

The Administrative Tribunal,

Considering the first complaint filed by Mr R. S. against the International Atomic Energy Agency (IAEA) on 31 July 2006 and corrected on 6 September, the IAEA's reply of 19 December 2006, the complainant's rejoinder of 12 February 2007 and the Agency's surrejoinder of 23 April 2007;

Considering the second complaint filed by Mr R. S. against the IAEA on 19 August 2006 and corrected on 18 September 2006, the IAEA's reply of 4 January 2007, the complainant's rejoinder of 12 February and the Agency's surrejoinder of 23 April 2007;

Considering the third complaint filed by Mr R. S. against the IAEA on 18 February 2007, the IAEA's reply of 29 May, the complainant's rejoinder of 23 June and the Agency's surrejoinder of 22 October 2007;

Considering the fourth complaint filed by Mr R. S. against the IAEA on 15 September 2007, the IAEA's reply of 7 January 2008, the complainant's rejoinder of 14 February and the Agency's surrejoinder of 11 April 2008;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. The complainant is an Indian national born on 9 June 1965. In March 2003 the IAEA issued vacancy notices for two software engineer positions in the Division of Information Technology of the Department of Management; one was a fixed-term position of three years and the other a fixed-term temporary assistance position of one year. The complainant applied for both vacancies. In March 2004 he was offered a one-year fixed-term temporary assistance contract and he joined the Agency on 7 July 2004. His appointment was subsequently extended for a year, up to 6 July 2006. On 18 January 2006 he was informed orally by Mr B., his second-level supervisor, that his appointment would not be extended upon expiry.

On 30 January 2006 the complainant wrote to the Director of the Division of Personnel alleging harassment on the part of Mr B. By a memorandum of 14 February he requested that the Director General review the decision not to extend his contract on the grounds that he had been given no reasons for it. On 6 March the complainant informed the Director General in writing that he had decided to leave the Agency because he was being harassed by Mr B. and because of the hostile working environment and mobbing in his section. He claimed compensation for moral injury. On 8 March he wrote again to the Director General seeking leave to appeal directly to the Tribunal. The following day the Acting Director of the Division of Personnel informed the complainant that his allegation of harassment was being dealt with in accordance with Appendix G to section 1 of part II of the IAEA's Administrative Manual, which sets out the procedures to be followed in the event of reported misconduct, and that he would be informed of the outcome of the procedure in due course. On 10 March the Acting Director notified the complainant that his resignation was accepted and would become effective on 15 March 2006.

On 23 March the Director General replied to the complainant's memorandum of 14 February stating that, although his resignation might have rendered the point moot, he was satisfied that there was no error in the exercise of the discretion to allow his contract to expire without granting him a further extension. He rejected the complainant's request to appeal directly to the Tribunal and indicated that it was premature to take a decision on the harassment claim as it was being dealt with in accordance with Appendix G. On 4 May 2006 the complainant wrote to the Director of the Division of Personnel enquiring about the "status" of his Performance Review Report for 2005. The Director informed him on 26 May that his performance report was incomplete. He added that a non-finalised report is normally deleted if the staff member concerned leaves the Agency, but that in this particular case he wished to seek his express consent before deleting it.

Meanwhile, by a letter of 21 March 2006, received by the Joint Appeals Board on 24 March, the complainant filed

a first internal appeal against the decision not to extend his contract. He alleged harassment by Mr B. and constructive dismissal. He also claimed that he was a victim of mobbing. Subsequently, he extended his allegation of harassment to Mr D., his first-level supervisor, and Mr R., another colleague.

On 24 June 2006 the complainant informed the Division of Personnel that he had completed his section of the Performance Review Report for 2005 and that he could not be held responsible for the fact that his supervisors had not completed and signed it. He asked that his supervisors sign the draft and that a final version be forwarded to him. The Acting Director of that Division wrote to the complainant on 17 July 2006 indicating that the report still had to be finalised, but that since he had separated from service this was not possible. By an e-mail of 18 July the complainant asked the Director General to compensate him for the moral injury suffered due to the Administration's failure to act in a timely manner.

On 31 July 2006, having received no decision on his first internal appeal the complainant filed a first complaint with the Tribunal. He sought material and moral damages for harassment and mobbing as well as for the Agency's failure to respond in a timely manner to his claim of harassment and to maintain a safe working environment.

On 18 August the Deputy Director General, Department of Management, replied to the complainant's e-mail of 18 July, indicating that when a staff member leaves the Agency the performance review process ends and the pending Performance Review Report remains a draft. He observed that the process had not even reached mid-stage but that, given the particular circumstances of the case, he had asked the Director of the Division of Personnel to depart from the established procedure and to forward him the draft report so that it could be finalised manually. Since this was not the normal procedure, he sought the complainant's permission to access this confidential document and to send him the report, but the latter did not reply.

