

A. (No. 2)

v.

IAEA

131st Session

Judgment No. 4344

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr P. K. A. against the International Atomic Energy Agency (IAEA) on 3 June 2019, the IAEA's reply of 9 September, corrected on 1 October, the complainant's rejoinder of 29 November 2019 and the IAEA's surrejoinder of 9 March 2020;

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 close the case on his allegations of harassment as unsubstantiated.

On 28 August 2018 the complainant, who was serving as a Section Head at the D-1 level, was summoned to a meeting with his second-level supervisor, the Deputy Director General for Nuclear Sciences and Applications (DDG-NA). Although the parties differ as to the tone of the ensuing discussion, there is no real dispute as to its content. The complainant had recently returned from a period of sick leave. He was also the subject of an ongoing disciplinary procedure stemming from a complaint of harassment by one of his subordinates (see Judgment 4343, also delivered in public this day). DDG-NA began by enquiring about the complainant's health. The complainant replied that he had some "issues" but that he was not willing to discuss this further. He suggested that

DDG-NA should consult the Medical Service. DDG-NA then enquired about the complainant's plans for the future, asking how long he would stay at the IAEA, when he would reach 62, and when he would be able to resign (sic) on a full pension. DDG-NA explained that he had received a lot of complaints about the complainant as a supervisor, and that four staff members wanted to leave his Section. He declined to give details of these complaints, saying that the Division of Human Resources (MTHR) was dealing with the matter. Finally, DDG-NA stated that he would like to see the complainant "out of the Agency". The complainant asked DDG-NA to put this in writing, to which DDG-NA replied that he would do so. The meeting then ended.

Immediately after this meeting, the complainant sent an email to his lawyer in which he recounted the conversation in detail, referring to DDG-NA's "belligerent" tone of voice, and sought advice as to what he should do. The following day, the complainant forwarded this email to the Director of the Office of Internal Oversight Services (OIOS), stating: "it was [...] a complete shock to be harassed and treated in the bullying manner that I was". He added that, earlier that year, his first-level supervisor, the Director of the Division of Physical and Chemical Sciences (DIR-NAPC), had made "similar anonymous accusations from staff members, attributing the source to DDG-NA", but she had yet to provide any details, nor had she completed his 2017 Performance and Development Review report (PDR). The complainant said he believed the behaviour of DDG-NA and DIR-NAPC was a direct consequence of the "flawed OIOS report" on the allegations of harassment that had been brought against him by a former staff member, which did not take into account his rebuttal and the evidence he had provided. The complainant requested that appropriate action be taken by OIOS to address the "bullying and harassment" that he had been subjected to by DDG-NA. He also asked OIOS to review its earlier report and to re-evaluate its conclusions taking into account the responses he had submitted.

In October 2018 the complainant asked for an update on the status of his complaint. The Director of OIOS informed him that OIOS had completed its preliminary assessment and was now awaiting the Director General's decision on the outcome of the disciplinary procedure against him, after which OIOS "w[ould] be able to determine whether and how to take the complaint forward". The complainant replied that, although one part of his complaint was related to the disciplinary procedure, this had no bearing on his reporting of "a verbal assault inflicted on [him]

by DDG-NA”, and he hoped that a prompt and timely investigation of this matter would be conducted by OIOS.

The complainant resigned on 6 December 2018, shortly after having received the Director General’s final decision on the disciplinary procedure against him. In February 2019 he enquired about the outcome of his complaint of bullying and harassment by DDG-NA. On 15 March 2019 the Director of OIOS informed him that OIOS had carefully reviewed his complaint, but that its assessment was unable to corroborate his allegations. The case had therefore been closed as unsubstantiated.

In an email of 3 April 2019 addressed to the Director General, the complainant questioned the decision to close the case. He pointed out that it was not clear which aspect of his allegations could not be corroborated, given that OIOS had not sought any input from him since the filing of his complaint. He attached to his email further evidence to support his allegations, including an audio recording of the meeting of 28 August 2018 with DDG-NA, and he asked the Director General to review the decision of 15 March 2019. However, the complainant was informed, on 9 April 2019, that the internal appeal process was only open to serving staff members. Accordingly, if he wished to challenge the decision of 15 March 2019, he would have to file a complaint with the Tribunal.

In his complaint filed on 3 June 2019, the complainant impugns the decision of 15 March 2019. He asks the Tribunal to set aside that decision and to award him 25,000 euros in material damages for procedural breaches, as well as 60,000 euros in moral damages for delays in investigating his claims and for damage to his health. He claims 150 euros in costs and invites the Tribunal to grant such other damages as are deemed appropriate.

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

CONSIDERATIONS

1. The complainant seeks an order to set aside the decision contained in the email dated 15 March 2019 from the Director of OIOS. That communication informed the complainant that OIOS had carefully reviewed his harassment complaint against DDG-NA, but that since its “assessment was unable to corroborate [his] allegations, [...] the case ha[d] therefore been closed as unsubstantiated”. In its Case Closure Report

(the Report) of its assessment, dated 13 March 2019, OIOS added that that decision did not preclude a re-opening of the matter should further related evidence be obtained. The complainant also seeks material damages for procedural breaches, as well as moral damages for delay in the investigation and for damage to his health. He also seeks costs.

2. OIOS's investigative power is conferred by its Charter, which is contained in Part III, Section 1, of the Administrative Manual. Its Procedures for the Investigation of Staff Members (hereinafter "the OIOS Procedures") are contained in Part III, Section 4, of the Administrative Manual. Paragraph 1 of its Charter tasks OIOS, among other things, to carry out special preliminary inquiries and investigations when there are indications that the Agency's regulatory regime may have been violated or where irregularities in activities may have come to light. The results are to be used to draw factual conclusions about the allegations. The OIOS Procedures set out the general procedures which OIOS should follow when investigating staff members for alleged misconduct under Staff Rule 11.01.1(A), which states as follows:

"Misconduct is defined as 'failure by a staff member to comply with his or her obligations under the Statute of the Agency, the Staff Regulations and Rules or other administrative issuances, or to observe the standards of conduct expected of an international civil servant'."

Under Staff Rule 11.01.1(B)(4) and (9), misconduct includes harassment and acts or behaviour that may discredit the Agency. Harassment is defined in Appendix E to the IAEA's Staff Regulations and Rules.

3. Regarding an organization's duties where harassment complaints are made, the Tribunal has stated, for example, in Judgment 4207, consideration 15, that an international organization has a duty to provide a safe and adequate working environment for its staff members and that given the serious nature of a claim of harassment, an organization has an obligation to initiate the investigation itself. It further stated that the investigation must be initiated promptly, conducted thoroughly and the facts must be determined objectively and in their overall context and that upon the conclusion of the investigation, the complainant is entitled to a response from the Administration regarding the claim of harassment. Moreover, a person who makes a harassment complaint has a duty to substantiate that claim.

The Tribunal's case law states that the question as to whether harassment has occurred must be determined in the light of a thorough examination of all the objective circumstances surrounding the events complained of and that an allegation of harassment must be borne out by specific facts, the burden of proof being on the person who pleads it, but there is no need to prove that the accused person acted with intent (see, for example, Judgment 3871, consideration 12).

4. Insofar as they are relevant to the present case, the provisions for the screening of reports of misconduct are provided in paragraphs 12 to 15 of the OIOS Procedures, which state as follows:

“12. OIOS will screen each report of possible misconduct it receives in order to assess the credibility and value of the information or allegation. When screening a report, OIOS investigators may need to contact the complainant and/or informant to obtain further background information or clarification in order to decide whether to open an investigation.

13. OIOS will assess the reported allegation to determine whether all of the following requirements are met:

- a) The allegation(s) falls within OIOS' mandate [...];
- b) The allegation(s) relates to the Agency and its staff members and/or affects its property, resources, programmes or activities;
- c) The allegation(s) is of a sufficient gravity as to warrant an investigation;
- d) An investigation is feasible based on: (1) the length of time that has elapsed since the reported allegation(s) occurred; (2) the specificity of the information received; and (3) the availability of necessary records, evidence and witnesses; and
- e) The matter cannot be independently and more effectively dealt with by another internal unit.

