G.

v.

IAEA

120th Session **Judgment No. 3489**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr W. G. against the International Atomic Energy Agency (IAEA) on 21 September 2012, the IAEA's reply of 2 January 2013, the complainant's rejoinder of 28 January and the IAEA's surrejoinder of 6 May 2013;

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 that his 2010 Performance Review Report (PRR) shall be redone from the beginning and that a decision regarding an amendment to his contract extension from three to five years will be contingent on the outcome of the new PRR.

The complainant joined the IAEA in May 1988 under a short-term appointment which was converted into a fixed-term appointment in April 1989. On 1 April 1997 he was granted a five-year fixed-term appointment which was extended twice, on 1 April 2002 and 1 April 2007 respectively. At the material time he was employed in the Division of Information Technology (MTIT).

By an e-mail dated 8 December 2010 the complainant was notified that, as his contract was due to expire on 31 March 2012, a recommendation for a three-year extension had been sent to the Joint Advisory Panel on General Service Staff for consideration. On 19 January 2011 he was informed that the Panel had decided to defer consideration of the proposed extension of his contract until its next meeting which was to be held in the spring of 2011.

The complainant's 2010 PRR, which covered the period from 1 January to 31 December 2010, was drawn up during the early part of 2011. Although Mr F. was listed on the form as the complainant's current supervisor, the section of the PRR entitled "Supervisor's assessment of previous 12 months" contained comments (which reflected concern about the complainant's performance) from Mr K., who had been the complainant's Section Head in 2010, but who was no longer an IAEA staff member. In formulating his comments, Mr K. relied on assessments made by another staff member who was described in the PRR as the complainant's "direct supervisor" and whom the IAEA characterises in its submissions as the complainant's *de facto* supervisor in 2010. In the section of the PRR regarding unresolved issues the complainant challenged the aforementioned comments and requested that they be removed. In the section of the PRR entitled "Director's comments pursuant to the Divisional review", Mr H., the Director of MTIT, concurred with the assessment that the complainant's performance in 2010 did not meet expectations. The complainant indicated on the PRR that he did not accept the contents of the report and he provided his reasons. On 31 March 2011 the complainant, Mr F. and Mr H. signed the PRR.

On 18 April 2011 the complainant submitted his 2010 PRR for resolution to the Deputy Director General for Management (DDG-MT) in accordance with the IAEA's Resolution Process Procedures (Part II, Section 3, Annex VIII of the IAEA Administrative Manual). He challenged inter alia the negative comments made by Mr K. and requested that they be removed, thus allowing him to remove his unresolved issues and to accept the contents of the PRR. In a memorandum of 10 June 2011, the DDG-MT informed Mr F. of the

outcome of the resolution process and instructed him to amend portions of the complainant's 2010 PRR. Mr F. was not instructed to remove Mr K.'s comments. In a memorandum of 5 July 2011 the complainant asked the Director General to review the decision of 10 June and to grant his request to have the contested comments removed from the PRR. He further requested the Director General to initiate an investigation into the behaviour of the staff members who had "mismanaged t[he] matter".

In a letter of 18 July 2011 the Director of the Division of Human Resources (DIR-MTHR) offered the complainant an extension of his appointment for a period of three years. He noted that the extension was of a shorter duration than the normal progression of contract extensions and that it was offered further to a recommendation of the Joint Advisory Panel on General Service Staff. The DIR-MTHR encouraged the complainant "to continue [his] efforts to improve [his] work performance to meet the Agency's standards". In a memorandum of 28 July to the Director General the complainant challenged that decision. He requested that the DIR-MTHR be instructed to amend the length of the contract extension from three to five years and to explicitly retract his comments regarding the complainant's performance. The complainant also asked the Director General to initiate an investigation into the mismanagement of the matter.

In a letter of 1 August 2011 the Director General confirmed the decision of 10 June and informed the complainant that he did not consider that any individuals had mismanaged the PRR resolution process. In a letter of 23 August the Director General upheld the decision of 18 July regarding the length of the complainant's contract extension. He further explained that he found no basis upon which to instruct the DIR-MTHR to retract any of his written comments or to initiate an investigation into any aspect of the matter.

On 17 August and 16 September 2011 the complainant respectively appealed the decisions of 1 and 23 August before the Joint Appeals Board (JAB), which joined the appeals. He claimed that the unsubstantiated comments should be removed from his PRR, that his contract extension should be amended to five years, that the relevant comments regarding his performance should be retracted, and

in each appeal he sought moral damages in the amount of 50,000 euros for the unjust manner in which the matter had been dealt with by all managers involved. In its report to the Director General dated 24 May 2012 the JAB recommended that the complainant's 2010 PRR be redone from the beginning. It further recommended that the complainant's contested contract extension be amended from three to five years. In the alternative, and at a minimum, in light of the fact that complainant's PPR's prior and subsequent to the 2010 PRR were positive, the JAB stated that it expected that when his next contract extension was considered, he would be returned to the "normal progression" of contract extensions.