The complainant filed a second complaint with the Tribunal on 19 August 2006, again contending that no decision had been taken on his first internal appeal. He also submitted that his separation from service was due to harassment and amounted to constructive dismissal.

On 20 August he filed a second appeal with the Joint Appeals Board against the non-completion of his Performance Review Report for 2005. He alleged that the performance review had been brought to an end because Mr B. had "abus[ed] his authority and disabled [his] access to the IAEA account", which had prevented him from adding his comments to his supervisors' draft evaluation.

On 16 October 2006 the Chairman of the Joint Appeals Board informed the complainant that the two appeals he had filed, being inextricably linked, would be considered together. The Board decided to await the completion of the review process provided for in Appendix G concerning the allegations of harassment and mobbing and the issuance of an administrative decision in that respect so as to have a comprehensive view of the situation.

By letters of 10 November 2006 the Division of Personnel informed the complainant that the Deputy Director General, Department of Management, had decided, in accordance with paragraph 4(D) of Appendix G, to close the case concerning alleged harassment and that consequently there was no basis upon which he should be compensated. By three e-mails of 15 and 17 November and 10 December the complainant requested that the Director General review the decisions of 10 November. The latter rejected his request on 19 December. The complainant subsequently sought leave to appeal directly to the Tribunal, but his application was turned down on 2 January 2007. On 14 January he lodged a third appeal with the Board. On 18 February he filed his third complaint with the Tribunal, impugning the Director General's decision of 19 December 2006.

In its report of 25 May 2007 the Joint Appeals Board indicated that it had decided to consider jointly the three appeals filed by the complainant on 21 March 2006, 20 August 2006 and 14 January 2007. Noting that the Division of Personnel had reviewed the allegations of harassment and mobbing in accordance with Appendix G, it held that it had no reason to disagree with the conclusions drawn by the Director of the Division of Personnel and endorsed by the Deputy Director General, Department of Management, that no harassment or mobbing had occurred. The Board therefore concluded that the circumstances surrounding the complainant's separation from service could not be considered as amounting to constructive dismissal. It also indicated that it had found no error in the exercise of discretion to allow the complainant's temporary assistance contract to expire. Concerning the non-completion of his Performance Review Report for 2005, it noted that the process had not been completed because he had resigned from the Agency and not because he had been discriminated against. It also observed that the Deputy Director General, Department of Management, had offered to depart from the normal procedure with a view to completing

the performance report manually; there were consequently no reasons to award the complainant moral damages. The Board recommended that the decision of 19 December 2006 – according to which there was no reason to reverse the decisions to close the cases of alleged harassment – be upheld, as well as the decision communicated to the complainant in the letter of 18 August 2006 concerning his Performance Review Report for 2005.

By a letter of 29 June 2007 the Director General informed the complainant that he had decided to endorse the Board's recommendations. The complainant filed his fourth complaint with the Tribunal on 15 September 2007, impugning the decision of 29 June.

B. The complainant alleges that his second-level supervisor, Mr B., harassed him, intimidated him and coerced him to leave. He contends that "as part of ongoing harassment", Mr B. informed him orally on 18 January 2006 that his contract would not be extended upon expiry. He also submits that Mr B. "degrad[ed]" him, undermined his career, isolated him, spread false rumours, did not acknowledge his achievements, put him under "excessive supervision" and excluded him from important project management training. In addition, he accuses him of having "abused his authority and misused the performance review system to ruin [his] career with unsubstantiated accusations and deliberate misrepresentation of the facts" and of having "disabled [his] access to [his] IAEA account" while he was still a staff member. He points out that he was removed from his "role as project manager" after having alleged harassment against Mr B. He further alleges harassment and mobbing on the part of Mr D. and Mr R., who "ganged up" with Mr B. following the latter's announcement that the complainant's contract would not be extended upon expiry. For example, they allowed an external contractor to access his computer while he was absent. He adds that his health has deteriorated as a result of the extreme stress caused by mobbing and harassment.

The complainant objects to the statement made by Mr B. during the review conducted under Appendix G, that he "had privileged access to important and critical IAEA [information technology] systems and the skills and knowledge to make significant damage to the Agency's databases and computer systems". That statement is to be found in the letter of 30 October 2006 from the Director of the Division of Personnel to the Deputy Director General, Department of Management. The complainant points out that this letter was forwarded to him on 14 February 2007 after the filing of his rejoinders in his first and second complaints. He submits that his supervisor's derogatory remark, which was aimed at "destroying [his] career", has caused him "heavy moral damage and career damage". He further argues that the Administration showed bad faith in accepting the comments made by Mr B. without giving him an opportunity to defend himself.

