L.

v.

IAEA

137th Session **Judgment No. 4752**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S.-S. L. against the International Atomic Energy Agency (IAEA) on 31 December 2019, the IAEA's reply of 19 May 2020, the complainant's rejoinder of 23 September 2020, corrected on 1 October, and the IAEA's surrejoinder of 6 January 2021;

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 grant her a special post allowance (SPA).

The complainant joined the IAEA in 1999. In September 2010, she was appointed as Benefits and Entitlements Assistant, at the G5 level, in the Division of Human Resources (MTHR), Staff Administration Section, Unit A (position number 003740). Between 1 June 2017 and 31 August 2018, she undertook a development reassignment to the position of Human Resources Planning Assistant, MTHR, Human Resources Planning Section (position number 167622). Since the latter position was graded at the higher G6 level, the complainant received a SPA for the duration of her development reassignment, pursuant to

Staff Rule 5.01.3. At the conclusion of her development reassignment, she returned to her original position as Benefits and Entitlements Assistant. Following a desk audit, the complainant's position as Benefits and Entitlements Assistant was reclassified to the G6 level, with retroactive effect from March 2018. As a result, the complainant was also paid a retroactive SPA with respect to such position, for the period from 1 October 2015 to 31 May 2017. The complainant's position as Benefits and Entitlements Assistant was eventually abolished and the complainant was reassigned to the position of Human Resources (HR) Associate, MTHR, Human Resources Service Centre Unit, in December 2018.

On 31 August 2018, the complainant submitted a request for "retroactive payment of [a SPA] for the satisfactory performance of higher level G7 functions and responsibilities" for the period of her development reassignment to the position of HR Planning Assistant. She based her request on "the approved [j]ob [d]escription [of] position 018731", another position of HR Planning Assistant which was reclassified at the G7 level. On 26 September 2018, the Director of MTHR denied the complainant's request for a SPA, on the basis that the duties performed during the complainant's development reassignment "were in line with the G6 level" and "position 018731 is classified as 'unique' and therefore has no linkage with" the position held during her development reassignment.

On 19 October 2018, the complainant requested the Director General, pursuant to Staff Rule 12.01.1(D)(1), to review the decision taken by the Director of MTHR. She submitted that during her development reassignment she "performed numerous duties above and beyond the generic [j]ob [d]escription", including "[taking] over the responsibilities of the position of [HR] Specialist P3". In addition, she argued that she had been "consistently disadvantaged, discriminated and marginalised as compared to other staff members in [her] Division and across the Agency" who had been granted a SPA. She further raised that the abolition of her Benefits and Entitlements Assistant position, which was notified to her on 21 September 2018, had "caused [her] very much anxiety and distress".

On 15 November 2018, the Director General responded to the complainant that he had found "no basis to depart" from the decision of the Director of MTHR. He did not agree that the complainant performed G7 or P3 responsibilities nor that she had been "treated in the adverse manner [she] describe[d]". Taking note that the complainant had "accessed the [Entreprise Resource Planning] ERP system to provide examples of the contract situations of other colleagues" who had been awarded a SPA, he reminded her of her confidentiality obligations pursuant to Staff Rule 1.06 and paragraph 35 of the Standards of Conduct for the International Civil Service.

On 14 December 2018, in a letter to the Director General, the complainant "refute[d] the insinuation" that she had "breache[d] any confidentiality". She noted that she had a duty to "report any breach of the organization's rules and regulations" and "invoke[d] the Whistle-Blower Policy AM. III/3 [...] so that [she] will suffer no retaliation". On 10 January 2019, the complainant was informed that the Director General had forwarded her 14 December 2018 letter to the Director of the Office of Internal Oversight Services (OIOS) and the Chief of Ethics "for their attention in the context of that policy".

On 17 December 2018, the complainant filed an appeal with the Joint Appeals Board (JAB) against the Director General's 15 November 2018 decision, asking to be retroactively paid a SPA for the duration of her development reassignment. She also claimed compensation for moral injury and "[a]ny other relief the [JAB] may consider appropriate".