By a letter of 29 June 2012 the Director General informed the complainant that, in accordance with the JAB's recommendation, his 2010 PRR process would be repeated from the beginning. In addition, the duration of his contract would be reviewed by the Joint Advisory Panel on General Service Staff based on the content of the new PRR and a decision would then be taken as to the appropriate duration of his contract. That is the impugned decision.

On 16 July 2012 the complainant wrote to the Director General inquiring as to whether he was willing to reach a settlement regarding the claims which he had raised during the internal appeal but which the JAB had failed to address. On 13 August the Director General replied inter alia that his decision was final.

The complainant asks the Tribunal to overrule the impugned decision of 29 June 2012 which is clarified in the Director General's letter of 13 August 2012. He requests the Tribunal to order the IAEA to remove the negative comments of Mr K. and Mr H. from his 2010 PRR and to then give him "the opportunity to remove [his] unresolved issues and closing comments, leaving only [his] work plans, [his] development plans, [his] staff member comments and the signatures, thus clearing [his] performance record". He seeks an amendment to the length of the contested contract extension from three to five years, and an order that the DIR-MTHR explicitly retract, in writing, the comments he made on the complainant's performance in the letter of 18 July 2011. He further requests that the written retraction be placed in his

personnel file. He asks the Tribunal to "forcefully advise" the Director General to comply with his request to initiate an investigation into the behaviour of those who were involved in this case. He seeks moral damages in an amount the Tribunal deems appropriate in the circumstances, and costs. The IAEA asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. In the complainant's correspondences of 5 and 28 July 2011, pursuant to Staff Rule 12.01.1(D)(1) he respectively requested the Director General to reconsider the decision that had been made concerning his (the complainant's) 2010 PRR and the decision to give him a three-year contract extension, rather than a five-year extension. The complainant also asked the Director General, for the first time, to make two further decisions. He asked the Director General to initiate an investigation into the conduct of various officials who, according to him, mismanaged his 2010 PRR and his contract extension. In the second place, he asked the Director General to issue instructions that certain comments that were made in the letter of 18 July 2011 in which he (the complainant) was informed about the three-year contract extension be retracted. When the Director General refused to reconsider the decision concerning the complainant's 2010 PRR and the decision to extend his contract by three rather than five years, the complainant correctly took the next step in relation to these matters by appealing to the JAB.

2. When, however, by the letter of 23 August 2011 the Director General dismissed the complainant's requests for the retraction of comments and for the investigation, the complainant was required by Staff Rule 12.01.1(D)(1) to ask the Director General to reconsider these decisions before he sought recourse to the JAB. Instead of requesting reconsideration he appealed these two new matters directly to the JAB, together with his appeal against the Director General's decisions on the two issues that he had requested him to reconsider. In

the absence of a request for reconsideration, he improperly brought the two new matters to the JAB. By extension he also improperly bases claims on them before the Tribunal. They will accordingly be dismissed as irreceivable pursuant to Article VII, paragraph 1, of the Tribunal's Statute as these are not matters which were the subject of final decisions and the complainant has not exhausted his internal remedies under Staff Rule 12.01.1(D) (see, for example, Judgment 2567, under 6). It is noted that the complainant did not activate an alternative means which Appendix G to the Staff Regulations and Staff Rules gave to seek redress for the investigation of the behaviour of persons whom the complainant alleged had mismanaged his PRR and the extension of his contract by submitting a report alleging misconduct concerning the staff members to the DIR-MTHR.

3. The IAEA argues that the complainant has no cause of action before the Tribunal insofar as his claims concern his 2010 PRR. According to the IAEA, this is because in the impugned decision the Director General had accepted the recommendations of the JAB that the complainant's 2010 PRR was to be redone *de novo* because it was not properly done, in breach of the provisions of Part II, Section 3, Annex V, of the IAEA Administrative Manual regarding Performance Review Report Procedures.

The Tribunal observes that these provisions require the staff member to benefit, for example, from regular feedback and guidance concerning his or her performance prior to the completion of his or her PRR. In fact, Staff Rule 3.06.4 lays down the procedure for identifying and addressing unsatisfactory performance. That procedure was clearly not met during the 2010 PRR. When the Director General accepted this finding by the JAB, set aside the 2010 PRR, and initiated the *de novo* process, the complainant had successfully impugned the 2010 PRR process. This effectively invalidated the prior decisions on the 2010 PRR so that the complainant has no cause of action on this issue before the Tribunal. As this aspect of his complaint has been overtaken by that decision, it is dismissed (see, for example, Judgment 1431, under 5).

4. The IAEA submits that the complainant is also without a cause of action with respect to his challenge to the refusal to amend his three-year extension to a five-year extension. The Tribunal does not agree.

5. Staff Rule 3.03.1(C)(8) contemplates that a staff member whose immediate prior contract extension was for a period of five years will also normally be granted a subsequent extension for the same length of time. This is, however, subject to the exceptional circumstances set out in Staff Rule 3.03.1(C)(9). This provision permits that the performance of a staff member, among others things, may be taken into account in deciding whether to grant a contract extension. The decision to grant the complainant a three-year, rather than a five-year contract extension, was made on the basis that his 2010 PRR showed that he had performed unsatisfactorily. The JAB concluded, however, that the 2010 PRR did not accord with the Performance Review Report Procedures because the complainant was not provided with regular feedback concerning his performance prior to the completion of that PRR. The Tribunal has already stated that this was in breach of Staff Rule 3.06.4, in particular.

6. The JAB reasoned, in effect, that since this breach invalidated the 2010 PRR, the decision to grant him a three-year contract extension was based on a faulty PRR process. This also meant that at the time when the decision to extend the complainant's contract for three years was made, the prior performance assessments for his then subsisting contract had recorded quite satisfactory performance. The result was that there was nothing on which to base unsatisfactory performance as a basis for deviating from the grant of another five-year extension. Noting that the complainant had three consecutive five-year prior contract extensions, the JAB recommended that the complainant's three-year contract extension from 1 April 2012 should be amended to a five-year extension instead. In the alternative, the JAB stated that it expected that the complainant would be returned to the normal progression of contract extensions when his next extension was considered.

7. It is observed that, in the impugned decision of 29 June 2012, the Director General did not accept these recommendations. His reference to those recommendations was fully stated in the following words:

> "as to the second appeal you have submitted, I agree that the duration of your contract should be reviewed by the Joint Advisory Panel on General Service Staff based on the content of the new PRR, and that a decision should be made as to the appropriate duration of your contract. As to the Board's alternative recommendation that upon consideration of your next contract extension it expected you to 'be returned to the normal progression of contract extensions', I note that future decisions may only be taken as based on facts as they exist at that time."

8. Consistent precedents hold that inasmuch as the right to an internal appeal is a safeguard enjoyed by international civil servants, the ultimate decision-maker cannot depart from the conclusions and recommendations of the internal appeal body without giving adequate reasons for her or his decision (see Judgments 2699, under 24, 2833, under 4, 3208, under 11, and 3361, under 14). The Director General did not provide adequate reasons for departing from the JAB's recommendation that the complainant's three-year contract extension from 1 April 2012 should be amended to a five-year extension. Moreover, it seems clear that the invalidity of the 2010 PRR, which the Director General accepted, stripped away the expressed basis for the deviation from the normal five-year contract extension that the complainant had been granted on three consecutive prior occasions and left no legal basis for the deviation. Accordingly, the decision to award the complainant a three-year, rather than the normal five-year contract extension was in breach of Staff Rule 3.03.1(C)(8). That decision will therefore be set aside as this aspect of the complaint is well founded.

9. The complainant first sought moral damages when he filed his internal appeals in the JAB, which however, did not address that issue in its report. In his letter dated 13 August 2012, the Director General expressed disagreement with the complainant's claims for moral damages on the grounds that the case did not reveal any injury

that required such compensation. He further stated that even the rectification of an impugned decision does not alone attract moral damages. The IAEA repeats this before the Tribunal and adds that the complainant has failed to exhaust internal remedies available to him and that he is without a cause of action in relation to his claim for moral damages. However, the Tribunal held in Judgment 3080, under 25, that the provision of Article VII, paragraph 1, of the Tribunal's Statute, which requires all internal means of redress to be exhausted, does not apply to a claim for compensation for moral injury. The Tribunal restates that moral damages constitute a claim for consequential relief which the Tribunal has the power to grant in all circumstances. The breach of its own rules by the IAEA, to wit the provisions of Part II, Section 3, Annex V, of the Administrative Manual and particularly Staff Rule 3.06.4, leading to the invalid 2010 PRR process for the complainant; its failure to extend the complainant's contract for the normal period of five years, rather than by providing a three-year extension, in breach of Staff Rule 3.03.1(C)(8); and the failure to give adequate reasons as found in consideration 8 of this judgment, entitle the complainant to moral damages, for which he will be awarded 15,000 euros. He will be also awarded 1,500 euros in costs in the circumstances of this case.

DECISION

For the above reasons,

1. The impugned decision dated 29 June 2012 is set aside to the extent that it dismissed the complainant's claim for a five-year contract extension.
2. The IAEA shall pay the complainant 15,000 euros in moral damages.
3. The IAEA shall pay the complainant 1,500 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