Concerning the decision not to extend his appointment the complainant contends that Mr B. gave him no reasons for his decision, which is unlawful. He submits that only the appointing authority, the Director General in the present case, may decide whether to extend a contract. Thus, Mr B. was not competent to take such decision. He adds that the latter took his decision on the basis of "corrupted elements from the Administration". In his view, the Director General misrepresented the nature of his contract by stating, in the impugned decision of 29 June 2007, that it was a "temporary assistance contract" and omitting to say that it was a fixed-term contract. He stresses that his letter of appointment and letter of extension did not contain the term "temporary assistance" but only "fixed term appointment".

With regard to the recruitment process leading up to his appointment he indicates that he was interviewed and selected for the three-year fixed-term position of software engineer and that at the last moment the position was given to another candidate; he was offered the one-year temporary assistance position. In his view, the recruitment process was "corrupted" and tainted with irregularities. He submits that he agreed to join the Agency under a fixed-term contract and not under a temporary assistance contract.

In addition, he alleges various procedural irregularities. He contends that the internal appeal proceedings were conducted in a "fraudulent and deceptive manner" and that the Agency blatantly "abuse[d] the processes" in order to delay the outcome of the procedure. In support of his contentions he points out that the Administration took more than a month to acknowledge receipt of his allegations of harassment and that it has failed to provide him with a copy of the "explanations" given by Mr B. concerning these allegations. He also argues that the Agency tried to "cover-up" the case by refusing to order an investigation and deciding not to refer the matter to the Joint Disciplinary Board. He consequently accuses the IAEA of endeavouring to obstruct justice. He further contests the Joint Appeals Board's findings alleging that its report was likewise a "cover-up exercise".

In his first complaint the complainant claims moral and material damages in the amount of 200,000 euros and a further 10,000 euros in costs. In his second complaint he asks the Tribunal to order his reinstatement in a similar

position “without loss of service benefits” and in a safe working environment, for three years and four months, or alternatively the payment of a sum equivalent to the “salary and allowances for 3 years and 4 months with all the benefits”. He also claims moral damages in the amount of 200,000 euros for constructive dismissal and the non-extension of his contract. He further seeks 10,000 euros in costs. In his third complaint he seeks 100,000 euros in compensation for the moral damages suffered as a result of his second-level supervisor’s statement and 5,000 euros in costs. In his fourth complaint he requests that his case be heard by a “five-member Judicial Bench of the Tribunal” and that he be awarded 850,000 euros in material and moral damages and 25,000 euros in costs. He also asks to be reinstated in a P-3 position located in a safe working environment, “without loss of service benefits to enable [him] to complete 5 years of qualifying service for pension” or, alternatively, compensation in an amount equivalent to “salary and allowances for 3 years and 4 months” and the Agency’s contribution to the pension fund for five years of service. He asks the Tribunal to order that an “independent investigation” be carried out in accordance with Article 11 of the Tribunal’s Rules in order to investigate recruitment irregularities and corruption in the Agency. In addition, he requests that the Tribunal publish his submissions on its database “without omitting any of the facts, arguments, considerations and conclusions” and that it consider together the facts and arguments of his four complaints.

C. In its reply the IAEA contests the receivability of the first, second and third complaints for failure to exhaust all internal means of redress. It points out first that at the time of filing of the first complaint the allegations of harassment were being reviewed in accordance with the procedures set out in Appendix G, as well as by the Joint Appeals Panel, since the complainant had filed an appeal without awaiting the outcome of these procedures. He had therefore not yet received a final administrative decision to challenge. Secondly, the complainant cannot invoke Article VII(3) of the Statute of the Tribunal, because the Agency diligently applied its prescribed processes; it argues that it was not possible to respond to the complainant’s claims within the time limit of sixty days from notification. Indeed, the complainant submitted his allegation of harassment against Mr B. on 30 January 2006, and the latter had in turn to provide his remarks thereon as required by Appendix G. Mr B. did so only on 24 March 2006. It further cites the Tribunal’s case law according to which a complainant may invoke Article VII(3) only where he has done his utmost, to no avail, to accelerate the internal procedure and where the circumstances show that the appeal body was not able to reach a decision within a reasonable time. It argues that the complainant’s relentless correspondence and queries demonstrated anything but an effort to accelerate the procedure. Moreover, he expanded his allegation of harassment to Mr D. and Mr R., when the Agency was four months into the review process, which added to the time needed to reach a conclusion. The defendant further contends that, to the extent that it is now presented not as a separate matter but as evidence in support of his harassment claim, the issue of the non-extension of the complainant’s contract is irreceivable because he has failed to exhaust internal remedies. In its reply to the second complaint the IAEA indicates that the complainant’s claim that his resignation amounted to “constructive dismissal” is based on the same underlying cause of alleged harm as in his first complaint, i.e. harassment, and therefore shows the same procedural and substantive flaws.

