Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

W.

v.

IAEA

126th Session **Judgment No. 4026**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. W. against the International Atomic Energy Agency (IAEA) on 26 March 2015 and corrected on 23 April, the IAEA's reply of 6 August and the complainant's e-mail of 1 October 2015 informing the Registrar of the Tribunal that she did not wish to enter a rejoinder;

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 not to reclassify her post.

At the material time the complainant held the post of Policy Associate in the Director General's Office for Policy (DGOP) at grade G-6. Following a request by her supervisor, Mr S.A., for reclassification of her post at grade G-7, a desk audit interview was conducted in December 2011.

As from 1 June 2012, the complainant had a new supervisor, Mr C.B. By an e-mail of 19 June 2012 she was informed that the reclassification process was suspended pending a re-assessment of the distribution of duties in the DGOP, which was being restructured. Mr C.B. was interviewed with respect to the classification of her post

in April 2013. The evaluation report, which was finalized in July 2013, recommended that the G-6 grade be maintained. The complainant was informed on 9 October 2013 of the outcome of the review of the classification of her post, namely that her functions and responsibilities did not warrant a reclassification at the G-7 grade.

The complainant asked the Director General to reconsider that decision. In accordance with the relevant provisions of the Administrative Manual, Part II, Section 3 (AM.II/3), this request was forwarded to the Director, Division of Human Resources in the Department of Management (DIR-MTHR), who dismissed it on 22 November.

The complainant's request for review of the decision of 22 November 2013 was dismissed by the Director General on 9 January 2014, and she then lodged an appeal on 22 January 2014 with the Joint Appeals Board. She retired on 31 January 2014.

The Joint Appeals Board heard the complainant on 15 May 2014. In its report of 17 November 2014 the Joint Appeals Board found that the evaluation process followed by the Administration had been comprehensive and not deficient in any material respect. However, it found that there had been undue delay and that, while it was understandable that the Administration might not wish to make the entire evaluation report available, some additional explanation should have been given to the complainant. It recommended dismissing the appeal and providing a summary of the rationale for the evaluation to the complainant.

By a letter of 10 December 2014 the Director General informed the complainant of his decision to follow the Joint Appeals Board's recommendation to dismiss the appeal and to maintain the complainant's post at grade G-6. In his view, the process had not been unduly delayed, as the time taken to complete the evaluation was due to the particular circumstances in the Director General's Office for Coordination (DGOC, formerly known as DGOP) during that period, but he agreed to provide further information on the evaluation of her post. That is the impugned decision.

The complainant initially requested that her complaint be joined with the complaint filed by her colleague Ms N. d. O. but, by a letter of 14 September 2015, she indicated that she no longer wished the complaints to be joined. She asks the Tribunal to set aside the impugned decision, to reclassify her post at grade G-7 with effect from 1 October 2011 or 1 January 2012, and to order the retroactive payment of the resulting difference in salary, including all benefits and the IAEA's contributions to the Pension Fund, together with interest calculated from due dates. She also claims moral damages for the excessive delay in the reclassification process and in processing the appeal, and costs.

The IAEA requests the Tribunal to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. The complainant initially applied for the joinder of her complaint with the complaint filed by Ms N. d. O. The IAEA agreed. Both complainants had jointly pursued their internal appeals to the Joint Appeals Board; the Joint Appeals Board issued a common report in respect of both appeals. The impugned decisions are in identical terms, but they were issued separately. The present complainant retired from the IAEA on 31 January 2014, a fact which she stated in her complaint. Ms N. d. O. had not. In September 2015, the present complainant informed the Tribunal that she no longer wished the complaints to be joined on the ground that, as she had retired, she was not in the same position as Ms N. d. O.

The Tribunal notes that although the complaints relate to the same subject matter and are based on virtually the same underlying facts, the arguments upon which this complainant relies and the relief sought in this complaint go beyond those in Ms N. d. O.'s complaint. The complaints do not raise the same issues of law and of fact and will therefore not be joined (see, for example, Judgment 3965, consideration 6).

2. The complainant impugns the decision of 10 December 2014 by which the Director General, at the outcome of the internal appeal procedure, confirmed that her grade G-6 post would not be reclassified as a grade G-7 post. In addition to an order setting aside the impugned decision, the complainant seeks moral damages for delays in the classification review and internal appeal processes. She also asks the Tribunal to reclassify her post at grade G-7 retroactively from 1 October 2011 or from 1 January 2012 and to order that she be paid the resulting increase in salary and interest from the due dates. This latter claim will be dismissed as the Tribunal has no competence to order an organization to reclassify a post (see, for example, Judgment 3834, consideration 6).