14. If the above requirements are met, OIOS investigators will then assess the reliability of the report of misconduct and the credibility of the source of the report.

15. After the screening process is completed, DIR-OIOS will determine whether or not an allegation of misconduct warrants an investigation. In the event that it is determined that no investigation is warranted, the person making the report, where identified, shall be informed by DIR-OIOS or DIR-MTHR as appropriate, that the investigation into their report of possible misconduct is concluded.”

5. The complainant challenges the decision which he impugns on the grounds that it is tainted by breaches of procedure and by errors of fact and law, which may be summarized in the following allegations:

- (1) OIOS committed a breach of the applicable procedure, since it failed to conduct an investigation following its screening assessment.
- (2) OIOS failed to have follow-up communication with him (the complainant).
- (3) In view of the documentary evidence, OIOS's conclusion that it could not "corroborate" his complaint was "preposterous".
- (4) OIOS wrongly linked his complaint of harassment to the outcome of the disciplinary proceedings against him.
- (5) There is no evidence that OIOS interviewed DDG-NA, and his immediate supervisor, DIR-NAPC, was interviewed in June 2018, before he made his harassment complaint.
- (6) The fact that OIOS did not take his complaint of harassment seriously shows bias against him, in addition to the fact that OIOS had likewise failed to follow-up his earlier allegations of harassment on the part of DDG-NA in 2016-2017.
- (7) OIOS did not investigate his report of continuing harassment by DIR-NAPC.
- (8) Taken together, the actions of OIOS, DDG-NA and DIR-NAPC amount to institutional harassment.

6. Several allegations can be dealt with briefly. The eighth allegation essentially invites the Tribunal to determine whether, taken together, the actions of OIOS, DDG-NA and DIR-NAPC amount to institutional harassment. However, a finding that a staff member was subjected to any form of harassment, including institutional harassment, is first within the investigative purview of OIOS upon a report of harassment made to it. In this case, however, the complainant's allegations of institutional harassment go beyond the scope of the report of harassment that he submitted to OIOS, which was directed against DDG-NA alone. The second allegation is unfounded. Paragraph 12 of the OIOS Procedures confers discretion upon OIOS investigators when screening a complaint to determine whether they need to contact the complainant and/or informant to obtain further background information or clarification in order to decide whether to open an investigation. OIOS exercised that discretion and, in the absence of evidence that it exercised it in error, committed no procedural error when it did not have follow-up communication with the complainant.

The fifth allegation is also unfounded. OIOS's Report of 13 March 2019 states that following a preliminary assessment, it put the complainant's harassment complaint on hold until the Joint Disciplinary Board (JDB) had finalized its review of another harassment complaint against him which was ongoing when the complainant made his complaint, but that it re-opened its assessment once the JDB review of the other matter was completed. The Report states that OIOS interviewed DDG-NA on 12 December 2018. It then states that it interviewed a Staff Relations Specialist, MTHR and DIR-NAPC. There is no evidence that supports the complainant's allegation that DIR-NAPC was interviewed in June 2018 concerning his harassment complaint.

The sixth allegation is unfounded. The complainant provides no evidence that discharges his burden to prove that OIOS was biased against him because it did not take his harassment complaint seriously, and the ground that OIOS had failed to follow-up his earlier allegations of harassment on the part of DDG-NA in 2016-2017 is unsubstantiated.

7. Regarding the seventh allegation: that OIOS did not investigate his report of continuing harassment by DIR-NAPC, the complainant's harassment complaint states that earlier in 2018 DIR-NAPC told him, referencing DDG-NA as the source, that staff members had complained about him (the complainant). It further states that almost six months later she had not provided any particular information about the staff members' complaints or completed his 2017 PDR. The emails which he attached to his complaint reveal communications between the complainant and DIR-NAPC concerning staff issues and the completion of his PDR. The complainant sent the last message to DIR-NAPC on 5 April 2018 in reply to her message to him the day before. In her message she had suggested to him that they should meet to "see what our views/thoughts are on the PDR and complaints by staff reporting to you, to the DDG". In his reply, the complainant stated that he would have been happy to speak with her further on the issues but first needed her comments on his PDR. Concerning the issue of the alleged complaints against him, the complainant asked DIR-NAPC to let him know what those were so that he could think about the issues before they could meet. However, in his harassment complaint he specifically requested "appropriate action by OIOS in treating the bullying and harassment that [he] ha[d] been subjected to by DDG-NA as a serious matter and a violation of the [IAEA's] policies". He neither made a harassment complaint against

DIR-NAPC nor requested the OIOS to investigate her for harassment in that complaint. Allegation 7 is therefore unfounded.

8. It is convenient to consider the first and third allegations together as they are interrelated. Under paragraph 15 of the OIOS Procedures, once the screening process is completed it is within the discretionary purview of OIOS to determine whether an investigation is warranted. OIOS should conduct an investigation where its assessment reveals *prima facie* evidence of harassment. It would be in breach of procedure if there were such evidence and OIOS failed to conduct an investigation. In allegation 3, the complainant contends, in effect, that OIOS was wrong, in view of the documentary evidence, to conclude that it could not “corroborate” his complaint. The Tribunal however recalls that it is not its role to reweigh the evidence before an investigative body which, as the primary trier of facts, has had the benefit of actually seeing and hearing the persons involved, and of assessing the reliability of what they have said. For that reason, such a body is entitled to considerable deference. The Tribunal will only interfere if there is manifest error in OIOS’s decision to close the complainant’s complaint as unsubstantiated because its assessment was unable to corroborate his allegation of harassment (see, for example, Judgment 4291, consideration 12). In the present case, the Tribunal finds that on the evidence which was before OIOS at the material time it could reasonably have concluded that the complainant’s allegation of harassment was not corroborated. The Tribunal further finds that in the absence of manifest error vitiating OIOS’s conclusion, OIOS did not breach applicable procedure by determining that an investigation was not warranted. Allegations 1 and 3 are therefore unfounded.

9. Regarding the fourth allegation, the complainant argues that OIOS wrongly linked his harassment complaint to the outcome of the disciplinary proceedings against him. OIOS stated that it put the complainant’s harassment complaint on hold until the JDB had finalized its review of a harassment complaint against the complainant, which had been ongoing at the time when he filed his complaint. The complainant argues that there was no basis in the OIOS Procedures for putting his complaint on hold and that by doing so OIOS also caused undue delay and violated his right to an effective means of redress. He refers to Judgment 4035, consideration 7. However, in that case, unlike in the

present case, the Director-General had accepted that the investigative body's closure of the harassment complaint without an investigation was wrong. The Tribunal noted that effluxion of time and the fact that possible witnesses had left the organization made it impossible for the complainant to have her case examined subsequently. It concluded, in effect, that the failure to conduct an investigation initially constituted a serious violation of the complainant's right to an effective means of redress and awarded her moral damages for that violation. In the present case, however, it has been determined that OIOS did not breach the applicable procedure when it concluded that an investigation was not warranted.

10. The complainant's statement that OIOS may indeed have delayed the investigation long enough for the officials concerned to leave the organization (DDG-NA left in December 2018 and DIR-NAPC left in February 2019, on the expiry of their respective contracts) is speculative. In the circumstances of this case, however, the Tribunal determines that OIOS's decision to put the complainant's complaint on hold as it did, in the absence of any regulatory or normative basis, violated the IAEA's duty to investigate harassment complaints promptly. This caused the complainant moral injury for which he legitimately claims redress. The Tribunal considers that the injury will be fairly redressed by awarding the complainant moral damages in the amount of 5,000 euros. Inasmuch as the complainant provides insufficient evidence to prove his claim for damage to his health, that claim is rejected. As he succeeds in part, he will also be awarded 1,000 euros in costs.

DECISION

For the above reasons,

1. The IAEA shall pay the complainant 5,000 euros in moral damages.
2. The IAEA shall pay the complainant 1,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 6 November 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