With regard to the receivability of the third complaint the Agency notes that, according to the complaint form, the complainant impugns the decision of 19 December 2006 in which the Director General confirmed the decision to close the cases of alleged harassment. In its view, this is not a final administrative decision. Indeed, in the letter of 19 December the Director General merely informed the complainant of the outcome of the review process as required under Staff Rule 12.01.1(D). In fact the complainant is not challenging the decision of 19 December 2006 but a statement made by Mr B. Having never sought, let alone received, a final decision concerning that statement, the complainant has not exhausted internal remedies. The defendant also notes that the alleged injury occurred well after the complainant had separated from service.

In its reply to the fourth complaint the IAEA maintains that the complainant’s claims concerning the statement made by Mr B., the alleged “obstruction of justice” and the “cover-up by the Agency’s Administration” are new claims and as such are irreceivable for failure to exhaust internal remedies.

With regard to the alleged procedural irregularities in dealing with the harassment complaint, the IAEA indicates that the complainant’s claims were reviewed in conformity with the procedures set out in Appendix G, and it draws attention to the Joint Appeals Board’s finding that the investigations on harassment had been properly conducted. The defendant adds that the complainant’s allegations concerning corruption, conspiracy and collusion must fail since the review procedure set out in Appendix G is not a disciplinary procedure. It denies any wrongdoing which would justify an award of damages to the complainant.

The Agency contends that the complainant has produced no evidence showing that he has suffered any harm

because of Mr B.'s statement concerning his access to the Agency's information technology systems. When the complainant's access to his computer was disabled he no longer needed it as he was on sick leave and had already tendered his resignation. It adds that Mr B. had a duty to protect the Agency's information technology systems from any harm and rejects the complainant's allegation that the latter's statement was derogatory or that it aimed at destroying his career. It also submits that, since the complainant was not harassed, the Agency cannot be held responsible for the consequences of his decision to resign.

As for the non-extension of the complainant's contract, the IAEA points out that that matter is part of the complainant's harassment claim. It was treated as such by the Agency and was therefore considered during the review conducted under Appendix G. In its view, the Tribunal should consider that issue only with regard to alleged procedural irregularities. The Agency draws attention to the fact that the Joint Appeals Board found no flaw in the manner in which the complainant's contract was terminated. The defendant argues that the complainant mistakenly considered that he held a fixed-term contract. It provides a copy of the complainant's letter of appointment and letter of extension, both signed by him, and bearing the initials "TA" for "temporary assistance". It adds that the Division of Personnel informed the complainant, by a letter of 22 March 2004, that he was being offered a "fixed-term temporary assistance appointment". Consequently, the Agency denies any "fraud" in this respect.

D. In his rejoinder concerning his fourth complaint the complainant contends that his four complaints are receivable. With regard to his first and second complaints he draws attention to the Tribunal's case law according to which a "complainant cannot sit back and do nothing when an appeal is lodged. He must pursue the appeal diligently"; thus he cannot be blamed for having made enquiries during the internal proceedings. He adds that since the Agency did not provide him with clear information on his case he had to make several enquiries. With respect to the receivability of his third complaint, he argues that the derogatory statement made by Mr B. and the actions taken to disallow access to his computer should be considered together. He also rejects the Agency's argument that Mr B.'s statement was made after he separated from service. He explains that his main claims as put forward in his fourth complaint, i.e. harassment, procedural irregularities, non-extension of his contract, constructive dismissal and matters relating to his Performance Review Report, all formed part of his internal appeal.

On the merits he reiterates his arguments as developed in his four complaints. According to him, the Administration knew about the "critical situation" that followed his filing of the harassment complaint, as he was placed on sick leave for two weeks in February 2006. He stresses that he did not resign but was "forced to leave". He asks the Tribunal to join his complaints as the facts of the four cases are substantially the same.

E. In its surrejoinders the IAEA notes that the complainant has introduced no new arguments in his rejoinders; consequently, it maintains its position on each of the complaints in full. It objects to the malevolent accusations that "mobbing gangs", which are allegedly supported by the Administration, exist in the Agency.