The JAB issued its report on 6 September 2019, in which it recommended to the Director General to dismiss the complainant's appeal as unfounded. The JAB noted that the complainant was "appealing only against the decision not [to grant her a] SPA" and that she was "not making any formal appeal on any other more general grounds". The JAB found that "the [j]ob [d]escription for position 018731 [...] [was] substantially different" from the complainant's job description during her development reassignment. It further observed that "it [was] not appropriate to make a direct comparison between the [complainant]'s situation and the individual cases of other staff members".

On 4 October 2019, the Acting Director General informed the complainant that he had decided to accept the JAB's recommendation and to dismiss her appeal. That is the impugned decision.

In her brief and complaint form, the complainant asks the Tribunal to set aside the impugned decision and to order that she be paid a SPA at the G7 level for the duration of her development reassignment from 1 June 2017 to 31 August 2018. She also claims "[c]ompensation and relief for moral injury" as the Tribunal deems appropriate.

In her rejoinder, the complainant seeks the following relief: moral damages "due to all evidence of delay and bias [...] particularly the unfounded accusations of releasing information and breaching confidentiality policy", moral damages "due to the Organization's breach of the Performance Management Confidentiality Policy and unlawful release" of her performance report, material and moral damages for the abolition of her position as Benefits and Entitlements Assistant, material and moral damages for the "undue delay of the JAB process" and the "undue delay of the payment of overtime". Moreover, she asks for the release of "all information pertaining to the precedent cases including the decisions on which the granting and receipt of [SPAs] and promotions were based upon as well as all historic records of the positions encumbered". She further requests the Tribunal to instruct the IAEA to nominate an independent classification specialist to conduct a desk audit and a classification review of the duties that she performed during her development reassignment. Lastly, she claims costs as deemed appropriate by the Tribunal and seeks the payment of interest.

The IAEA asks the Tribunal to reject the complaint as devoid of merit and submits that some of the complainant's claims are irreceivable.

CONSIDERATIONS

1. The following discussion proceeds against the background already set out in the facts described above.

The complainant submits, in her complaint, a number of arguments, some of which are reiterated in her rejoinder. The rejoinder also contains further pleas, requests and claims.

2. By a first series of arguments, the complainant submits that:

(a) she encumbered the post of Human Resources Planning Assistant (HRPA), at the G6 level, position number 167622, from 1 June 2017 to 31 August 2018 by operation of a Development Reassignment (DR); the job description of this post was identical to the one of the post of HRPA position number 018731 which had been reclassified from the G6 level to the G7 level;

(b) due to the original identical job description of the positions numbers 167622 and 018731, and in compliance with the principle of equal treatment, she should have been granted a special post allowance (SPA) for her duties at the G7 level performed in position number 167622;

(c) for the granting of the SPA there was no need for a classification review of position number 167622; there is an "established practice" of granting a SPA to incumbents of positions holding identical job descriptions as positions already successfully subject to classification review; and

(d) there was no desk audit and classification review of the duties performed by the complainant; the IAEA should have initiated a classification review of the post she encumbered.

In her rejoinder, the complainant also asks the Tribunal to order the IAEA to carry out a desk audit and a classification review of the duties that she performed during her development reassignment.

3. In order to deal with these arguments and requests, it is appropriate to quote the relevant rules. Administrative Manual, Part II, Section 3 (AM.II/3) in the relevant part read:

– Paragraph 39(a):

"The job description may be selected from generic job descriptions available on the electronic HR platform. Generic job descriptions characterize a whole group, family or class of jobs carried out by more than one staff member;

they are already classified and require no further approval in respect of their classification or content."

– Paragraphs 44 to 47(a), "Changes to a job description":

"44. Changes to a job description should reflect significant and lasting changes in responsibilities, in accordance with programmatic and operational requirements, and be consistent with an efficient distribution of functions within the relevant Division and Department. Changes to a job description do not necessarily warrant a change in grade level.

45. Either the supervisor or the staff member may initiate a review of the job description, including for the purpose of ensuring that the job description is appropriately classified. Such a review should normally be as a result of changes to a Major Programme in the context of the Programme and Budget review process. A job description may also be reviewed in connection with restructuring or any other exceptional circumstance.

46. Where there is a proposal to change the job description of a particular job and there are other staff performing similar roles in the Division/Department, the supervisor must consult with [the Division of Human Resources] MTHR as to the rationale for amending that particular job description.

47. Proposed changes to a job description will be reviewed as follows:

(a) At the request of the staff member or on the initiative of the supervisor, the supervisor shall enter the proposed changes into the electronic [Human Resources] HR platform for clearance by the Division Director prior to consideration by MTHR. The proposal shall include a brief rationale explaining how the proposed changes are linked to changes in the programmatic and operational requirements. If the staff member has requested the supervisor to take these steps and the supervisor does not do so, the staff member may request in writing from DIR-MTHR a review of the job description."

4. The Tribunal notes that there is some inconsistency in the arguments submitted by the complainant. On the one hand, she contends that, in order to grant her a SPA, there was no need for a classification review of the post she encumbered by way of a development reassignment. On the other hand, she complains that the IAEA failed to initiate a proper classification review. The argument that the IAEA failed to initiate a proper classification review is unfounded. Firstly, she never requested a classification review: she only requested to be awarded a SPA in her 31 August 2018 claim, and in her 19 October 2018 request for review; even in her internal appeal, she

insisted that she was only claiming the SPA and not a reclassification of the post. As a result, she cannot complain, for the first time before the Tribunal, that a classification review was not initiated by the IAEA on its own motion. Secondly, and in any event, according to the relevant rules quoted above, the supervisor of the staff member is not obliged to initiate a review of the job description, and such review is subject to specific or exceptional circumstances pursuant to paragraph 45 of AM.II/3. The complainant has not established the existence of such specific or exceptional circumstances justifying a reclassification exercise with regard to the post.

As to the argument that in order to grant her a SPA there was no need to reclassify the post, due to an established practice, the Tribunal will not address the issue of whether this practice actually existed. Although the complainant does not provide sufficient evidence of this practice, the IAEA does not contest specifically its existence, nor provides evidence. In any event, even if it were proven that such a practice existed, it would not be relevant in the present case. The practice would indeed be based on the assumption that the IAEA grants the SPA to incumbents of posts performing the same duties performed by incumbents of posts which have successfully undergone a classification review. This is not the case in the present complaint. It is true that the post at the G6 level, position number 167622, encumbered by the complainant from 1 June 2017 to 31 August 2018, had initially the same job description as the post of HRPA position number 018731. Nonetheless, position number 018731 was reclassified from the G6 level to the G7 level following a desk audit based on the specific duties performed by the incumbent of position number 018731. Further to such reclassification, position number 018731 no longer shared with position number 167622 a "generic job description" characterizing, according to paragraph 39 of AM.II/3, a whole group, family or class of jobs carried out by more than one staff member. The complainant has not established that her duties were equivalent, in the relevant period, to those of the incumbent of position number 018731. She failed to demonstrate such equivalence in her initial request of 31 August 2018 and in her request for review of 19 October 2018. Even though in her request for review of 19 October 2018 she described her duties based on the assumption that they

corresponded to the G7 level, she failed to demonstrate that they matched with the duties discharged by the incumbent of position number 018731. Therefore, her performance of duties at the G7 level (as alleged in her request for review) should at most have entitled her to request a classification review of position number 167622, a request that she never lodged internally. In any event, she could not rely on the reclassification of position number 018731 in order to get a SPA. Additionally, in the 15 November 2018 decision, the IAEA properly and thoroughly examined the duties performed by the complainant and concluded that they were neither equivalent to those of the incumbent of position number 018731, nor, in any way, aligned with the G7 level. The Tribunal does not accept the complainant's contention that the IAEA unlawfully dismissed her claim without initiating a classification review and without carrying out a desk audit. As already stated above, the complainant did not specifically request a classification review, and the IAEA was not obliged to initiate a classification review on its own motion.

