

R. (No. 6)

v.

IAEA

130th Session

Judgment No. 4299

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr G. R. against the International Atomic Energy Agency (IAEA) on 26 June 2018 and corrected on 30 July, the IAEA's reply of 7 November 2018, the complainant's rejoinder of 22 February 2019 and the IAEA's surrejoinder of 3 June 2019;

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 to dismiss his claim for moral damages for harassment.

On 26 April 2017 the complainant, a former staff member who had separated from service in April 2016 on a disability pension, submitted a harassment complaint for the actions taken by IAEA officials in connection with the processing of his work-related injuries sustained on 10 September 1999 and on 23 July 2010, which were the subject of his first two complaints before the Tribunal. He referred in particular to the processing of his disability pension appeal and the processing of his payslips, which he had challenged in his third and fourth complaints before the Tribunal, respectively. On 21 August 2017 the Office of Internal Oversight Services (OIOS) notified him

that its investigation had been completed, that his allegations were found to be unsubstantiated and that, accordingly, the investigation had been closed.

By a letter of 3 October 2017 the complainant, who considered that the OIOS had not conducted a thorough investigation and had not reached correct conclusions based on the evidence, requested the Director General to, inter alia, “review the [OIOS] report”, “re-consider the conclusion that the harassment was not proven” and “award [him] moral damages”. He also asked to be provided with the OIOS report and any other evidence gathered in the course of the investigation. On 25 October 2017 the Director General answered that, in view of the complexity of the issues raised and the requests made, he would revert to the complainant in due course.

The complainant filed his fifth complaint against the implied rejection of his claim for moral damages on 17 November 2017, but later withdrew it.

On 28 March 2018 the Director General issued his final decision responding to the letter of 3 October 2017. He rejected the claim for moral damages for harassment and the request for documents, arguing that he could not interfere with the OIOS’s operational independence. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and remit the matter to the Director General for a new decision to be made. He also seeks an award of material damages with interest, moral damages in the amount of 20,000 euros and 5,000 euros in costs.

The IAEA asks the Tribunal to dismiss the complaint in its entirety as devoid of merit.

CONSIDERATIONS

1. The complainant is a former staff member of the IAEA. He separated from service in April 2016. By letter dated 26 April 2017 sent to the Director of the OIOS, he submitted a complaint claiming to have been harassed. Having regard to the terms of the letter, the harassment involved conduct by others within the IAEA between 2013 and, at the latest, 2016. The question of whether he had been harassed was investigated by the OIOS, which informed the complainant, by letter dated 21 August 2017, that it had concluded that the allegations

of harassment were unsubstantiated and that the OIOS was closing the investigation. On 3 October 2017 the complainant wrote to the Director General challenging the conclusions of the OIOS and saying, amongst other things, that the Director General should “review the [OIOS] report and re-consider the conclusion that the harassment was not proven, and [...] award [the complainant] moral damages”. Ultimately, the complainant’s grievance was addressed by the Director General who, in a letter dated 28 March 2018, informed the complainant of his decision. In that letter, the Director General focused, in part, on the request that he “review the [OIOS] report” and defended the position he was then taking by emphasising the operational independence of the OIOS and the provisions in its Charter proscribing interference in its activities. Having discussed that independence and his inability to review the OIOS report, the Director General said: “I therefore also decline to award you moral damages in this regard.” The decision in the letter of 28 March 2018 is the impugned decision in these proceedings.

2. Of some significance is that the complainant’s letter of 26 April 2017 itself (that is, putting aside the detailed statement in support annexed to the letter) sent to the Director of the OIOS involved, as stated in the letter, the “fil[ing of] a grievance for harassment for the actions taken by [IAEA] officials” without any express allegation that the unnamed (in the letter) officials were guilty of misconduct. Moreover, the letter requested the OIOS to open an investigation, to review the procedures related to reporting and processing service-incurred injuries and to find that “[the complainant] was subject to harassment and pay [him] moral damages”.

3. In a recent judgment concerning the IAEA, Judgment 4207, the Tribunal observed at considerations 14 and 15:

“14. A claim of harassment and a report of misconduct based on an allegation of harassment are distinct and separate matters. A claim of harassment is a claim addressed to the organization the resolution of which only involves two parties, the organization and the reporter of the harassment. In contrast, a report of alleged misconduct, based on an allegation of harassment, triggers the Appendix G procedures, a process that is directed at the culpability of the staff member in question and potentially the imposition of a disciplinary measure. In this process, the two parties are the organization and the staff member in question. In this process, the reporter of the misconduct, a potential victim of the harassment, is a witness and not a party in the proceedings.