## CONSIDERATIONS

1. The complainant is a former staff member of the IAEA. He joined the Agency on 7 July 2004 on a one-year fixed-term contract as a software engineer at grade P-3 in the Division of Information Technology. There is a dispute as to whether the contract was a fixed-term temporary assistance contract or, simply, a fixed-term contract. His contract was extended on 12 May 2005 for a further year. On 18 January 2006 his second-level supervisor, Mr B., informed him orally that his contract would not be extended on its expiry. Thereafter, on 30 January 2006, the complainant wrote a memorandum to the Director of the Division of Personnel, complaining of harassment by Mr B. On 14 February he wrote to the Director General asking him to review the decision not to extend his contract. Not having received a reply to either memorandum, he wrote again to the Director of the Division of Personnel, on 3 March, requesting that he be relieved of his post by 15 March 2006 "because of the harassment by [Mr B.] and the extremely hostile working conditions".

2. There were two further letters from the complainant to the Director General on the above matters and, on 9 March 2006, he was informed that his allegation of harassment was being dealt with in accordance with the procedures in Appendix G to section 1 of part II of the IAEA's Administrative Manual. The following day, 10 March, he was notified that his resignation had been accepted and would become effective on 15 March 2006. Shortly afterwards, the Director General informed him, amongst other things, that although his "resignation may have rendered [the] point moot", he was satisfied that there was no error in allowing his contract to expire without a

further extension. In the same letter, the Director General indicated that he would not waive the jurisdiction of the Joint Appeals Board to allow the complainant to proceed directly to the Tribunal. In the meantime, on 21 March 2006, the complainant lodged an appeal with the Board with respect to the non-extension of his contract, harassment and mobbing, and constructive dismissal.

3. After lodging his appeal with the Joint Appeals Board, the complainant requested information from the Administration as to the progress of his claim of harassment and from the Board as to when a final decision would be taken on his appeal. In correspondence in May 2006 to the Division of Personnel, the complainant provided further information with respect to his claim of harassment, stating that Mr D. and Mr R. were also guilty of harassment, mobbing and retaliation. On 21 June he was informed that there would be further delay in the consideration of his harassment case as his allegations concerning Mr D. and Mr R. would have to be referred to them for comment. On 31 July 2006 he lodged his first complaint with the Tribunal, seeking material and moral damages for harassment and mobbing.

4. On 19 August 2006 the complainant lodged his second complaint with the Tribunal, seeking reinstatement or, in the alternative, payment of a sum equal to salary, allowances and other benefits for a period of three years and four months, as well as compensation for moral injury suffered by reason of constructive dismissal and non-extension of his contract. On 20 August 2006 the complainant lodged his second appeal with the Joint Appeals Board challenging a decision of 18 August 2006 that his Performance Review Report for 2005 would be completed only after he gave permission to the Administration to gain access to the document so that it could be sent to him for his further comments. In October 2006 the Chairman of the Board informed the complainant that, as the various issues were interlinked, consideration of his appeals would have to await completion of the Appendix G process.

5. The complainant was informed on 10 November 2006 that the Deputy Director General, Department of Management, had concluded that there had been no harassment or similar behaviour and had, therefore, decided to close the case. The complainant then requested the Director General to review that decision. That request was rejected and, on 14 January 2007, the complainant lodged his third internal appeal challenging that decision.

6. On 14 February the Secretary of the Joint Appeals Board forwarded to the complainant three memoranda from the Director of the Division of Personnel relating to his claims of harassment. In one of them, there was a statement of Mr B.'s reasons for disabling the complainant's computer account while he was on sick leave and before his resignation took effect. In the memorandum, Mr B. was quoted as saying that the complainant "had privileged access to important and critical IAEA [information technology] systems and the skills and knowledge to make significant damage to the Agency's databases and computer systems". Four days later, on 18 February 2007, the complainant lodged his third complaint with the Tribunal seeking moral damages with respect to that statement.

7. On 25 May 2007 the Joint Appeals Board recommended that the Director General maintain the three decisions that were the subject of the complainant's internal appeals. That recommendation was accepted and the complainant was so informed by a letter of 29 June 2007. That decision is the subject of the fourth complaint by which the complainant seeks, amongst other relief, material and moral damages, and reinstatement.

8. It is convenient at this point to note a number of preliminary matters. The first is that, as all complaints arise out of the same substratum of fact, it is appropriate that they be joined. The second is that, in all four of his complaints, the complainant applies for oral hearings. Those applications are refused. The basic facts are documented and are not in dispute. There is, thus, no need for oral hearings. In his fourth complaint, the complainant asks the Tribunal to investigate, under Article 11 of its Rules, "recruitment irregularities and corruption in the Agency". So far as is presently relevant, the Tribunal's jurisdiction is confined to the hearing of "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the [applicable] Staff Regulations". Insofar as the complainant refers to "recruitment irregularities and corruption", he does not allege the breach of any term of his appointment or of the staff regulations and rules affecting his rights. Accordingly, that claim for relief must be dismissed. So, too, the application in the fourth complaint for a hearing before a five-member bench of the Tribunal and for publication of the complainant's submissions in full must be dismissed. The complaint raises no issue warranting departure from the Tribunal's normal practice and procedure.

