 per cent per annum from due dates, less any sums earned by the complainant during that period. The Tribunal will also award moral damages in the amount of 15,000 euros and costs in the amount of 5,000 euros. All other claims must be dismissed.

### DECISION

For the above reasons,

1. The impugned decision of 15 October 2009 as well as the previous decision of 27 January 2009 are set aside to the extent that they did not provide a contract extension of two years.
2. The IAEA shall pay the complainant material damages in an amount equivalent to what she would have earned had her contract been extended for two years, including all salaries, allowances, emoluments, entitlements and pension benefits plus interest at 5 per cent per annum from due dates, less any sums earned by the complainant during that period.
3. The Agency shall pay the complainant moral damages in the amount of 15,000 euros.
4. It shall also pay her costs in the amount of 5,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2011, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba  
Mary G. Gaudron  
Giuseppe Barbagallo  
Catherine Comtet