A.-M. (No. 2)

v.

IAEA

127th Session **Judgment No. 4088**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. A.-M. against the International Atomic Energy Agency (IAEA) on 7 March 2017 and corrected on 16 March, the IAEA's reply of 23 June, the complainant's rejoinder of 22 September and the IAEA's surrejoinder of 22 December 2017, corrected on 15 January 2018;

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 reassign him to the General Service (GS) category upon the expiry of his fixed-term appointment to a position in the Professional (P) category.

The complainant joined the IAEA on 1 May 1995 at grade G-6 in the GS category. As from 1 June 2010, he was appointed – by a letter of 28 May 2010 – to a P category position at grade P-2 in the Division of Information Technology (MTIT) on a three-year fixed-term contract expiring on 31 May 2013. According to the version of Staff Rule 3.03.1(C)(2) in force at the time of his appointment in the P category, the normal tour of service for P category staff was five years. The complainant's fixed-term contract was extended twice, the last extension

covering the period from 1 June 2015 until 31 May 2017. In the last letter of extension his attention was drawn to Staff Rule 3.03.1(C)(3), according to which exceptional extensions of appointments beyond the normal five-year tour of service could be offered for up to two years, normally without any further possibility of extension. He was informed that if the Director General decided to make an exception and offer him a further extension, he would be informed at least one year prior to the expiry of his contract.

By a letter dated 11 January 2016 the complainant was informed that his fixed-term appointment would expire on 31 May 2017, but that pursuant to the new Staff Rule 3.03.1(F)(5), he was entitled to return to a position in the GS category given that he had held a five-year contract in the GS category immediately prior to being appointed to the P category. He was asked to inform the Director of the Division of Human Resources of his intentions by 31 March 2016.

On 29 February the complainant expressed his disappointment with the decision not to extend his contract in the P category for "another couple of years" and notified his acceptance to return to a post in the GS category as he had not been given any other option. He nevertheless stated that his acceptance was without prejudice to his right to appeal. On the same day, he requested the Director of MTIT to provide him with the Human Resources record that documented the process and the reasons why Staff Rule 3.03.1 only applied to him and not to the other officials in the Division who were similarly situated.

On 4 March 2016 the complainant requested the Director General to review the decision not to extend his contract in the P category. He contended that he only needed "another couple of years" before considering retirement and that he was being discriminated against. If no further contract extension in the P category could be granted, the complainant asked that "[his] acquired rights during the P post" be preserved in the GS category post and he reiterated his request for the disclosure of the Human Resources record.

By a letter of 24 March 2016 the Director General notified the complainant that he had found no errors of law, fact or procedure that would necessitate a reconsideration of the contested decision and he

therefore rejected his request. Attached to the letter was an "overview document", reviewed by the Joint Advisory Panel on Professional Staff, in which MTIT had recommended not extending the complainant's contract.

On 21 April 2016 the complainant lodged an appeal with the Joint Appeals Board (JAB) against the decision of 24 March introducing, among other things, a claim of harassment.

After having heard the parties, the JAB issued its report on 18 November 2016 in which it recommended that the Director General maintain his original decision. The JAB concluded that the process of considering whether to extend the complainant's appointment had been conducted in accordance with the applicable rules and procedures and that it could not see any actions on the part of the complainant's supervisors amounting to harassment. However, the JAB noted that there had been a failure on the part of the complainant's supervisors to communicate properly with him with regard to his situation and that this failure had led to an accumulation of dissatisfaction and frustration on his part. It further recommended that clear guidance in the form of guidelines should exist which would require supervisors to maintain ongoing and meaningful communication with staff members regarding their performance and their expectations concerning career advancement.

By a letter dated 16 December 2016, which constitutes the impugned decision, the complainant was informed that the Director General had decided to reject his appeal in accordance with the JAB's findings. As for the particular recommendation on clear guidance, the Director General noted that the performance review procedures in force at that time already emphasised that supervisors should provide staff members with regular feedback on their performance.

On 18 January 2017 the complainant contacted the Office of Internal Oversight Services (OIOS) requesting it to "initiate the IAEA internal processes to investigate the current practice in MTIT [with] regard to misconduct and harassment". At the date of filing of the present complaint, the OIOS investigation was still ongoing.