9. The first question that arises is the receivability of the first, second and third complaints. The relevant internal procedures had commenced but were not completed when the first and second complaints were filed. The complainant argues that the first complaint is receivable because the IAEA "did not deal with [his] official

complaint [...] with the care owed by an international organisation to its staff". In this regard, he points out that his complaint of harassment was not acknowledged until 9 March 2006 and that, although he had stated in his memorandum of 6 March 2006 that he was leaving the Agency because he was being harassed by Mr B., and that Mr D. and Mr R. "were ganging up with [...] Mr [B.] to drive [him] out of the section", the Division of Personnel indicated on 26 May that his allegation of harassment had been understood to relate only to Mr B. Further, he points out that on 28 May he clarified that his claim included Mr D. and Mr R. but the IAEA did not seek their comments until 27 July. A few days later, on 31 July 2006, the complainant lodged his first complaint with the Tribunal.

10. Article VII(1) of the Tribunal's Statute relevantly provides that a complaint is not receivable unless the complainant "has exhausted such other means of resisting [the impugned decision] as are open to him under the applicable Staff Regulations". However, the case law allows that "when a complainant has done all that is required of him to get a final decision, yet the proceedings appear unlikely to be concluded within a reasonable time, he may appeal directly to the Tribunal" (see Judgment 1344). In the present case, the official appeal concerning harassment was confined to Mr B. Subsequently, there was considerable correspondence from the complainant to the Administration raising various matters but it was not until 28 May 2006 that it clearly emerged that the appeal concerning harassment extended to Mr D. and Mr R. It should not have taken a further two months to seek the written response of these persons. However, when the complainant filed his first complaint on 31 July 2006, it did not appear unlikely that the Appendix G process would be concluded within a reasonable time. Accordingly, the first complaint is irreceivable. The subject of that complaint is replicated in and will be considered as part of the fourth complaint.

11. Similar considerations to those set out in relation to the first complaint apply to the second one. The complainant contends that the Joint Appeals Board was not constituted until 19 May 2006 and that, although he regularly requested information as to the progress of his appeal in July 2006, he received no response. The Board could have told the complainant at that time that his appeal would have to await the outcome of the Appendix G process. However, the subsequent information to that effect was undoubtedly correct. The issues raised by the complainant were inextricably linked and, that being so, it cannot be said that the delay was unreasonable. More to the point, it could not be said that, when the complainant filed his second complaint on 19 August 2006, it was unlikely that his internal appeal would be concluded within a reasonable time. Accordingly, it is also irreceivable but its subject matter is comprehended in and will be dealt with as part of the fourth complaint.

12. Different considerations apply to the third complaint. The complainant's argument made by reference to the same facts and considerations that underlie his arguments in relation to the first and second complaints is irrelevant. The complainant is challenging a statement quoted in a memorandum relating to his claim of harassment. As pointed out in Judgment 1221, "[a] staff member may challenge a text only if it amounts to a decision and affects him adversely". The statement in question was a statement of the reason for disabling the complainant's computer access and clearly does not amount to a decision. The third complaint is, thus, also irreceivable.

13. It is necessary to say something about constructive dismissal. "Constructive dismissal" is a phrase used to signify that an organisation has breached the terms of a staff member's contract in such a way as to indicate that it will no longer be bound by that contract. A staff member may treat that as constituting constructive dismissal with all the legal consequences that flow from an unlawful termination of the contract, even if he/she has resigned. Harassment, which goes unchecked, is a breach of those fundamental principles requiring an organisation to treat its staff members with dignity, to observe the principle of equality and to provide a safe and secure workplace. It follows that the complainant's claim of constructive dismissal is dependent upon the outcome of his claim of harassment. Only if his claim of harassment is sustained, can his request to be relieved of his post be treated as constructive dismissal. And if it is not sustained, the complainant resigned from his post and suffered no damage as a result of non-extension of his contract and, thus, has no cause of action in relation to it.

14. Because it is an aspect of his harassment claim, it is necessary to note the complainant's argument that he was employed on a fixed-term contract and not on a fixed-term temporary assistance contract. It seems that the complainant was interviewed for two different posts, one a fixed-term post, the other a fixed-term temporary assistance post. However, the letter of 22 March 2004 offering him an appointment clearly stated that it was "a fixed-term temporary assistance appointment". Each of the letters of appointment and of extension signed by the complainant stated that an appointment might "be terminated prior to its expiry date if the necessary financial resources [were] not available". Moreover, each of those documents is clearly stamped "TA". Accordingly, it must be concluded that, contrary to the complainant's contentions, he was employed on a fixed-term temporary

assistance contract.