15. It is observed that there are no specific provisions in the IAEA's Staff Regulations and Staff Rules that articulate a comprehensive procedure to deal with a claim of harassment of the type first discussed in the preceding consideration. In the absence of a lawful comprehensive procedure within the IAEA's Staff Regulations and Staff Rules to deal with a claim of harassment, the IAEA had to respond to the complainant's claim of harassment in accordance with the Tribunal's relevant case law. It is well settled in the case law that an international organization has a duty to provide a safe and adequate working environment for its staff members (see Judgment 2706, consideration 5, citing Judgment 2524). As well, 'given the serious nature of a claim of harassment, an international organization has an obligation to initiate the investigation itself [...]' (see Judgment 3347, consideration 14). Moreover, the investigation must be initiated promptly, conducted thoroughly and the facts must be determined objectively and in their overall context. Upon the conclusion of the investigation, the complainant is entitled to a response from the Administration regarding the claim of harassment. Additionally, as the Tribunal held in Judgment 2706, consideration 5, 'an international organisation is liable for all the injuries caused to a staff member by their supervisor acting in the course of his or her duties, when the victim is subjected to treatment that is an affront to his or her personal and professional dignity' (see also Judgments 1609, consideration 16, 1875, consideration 32, and 3170, consideration 33). Thus, an international organization must take proper actions to protect a victim of harassment."

4. Several points of substance arise, directly or indirectly, from the above discussion. One is that there is a material difference between an official alleging she or he had been harassed in the context of alleging misconduct, on the one hand, and an official alleging she or he had been harassed in the context of seeking protection from the harassment, on the other. In the latter situation, the organization's primary obligation is to investigate whether there has been harassment and, if satisfied that there has been, take steps to prevent any further harassment. This obligation is part of a more general obligation to ensure that officials work in a safe working environment free from physical and psychological risk (see, for example, Judgment 4171, consideration 11). Those steps might include counselling the perpetrators of the harassment or relocating the staff member the subject of the harassment to another workplace or even another position.

5. It is true that a staff member who has, in the latter situation just discussed, established she or he has been harassed may also be entitled to an award of moral damages by the organization for the harassment (see, for example, Judgment 4158, consideration 3).

Whether there is such an entitlement may depend on the terms of the regime in place within the organization to deal with harassment grievances. It is certainly something that can be awarded in proceedings in the Tribunal (see Judgment 4241, considerations 24 and 25). However, what is important is that, even if moral damages might be awarded, that is a subsidiary remedy or relief available in cases of this type when harassment is established. As just discussed, the primary obligation of the organization if harassment is proved is to protect the complainant and prevent further harassment.

6. The complainant's brief and rejoinder were filed before Judgment 4207 was delivered in public. The complainant's pleas proceed on the basis that his letter of 26 April 2017 raised a complaint of misconduct to be investigated by the OIOS under Appendix G. The language of the letter and the detailed statement in support, together with the relief sought, do not support this characterisation. The word "misconduct" or any analog term do not appear in the letter or annexed statement. Nor is there any suggestion, even obliquely, that the IAEA should or might commence disciplinary proceedings against any individual if an arguable case of harassment was revealed by the OIOS investigation. Also, the complainant's request for moral damages suggests his letter was not sent for the purpose of raising an allegation of misconduct warranting investigation. In his brief in these proceedings, the complainant concludes by requesting that the impugned decision be set aside and the matter referred back to the Director General to make a new decision on whether the OIOS correctly concluded on the evidence that the complainant's harassment allegations were unsubstantiated. He also requests moral damages which, in his rejoinder, he quantifies at 20,000 euros and also material damages.

7. As noted earlier, in his letter of 28 March 2018, the Director General, having discussed the operational independence of the OIOS and his inability to review the OIOS report, said: "I therefore also decline to award you moral damages in this regard." However, the Director General misunderstood his role in determining the complainant's grievance. The OIOS report was a tool the Director General had available to him in making a final decision on the complainant's grievance on its merits. The Director General was being asked to decide, notwithstanding the conclusions of the OIOS, that there had

been harassment and that the complainant should be awarded moral damages (see, as to the scope and limited effect of the OIOS's operational independence, Judgment 4207, consideration 9).

8. Even if, as just discussed, the Director General erred in the impugned decision in affording the OIOS report a status it did not warrant and declining to consider the matter himself, no purpose would be served by setting the decision aside and remitting the matter to the IAEA. The complainant has not been a staff member of the IAEA for over four years. Plainly enough, the IAEA does not now have any obligation to ensure the complainant is not harassed in the workplace. Indeed, as noted earlier, the complainant was no longer a staff member at the time he submitted his harassment complaint on 26 April 2017, a year after his separation from service. Resolving his grievance for this purpose of ascertaining whether there had been harassment and, if so, protecting the complainant in the workplace would be manifestly futile.

9. There is, additionally, the complainant's request for moral damages in his letter of 26 April 2017. However, at no point has the complainant sought to satisfactorily explain, in the correspondence leading to the impugned decision or in his pleas in the internal proceedings, the basis on which those damages should be awarded. The same can be said of his claim for moral damages in these proceedings before the Tribunal. His claim for material damages in these proceedings is entirely unsubstantiated. In these circumstances, it would be inappropriate to remit the matter to the IAEA. Accordingly, the complaint should be dismissed and it is not necessary to order the production of documents as requested by the complainant.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