The complainant asks the Tribunal to set aside the impugned decision and order the IAEA to preserve his "acquired rights" as a P category staff member and start the process of granting him an appointment

extension according to the criteria set out in Staff Rule 3.03.1. He also asks to be granted a termination indemnity, the updating of his job description and the reclassification of his P category post. He seeks in addition compensation under several heads related in particular to the fact that for seven years he had to work in a "less graded" post outside normal working hours and on non-working days. In this regard, he mentions his involvement in an IT Extended Schedule, which is a 24 hours a day, 7 days a week "call system" for which he worked and deserves to be compensated, and he requests that a compensation scheme be created. Lastly, he claims moral damages, damages for harassment (as requested to OIOS), and costs.

The IAEA asks the Tribunal to dismiss the complaint in its entirety and to reject as irreceivable the complainant's claims concerning the job classification, "overworking" and harassment.

In his rejoinder the complainant requests that he be granted a fixed-term contract at grade P-2 with effect from 1 June 2017 and that this contract be extended until he reaches retirement age. In its surrejoinder the IAEA maintains its position.

As of 1 March 2017 the complainant was temporarily reassigned to a G-6 post, but his contractual status and salary at P-2 level remained unchanged until his fixed-term appointment expired on 31 May 2017.

CONSIDERATIONS

1. The complainant impugns the decision which the Director General issued on 16 December 2016. That decision upheld the initial decision contained in the letter of 11 January 2016, which informed the complainant of his possible return to a post in the GS category when his appointment to the P-2 post which he then held expired on 31 May 2017. The letter of 11 January 2016 recalled that the letter of 28 May 2010, which had informed the complainant of his initial appointment to the P-2 post, had drawn his attention to the previous version of Staff Rule 3.03.1(C)(7), which became Staff Rule 3.03.1(F)(5) in a subsequent revision of the Staff Regulations and Staff Rules. The letter further stated that, under that provision, a staff member who held a five-year

fixed-term appointment in the GS category immediately prior to an appointment in the P category (as the complainant did) was entitled, upon the expiration of the appointment in the P category, to return to a GS category post.

2. On 29 February 2016 the complainant expressed disappointment with the decision not to extend his appointment in the P category. He stated that the decision did not take into consideration the criteria for exceptional contract extension set out in Staff Rule 3.03.1(F). He questioned the value of requiring him to return to a GS category post after all the years he had served in the P category "without any regard to past practice in MTIT [...] and the current policy of the Agency in reducing long-term GS posts". He complained that the decision was neither transparent nor fair and that it did not take into account the opinions of his direct supervisors and his previous Performance Review Reports. He however agreed to return to a GS category post as, in his words, he was not given any other option. He reserved his right to appeal the decision, further stating that "due to the current situation in MTIT of injustice and no appreciation and no respect to staff, [he] would appreciate it very much [to] be transferred as quickly as possible (even before the end of the current contract) anywhere in the Agency away from MTIT [...]". He also asked that his return to the GS category should not affect the rights that he had acquired in his P-2 post. He accordingly requested, first, that his salary should not be less than his last salary in the P-2 post; second, that he did not lose his "current pensionable remuneration and current pension contribution"; third, that he received no less benefits such as the education grant; fourth, that he did not lose his non-local status; and fifth, that the seven years he spent in the P category post "be counted in the end of service allowance of the GS".

3. The scope of the complaint is reflected in the complainant's statement that "[the] complaint [is filed] against the final administrative decision in not supporting an extension of [his] current P-2 contract and let it expire". The grounds for his complaint may be summarized as follows:

(1) The decision not to grant him an extension of his appointment in the P category beyond seven years breached Staff Rule 3.03.1 as the criteria therein for granting exceptional extension in that category were not assessed.

(2) The decision was taken in breach of other rules and without taking into consideration other factors such as his competence, his age (he was close to retirement) and the fact that he was a long-term GS staff member before he was appointed to the P category.

(3) He was not given a fair chance to be considered for the extension as MTIT applied the rules unequally and discriminatorily against him because he was the only long-term GS staff member in the history of MTIT who was not recommended for such an extension and returned to the GS category.

(4) The decision was taken in breach of his acquired rights.

(5) "[T]here was a clear lack of communication on the part of MTIT [which] is another clear evidence of the lack of fairness, transparency, the manipulations and the inconsistency in applying the rules."

(6) The JAB's process was flawed.

(7) MTIT's decision was an act of reprisal, bullying and harassment.

4. The IAEA contends that the claims which the complainant raises concerning the under-classification of his P-2 post and his request for an order that a compensation scheme be created and that he be awarded compensation for his involvement in an IT Extended Schedule are also irreceivable under Article VII, paragraph 1, of the Tribunal's Statute. However, the creation of such a scheme and making an order that the complainant is to be compensated therefrom is beyond the competence of the Tribunal (see, for example, Judgment 4038, under 19).

5. The Tribunal notes the IAEA's statement that the IT Extended Schedule itself enables staff members who are regularly required to work outside official office hours for scheduled IT maintenance to earn additional credit hours. With respect to the alleged under-classification of the complainant's P-2 post, it is observed that, although the complainant

has asked the Tribunal to "order updating the job description and the reclassifications of [his] current post and award [him] compensation in working with less graded post during the 7 years [he worked] in the professional category", he had never filed an official request for the reclassification of his P-2 post. Accordingly, the claim concerning the under-classification of that post is irreceivable as the complainant has not exhausted the internal means of redress that were open to him. By extension, the complainant's request for the IAEA to provide him with any OIOS reports, findings or action plan concerning the job classification and the IT Extended Schedule is rejected.

6. The IAEA requests the joinder of the present complaint with the complainant's first complaint filed in the Tribunal. This request has, however, become moot because the Tribunal has already ruled on the complainant's first complaint in Judgment 4023. The complainant's request for the disclosure of "all documents related to the decision and the previous justification that were used for the [last] extension [of his fixed-term appointment in the P category]" is also moot inasmuch as he has acknowledged that the IAEA has provided him with the documents which he requested.

7. The applicable provisions against which the lawfulness of the impugned decision is to be determined are contained in Staff Rule 3.03.1. Except for a few changes, the 2015 version of this rule, which was in effect on 11 January 2016 when the decision not to extend the complainant's appointment in the P category was issued, was similar to that which was in effect when he was first appointed to the P-2 post in 2010. The criteria governing the decision whether to exceptionally extend such appointment were essentially similar in Staff Rule 3.03.1(F) in the 2015 version, to those contained in Staff Rule 3.03.1(C) in the prior version and the decision to extend fixed-term appointments was within the discretion of the Director General in both versions of Staff Rule 3.03.1. However, in the 2015 version, Staff Rule 3.03.1(C) introduced a provision that "[t]he maximum tour of service for staff members appointed in the Professional or higher categories shall normally be seven years, subject to the extension of fixed-term appointments on a

long-term basis [i.e. for periods of five years], in exceptional cases, in accordance with paragraph F(3) below" (see consideration 13 below).

8. Staff Rule 3.03.1(F) of the 2015 version was applicable in deciding whether the complainant's appointment in a P category post was to be exceptionally extended beyond May 2017. The Tribunal recalls the following statement in Judgment 4028, under 13:

> "[...] As the Tribunal found in Judgment 3909, under 12, international organisations' staff members are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered during or after an employment relationship as a result of amendments to those provisions (see also Judgment 3876, under 7).
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> The Tribunal has consistently held that the position is of course different if, having regard to the nature and importance of the provision in question, the complainant has an acquired right to its continued application. However, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on. In order for there to be a breach of an acquired right, the amendment to the applicable text must therefore relate to a fundamental and essential term of employment within the meaning of Judgment 832 (see, for example, Judgments 2089, 2682, 2986, 3135 and 3909 cited above)."

9. The letter appointing the complainant to the P-2 post in 2010, with which a copy of the Staff Rules and Staff Regulations was transmitted to him, stated that the appointment was for three years "in accordance with the terms and conditions specified below and subject to the STAFF REGULATIONS, the STAFF RULES and related administrative issuances, together with such amendments as may from time to time be made thereto". The letters which informed him that his appointment in that post was extended to 31 May 2015 and 31 May 2017 repeated that those extensions were subject to the provisions of the Staff Regulations and Staff Rules and with any amendments made thereto. The implication of this was that the complainant had no acquired right to either retain his P-2 post beyond 31 May 2017 or to retain the

salary, "pensionable remuneration", indemnities and/or allowances and the international recruitment status inherent to that post, which he claims under the fourth-mentioned ground in consideration 3, above. That ground is therefore unfounded.

10. It is also determined that the second-mentioned ground in consideration 3, above, is unfounded. This is because the determination of whether the complainant's appointment in the P category was to be exceptionally extended does not include factors, which the complainant raises, such as his age, the fact that he was close to retirement, and the fact that he was a long-term GS staff member before he was appointed to the P-2 post. Moreover, the "other rules" which the complainant states were breached are either internal rules which have no bearing on the central issue of the case or United Nations General Assembly recommendations, principles or statements that are external to the IAEA and were not applicable.

It is further determined that the third-mentioned ground in which the complainant alleges that MTIT applied the rules unequally and discriminatorily against him is also unfounded. The complainant provides no evidence that shows that his appointment in the P category was not exceptionally extended in circumstances in which he was in a like situation to other staff members but was treated differently (see Judgment 3298, under 21).

11. Regarding the first-mentioned ground, the complainant submits that the decision not to grant him an exceptional extension of his appointment in the P category beyond 31 May 2017 breached Staff Rule 3.03.1, as the criteria therein for granting that extension were not assessed. This, he states, was because no reference was made to those criteria in the Human Resources record (which is in fact the "overview document" he received with the letter of 24 March 2016) which did not recommend an extension. He points out that that record did not mention any rule or criteria that were used in assessing whether his appointment should have been exceptionally extended, and that the headings under which comments were entered were "Internal Availability", "External Market Availability" and "IAEA Mobility", which are not the criteria

specified in Staff Rule 3.03.1(F)(2) and (3). He insists that this must mean that "[a]pparently different unwritten criteria were used by MTIT not to support an extension [and that] the initiator of the request (the section head) was not allowed to express his own opinion in the renewal process as he claimed and was documented by the Joint Appeal Board [...]". He submits that, in any event, there are contradictions in the statements in the Human Resources record under "External Market Availability" – that "[t]he virtualization domain is using a widespread technology, for which external candidates can be found" and the statement under "Internal Availability" – that "[t]here are few system engineers in the IAEA that could take over part of the tasks performed by [the complainant], after proper hand-over and specific training". He also states that the Director General, who had the discretion to grant the exceptional extension, was not given a chance to make an assessment using the specified criteria because the extension was not recommended in the first place.

12. The IAEA is a non-career organization which offers appointments of limited tenure. It is noteworthy that the letter of appointment which the complainant signed to accept his appointment to the P-2 post in 2010 stated that the appointment did not carry any expectancy of renewal or of conversion to any other type of appointment. Among other things, the covering letter drew the complainant's attention to a similar statement in Staff Regulation 3.03(c) (*recte* (d)).

13. As to the IAEA's regulatory regime, Article VII.C of its Statute states, among other things, that in employing staff it "shall be guided by the principle that its permanent staff shall be kept to a minimum". Staff Regulation 3.03(a) repeats this. While, under Staff Rule 3.03.1(C), seven years is the maximum tour of service for a staff member appointed in the P category, an extension is possible "in exceptional cases, in accordance with paragraph [(F)(3)]". Staff Rule 3.03.1(F)(3) states as follows:

> "(3) An extension of a fixed-term appointment beyond the maximum tour of service may, in exceptional cases, be granted on a long-term basis, for staff members on established posts, for periods of each five years, normally until the staff member's retirement, subject to the criteria set out in paragraphs 2(i), (ii) and (iv) [...], and the following additional criteria:

(i) The conduct and performance of the staff member must have been of the highest degree of excellence; and

(ii) The staff member's technical qualifications and expertise are useful for the total duration of his/her expected service with the Agency."

The criteria set out in paragraphs 2(i), (ii) and (iv) are the following:

"(i) The need for continuity in the specific functions assigned to the staff member's post;

(ii) The availability of funding;

(iii) [...]; and

(iv) The best interests of the Agency."

14. As these criteria are compendious, the decision by the Director General that any one of the criteria was not met puts a staff member outside of the benefit of an exceptional extension in a P category post. In the letter of 24 March 2016 to the complainant, by which the Director General informed him that his request for review was rejected, it was stated in effect, among other things, that although he had a strong performance record, that performance was not of the highest degree of excellence. It follows that the complainant did not meet the criterion set out in Staff Rule 3.03.1(F)(3)(i), as assessed by the Director General, with the result that ground 1 of the complainant's challenge is unfounded. Further, there is no evidence that the lawfulness of the decision not to exceptionally extend the complainant's appointment in the P category is affected by acts of harassment, reprisal and bullying, as alleged in ground 7 referred to in consideration 3 above.

15. Regarding ground 5, in its report, the JAB stated the following, among other things, in its conclusions:

"29. [...] the Board did conclude that there had been a failure on the part of the [complainant]'s supervisors to communicate properly with [him] with regard to his situation and that this had led to accumulating dissatisfaction and a considerable and understandable degree of frustration on his part. The Board felt that the problems of communication highlighted in this case pointed to a wider issue concerning the proper management of the reasonable expectations of staff members concerning contract extensions or opportunities for career advancement more generally. The Board noted that, while the manner in which the [complainant] had been informed of his situation was strictly correct from

> a legal point of view, it clearly lacked the sort of ongoing personal interaction which staff are entitled to expect from their supervisors. The Board considered that this issue has a wider resonance in the Agency and accordingly the Board felt that clearer guidance should exist which would require supervisors to maintain ongoing and meaningful communication with staff members concerning their performance and expectations.
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> 30. In these circumstances, and particularly in view of the dissatisfaction and frustration which the [complainant] has experienced in the course of this process, the Board is of the view that the [A]dministration should actively consider moving the [complainant] to an area of the Agency's operations where his skills and competencies can be optimally employed for the benefit of both the Agency and the [complainant] himself."

16. The JAB's conclusions concerning the effect of the supervisors' failure to communicate properly with the complainant during the process rest on good grounds, particularly given the JAB's earlier statement that the complainant's supervisors had admitted that that failure "had certainly exhibited a lack of compassion and they apologised for that". Nonetheless, the JAB's conclusions have no bearing on the legality of the impugned decision, notwithstanding they support an argument that the IAEA breached its duty of care to the complainant. But that is not the subject-matter of this complaint. Accordingly, ground 5 is unfounded.

17. In substantiating his sixth ground of challenge, the complainant seeks to challenge the JAB's process, among other things, on the basis that the JAB overlooked the connection between the case leading to Judgment 3830 and his case. In Judgment 3830, the JAB had noted that it was the only case in the IAEA where a staff member in the P category, with continuous excellent performance, had been obliged to return to the G-6 level. The JAB found that the IAEA had not treated the complainant fairly and had not abided by its duty of care, particularly as no actions had been taken to provide her with "job security", or to assist her in finding a suitable position. The Tribunal dismissed the plea that she had thereby been subjected to unequal treatment on the grounds that it was not substantiated. However, the Tribunal upheld her plea that during the process the IAEA had not abided by its duty of care to her and its duty to respect her dignity and reputation. It found that, based on the facts and on its reasoning, the JAB had concluded, on good grounds, that the

IAEA had not abided by its duty of care to the complainant and that the Director General had failed to provide adequate reasons for rejecting the JAB's recommendation to exceptionally extend the complainant's appointment in the P category.

18. The circumstances referable to the issue of duty of care in the present case are not on all fours with those in Judgment 3830. While, in the present case, the JAB noted that the complainant's performance appraisals were all good; that his supervisors had informed it (the JAB) that he had performed his work "in a fine manner" and that he was indeed an expert in the area of his work, the JAB made no findings concerning the actions which were taken or otherwise to provide the complainant with "job security", or to assist him in finding a suitable position. Moreover, in the present case, the Director General accepted the JAB's conclusion that it did not find that the relevant process was not followed. The JAB did not expressly conclude, as the JAB did in the report that was considered in Judgment 3830, that during the process the IAEA had not abided by its duty of care to the complainant. It does not follow, as the complainant in effect argues, that had his case and the case leading to Judgment 3830 been reviewed by the same JAB the outcome might have been the same. In any event, such an argument merely invites speculation and there is no provision in the IAEA's rules or statement in the case law which requires it to constitute a JAB of the same members to consider internal appeals where similar issues are to be determined. In the premises, ground 6 is unfounded.

19. For the foregoing reasons, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 26 October 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