3. In Judgment 3589, where the reclassification of a post was challenged, the Tribunal stated the following at consideration 4:

> "It is well established that the grounds for reviewing the classification of a post are limited and ordinarily a classification decision would only be set aside if it was taken without authority, had been made in breach of the rules of form or procedure, was based on an error of fact or law, was made having overlooked an essential fact, was tainted with abuse of authority or if a truly mistaken conclusion had been drawn from the facts (see, for example, Judgments 1647, consideration 7, and 1067, consideration 2). This is because the classification of posts involves the exercise of value judgements as to the nature and extent of the duties and responsibilities of the posts and it is not the Tribunal's role to undertake this process of evaluation (see, for example, Judgment 3294, consideration 8). The grading of posts is a matter within the discretion of the executive head of the organisation (or the person acting on her or his behalf) (see, for example, Judgment 3082, consideration 20)."

4. The IAEA's process for the reclassification of posts in the General Service category (grades G-1 to G-7) is set out in paragraphs 48 to 57 of AM.II/3. They relevantly provide that a decision to reclassify a post may arise from a request to MTHR by a supervisor, as in the present case. The subject post is to be evaluated "by the classification officer(s) designated by MTHR" who should evaluate it in accordance with the International Civil Service Commission's (ICSC) job classification system. The evaluation of an encumbered post "should include a desk audit" consisting of an interview of the incumbent and her or his supervisor and a review of any information which might be

relevant to supplement and verify the documents provided with the reclassification request. The result of the evaluation is to be submitted to DIR-MTHR for approval and the decision thereon is to be communicated to the incumbent and to specified officials. Reasons must be given for a decision not to reclassify a post and the incumbent may request DIR-MTHR to review that decision. In respect of technical issues DIR-MTHR may request the advice of an independent classification specialist. The latter is to submit the findings to DIR-MTHR who shall take them into consideration in making the final decision. The final decision is to be communicated to the incumbent and specified officials. Reasons must be given for a decision which upholds a prior decision. The promotion of an incumbent whose post is reclassified to a higher grade is not automatic. The Division Director must make a proposal for the promotion to the reclassified post to DIR-MTHR who must then submit it to the corresponding Joint Advisory Panel. The proposal with any comments thereon from the Joint Advisory Panel must then be submitted to the Director General for approval.

5. The complainant primarily challenges the Joint Appeals Board's report. She asks that the impugned decision be set aside on the ground that the Board neglected material facts. The Tribunal has consistently stated that it is not its role to reweigh the evidence before an internal appeal body. In addition, where an internal appeal body has heard evidence and made findings of fact, the Tribunal will only interfere if there is manifest error (see Judgment 3439, consideration 7).

6. The complainant submits that the Joint Appeals Board neglected material facts because, notwithstanding that it noted that assurances or promises were made to her by the DGOP supervisory staff that her post would be upgraded to grade G-7 and provision was made for a post at that grade in the 2012/2013 Programme and Budget, the Board erred by concluding that these actions were insufficient to bind the IAEA. She insists that the Joint Appeals Board did not consider that the assurances were not conditional upon the conduct of a desk audit of the post; neither did it consider that there was a practice of not conducting a desk audit for new or modified posts after they were

included in the approved budget for a specific year. However, she gives no evidence to prove that such a practice existed. Moreover, a practice cannot become legally binding where, as in the present case, it contravenes specific rules which are already in force (see, for example, Judgment 3734, consideration 5).

7. The complainant further submits that the Joint Appeals Board erred when it stated that the promises or assurances were only made to her out of appreciation. She insists that by so stating, the Board failed to find that as a result of them she was given and carried out additional responsibilities. She insists that these additional responsibilities cannot be compensated for merely by the Board's suggestion that supervisory staff should refrain from making such promises in the future.

8. The Tribunal finds that given the reclassification process described in AM.II/3, the officials who made the promise to the complainant that her post would be reclassified to grade G-7 were not competent to make that promise and bind the IAEA. The decision fell within the competence of DIR-MTHR, after the conclusion of the reclassification process. Had a decision been made to reclassify the post, it would then have been necessary to initiate a process to determine whether the complainant, as the incumbent, was to be appointed to the reclassified post. Moreover, there is no authority for the proposition that the mere inclusion of the post in the 2012/2013 Programme and Budget entitled the complainant to have her post reclassified.

9. The complainant submits that the impugned decision should be set aside because the Joint Appeals Board failed to conduct a proper inquiry into the facts and to verify them. She states that Mr A.-H., an official from MTHR, presented misleading information and "several misrepresented facts" to the Joint Appeals Board, which strongly suggests that the evaluation process was flawed, contrary to what the Board found. The Tribunal is not persuaded that the results of the evaluation involved a mistaken conclusion (see Judgment 3589, consideration 4).

10. The complainant notes the Joint Appeals Board's statement that the evaluation process appeared to have been comprehensive and not deficient in any material respect. She however insists that in arriving at that conclusion the Board accepted untrue statements without verifying them. She alleges that one such untrue statement was that two classification specialists had worked on the case and had confirmed the low-range G-6 assessment, when she had mentioned to the Board that only one specialist had audited the post. She suggests that the Joint Appeals Board's statement must have been based on the evidence of Mr A.-H. and that it should have called Ms S.G., the classification specialist who had audited the post, to verify Mr A.-H.'s statement. In the Tribunal's view, however, inasmuch as the requirement is that at least one specialist should carry out the classification review, which was done in the present case, whether it was carried out by two specialists is immaterial. It is also immaterial that findings from the interview between MTHR and Mr C.B., the complainant's new supervisor, were used for the revision of the job description for the complainant's post, when the complainant's evidence was that her tasks had been changed and her job description had remained as revised by Mr S.A., her former supervisor.