15. The complainant's claim of harassment was filed shortly after his being informed by Mr B. that his contract would not be extended. The complainant gives an account of Mr B.'s statements in relation to the non-extension of his contract, but not of his own. It is clear from Mr B.'s statements that the non-extension was not performance related. It is also clear that there were a number of questions from the complainant which are explicable on the basis that he considered that he had a fixed-term contract, rather than a fixed-term temporary assistance contract. Although a number of the statements attributed to Mr B. seem unduly brusque (for example, "[y]ou can go and talk to Personnel, you can talk to anybody you want, I am not giving you a reason, your contract is not getting extended"), it seems likely that his responses reflect the fact that he considered he was dealing with a fixed-term temporary assistance contract whereas the complainant was contending, as he continues to do, that he had a fixed-term contract.

16. Before turning to the specific incidents on which the complainant relies to establish harassment, it is to be noted that there was not at any stage any complaint with respect to his professional skills and ability. Indeed, it is clear that he received considerable praise for his work, both from his first-level supervisor, Mr D., and from customers and colleagues. However, he complains that, except for one occasion in June 2005, he received no appreciation from Mr B., his second-level supervisor. Additionally, he complains that on 13 August 2004 Mr B. reprimanded him for sending him a copy of a power point presentation and told him that such matters were to go through the Project Manager. Further, he states that, in his first six months, he was not allowed to lead projects as required by his job description. These are the only matters on which the complainant relies prior to 7 March 2005 when he was informed that his contract would be extended for one year, rather than for two years as he had expected. He then experienced chest pains and had to rest for three days. That same day the complainant informed Mr B. that he considered that his attitude constituted harassment. Shortly afterwards, Mr B. completed the complainant's Performance Review Report for 2004 and made certain comments with respect to the complainant's disagreement with two project managers, his lack of team approach, reluctance to attend a training course and the making of false allegations. The complainant contends that these comments were made by way of retaliation because of his earlier claim of harassment. The complainant's 2004 Performance Review Report was referred to the Divisional Review committee and Mr B. revised several of his remarks. However, he maintained his comment that there needed to be improvement in the complainant's behaviour so that he could work with his colleagues in a variety of roles. The complainant also states that during 2005 he was excluded from Project Management Training sponsorships and that, on one project, he was required to work below his level of skills.

17. The complainant's claims with respect to Mr D. and Mr R. relate to events that occurred after he filed his claim of harassment on 30 January 2006. On 3 February Mr D., the complainant's first-level supervisor, completed his section of the complainant's Performance Review Report. He praised the complainant's work but stated that "[t]o contribute better to the work of the Section, [he would] have to improve his listening skills and his ability to consider situations from more than one perspective, especially when his viewpoints differ from others". Mr D. added that the complainant was "also expected to more easily accept the fact that software engineers [...] may be assigned to projects involving any technology [...] at any stage of a project if required by the situation and not always as project managers". The complainant requested justification of these remarks and Mr D.'s e-mails in response were copied to Mr B. According to the complainant, this shows that "Mr. [D.] was ganging up with [Mr B.]" with deliberate intention to put some negative points in his Performance Review Report and that he "deliberately added these baseless comments about 'listening skills' only to give some legitimacy to the contract non-renewal decision by [Mr B.]". The complainant's Performance Review Report interview took place on 20 February 2006 and, shortly afterwards, he was sent home sick by the Medical Service. On 22 February the complainant proceeded on sick leave, it being said by his treating doctor that "sick leave of minimum 14 days [was] advised".

18. On 1 March 2006, while the complainant was on sick leave, an external contractor was allowed access to his computer to take some files. Two days later, on 3 March, Mr R. informed him that, in view of his sick leave, another person would take over the project on which he had been working but that, on his return, he would work with that person on it. He added that the nature of his work on the project would depend on when the complainant returned from sick leave. On the same day the complainant asked to be relieved of his post and, on 7 March, Mr B. disabled the complainant's access to his computer.

19. It was said in Judgment 2524 that, although harassment and mobbing do not require bad faith or prejudice or other malicious intent, "behaviour will not be characterised as harassment or mobbing if there is a reasonable



explanation for the conduct in question”. Thus, it was said in Judgment 2370 that conduct that “had a valid managerial purpose or was the result of honest mistake, or even mere inefficiency” would not constitute harassment. However and as pointed out in Judgment 2524, “an explanation which is *prima facie* reasonable may be rejected if there is evidence of ill will or prejudice or if the behaviour in question is disproportionate to the matter which is said to have prompted the course taken”.

20. The acts and events that are said to constitute harassment in the present case occurred in the normal course of the discharge of managerial and supervisory duties. Thus, for example, it was the responsibility of Mr D. and of Mr B. to complete the complainant’s Performance Review Reports. It was their duty to express their views with respect to the complainant’s work performance and conduct, particularly his ability to work as a member of a team and in accordance with established routines. In completing performance review reports, it is essential that supervisors be allowed “great freedom of expression” (see Judgment 599). That necessarily means that they must be able to express their subjective evaluations, particularly where there are questions as to the ability of a person to work within a team. Although the complainant ascribes various improper motives to Mr D. and Mr B., there is no evidence that they were not honestly expressing their opinions in the Performance Review Reports. Moreover, as pointed out in Judgment 2521, where it is necessary to establish some purpose or attitude that allows acts to be characterised as harassment, as is the case where, as here, there is a *prima facie* valid managerial reason, it is for the person alleging harassment to establish that purpose or attitude. The complainant has not done so in relation to the Performance Review Reports.

21. As already indicated, the complainant was and is mistaken as to the nature of his appointment. Once it is accepted that he was appointed on a fixed-term temporary assistance contract, it follows that Mr B.’s actions in informing him in March 2005 that his contract would be extended only for one year and, again, in January 2006, that it would not be extended on its expiry must be viewed as acts performed in the normal discharge of his, Mr B.’s duties. There is no evidence that those acts or decisions were prompted by any purpose or attitude that would enable them to be characterised as harassment.

22. Although the complainant has objected to Mr D.’s comment to the effect that he needed to improve his “listening skills”, he has not disputed that the system of work required software engineers to work in different capacities on different projects as the need arose, and not simply as project leaders. That being so, he has not established that either the failure to assign him as a project leader in his first six months or the requirement that he work below his capacity on one project was not the result of the work requirements within his section. So too, he has not established that Mr B. was not simply informing him of normal procedures in August 2004, shortly after he joined the Agency, with respect to the transmission of information. Nor has he provided any evidence that the decisions with respect to his attendance at training courses were not made for valid managerial reasons. Accordingly, none of these matters can be held to constitute harassment.

23. The claim of harassment on the part of Mr R. relates to the decision to replace the complainant as manager of a particular project because of his absence on sick leave. The notification by Mr R. with respect to this matter clearly indicated that there was some urgency with respect to the project and it is tolerably clear that files were removed from the complainant’s computer to enable the project to proceed. It is not possible to conclude, in these circumstances, that these acts constituted harassment.

24. Mr B. does seem to have acted with undue haste in disabling the complainant’s computer account. And there is nothing in the materials to suggest that he had any basis to fear that the complainant would harm the computer systems or databases. However, that occurred after the complainant asked to be relieved of his post and, on its own, does not constitute harassment.

25. The complainant’s claim of harassment on various heads must be rejected. It follows that his request to be relieved of his post cannot be regarded as constructive dismissal. That being so, he resigned from the Agency. His resignation brought his contract to an end on 15 March 2006. (See Judgment 150.) In consequence, the decision not to extend his contract was deprived of legal effect and the complainant suffered no loss in consequence of it. Accordingly, he has no cause of action in relation to that matter.

26. The remaining issue relates to the complainant’s Performance Review Report for 2005. As earlier indicated, the complainant became ill after his performance review interview on 20 February 2006. In consequence, he did not complete his section with respect to unresolved issues. On 9 March he informed the Administration that he was unable to complete this section as he no longer had access to his computer account and enquired as to the current

status of the report. He repeated this enquiry on 17 March and forwarded several other e-mails in May 2006, although they dealt with other matters. On 26 May he was told, amongst other things, that his Performance Review Report was not complete and that, because of the confidentiality associated with the early stages of the performance review process, the Division of Personnel could not gain access to the draft report. It was also explained that when a staff member left the Agency, it was normal practice to delete the draft report and his express permission was sought for this course. There was further correspondence in which it was explained that the report could not be completed.

27. On 18 July 2006 the complainant sought review of the decision not to complete his Performance Review Report for 2005. On 18 August he was informed that the Agency would permit a departure from normal procedures and would forward the form to him so that he could complete and sign his part of it and, thereafter, the remaining steps could be completed manually. He was also informed that “the Agency require[d his] prior explicit permission in order to access the confidential document and send it to [him]”. The complainant did not grant permission. Instead, on 20 August 2006 he lodged his second internal appeal. The Joint Appeals Board was of the view that, as the complainant had not granted permission, his second appeal was moot. There was no error in that conclusion and, accordingly, the complainant’s claim with respect to his Performance Review Report must be rejected.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 16 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet