Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

**R. (No. 12)**

***v.***

**IAEA**

**134th Session** **Judgment No. 4522**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr R. R. against the International Atomic Energy Agency (IAEA) on 22 September 2018 and corrected on 4 December 2018, the IAEA's reply of 7 March 2019, the complainant's rejoinder of 24 July and the IAEA's surrejoinder of 21 November 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 not to conduct an investigation into allegations of breach of confidentiality and the refusal to disclose two documents.

On 1 February 2017 the complainant alleged that, notwithstanding their confidential nature, two performance-related documents concerning him were publicly accessible on the Electronic Records Management System (ERMS) application. The documents were a memorandum of 21 November 2016 entitled "Note to File" and a memorandum dated 2 December 2016 entitled "Initiation of the Non-Performance Process". The complainant requested to be provided with a "full copy" of the

documents and that the Office of Internal Oversight Services (OIOS) conduct an investigation into the alleged breach of confidentiality.

On 16 February 2017 the complainant reiterated his request to be provided with the two documents.

On 31 March 2017 the complainant requested the review of the implied rejection of his request of 16 February.

On 4 April 2017 he was informed that OIOS had initiated an audit with regard to his allegations of breach of confidentiality and that his request for disclosure would be considered once OIOS had finalized their audit.

On 21 April 2017 the Director General, referring to the letter of 31 March, informed the complainant that the IAEA was not in a position to consider his request for disclosure of the two documents at this stage, because the OIOS audit was still on-going.

On 1 June 2017 the complainant reiterated his request of 31 March. He also reported misconduct on the part of the Director of the Division of Human Resources.

On 31 July 2017 the complainant lodged an appeal before the Joint Appeals Board against the implied rejection of his request for disclosure of the two documents.

On 21 August 2017 the complainant was informed that the OIOS had concluded that there was no evidence to substantiate his allegations of misconduct on the part of the Director of the Division of Human Resources. Consequently, the investigation had been closed.

In its report of 30 October 2017 the Joint Appeals Board found that the complainant was appealing the decision not to allow him to access the two documents requested. As this decision had been conveyed to him by the Director General on 21 April 2017, the complainant should have lodged his appeal by 21 May 2017. It thus recommended rejecting the appeal as time-barred.

On 21 November 2017 the complainant was informed that, pursuant to this recommendation, the Director General had decided to reject his appeal as irreceivable. The Director General added that his letter of 21 April 2017 was an interim response and that the complainant would

be provided with a final decision on his request of 31 March 2017 in due course.

On 15 March 2018 the complainant was informed that the findings of the OIOS's audit did not justify proceeding with an investigation into the alleged breach of confidentiality.

On 4 May the complainant requested the Director General to review this decision.

The complainant separated from service on 31 May 2018 upon the expiry of his fixed-term contract.

By a letter of 25 June 2018 the Director General rejected the complainant's request for review. He explained that the OIOS had found that the accessibility of the two documents was the result of a design flaw in the application, rather than intentional human intervention that would warrant the opening of an investigation into possible misconduct by staff members. As a result, he considered that there was no basis to award monetary compensation in relation to the decision not to proceed with an investigation. Also, referring to the letter of 31 March 2017, the Director General rejected the complainant's request to be provided with the two documents. He pointed out that the memorandum of 21 November 2016 was classified as Privileged Information, and that the memorandum of 2 December 2016 did not form the basis for any action concerning the complainant's performance, as confirmed by the latter during his inspection of his Personal File on 7 February 2017. Lastly, the Director General informed the complainant that, as a former staff member, he could challenge this decision directly before the Tribunal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to remit the matter to the IAEA for further investigation and to order that the two documents be disclosed to him in full. He also claims compensation for the alleged leakage of his letter to the Director General of 11 November 2016 in which he had requested the review of decisions concerning a recruitment procedure and which he has challenged in the context of other proceedings. He claims 50,000 euros in material damages, 100,000 euros in moral damages, 20,000 euros in consequential damages

and 30,000 euros in exemplary damages. He seeks costs in the amount of 2,000 euros, as well as interest on all sums awarded.

The IAEA requests the Tribunal to dismiss the complaint as unfounded in its entirety. It submits that some of the complainant's claims are irreceivable.

## CONSIDERATIONS

1. The complainant impugns the Director General's 25 June 2018 decision to reject his request for review of the decision not to investigate certain IAEA officials following his allegations of breach of confidentiality, with concomitant denial of monetary relief, and to refuse his request to have access to a memorandum of 21 November 2016 entitled "Note to File" and a memorandum of 2 December 2016 entitled "Initiation of the Non-Performance Process".

2. The complainant impugns the decision on the following grounds:

(a) The Director General's decision not to reconsider OIOS' decision not to proceed with an investigation was tainted with procedural flaws, abuse of authority, error of law and lack of proportionality;

(b) The Director General's decision not to grant him access to the redacted documents was tainted with abuse of authority, and breached his due process rights and the IAEA's duty of care;

(c) The archiving and wide circulation of redacted documents to senior managers evidenced a long series of acts and omissions which, taken as a whole, constituted institutional harassment;

(d) He suffered damages from the above-mentioned decisions, from the unreasonable delay in addressing his allegation, and from the public availability of the redacted documents, as well as the alleged leakage of his letter to the Director General of 11 November 2016 in which he had requested the review of decisions concerning a recruitment procedure.

3. The IAEA correctly states that the complainant's allegation of institutional harassment is a new claim which was not raised in his original requests for review of 31 March 2017 and 4 May 2018. The Tribunal's case law clearly establishes that a complainant's claims must not exceed in scope the claims submitted during the internal appeal process. However, a complainant is not precluded from advancing new pleas (see, for example, Judgments 4009, considerations 10 and 14, and 4066, consideration 4). The new claim is outside the scope of the present case. Additionally, the complainant's request for damages for the public availability of his 11 November 2016 letter to the Director General does not relate to the challenge to the impugned decision itself. This claim is also outside the scope of the present complaint.

4. The complainant contends that in accordance with the "Procedures to be Followed in the Event of Reported Misconduct", contained in Appendix G to the Administrative Manual, Part II, Section 1, upon receipt of his report of misconduct, the Director of OIOS should have submitted the matter for investigation; instead, the Director of OIOS arbitrarily decided to submit the matter to an ad hoc audit, thus vitiating the decision with an error of law. He argues that the design flaw found by OIOS was necessarily the result of a human mistake, and several managers, including the Director of the Division of Human Resources, should have been investigated as this fell within their responsibility to protect Personnel confidential information. He further alleges that the Director General erred in law by disregarding the provisions of the "OIOS Procedures for the Investigation of Staff Members" contained in Part III, Section 4 of the Administrative Manual and acted unreasonably, with malice and abused his authority, by endorsing the Director of OIOS' flawed conclusion.

5. The central issue is whether the IAEA had an obligation to initiate an investigation into the complainant's allegations of misconduct.

6. In the present case, the Director of the Division of Human Resources, after receiving the complainant's allegations of breach of confidentiality, referred them to OIOS in accordance with paragraph 2

of Appendix G, "Procedures to be Followed in the Event of Reported Misconduct". OIOS' investigative power is vested by Article 1 of the OIOS Charter as follows:

> "Investigation carries out special inquiries and investigations when there are indications that the Agency's regulations, rules, policies and pertinent administrative instructions may have been violated or where irregularities in activities may have come to light. The results of the preliminary inquiry and investigation are used to draw factual conclusions about the allegations and to help management use the findings to take corrective and remedial action to recover any losses and to prevent recurrence."

7. Additionally, the "OIOS Procedures for the Investigation of Staff Members" provide the procedure for "Screening Reports of Alleged Misconduct" before starting an investigation, in the following paragraphs:

> "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 as stated in paragraph 2 above;
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> 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: (l) 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 [the Director of OIOS] or [the Director of the Division of Human Resources] as appropriate, that the investigation into their report of possible misconduct is concluded."

8. Hence, OIOS not only has a degree of discretion to decide whether an investigation into allegations of misconduct is warranted through a screening process, but also the discretion to decide how to assess the reliability of the report of misconduct and the credibility of the source of the report. There is no rule that prohibits OIOS from resorting to an audit in the screening process. On the contrary, paragraph 8 of the OIOS Charter provides that the Director of OIOS "may, either at the request of the Director General or on his/her own initiative, institute special audits, reviews, evaluations and investigations warranted by specific management requests or special circumstances". In the Tribunal's view, it was not arbitrary, but entirely reasonable that OIOS, within its authority, initiated an audit with regard to the documents on the ERMS.

9. On 7 March 2017 OIOS issued a document entitled "Assessment of Incident Related to Livelink Access Rights" which is relevant to the complainant's allegations and which stated as follows:

> "Based on the assessment of audit logs for the file 'Reference: Note to File of [the complainant]' and performed interviews with [the Archives and Records Management Section (ARMS)] and MTIT staff, the Internal Audit (IA) concluded that mentioned incident (sic) was caused by a design flaw in the ERMS application. Namely, the ERMS application granted 'IAEA All Staff' group access to the personal performance related files although ARMS marked those files in ERMS as 'Confidential'. In addition, IA, noted that most of the performance review files in the same folder are marked as classified in ERMS, but they are saved as unclassified in Live link, which is yet another design flaw of the application."

10. OIOS, by an email of 15 March 2018, informed the complainant that the findings of the audit did not justify proceeding with an investigation into his allegations. According to paragraph 15 of the "OIOS Procedures for the Investigation of Staff Members", once the

screening process is completed it is within the discretionary purview of the Director of OIOS to determine whether an investigation is warranted. As the audit was sufficient to clarify that the temporary public availability of two redacted documents was due to a design flaw, it was open to OIOS to close the case. The Tribunal finds that OIOS did not breach the applicable procedure. Considering that the complainant did not provide sufficient grounds to warrant the investigation into his allegation of "human mistake", the Director General, by exercise of discretionary power, did not err in law in concurring with OIOS' assessment and deciding not to investigate the matter. Nor was there procedural flaw, abuse of authority, or lack of proportionality that would vitiate the Director General's decision. The complainant's pleas in this regard are dismissed as unfounded.

11. The complainant claims that the Director General's decision not to grant him access to the redacted documents breached his right to due process, by depriving him of the opportunity to rebut any allegations contained in them. He alleges that the "Note to File" contains allegations against him by his supervisor, accusing him of harassment, that he should have been granted access to it to rebut those allegations and that the failure to do so was in breach of the IAEA's duty of care. The memorandum of 2 December 2016 should also have been given to him in full unredacted form as it served as the basis for initiating the unsatisfactory performance procedure.

12. The IAEA contends that the complainant's attempt to conflate the "Note to File" with OIOS' investigation into his supervisor's harassment allegations is misguided and amounts to speculation. It emphasises that no decision against him was ever taken with respect to these allegations and there was thus no right to receive evidence in this connection. As the "Note to File" is classified as "Privileged Information" pursuant to paragraph 4 of Part II, Section 8 of the Administrative Manual on the "Protection of Personnel Confidential Information" and as it did not serve as the basis for any decision concerning the complainant, the IAEA argues that its disclosure was not required. It adds that disclosure of the memorandum of 2 December 2016 was not

required either, because the full unredacted document in six pages was a draft version of the four-page document that the complainant received as the basis for the initiation of the unsatisfactory performance procedure.

13. The Tribunal recalls its case law on disclosure of evidence, as clearly stated in Judgment 4447, consideration 14:

> "It is well established in the Tribunal's case law that a staff member must, as a general rule, have access to all evidence and other materials on which an authority bases or intends to base its decision against her or him, and, under normal circumstances, such materials cannot be withheld on grounds of confidentiality, unless there is some special case in which a higher interest stands in the way of the disclosure of certain documents (see, for example, Judgment 4412, consideration 14). It is also well established that the principle of equality of arms must be observed by ensuring that all parties in a case are provided with all of the materials an appeal body uses in an internal appeal, and that the failure to do so constitutes a breach of due process (see, for example, Judgment 3586, consideration 17)."

14. However, in the present case, the complainant's reliance on the principle of breach of due process is misplaced. Although he speculatively connects the "Note to File" to his former supervisor's harassment allegations, the reality is that there was no decision against the complainant arising from those allegations of harassment against him. Moreover, there is no evidence which shows that the "Note to File" served as the basis for <u>any</u> decision concerning the complainant. Regarding the six-page memorandum of 2 December 2016, the Director General explained that it was a non-final, draft version, which did not form part of the unsatisfactory performance procedure. As stated in the impugned decision, "any/all actions taken concerning the initiation of non-performance procedures were solely based on the four-page IOM of 2 December 2016, i.e. 'the final version' of that document". Since the IAEA has based its decision solely on the four-page memorandum, not the six-page memorandum, it was unnecessary for the complainant to defend himself against the contents of the six-page memorandum. While acknowledging the paramount importance of a staff member's due process rights, the Tribunal considers that the IAEA's refusal to provide the requested documents was neither unlawful, nor tainted with abuse of authority.

15. The complainant finally claims various types of damages resulting from the impugned decision, including the public availability of the two redacted documents and alleged delays in the internal appeal process and in responding to his allegations of misconduct for the breach of confidentiality. As noted above, the Director General lawfully exercised his discretionary power in deciding to uphold OIOS' decision not to proceed with an investigation. The complainant's request for damages in connection with the impugned decision is therefore unfounded.

16. It is undeniable that the filing of two memoranda which contained confidential information in publicly accessible electronic folders constituted a breach of the organization's duty to maintain the confidentiality of a staff member's personnel information. The Tribunal notes that the Director General in the impugned decision also acknowledged the breach of such a duty, communicated his regrets to the complainant and assured him that, upon notification of the breach on 1 February 2017, immediate measures were taken to remedy the breach. Furthermore, as shown in the document STA/NOT/2122, MTIT had adjusted permissions on folders containing the two memoranda on 1 February 2017, shortly after receiving the complainant's report. The complainant was also informed of long-term solutions, with the upgrade of the Agency's platform from Livelink to the Repository of Online Agency Documents ("ROAD"), which removed the risk of occurrence of such a flaw in the future. Although the subject line, footnotes, as well as the authors and addressees of the documents were visible, the contents of the two memoranda were not visible as they were covered by placeholders.

17. The Tribunal has relevantly dealt with similar circumstances, as stated in Judgment 4012, consideration 3:

> "[T]he filing of confidential personnel information in a publicly accessible email folder constituted a breach of the Organization's duty to maintain the confidentiality of a staff member's personnel information. The complainant, however, did not suffer any damage because of this breach. Leaving aside the fact that the complainant did not submit any evidence whatsoever let alone evidence establishing damage to his reputation or otherwise [...] As soon as the emails were located, they were immediately removed. Taking this into account, there will be no award of moral damages for the breach."

The consistent case law of the Tribunal reiterates that with regard to damages, the complainant bears the burden of proof and she or he must provide evidence of the injury suffered, of the alleged unlawful act, and of the causal link between the unlawful act and the injury (see Judgments 3778, consideration 4, 2471, consideration 5, and 1942, consideration 6). Considering all the facts and relevant circumstances of the present case, as well as the fact that the complainant did not submit any evidence to establish any damage to his reputation or other injury arising out of the temporarily public availability of two redacted documents, the Tribunal finds that the complainant's request for damages is unsubstantiated.

18. With regard to the alleged delays, the 15-month review period in addressing the complainant's allegations was not unreasonable in the circumstances of this case, given the time that the IAEA needed to review the audit report and to deal with concomitant appeals and overlapping allegations of misconduct. Moreover, the complainant has failed to present any evidence in support of his claim. He has not articulated the adverse impact which the alleged delays had on him (see, for example, Judgments 4392, consideration 12, 4231, consideration 15, and 4147, consideration 13). The Tribunal accordingly rejects the request for compensation for procedural delays.

19. With regard to the request for exemplary damages, the complainant has provided no evidence or analysis to establish that there was bias, ill will, malice, bad faith or other improper purpose on which to base an award of punitive damages (see, for example, Judgments 4286, consideration 19, and 3419, consideration 8). Accordingly, no exemplary damages will be awarded.

20. It follows from the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 23 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