As the Tribunal recalled in Judgment 4685, consideration 4, quoting Judgment 4186, consideration 6:

> "It is well established in the Tribunal's case law that the grounds for reviewing the classification of a post are limited and ordinarily a classification decision would only be set aside if it was taken without authority, was made in breach of the rules of form or procedure, was based on an error of fact or law, overlooked an essential fact, was tainted with abuse of authority or if a truly mistaken conclusion was drawn from the facts (see, for example, Judgments 1647, consideration 7, and 1067, consideration 2). Indeed, the classification of posts involves the exercise of value judgements as to the nature and extent of the duties and responsibilities of the posts, and it is not the Tribunal's role to undertake this process of evaluation (see, for example, Judgment 3294, consideration 8). The grading of posts is a matter within the discretion of the executive head of an international organisation (or of the person acting on his behalf) (see, for example, Judgment 3082, consideration 20)."

This case law is applicable not only to the judicial review of a decision on the classification or reclassification of a post, but also, as in the present case, to the decision not to start a reclassification process.

Having examined the evidence in the file, the Tribunal is satisfied that the 15 November 2018 decision, the Joint Appeals Board (JAB) report, and the impugned decision, correctly established that the two job descriptions were "substantially different". The JAB, inter alia, noted the statement of the complainant's supervisor, who confirmed that the complainant's duties were and remained at the G6 level.

Since the situation of the complainant differs from the one of the incumbent of position number 018731, her contention that the principle of equal treatment was breached is unsubstantiated, as well as her contention that she was discriminated against. Her claim to be granted a SPA at the G7 level is, thus, rejected.

5. For the reasons above, the complainant's request that the Tribunal order the IAEA to carry out a desk audit and a classification review is unsubstantiated. The Tribunal cannot replace the IAEA's lawfully adopted discretionary decision. Moreover, the Tribunal will not order the IAEA to take an action that the complainant never requested internally, failing to follow the proper procedure set out in paragraphs 45 and 47 of AM.II/3.

In light of the foregoing, the first group of pleas and requests is unfounded.

6. By a second series of arguments, the complainant contends that the impugned decision was based on a flawed process and on errors of law stemming from the JAB report; namely, she submits that:

(a) the JAB report was not sent to the complainant for her comments prior to the adoption of the impugned decision;

(b) the JAB report did not address the complainant's arguments based on the "established practice" she mentioned and relied on;

(c) the JAB report did not include correct information about the complainant's employment history, periods and titles;

(d) the information provided by the IAEA to the JAB regarding the job description of position number 018731 was "purposely misleading";

(e) the impugned decision is tainted by abuse of authority; and

(f) the accusation by the IAEA that the complainant breached confidentiality was an attempt to discourage her from pursuing remedies.

7. The complainant's contention that the JAB report was not sent for her comments prior to the adoption of the impugned decision is unfounded, as no internal rules establish that a staff member be provided with the JAB report prior to the adoption of the decision on the internal appeal. On the contrary, the internal rules establish that the JAB submits its report to the Director General and that the complainant be provided with a copy of the said report together with the final decision. Staff Rule 12.01.1(D)(9) and (10) read: "(9) [...] The Board shall submit its report to the Director General [...] (10) The final decision in the matter, together with a copy of the Board's report, shall normally be forwarded by the Director General to the staff member within 30 days after the Board has taken its decision. The Director General's decision and a copy of the Board's report shall also be transmitted to the Staff Council."

The complainant's plea that the JAB did not address her argument based on the "established practice" is unfounded. On the one hand, the JAB did address this plea (in paragraphs 24 to 27 of its report), therefore the complainant might only plead that the answer to her plea was unsatisfactory, not that there was no answer at all. On the other hand, the plea is unfounded. The Tribunal has examined and rejected it in consideration 4 above.

The complainant's contention that the JAB report did not include correct information about her employment history, periods and titles is generic and does not establish a legal flaw in the final decision.

The complainant further submits that the information provided to the JAB regarding the job description of position number 018731 was "purposely misleading", as the said job description was changed and approved in October 2018, after the complainant had already requested to be awarded the SPA. The Tribunal notes that the complainant was already aware, during the internal appeal proceedings, that the job description of position number 018731 had been approved in October

2018, after she had lodged, in August 2018, her initial request to be awarded the SPA. Indeed, during the internal appeal proceedings she sent two emails, on 1 July 2019 and on 7 August 2019, evidencing this fact. She had therefore the opportunity to comment on the job description of position number 018731 as approved in October 2018, and to provide evidence that she had performed the same duties as those performed by the incumbent of position number 018731, but she did not. In addition, the circumstance that the job description of position number 018731 was approved in October 2018 does not corroborate any allegation of abuse of power, of discrimination against the complainant, or of providing misleading information to the JAB. Indeed, the reclassification decision regarding position number 018731 was the result of a reclassification exercise that followed its proper course, in due time, and the retroactivity of the reclassification was consistent with the applicable rules (paragraph 53 of AM.II/3).

In light of the above considerations, there is no evidence that supports the complainant's further contention that the impugned decision is tainted by abuse of authority.

The complainant's last argument, that the accusation of breach of confidentiality by the IAEA was an attempt to discourage her from pursuing remedies, has not been proven by the complainant.

8. In her rejoinder, the complainant submits further pleas, requests and claims.

Firstly, the complainant argues that the Director of MTHR exhibited a conflict of interest, in the context of "adjudicating the duties" performed by the complainant. This plea is unfounded, because from the date of the IAEA's receipt of the complainant's appeal against the Director of MTHR's administrative decision, namely by way of the Interoffice Memorandum dated 19 October 2018, the Director of MTHR was recused from the matter in order to avoid any conflict of interest, suspicion, or appearance thereof. On 22 October 2018, the Deputy Director General, Head of the Department of Management (DDG-MT), was delegated the authority to act as Director of MTHR, with respect to the complainant's internal appeal. Therefore, the

Director was not involved in any decision-making process with regard to the complainant's appeal. The complainant submits that as a staff member in MTHR, she was without recourse to independent and unbiased review due to having to submit her case through her own chain of command. The internal rules, namely paragraph 2 of AM.II/2, relevantly stated that "[t]he authority to apply the Staff Regulations and Staff Rules (including the Special Staff Rules for Short-term Staff) in individual cases and to take the related decisions is delegated to the Director of [MTHR] unless such authority is reserved to the Director General or other officials as stated below". Therefore, the complainant properly submitted her request for a SPA to the Director of MTHR and, later, in order to avoid conflict of interest or even the possibility of it, the Director of MTHR was replaced by the Deputy Director General.

9. Secondly, the complainant points to a number of procedural flaws, namely:

(i) the JAB report refers to the desk audit's report for the position of HR Planning Assistant and she was not provided with a copy;

(ii) documents provided to the JAB by the IAEA were not shared with the complainant, namely "documents that were provided to the JAB by the Office of the Deputy Director General for Management, as per the email statement dated 20 February 2019, as regarded the recusal of MTHR from the complainant's case" and "documents that the then Transformation Advisor [...] had provided the JAB after her interview with the JAB held on 4 April 2019";

(iii) breach of Staff Rule 12.01.10, as the Staff Council did not receive a copy of the then Acting Director General's decision nor the JAB report;

(iv) breach of Staff Rule 12.01.1(D)(9), as the JAB did not submit its report to the Director General within three months.

These pleas are unfounded.

In particular, as to the alleged non-disclosure of the desk audit's report concerning position number 018731, the Tribunal holds that the IAEA lawfully withheld it on grounds of confidentiality. As to the

alleged non-disclosure of the documents mentioned under (ii) above, the complainant's plea fails because the evidence is insufficient to conclude that there were other documents. In conclusion, the Tribunal is satisfied that the complainant received all the relevant documents in order to articulate her defense.

As to the plea summed up under (iii), Staff Rule 12.01.10 states that a copy of the Director General's decision and of the JAB report shall also be transmitted to the Staff Council. However, the failure to transmit a copy of the decision and of the report to the Staff Council does not affect the lawfulness of the decision itself.

As to the plea summed up under (iv), Staff Rule 12.01.1(D)(9) was not breached as pursuant to it, the Board may, with the agreement of the Director General, extend the established time limit in exceptional circumstances, which happened in the present case.

10. Thirdly, in her rejoinder the complainant requests access to all information pertaining to previous reclassification decisions on which she relies in order to demonstrate the existence of an established practice. This request, in addition to being an impermissible fishing expedition, is irrelevant to the present judgment. The IAEA does not deny that the relevant staff members encumbering the posts of Benefits and Entitlements Assistants, as well as those encumbering the posts of Recruitment Assistants, received a retroactive SPA. Therefore, there is no need for the disclosure of documents in order to prove this fact. Rather, the Tribunal has already stated in consideration 4 above that these previous reclassification decisions are not relevant to the present case. Therefore, the request for disclosure of documents is rejected.

11. Fourthly, the complainant requests the award of damages for moral injury due to the IAEA's breach of the Performance Management Confidentiality Policy and the unlawful release of her Performance Development Review (PDR), and of the PDR of the incumbent of position number 018731 without their written consent. The complainant has no cause of action regarding the request for damages for the disclosure of the PDR of the incumbent of position number 018731.

The only person entitled to make such a request was the incumbent of this position, who is not a party to this case. To the extent the claim is also about the disclosure of the complainant's PDR, the Tribunal notes that the disclosure of documents by the IAEA in a case before the Tribunal or the JAB does not require the prior approval of the complainant. Indeed, paragraph 71 of Annex IV to AM.II/3, provided that "[i]n all other circumstances, PDR reports shall not be released without the written consent of the staff member concerned". However, this rule is subject to the exception in AM.II/8 ("Processing of Personnel Information"), which stated, under paragraph 16, that, "[w]hen required for the performance of their official duties, persons outside MTHR will be given access to a staff member's Personnel File. In particular, this shall include [...] (g) [the] Joint Appeals Board, [and the] Joint Disciplinary Board – parts relevant to the purposes of the boards". The JAB report marked the complainant's PDR as "confidential" and did not reveal or disclose any personnel confidential information, other than summarizing the conclusion of its verification. Therefore, this claim is rejected.

12. Fifthly, the complainant asks for the "[a]ward of material and moral damages for the unlawful abolishment of [her] position [number] 003740". This issue is a new claim, not raised in the internal proceedings leading to the impugned decision, and, thus, is irreceivable for failure to exhaust internal means of redress (see Article VII, paragraph 1, of the Statute of the Tribunal).

13. Sixthly, the complainant asks for an "[a]ward of material and moral damages for the undue delay of the JAB process". This claim is irreceivable since it is contained only in the complainant's rejoinder (see, for example, Judgment 4396, consideration 7), whilst the complainant could, and should, have submitted it in her complaint. In any event, the claim is also unfounded, as there was no egregious delay in the internal appeal proceedings.

14. Lastly, the complainant claims the award of material and moral damages for "the undue delay of the payment of overtime". This issue is a new claim, not raised in the internal proceedings leading to

the impugned decision, and, thus, is irreceivable for failure to exhaust internal means of redress (see again Article VII, paragraph 1, of the Statute of the Tribunal).

15. As the complainant's claims are irreceivable in part and unfounded in the remainder, her ancillary claims to be awarded costs and interest are unfounded as well and are thus rejected.

16. In conclusion, the complaint should 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 Rosanna De Nictolis, 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

ROSANNA DE NICTOLIS

MIRKA DREGER