

M.
v.
IAEA

137th Session

Judgment No. 4753

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. M. against the International Atomic Energy Agency (IAEA) on 16 March 2021 and corrected on 26 June, the IAEA's reply of 22 October 2021, the complainant's rejoinder of 29 November 2021 and the IAEA's surrejoinder of 25 February 2022;

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 place on his personnel file a letter of 17 December 2020, notifying him that he had committed serious misconduct for which he would have been summarily dismissed had he not separated from the IAEA, and to relevantly inform all affected individuals.

The complainant, a former IAEA staff member, joined the Agency in April 2018, as a Safeguards Technology Expert, at grade P.4, in the Safeguards Division of Information Management (SGIM).

In November and December 2019, staff members in SGIM complained to the Staff Relations Specialist, Division of Human Resources (MTHR), that the complainant's behaviour was intimidating

and inappropriate. When informed of these allegations, the complainant responded that it was he who had been the victim of harassment and bullying. Although initially the two sides agreed to pursue an informal resolution of their grievances, on 25 February 2020, several SGIM staff members advised the Staff Relations Specialist that they had decided to submit a formal report of misconduct against the complainant (group complaint), under Appendix G to the Staff Regulations and Staff Rules, entitled “Procedures to be Followed in the Event of Reported Misconduct”. The Staff Relations Specialist informed the complainant that same day that a group complaint had been submitted against him and advised that the matter would be escalated to the Office of Internal Oversight Services (OIOS).

On 9 March 2020, considering that the informal resolution efforts had failed, the complainant also submitted a report of misconduct (complaint), under Appendix G to the Staff Regulations and Staff Rules. In his complaint, the complainant firmly rejected the allegations raised against him in the group complaint and asserted, inter alia, that: (i) a decision to extend his contract for a period of six months instead of one year, which was communicated to him orally, was taken without due process and appeared to be the direct result of retaliation against him; (ii) one of his colleagues had deliberately retaliated against him by spreading rumours, making false allegations, and breaching the confidential nature of any harassment complaint, all of which constituted misconduct on several counts; (iii) he had witnessed three of his colleagues disclosing confidential IAEA information to the United States Mission to the International Organizations in Vienna and their conduct in this respect should be investigated.

By a memorandum of 11 March 2020, the Director, MTHR, referred the allegations of misconduct on the part of the complainant to the Director, OIOS, for review and, if appropriate, investigation. OIOS considered that the complainant’s counter-allegations against specific staff members had arisen in the context of the group complaint submitted against him, and therefore dealt with the allegations of both sides in the context of the same investigation.

On 31 March 2020, the complainant's contract was extended for one year.

By a memorandum of 23 April 2020, the complainant was informed that he was the subject of an investigation into allegations of harassment and sexual harassment. On 5 May 2020, he was interviewed by OIOS and, on 12 May, he supplemented his 9 March 2020 complaint by a written statement, in which he rejected what he considered to be false and fabricated claims against him and provided details of the allegedly inappropriate and harassing behaviour towards him by several SGIM staff members.

Pending the OIOS investigation, to prevent an escalation of the dispute, the complainant was instructed to work from home. In early June 2020, during the gradual return of staff to the office following a period of mandatory teleworking due to the Coronavirus pandemic, the complainant was offered an office space on the 18th floor of the IAEA premises (away from SGIM office spaces which were located on the 11th floor). While initially he was allowed to work in that office space three days per week, he was subsequently instructed he should only work at the IAEA premises one day per week.

On 2 July 2020, the complainant resigned from the IAEA and, the next day, he asked the Administration to shorten the notice period for his resignation to one month instead of the statutory notice period of three months. By a letter of 8 July 2020, the Acting Director, MTHR, informed the complainant that, on behalf of the Director General, he accepted his resignation effective 3 August 2020, but this acceptance in no way limited the IAEA's ability to pursue any action it deemed appropriate in response to any findings resulting from the ongoing OIOS investigation into allegations of misconduct against him. The Acting Director, MTHR, also informed the complainant that, as per standard practice, a copy of the 8 July 2020 letter would be placed in the complainant's personnel file to reflect the fact that the complainant had resigned during an investigation into allegations of misconduct against him.

On 9 July 2020, OIOS forwarded to the complainant the draft investigation report and invited him to provide his comments thereon, which the complainant did on 31 July 2020.

OIOS issued its Final Investigation Report on 4 August 2020. It concluded that the evidence gathered supported the finding that the allegation of long-term harassing behaviour by the complainant against several staff members was substantiated, and it also supported the finding that the complainant had sexually harassed two female colleagues. As regards the allegations that one of the complainant's colleagues had manipulated and orchestrated the group complaint against him; that confidential IAEA information was inappropriately disclosed to the United States Mission; and that the complainant had been subjected to inappropriate behaviour, comments or actions by several SGIM staff members, OIOS concluded that the evidence gathered supported a finding that these allegations were unsubstantiated. As regards the allegations concerning the complainant's contract extension, OIOS concluded that the evidence gathered supported a finding that they should not be further investigated.

On 6 August 2020, the Acting Director, MTHR, provided the complainant with a copy of the Final Investigation Report and invited him to submit his comments thereon, which the complainant did on 1 September 2020.

By a letter of 17 December 2020, the complainant was informed that the Director General had found the harassment and sexual harassment allegations against him to be substantiated and considered that he had committed misconduct. The complainant was also informed that, in light of his separation from the IAEA pending the outcome of the OIOS investigation, the Administration had decided to close the matter without further action in the disciplinary context but, had he not separated, he would have been summarily dismissed. Lastly, the complainant was informed that the 17 December 2020 letter, along with any comments he wished to make thereon, would be placed in his personnel file and that all individuals affected by his harassing behaviour would be relevantly informed. This is the decision the complainant impugns in the present complaint (his first).

The complainant asks the Tribunal to order the removal of the impugned decision and of any reference to sexual harassment from his personnel file, as well as from any other IAEA file and/or database. He claims moral damages on the following counts: 20,000 euros for the IAEA's "incapability" to manage the group complaint and the several breaches of confidentiality, despite his several warnings; 50,000 euros for the professional and reputational damage he suffered due to the fabricated allegations against him of harassment and sexual harassment; and 20,000 euros for the fact that the IAEA used a double standard throughout the investigation process. He also claims costs in the amount of 10,000 euros, which corresponds to the costs he incurred in the internal process and in filing the present complaint.

The IAEA asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant was a staff member of the IAEA until he resigned on 2 July 2020, effective one month later. The relevant general background preceding and following his resignation is set out earlier in this judgment. Suffice it to note, at this point, that by letter dated 17 December 2020, the complainant was informed that the Director General had found that the allegations of harassment and sexual harassment against him by other staff members (also referred to as "group complaint") had been substantiated and this constituted misconduct. He was informed of three further matters. The first was that had he not separated from service earlier that year, he would have been summarily dismissed. The second was that, in view of the fact that he had separated from service, the matter had been closed without further action against him. The third was that the letter of 17 December 2020 would be placed on his personnel file.

2. The complainant has filed two complaints, impugning two distinct decisions communicated to him in separate letters of 17 December 2020. The complainant filed his first complaint on 16 March 2021. He filed a second complaint on the same day, and did so after an earlier

attempt to file one complaint comprehending the subject matter of what are now his first and second complaints. Both the complainant and the IAEA seek the formal joinder of the two complaints.

3. Plainly the Tribunal can, and often does, consider related complaints at the same session and by the same panel of judges. The joinder of two complaints is a legal device deployed by the Tribunal in order that one judgment can be rendered, and orders then made disposing of the joined complaints. When considering the scope and purpose of a joinder, it must be borne in mind that while such an order can be made in relation to multiple complaints by one complainant, they can also be made in relation to complaints by two or more individuals who, in substance, raise the same grievance. This latter situation illustrates the need for such orders to be made only in quite explicit circumstances and to be guided by focused principles and not loosely expressed generalities. This is particularly important given the *res judicata* effect of the Tribunal's judgments. It would be wrong, in principle, to burden one individual with the legal outcome of proceedings where her or his complaint has been joined with the complaints of others in which legal issues have arisen and are resolved, but not legal issues raised by that individual.

4. The relief the complainant seeks in his first complaint has several related elements. Firstly, he seeks an order that the letter of 17 December 2020 be removed from his personnel file. Secondly, he seeks an order requiring the removal of any reference to sexual harassment from his personnel file and from any other IAEA file and/or database. Thirdly, he seeks moral damages on a number of bases, as well as costs. One of the bases on which he seeks moral damages is the IAEA's "incapability" to manage the complaint of harassment lodged against him by other staff members and several breaches of confidentiality.

5. The relief the complainant seeks in his second complaint includes a claim for moral damages formulated in terms identical to the last-mentioned claim, additional claims for moral damages on several other bases, as well as costs. He also seeks an order setting aside the

decision to close his harassment complaint and to dismiss his counter-allegations, based, in substantial part, on what the complainant appears to contend were flaws in the investigation process.

6. The question that arises is whether it is appropriate to join the two complaints. The touchstone for formal joinder has historically been that the complaints involve the same or, more recently, similar questions of fact and law, and it is not sufficient that they stem from the same continuum of events. A recent example is Judgment 4600, consideration 2. In that case, no joinder was ordered, notwithstanding that the complaints, the joinder of which was sought, concerned the same continuum of events. If the complaints concern the same or similar questions of fact and law, then it is probable that the same or related orders will be made dispositive of the several complaints.

7. In the present case, notwithstanding the linkage discussed earlier, the ultimate legal issues are quite different. At base, the first complaint requires a consideration of the legality of placing the letter of 17 December 2020 on the complainant's personnel file. Any orders made, will address that question, unless the complaint is dismissed. At base, the second complaint addresses a different issue, namely the lawfulness of the decision to close the complainant's harassment complaint, and again, any orders made, will address that question, unless the complaint is dismissed. Therefore, the two complaints will not be joined to form the subject of a single judgment, though they will be considered at the same session by the same panel of judges.

8. This judgment concerns the first complaint directed against the decision to place the 17 December 2020 letter on the complainant's personnel file. Ordinarily, a document addressing a staff member's performance or conduct can, appropriately, be placed on the staff member's personnel file. However, if the document is legally flawed, an order could be made requiring its removal (see, for example, Judgment 3997, consideration 8). In the present case, the letter of 17 December 2020 might arguably be legally flawed, if there was a flawed process of investigation.

9. The complaint of harassment and sexual harassment against the complainant by other staff members was lodged on 25 February 2020. The complainant's complaint of harassment was lodged on 9 March 2020. Both complaints were investigated by the Office of Internal Oversight Services (OIOS), which issued a Final Investigation Report on 4 August 2020. In the letter of 17 December 2020 from the Director, Division of Human Resources (MTHR), there is an accurate summary of some of the important findings in that report:

“As you are aware, OIOS issued its Final Investigation Report [...] on 4 August 2020, taking account as appropriate your response to the draft report which was previously shared with you. In the [Final Investigation Report], OIOS detailed numerous individual interactions between you and the individuals involved in the group complaint. The investigation found that these interactions ‘show a pattern of behaviour, on [your] part [...], covering approximately 1 1/2 years’ and that your ‘behaviour both verbal and physical, would reasonably be expected to cause offence; and that it has created an intimidating, hostile or offensive work environment’.

The [Final Investigation Report] concluded that ‘the evidence gathered supports a finding that the allegation of the long-term harassing behaviour (between May 2018 and December 2019) by [the complainant], which affected multiple staff members [thirteen (13) individuals in total] is substantiated’.

OIOS further determined that your behaviour included inappropriate comments of a sexual nature, and unsolicited and unwanted physical contact. As a result, OIOS concluded that the evidence gathered supports a finding that you sexually harassed two affected individuals in ‘about’ May 2018 and ‘during 2019’, respectively. Your behaviour was found to have created an offensive work environment for these two affected individuals who had experienced sexual harassment.”

10. It should be observed, at the outset, that the Tribunal generally defers to the findings by internal investigative bodies. For example, in Judgment 4237, consideration 12 (recently cited in Judgment 4674, consideration 5), the Tribunal said:

“Moreover, where there is an investigation by an investigative body in disciplinary proceedings, ‘it is not the Tribunal’s role to reweigh the evidence collected by an investigative body the members of which, having directly met and heard the persons concerned or implicated, were able immediately to assess the reliability of their testimony. For that reason, reserve must be exercised before calling into question the findings of such a

body and reviewing its assessment of the evidence. The Tribunal will interfere only in the case of manifest error (see Judgments 3682, under 8, and 3593, under 12)' (see Judgment 3757, under 6)."

These observations are apt to apply also to the investigation of a harassment complaint as occurred in the present matter.

11. Indeed, in these proceedings, the complainant goes a little further and says explicitly in his brief that he is not asking the Tribunal to reassess the OIOS's findings. His reason for taking this position is that he believed this "would not be within the Tribunal's scope nor would add to this appeal, considering that [he] resigned and that the disciplinary process had been closed without the imposition of a sanction". It is unnecessary to analyse this reason. All that is presently relevant is that he is not asking the Tribunal to reassess the OIOS's findings and, consistent with this approach, the Tribunal does not do so. Thus, the summary quoted above from the letter of 17 December 2020 can be taken to reflect the uncontroverted facts, as found by OIOS. It is not open to the complainant to not invite scrutiny of the OIOS findings while, at the same time, relying on the comments (dated 31 July 2020) he made on the draft investigation report and the comments (dated 1 September 2020) he made on the Final Investigation Report. Neither commentary is persuasive proof of the facts asserted.

12. What the complainant does do in his brief, is make assertions at a high level of generality. For example, he says that "the [IAEA] [and this must be taken to include what the OIOS did in its investigation] faced the investigation of [his] claim and of the group claim fabricated against him with bias and with a preconceived investigation result in mind, which clearly shows through the investigation report". To similar effect, by way of further example, is a statement in the brief that "[t]he [c]omplainant was treated as guilty from the onset due to large number of recruited complainants who admitted in their interviews/written statements that they were 'recruited' to join the group in a rather intense and invasive manner by [the staff member who was central to the initiation of the group complaint of 25 February 2020]".

13. Notwithstanding multiple contentions of this general type, it is incumbent on the complainant to prove his case. He has failed to do so. In recent Judgment 4505, consideration 9, the Tribunal said:

“[T]he Tribunal has pointed out many times that bad faith may not be presumed and must be proved (see Judgments 4451, consideration 16, and 4345, consideration 6). The burden of proof is on the complainant, and to support his allegation he must demonstrate that there was malice, ill-will, improper motive, fraud or similar dishonest purpose (see Judgment 3902, consideration 11). Similarly, the complainant bears the burden of proof in establishing any bias or inequitable treatment (see Judgment 4097, consideration 14).”

14. The complainant has not established that the investigation and findings of the OIOS in relation to the group complaint against him were legally flawed. Accordingly, there is no basis for concluding that the decision to place the letter of 17 December 2020 on the complainant’s personnel file was infected by legal error. Consequentially, there is no basis for ordering that the letter be removed from the complainant’s personnel file.

15. As there was no legal error in placing the letter of 17 December 2020 on the complainant’s personnel file, or otherwise referring to the complainant’s conduct in the IAEA records, there is no occasion to consider his claim for moral damages flowing or arising from that act. Additionally, he has not demonstrated any legal error in the consideration of the group harassment complaint lodged against him, and no occasion arises to consider his claim for moral damages in this regard either.

16. The complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 7 November 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