11. The complainant further contends that the recommendation in the Joint Appeals Board's report is inconsistent with its conclusions. She states that although the Board made two important observations about the length of the process and the lack of information or explanation, either of which provided sufficient grounds to recommend that the decision not to reclassify her post be set aside, the Board instead recommended that the internal appeal against that decision be dismissed. The complainant refers to the Board's observation "that the process had taken much too long". She submits that this constituted a material flaw in the reclassification process, which, given the repeated reminders to the IAEA about the slow progress of that process, should have led the Joint Appeals Board to investigate the reasons for the delay, but it did not. Rather, its own delay prolonged her frustration.

12. In the Tribunal's view, there was sufficient evidence from which the Joint Appeals Board could have concluded, as it did, that the evaluation process was conducted in accordance with the relevant provisions of AM.II/3. The Tribunal also notes that reasons were given for the decision not to reclassify the complainant's post. In the foregoing premises the grounds on which the complainant seeks to challenge the Joint Appeals Board's findings and recommendations, which were accepted by the Director General in the impugned decision, are unfounded and will be dismissed. Undoubtedly, however, there was inordinate delay in the reclassification exercise, which may entitle her to moral damages.

13. The Tribunal stated the following, in Judgment 3102, consideration 7:

> "[E]ven if a staff member may claim no right to promotion, promotion procedures must be conducted with due diligence and as swiftly as the normal workings of an administration permit. There is nothing to justify delaying for years a promotion which the staff member may legitimately expect and which naturally has a direct impact on his or her career prospects, unless this delay may be attributed to a fault on the part of the person concerned during the procedure (see Judgment 2706, under 11 and 12)."

14. Mr S.A., the complainant's then supervisor, made the request to reclassify the complainant's post in May 2011. A desk audit was not initiated until 12 December 2011, because it was decided that the Director General would approve the Department's staffing plan and the Programme and Budget for 2012/2013 prior to its commencement. Mr S.A. had been preparing the brief for the evaluation but had then demitted office. The evaluation was suspended pending the recruitment of the new supervisor and a reassessment of the briefing process. The new supervisor, Mr C.B., was appointed with effect from 1 June 2012 and the recommendation that the grade of the complainant's post be maintained was issued in July 2013. The complainant was informed of this by communication of 9 October 2013. The reclassification process took too long and the IAEA's explanation for the delay is unconvincing. Given the circumstances of the delay in the reclassification process, the complainant will be awarded 2,000 euros in moral damages.

15. The complainant further claims that the Joint Appeals Board's delay in processing the appeal breached Staff Rule 12.01.1(D)(9) as it took ten months to issue its report, although it was required to do so within three months. This Rule states as follows:

> "In considering an appeal, the Joint Appeals Board shall act with the maximum of dispatch consistent with a fair review of the issues before it. The Board shall submit its report to the Director General within three months after undertaking consideration of an appeal. The Board may, however, with the agreement of the Director General, extend this time limit in exceptional circumstances."

16. In the present case, the Joint Appeals Board presented its report to the Director General more than nine months after it undertook consideration of the appeal. However, there was no agreement to extend the time limit pursuant to Staff Rule 12.01.1(D)(9). For this, and in the circumstances, the complainant will be awarded 1,000 euros in moral damages. However, no moral damages will be awarded for delay in issuing the impugned decision as the Director General forwarded it to the complainant within thirty days after the Joint Appeals Board's report as Staff Rule 12.01.1(D)(10) requires.

17. The Joint Appeals Board observed that the information and explanation which the complainant received about the reclassification were insufficient, particularly after such a delay in the process, and that additional information should have been given to her at the end of the process. The complainant states that she requested a copy of the "reclassification review document" from MTHR but never received it. The IAEA states that there is no such document. It is however noted that the IAEA provided documents to the Joint Appeals Board, which it did not provide to the complainant. It is also noted that the IAEA did not provide a copy of the full job evaluation report, which included the desk audit report, and the proposed job description for Policy Associate, DGOP, until it submitted its reply in these proceedings. It confirmed that Ms S.G. prepared the document, which is dated July 2013. The IAEA should have provided these documents to the complainant much earlier, and, in any event, in time to enable her to properly prepare and present her internal appeal. The IAEA thereby breached the principle of

procedural fairness. This would usually warrant setting aside the impugned decision. However, in the circumstances of this case, that will not be done. The complainant will be awarded moral damages in the amount of 8,000 euros. The complainant will also be awarded 1,500 euros in costs.

DECISION

For the above reasons,

1. The IAEA shall pay the complainant 11,000 euros in moral damages.
2. The IAEA shall pay the complainant 1,500 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 1 May 2018, 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 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