

R. (No. 17)

v.

IAEA

137th Session

Judgment No. 4755

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventeenth complaint filed by Mr R. R. against the International Atomic Energy Agency (IAEA) on 11 March 2019 and corrected on 17 April, the IAEA's reply of 5 August 2019, the complainant's rejoinder of 10 December 2019, corrected on 7 January 2020, and the IAEA's surrejoinder of 20 April 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 cases arising from his reports of alleged misconduct and to reject his request to be provided with an unredacted version of two investigation reports. He also claims institutional harassment.

By letters dated 29 April 2017 and 22 June 2017, the complainant made allegations of misconduct against his supervisor, Mr K., and the Director, Division of Human Resources (MTHR). These allegations, which concerned the allegedly improper appointment of Mr K. to a post and the Director, MTHR's alleged failure to investigate previous allegations by the complainant against Mr K., became the subject of investigation IF 17-0021.

By a letter of 1 June 2017, the complainant reported misconduct on the part of the said Director for allegedly tampering with official records. These allegations became the subject of investigation IF 17-0023.

An external investigation firm was contracted by the Office of Internal Oversight Services (OIOS) to conduct the investigations.

By two memoranda of 21 August 2017, OIOS informed the complainant that it had closed both investigations, concluding that the allegations raised by the complainant were unsubstantiated. By emails dated 24 August 2017, OIOS provided him with details regarding the findings in the two investigations.

By a letter dated 27 September 2017, the complainant requested that the Director General review the decisions to close the two investigations.

On 24 October 2017, the Director General acknowledged receipt of the complainant's request for review and replied that he would revert to him in due course. It was also noted that the time limit for any appeal would be suspended pending the Director General's substantive response to the complainant's request for review.

By a letter of 7 March 2018, the complainant requested that the two investigation reports be disclosed. He also made a further allegation of institutional harassment.

By a decision of 5 April 2018, the Director General rejected the complainant's request to review the decisions to close the two investigations. He also rejected the complainant's request to be provided with the two investigation reports, noting that this request was, in any case, time-barred. Lastly, the Director General decided to refer the complainant's allegation of institutional harassment to OIOS for investigation.

On 4 May 2018, the complainant lodged an appeal before the Joint Appeals Board (JAB) against the decision of 5 April 2018.

By a letter of 4 June 2018, the complainant was informed that, following a thorough assessment, OIOS considered that the complainant had not provided sufficient evidence to support his claim of institutional harassment. Therefore, OIOS did not propose to investigate this matter further.

In its report of 13 September 2018, the JAB recommended that the Director General maintain his decision and dismiss the appeal, which he did by a decision of 7 December 2018. That is the impugned decision.

The complainant requests the Tribunal to set aside the impugned decision and to order the IAEA to disclose the unredacted investigation reports. He also requests that the investigations into his allegations of misconduct be carried out anew. He claims 30,000 euros in material damages, 30,000 euros in moral damages, 20,000 euros in consequential damages, 20,000 euros in exemplary damages, as well as 2,000 euros in costs, with interest on all amounts awarded. In his rejoinder, the complainant submits that the submissions of the IAEA, which include as part of its annexes submissions made by the IAEA in the context of other complaints filed by the complainant before the Tribunal, amount to an abuse of process.

The IAEA asks the Tribunal to reject the complaint as partly irreceivable and otherwise entirely unfounded. It submits that the complainant's request to be provided with the unredacted versions of the two investigation reports is time-barred. The final reports of investigations IF 17-0021 and IF 17-0023 were submitted as annexes to the reply, with their supporting documents, although several of them were totally or partially redacted. The IAEA further submits that the allegation of institutional harassment is irreceivable for failure to exhaust internal remedies, as the complainant should have challenged the decision of OIOS of 4 June 2018 not to investigate the matter further. Some of the complainant's allegations in the present complaint have already been raised in other proceedings. As a result, it has articulated the substance of the arguments made in parallel proceedings and has included references as necessary to substantiate contentions of irreceivability and denies that this amounts to an abuse of process.

CONSIDERATIONS

1. The complainant impugns the Director General's final decision of 7 December 2018 to endorse the Joint Appeals Board (JAB) recommendations of 13 September 2018 and to dismiss the complainant's appeal of 4 May 2018.

2. The complainant bases his complaint on the following grounds:

- (a) the investigator who conducted investigations IF 17-0021 and IF 17-0023 had no legal authority;
- (b) there were omissions and mistakes of fact and law in the investigations and in the JAB report, ultimately tainting the impugned decision with manifest unreasonableness and error of law;
- (c) there was undue delay in the internal appeal process amounting to a breach of due process and of the Organization's duty of care; and
- (d) the impugned decision results from a series of acts which, taken as a whole, amount to institutional harassment.

In his rejoinder, the complainant further alleges that the fact that one third of the annexes to the IAEA's reply consist of its submissions in other complaints filed by the complainant amounts to an abuse of process and that the IAEA should be "liable to be adequately sanctioned within the context of the equitable calculation of the punitive damages he has already claimed in his [b]rief".

3. The IAEA submits, in substance, that the complaint is irreceivable in part because the complainant's allegation of institutional harassment was not raised in his appeal to the JAB, because he failed to challenge the decision of 4 June 2018, and was not considered in the impugned decision. The IAEA correctly states that the complainant's allegation of institutional harassment is irreceivable. The allegation of institutional harassment is a matter that should have been raised internally, pursuant to the relevant rules of the organization. Since it was not, it is irreceivable before the Tribunal.

4. Turning to the merits, in his first plea the complainant challenges the legal authority of the investigator who conducted the investigations of IF 17-0021 and IF 17-0023. He alleges that: (a) the interviews were conducted by one investigator instead of two, in violation of Administrative Manual Part III, Section 4, paragraph 25, of “[Office of Internal Oversight Services (OIOS)] Procedures for the Investigation of Staff Members” (AM.III/4); (b) the selection of Mr D., the investigator, breached the requirements of objectivity and independence enshrined in the OIOS Charter; (c) the involvement of the Director, Division of Human Resources (MTHR) in the appointment of Mr D. resulted in a conflict of interest and lack of independence on the part of the investigator; (d) the IAEA failed to comply with its internal rules governing the procurement of goods and services; (e) the manner in which the investigations were subcontracted unduly deprived the complainant of a fair and thorough review of his allegations.

5. The organization does not raise as an issue the fundamental question of whether, in the context of a complaint alleging misconduct, a complainant can challenge the procedures adopted in the investigation of those allegations.

The Tribunal notes that, contrary to the complainant’s allegation, paragraph 25(d) of AM.III/4 stated that “[i]nterviews shall be conducted [...] **[t]o the extent possible**, by two OIOS investigators” (emphasis added). The use of the expression “to the extent possible” indicates that, while the presence of two investigators is preferable, the conduct of interviews by one officer is also permitted. As the IAEA explains, OIOS hired an external investigation firm to deal with the high number of cases. The terms of this arrangement led to the investigation being conducted by one single investigator. Furthermore, as correctly found by the JAB, OIOS’ hiring of the aforementioned external investigation firm was a justified professional managerial decision in dealing with its high number of cases. The authority of OIOS to hire an external investigative firm was recognized by the Tribunal in Judgment 4703, consideration 6:

“The complainant advances various arguments to support his second ground that OIOS’s use of the services of an external investigative firm to assist in its investigation was in violation of IAEA policies and applicable rules. His arguments are unfounded. The OIOS Charter, contained in AM.III/1, provides in its Article 2 that, although OIOS reports directly to the Director General, it shall carry out all assignments free from managers’ interference in determining the scope and in performing the work. There is no rule that prohibits OIOS from procuring the services of an investigative firm, which was within its operational independence in carrying out the work, and which is also permitted by AM.VI/1 on the ‘Procurement of Goods and Services’.”

The Tribunal also notes that Mr D., the investigator of the aforementioned external firm, was not engaged as a consultant, but was hired pursuant to AM.IV/1 on the Procurement of Goods and Services and on the basis of his qualifications; that he had the authority to conduct the investigations under the supervision of the Director of OIOS; and that the Director, MTHR had no role in the selection of Mr D. The complainant’s allegations are therefore without merit.

6. In the complainant’s second plea, by citing Judgments 3617 and 3065, he contends that he was never offered any opportunity to review evidence and comment on the testimony of the witnesses. In the present case, the complainant is a mere reporter of misconduct. Therefore, he was not entitled to review the evidence. Nor is he entitled to be provided with a full and unredacted version of the final investigation reports. The Tribunal considered essentially the same argument in the complainant’s fourteenth complaint (see Judgment 4703, consideration 9), and dismissed it. After review, the Tribunal has found no manifest error of fact or law in the investigations and in the JAB report that would require the intervention of the Tribunal.

Nevertheless, it must be noted that, as evidenced in its report on the complainant’s appeal, the JAB not only reviewed full versions of the two investigation reports in question but, as a matter of fact, relied on them for some of its main findings. In this regard, the Tribunal has consistently stated that a staff member must be provided with all the materials an adjudicating body uses in an internal appeal and that the failure to do so constitutes a breach of due process (see

Judgments 4412, consideration 14, 3413, consideration 11, and 3347, considerations 19, 20 and 21). However, no moral injury has been established for this procedural flaw and, accordingly, no relief is warranted.

With regard to the complainant's allegation that the IAEA breached its Whistle-blower Policy, this was raised for the first time before the Tribunal and neither the Director General nor the JAB had an opportunity to comment on it in the internal appeal proceedings. It is therefore outside the scope of the present complaint.

7. In his third plea, the complainant alleges that there was an excessive delay of more than ten months, as opposed to the statutory review period of four months, which constitutes a breach of due process and of the organization's duty of care. Staff Rule 12.01.1(D)(9) stipulates that the JAB shall issue its report within three months of undertaking consideration of an appeal, unless an extension of one month is granted by the Director General. In the present case, the Director General granted a one-month extension. The JAB issued its report on 13 September 2018, approximately four months after receiving the complainant's appeal on 4 May 2018. There was no undue delay on the part of the JAB, pursuant to Staff Rule 12.01.1(D)(9). Furthermore, Staff Rule 12.01.1(D)(10) provides for a margin of flexibility and stipulates that the Director General shall *normally* communicate a final decision to a staff member within 30 days of the issuance of the JAB report. Therefore, the final decision of 7 December 2018, made within less than three months after the issuance of the JAB report, did not violate the time limit contained in Staff Rule 12.01.1(D)(10). The Tribunal considers that the delay in providing a response to the complainant's request for review was not an inordinate delay, given the complexity of the issues and the multiple overlapping proceedings raised by him. Moreover, the complainant failed to articulate and substantiate the adverse effects of the alleged delay. Accordingly, his claim for compensation for the excessive delay in the internal appeal process must be dismissed.

8. Lastly, the complainant contends in his rejoinder that the fact that one third of the annexes to the IAEA's reply consist of its submissions in other complaints filed by the complainant amounts to an abuse of process. The Tribunal does not accept this is so.

9. In light of the above reasons, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 18 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER