109th Session **Judgment No. 2946**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M.J. C. against the International Atomic Energy Agency (IAEA) on 9 January 2009 and corrected on 11 March, the IAEA's reply of 18 June, the complainant's rejoinder of 14 September and the Agency's surrejoinder of 9 December 2009;

Considering the complainant's second complaint against the IAEA, also filed on 9 January 2009 and corrected on 11 March, the IAEA's reply of 22 June, the complainant's rejoinder of 14 September and the Agency's surrejoinder of 16 December 2009;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. By virtue of its Statute, which stipulates that permanent staff shall be kept to a minimum, the IAEA has a policy, commonly referred to as the "rotation policy", which results in staff members in the

Professional category normally leaving the Agency's employment after five years (normal tour of service) or, if extensions are granted, after seven years (maximum tour of service). Exceptions to that policy may be made, in which case staff members are retained in the Agency's employment until retirement age (long-term appointment).

The complainant, a British national born in 1961, is a former official of the IAEA. He joined the Agency under a special service agreement on 1 August 1995 at the Marine Environment Laboratory in Monaco. On 1 November 1996 he was offered a fixed-term appointment, subsequently extended a number of times, as a Senior Laboratory Technician at grade G-6 at the Agency's Seibersdorf Laboratories near Vienna (Austria). In August 2000 he requested the reclassification of his post. This request was granted and he was offered, with effect from 1 January 2002, a three-year fixed-term appointment at grade P-3 as an Analytical Chemist at the Seibersdorf Laboratories. That appointment was subsequently extended for a period of two years.

In August 2004 and in March 2005 the Director of the Agency's Laboratories (Seibersdorf and Headquarters) informed the Division of Personnel that due to planned programmatic changes the complainant's post would become redundant and that assistance should therefore be offered in identifying a suitable position for the complainant within the Agency. In May 2005 the complainant was offered a transfer to the post of Research Scientist at grade P-3 at the Monaco Laboratory. He accepted this offer and his transfer took effect on 1 November 2005.

On 9 December 2005 the complainant was informed that the Director General had decided to offer him a further two-year extension of his fixed-term appointment, with effect from 1 January 2007, but that by virtue of Staff Rule 3.03.1(C) there would normally be no further possibility of extension. The complainant signed the letter of extension of appointment on 14 February 2006. On 4 June 2007 he was informed that, according to its terms as well as those of Staff Rule 3.03.1(C), his appointment would expire on 31 December 2008. He wrote to the Director General on 31 July 2007 requesting a

review of that decision and alleging harassment on the part of the Director of the Agency's Laboratories. By a letter of 24 August 2007 the Director General confirmed that the complainant's appointment would expire according to its terms, noting that as a member of the Professional category the complainant was subject to the Agency's rotation policy. Regarding the allegation of harassment, he referred the complainant to Appendix G to the Staff Rules in the event that he wished to make a formal allegation of misconduct. On 14 September 2007 the complainant filed a first appeal with the Joint Appeals Board, challenging the Director General's decision to allow his appointment to expire.

Meanwhile, on 25 January 2007, the Agency issued vacancy notice No. 2007/002 for the post of Analytical Chemist at grade P-3 at the Seibersdorf Laboratories. The complainant applied for this post on 28 February 2007 and was later interviewed by a selection panel. On 21 June he wrote to the Director General, explaining that he had recently learned that his application might not be assessed with impartiality and requesting that the latter review carefully the recommendations made to him for the said vacancy. By a memorandum of 27 July the Director General replied that, as a result of his communication, the selection process had been suspended in order to determine the existence of any irregularity, but that no irregularity had been identified and the process had been resumed. He expressed concern about the disclosure of confidential information and requested that by 10 August 2007 the complainant identify his source and the type of information provided to him. The complainant replied by a memorandum of 2 August that the information in question had been provided to him by a former staff member whose identity, as he explained, he was not at liberty to reveal. He expressed the view that there had been substantial irregularities in the selection process and accused the Director of the Agency's Laboratories of having "acted most improperly". In a letter of 31 August, the Director General reiterated that no irregularity had been identified and advised that, as a breach of confidentiality appeared to have occurred, he had instructed the Division of Personnel to take further action as appropriate.

By a letter of 17 September 2007 the complainant was informed that his application had not been successful. On 19 October he wrote to the Division of Personnel asking for a transfer to Vienna – where his wife and children lived. On 25 November 2007 he requested that the Director General review the decision not to appoint him to the vacant post; having received no reply, he filed on 22 January 2008 a second appeal with the Joint Appeals Board, challenging that decision. By a letter of 17 March 2008 the Director General confirmed his decision to appoint another candidate.

In January and again in March 2008 the complainant reiterated his request for a transfer to Vienna for family reasons. On 31 March 2008 he was advised that the Division of Personnel had not been able to identify a suitable position for him but that it would be willing to support a request for unpaid leave if he wished to avail himself of that option. In a memorandum of the same day the complainant expressed dismay at the fact that his request for transfer had not been heeded. On 3 and 11 April he wrote to the Division of Personnel requesting feedback as to the reasons why his application for the post of Analytical Chemist had not been successful. By a memorandum of 13 May 2008 he requested that the Joint Appeals Board also address the issue of appropriate compensation in the context of his appeals.

In its report of 8 August 2008 on the complainant's first and second appeals, the Board recommended that the Director General maintain his decisions to allow the complainant's appointment to end on the date of its expiry and not to appoint him to the post of Analytical Chemist. By a letter of 14 October 2008, which constitutes the impugned decision in the complainant's first and second complaints, the Director General informed the complainant that he had decided to endorse the Board's recommendations and to dismiss his appeals. Prior to that, on 24 September 2008, the complainant had written to the Director General alleging serious misconduct on the part of the Director of the Agency's Laboratories, and on 13 October he had submitted a formal report in accordance with Appendix G to the Staff Rules requesting an investigation into the latter's conduct.

B. In his first complaint the complainant impugns the decision not to award him a long-term appointment on the grounds that it was contrary to the Agency's established practice and tainted with omission of essential facts. He argues that there exists a practice within the IAEA, as confirmed in Judgment 2702, according to which staff members promoted from the General Service to the Professional category are offered long-term appointments or, at least, fixed-term contracts until retirement age. He adds that this practice is still in force, notwithstanding the Agency's contention that it ceased on 1 October 2003 with the issuing of the Notice to the Staff SEC/NOT/1966. In support of his assertion, he points to the case of two staff members who were likewise promoted from the General Service to the Professional category but who were then retained in service beyond the five-year period prescribed in Staff Rule 3.03.1(C)(2). He contends that the principles of non-retroactivity and good faith preclude the application of SEC/NOT/1966 in his case, given that at the time of his promotion to the Professional category that notice had not yet been issued. He also draws attention to the Notice to the Staff SEC/NOT/2001 of 23 September 2004, which gave staff members the possibility of returning to the contractual status they held in the General Service category upon the expiration of their appointment as Professional staff. This, he argues, is a further indication that former General Service staff cannot be "rotated out".

Moreover, in the complainant's view, the IAEA failed to consider essential facts, in particular the fact that he had an acquired right to a long-term appointment and a legitimate expectation of obtaining one, given that he had served the Agency for more than 13 years and that one third of professional staff are offered long-term appointments, not necessarily in accordance with the requirements of Staff Rule 3.03.1(C)(4).

In his second complaint the complainant impugns the decision not to appoint him to the post of Analytical Chemist (vacancy notice No. 2007/002) on the grounds that it is vitiated by procedural flaws, clearly mistaken conclusions and bias. He criticises the Joint Appeals

Board for lack of transparency and for failing to review his appeal properly and to ascertain the veracity of the reasons for his non-appointment. He also criticises the Board for breach of due process, in particular for not taking into account a number of important documents submitted by him, choosing to conduct interviews *in camera* and denying him the right to cross-examine witnesses. Furthermore, he argues that the Board drew clearly mistaken conclusions from the facts in that it considered his alleged lack of experience in two specific technical areas as the major factor for his non-appointment, notwithstanding the fact that the vacancy notice made no reference to such experience. The complainant asserts that the decision not to appoint him was motivated by the prejudice harboured against him by the Director of the Agency's Laboratories. He accuses the Agency of having a deliberate plan to separate him from service and of failing to act in good faith.

In his first complaint the complainant requests that the decision denying him a long-term appointment be set aside and that the IAEA be ordered to reconstitute his career by granting him such appointment with effect from 31 December 2008. In particular, he seeks reinstatement as from that date and payment of the salary, emoluments and pension contributions to which he would have been entitled had his appointment not been terminated or, alternatively, payment of an amount equivalent to five years' pensionable remuneration. In his second complaint he requests that the decision not to appoint him to the post of Analytical Chemist (vacancy notice No. 2007/002) be set aside and that the IAEA be ordered to rerun properly the selection process for that post and to restore his pension rights in the event of his reinstatement. In both complaints he claims compensation for the financial and moral prejudice he has suffered, and costs.

C. In its reply to the first complaint the IAEA submits that the decision to allow the complainant's appointment to expire according to its terms without offering him a long-term appointment was taken in the proper exercise of the Director General's discretionary authority, in accordance with its established rotation

policy. It explains that, as may be inferred from the Notice to the Staff SEC/NOT/1484 of 25 May 1993, staff members who are promoted from the General Service to the Professional category have always been subject to rotation and, therefore, contrary to what the complainant may contend, SEC/NOT/1966 did not introduce with effect from 1 October 2003 a new feature in the Agency's personnel policy, but merely incorporated an existing feature into the Staff Regulations and Staff Rules. Accordingly, the complainant was well aware, as he expressly acknowledged in his request for reclassification, that upon joining the Professional category on 1 January 2002 he would become subject to the Agency's rotation policy, as clarified in SEC/NOT/1484.

With regard to the practice of granting long-term appointments to staff members promoted from the General Service to the Professional category, to which the complainant extensively refers, the IAEA points out that it was abolished on 1 October 2003 through SEC/NOT/1966, whereby the rotation policy was embodied in Staff Rule 3.03.1(C), and that no long-term appointment has since been granted on the basis of that practice. It adds that, as his appointment had been made subject to the "Staff Regulations and the Staff Rules together with such amendments as may from time to time be made thereto", the complainant knew, at the latest by October 2003, that the only possibility for him to remain in the Agency's employment beyond the seven-year maximum tour of service would be through the award of a long-term appointment in accordance with the criteria set forth in Staff Rule 3.03.1(C)(4), namely the need for continuity in essential functions or for other compelling reasons in the interest of the Agency. Indeed, his case was properly considered in spring 2007; however, the outcome was not favourable and he was promptly notified that his appointment would expire according to its terms.

The Agency denies that it omitted essential facts and observes that the complainant had no acquired right or legitimate expectation of extension beyond the maximum tour of service. It also denies his allegations of bad faith and of a deliberate plan to separate him from service.

In its reply to the second complaint the Agency states that the issue of alleged harassment on the part of the Director of the Agency's Laboratories is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute for failure to exhaust the internal means of redress. It adds that an investigation into the complainant's report of misconduct is presently under way. On the merits, it submits that the decision not to appoint the complainant to the post of Analytical Chemist was made following a thorough and fair selection process, in the course of which it was determined that he was not the best candidate. It states that he lacked important skills which were directly relevant to the post in question and which, contrary to what he alleges, were set out in the vacancy notice. It categorically denies any connection between the alleged bias on the part of the Director of the Agency's Laboratories and the decision not to select the complainant for the post of Analytical Chemist. The IAEA rejects the complainant's allegation of breach of due process. It considers that the Joint Appeals Board acted reasonably and in line with established case law in choosing to conduct interviews *in camera*, and that it is not required to explain which documents it relied upon or to afford the parties the right to cross-examine witnesses.

D. In his rejoinder to the first complaint the complainant asserts that, as SEC/NOT/1484 was applicable to "[r]egular staff members (i.e. those recruited to an established post on a competitive basis, following vacancy notice action)", it did not, according to its terms, apply to staff members promoted from the General Service to the Professional category. He thus argues and that the rotation policy only became applicable to such staff members on 1 October 2003 through the issuing of SEC/NOT/1966 and consequently he did not become subject to rotation upon joining the Professional category and should, in view of the Agency's practice at the time, have been retained in service until retirement age. In his rejoinder to the second complaint he rejects the IAEA's argument on receivability as irrelevant and reiterates his pleas on the merits.

E. In its surrejoinders to the first and second complaints the Agency maintains its position in full.

CONSIDERATIONS

1. Although these complaints arise out of different decisions and involve different legal issues, each raises the question whether the decision in issue was the result of bias and/or an improper purpose. The complainant relies on each decision to establish bias or improper purpose in relation to the other, as well as on other matters that are common to both complaints. It is, thus, convenient that the complaints be joined, as were his two appeals to the Joint Appeals Board.

2. The complainant was first employed by the Agency in Monaco on 1 August 1995 on a special service agreement that was extended from time to time. On 1 November 1996 he was appointed as a Senior Laboratory Technician at the Agency's Laboratories at Seibersdorf, outside Vienna, on a six-month fixed-term contract. His appointment was at grade G-6 in the General Service category. That appointment was also extended from time to time, the first extension being for a period of one year, the second for two years and the third for three years from 1 May 2000. His supervisors recommended the reclassification of his post to the Professional category in 1998 and, again, in 1999. In August 2000 the complainant, himself, requested reclassification, stating in his letter of request that he appreciated that, if the process were successful, he would become subject to the Agency's rotation policy but that he considered that it was a necessary step to obtain career advancement, even if it had to be outside the Agency. His post was ultimately reclassified and, with effect from 1 January 2002, he was granted a three-year fixed-term contract – which was twice renewed for further periods of two years – as an Analytical Chemist at grade P-3, in place of the last extension of his contact in the General Service category. The new letter of appointment stated that the fixed-term appointment did not carry any

expectation of or right to another extension, renewal or conversion to another type of appointment. That statement was also included in the first subsequent letter of extension.

3. In August 2004 the complainant was informed by copy of a memorandum from the Director of the Agency's Laboratories and the Director of the Division of Human Health to the Director of the Division of Personnel that the work performed by him for the Division of Human Health in the Chemistry Unit of the Laboratories would end in December 2005 and that, in consequence, his position in the Chemistry Unit would become redundant. It was thus proposed that the complainant be transferred to a suitable position within the Division of Human Health. However, in March 2005 both Directors reported to the Director of the Division of Personnel that it had been determined that the duties of that position were at the G-6 level and not suited to a staff member in the Professional category. In the result, the complainant was appointed to a P-3 post as a Research Scientist in Monaco with effect from 1 November 2005. It was stated in the letter informing him of his new duty station that that change would have no effect on his contractual status. In December of that year the complainant's appointment was extended for the last time. On 4 June 2007 he was informed, without any reason then being given, that his contract would not be renewed on its expiry on 31 December 2008. The first complaint arises out of that decision.

4. Six months before he was informed that his contract would not be renewed, the complainant applied for the post of Analytical Chemist at grade P-3 at the Seibersdorf Laboratories. He was informed on 17 September 2007 that his application had not been successful. The second complaint arises out of that decision, it being claimed that there were procedural irregularities in the selection process. In that complaint it is also claimed that there was a lack of due process in the proceedings before the Joint Appeals Board.

5. In his request for review of the decision not to renew his contract, the complainant claimed that he had been the victim of

harassment by the Director of the Agency's Laboratories and stated that the "programmatic reasons" advanced by her for the suppression of his former post were not genuine. In support of his claim of harassment, he also referred to the Director's decision not to interview him for the post of Head of the Chemistry Unit for which he had also applied, and a statement allegedly made by her in relation to his application for the post of Analytical Chemist. In his reply to that request the Director General informed the complainant of the procedures for making a formal allegation of misconduct. A formal written report to that effect was subsequently submitted by the complainant in October 2008. Although the Agency argues that the second complaint is irreceivable to the extent that it raises the question of harassment, that issue is not raised, as such, in either complaint. The issue that is raised is whether the decisions in question resulted from bias or improper motive. Presumably, the matters relied upon in support of the argument in that regard are substantially the same as those covered by the report submitted in October 2008.

6. In his reply to the complainant's request for review of the decision not to renew his contract, the Director General also stated that the complainant had not provided any evidence in support of his claim that the Director of the Agency's Laboratories had "played a key role in th[at] decision" and that he was subject to the Agency's rotation policy. The first question that arises is whether the policy applied to the complainant.

7. It is not disputed that, at all relevant times, Professional staff were subject to the rotation policy. The complainant acknowledged as much in his request for reclassification of his post in 2000. At that stage and in 2002, when the complainant's post was reclassified, that policy was contained in SEC/NOT/1484, which provided that, for "[r]egular staff members (i.e. those recruited to an established post on a competitive basis, following vacancy notice action)" the normal tour of service was five years but that, by way of exception, contract extensions beyond five years were possible, including by way of a long-term contract for five years that could be further extended until

retirement age. It also provided that, save in the case of staff members granted an extension by way of a long-term contract for five years, the maximum tour of service was seven years. The rotation policy was subsequently incorporated in the Staff Rules with effect from 1 October 2003.

8. Staff were advised by SEC/NOT/1966, which was issued on that date, of the promulgation of "revised" Staff Regulations and Staff Rules. Reference was made to "new Staff Rules" and it was stated that "previous [...] Personnel Practices, administrative issuances and parts of the Administrative Manual no longer conforming to the new Staff Rules [were] superseded and abolished with effect from [1 October 2003]". The Staff Rules thereafter provided in Rule 3.03.1(C)(7) and continue to provide that the rotation policy set out in sub-paragraphs (2) through (6) of paragraph (C) also applied to staff members appointed from the General Service to the Professional category and allowed for those staff members to return to a post in the General Service category if they held a five-year contract prior to their appointment to the Professional category. Save for that last provision, the rotation policy set out in the rule does not differ in any material respect from the policy previously contained in SEC/NOT/1484.

9. The complainant did not have a five-year contract before his appointment to the Professional category and does not claim that he is entitled to the benefit of Staff Rule 3.03.1(C)(7). Rather, he claims that, on reclassification of his post, he did not become subject to the policy in SEC/NOT/1484 and that, by reason of the presumption against retroactivity, Staff Rule 3.03.1(C) does not apply to him. Instead, he claims that there was and continues to be a practice, notwithstanding the terms of Staff Rule 3.03.1(C)(7), whereby staff members appointed to the Professional from the General Service category are either given long-term appointments or fixed-term contracts that are renewed until they reach retirement age. He claims that the decision not to renew his contract beyond seven years constituted a breach of that practice.

10. Before turning to the question whether or not there is or was a practice, as claimed by the complainant, it is convenient to note his argument that he was subject neither to the rotation policy set out in SEC/NOT/1484 nor Staff Rule 3.03.1(C). That argument is based on the definition of "regular staff members" in SEC/NOT/1484 as "those recruited to an established post on a competitive basis, following vacancy notice action". The fact that the complainant became a member of the Professional staff following the reclassification of his post does not mean that he was not then a regular staff member. He continued to occupy the same post and there is nothing to suggest that it was not an established post to which the complainant was initially appointed "on a competitive basis, following vacancy notice action". Although the contract that replaced the complainant's earlier letter of extension is headed "Letter of Appointment" and is couched in terms of the offer and acceptance of an appointment, it was in substance and in fact the confirmation of the complainant's earlier appointment, notwithstanding the reclassification of his post, and not a new appointment other than on a competitive basis following vacancy notice action. It follows that SEC/NOT/1484 applied to the complainant. And, save to the extent that Staff Rule 3.03.1(C)(7) specifies that the rotation policy applies to persons appointed from the General Service to the Professional category, that rule is properly to be regarded as restating or codifying the policy previously contained in SEC/NOT/1484, and not as altering that policy or introducing a new policy. That being so, there is no scope for the application of the presumption against retroactivity so far as concerns the substance of the policy. And that is so notwithstanding the use of the word "new" in SEC/NOT/1966. In context, "new" simply refers to the newly published Staff Rules, even though some may have been "new" in the sense that they were different from or in addition to the previous Staff Rules and practices.

11. It is not disputed that prior to 2003 there was some practice of the kind claimed by the complainant with respect to staff promoted from the General Service to the Professional category. And the

existence of some such practice is indicated by the specification in Staff Rule 3.03.1(C)(7) that the policy also applies to them. However, that specification does not provide any indication as to the substance of the practice. The Agency submits that, until 2003 when it was abolished by Staff Rule 3.03.1(C)(7), the practice was as set out in Judgment 2702, under 14, namely:

> "to offer long-term appointments to some, but not all, staff members who:
>
> (a) had held a long-term appointment in the General Service category;
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> (b) had at least five years service in the Professional category, that is, the normal tour of duty in that category;
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> (c) were more than five years from retirement; and
>
> (d) were recommended for long-term contracts by their supervisors."

It further submits, and it is not disputed by the complainant, that on that basis, he was not eligible for an extension because he neither held a long-term appointment in the General Service category nor was he recommended for a long-term contract by his supervisor. However, the complainant argues that the practice was not so confined and that it continues notwithstanding the terms of Staff Rule 3.03.1(C)(7).

12. In support of his contention that the practice was and is to offer "long-term appointments [...] to most staff members who have advanced to the Professional category, and [to grant] some staff members [...] fixed-term contracts until the retirement age", the complainant points to the position of two named staff members and, also, to the general incidence of long-term appointments. It is clear that the two named staff members did not have long-term appointments in the General Service before their appointments to the Professional category. One was granted a five-year extension after serving five years in the Professional category and the other was granted a two-year extension after seven years, which extension will take him to retirement age. Further, the complainant points out that 35 per cent of the Professional staff hold long-term appointments.

13. The rotation policy has always been subject to exceptions. Relevantly, the exceptions now stated in Staff Rule 3.03.1(C) are as follows:

> "(3) Extensions of fixed-term appointments in the Professional and higher categories beyond the normal five year tour of service [...] may be granted exceptionally for programmatic or other compelling reasons [...] for up to two years, normally without any further possibility of extension [...].
>
> (4) Notwithstanding sub-paragraph (3) above, extensions of fixed-term appointments [...] may be granted for a period of five years ('long-term appointments') if there is a need for continuity in essential functions or for other compelling reasons [...]. Such 'long-term appointments' shall be subject to further extension until retirement age. [...]"

14. There is no evidence to show that the two named staff members referred to in the complainant's argument were not granted extensions of their contracts in accordance with the exceptions in Rule 3.03.1(C)(3) and (4), respectively. And although the complainant argues that it is not plausible that long-term appointments were granted to 35 per cent of the Professional staff only on the basis of "a need for continuity in essential functions or for other compelling reasons", that argument takes no account of the long-term appointments granted in accordance with the practice prior to 2003, as admitted by the Agency. Certainly, that percentage does not support a finding of a continuing and wider practice as claimed by the complainant. Accordingly, his argument to that effect must be rejected.

15. The complainant also argues that two essential facts, namely the statistical incidence of long-term appointments and his service with the Agency for 13 years – and hence his legitimate expectation of a long-term appointment – were not taken into account in the decision not to renew his contract. These arguments must be rejected. Once it is accepted, as it must be, that the complainant became subject to the Agency's rotation policy on the reclassification of his post, the only questions that arise are whether, in terms of sub-paragraph (3) of Staff Rule 3.03.1(C), there were "programmatic or other compelling reasons" to grant him a further extension, or, in terms of sub-paragraph (4), there was a "need for continuity in essential functions or […] other compelling reasons" for granting him a long-term appointment. There is nothing to indicate that

either condition was satisfied. Moreover, the complainant's letter of August 2000 requesting the reclassification of his post is inconsistent with any legitimate expectation as claimed.

16. Before turning to the claim of bias or improper motive, it is convenient to consider whether there were procedural irregularities in the selection process for the vacant post at the Seibersdorf Laboratories. The complainant applied for that post on 28 February 2007 and was later interviewed. However, on 21 June, some 17 days after he was informed that his contract would not be renewed, he wrote to the Director General stating that he had "recently learned that [his] application m[ight] not [be] assessed with [...] impartiality". Thereafter, the selection process was suspended and, later, on 27 July 2007, the Director General informed the complainant that, as no irregularity had been identified, he had given instructions for the process to continue. On 2 August the complainant informed the Director General that a former staff member had told him that someone, who was not named but who, it was claimed, was involved in the selection process, had said that the Director of the Agency's Laboratories had stated that he was well qualified for the post but that she did not want him back in Seibersdorf and, consequently, he should be regarded as "qualified" but not "well qualified". The Director was a member of the selection panel and it is not disputed that the complainant was initially rated "well qualified" but that that rating was changed to "qualified" after his interview. The complainant was later informed that his application had not been successful because he lacked practical experience in the operation of a multi-collector Inductively Coupled Plasma Mass Spectrometer (ICP-MS) and in handling nuclear material. The complainant contends that these matters were not specified as requirements in the vacancy notice for the post and were not discussed in depth in the interview and that, that being so, there were procedural irregularities in the selection process. He also maintains his claim that the Director improperly intervened in the selection process to have his rating changed.

17. The vacancy notice (No. 2007/002) for the post of Analytical Chemist in the Seibersdorf Laboratories specified that the main purpose of the post was to "carry out the work of a [high-resolution] ICP-MS […] laboratory, including the validation, maintenance and upgrading of analytical procedures and equipment when necessary". It also specified the need for "[p]ractical experience in the application of ICP-MS". It is correct, as the complainant contends, that the vacancy notice did not mention a "multi-collector ICP-MS". The complainant had had practical experience with ICP-MS but it was not on the most recent machines of that kind. The selected candidate had had experience of more recent machines, including a multi-collector ICP-MS. In a context in which the vacancy notice specified the possibility of upgrading equipment, it was open to the selection panel, and later the Director General, to conclude that, on that account, the selected candidate was better qualified. And as the complainant's experience was well known, there was no need to question him with respect to that equipment.

18. So far as concerns the handling of nuclear materials, the vacancy notice specified that one of the key functions of the post was to "lead […] and guide […] the logistics and analysis by [high-resolution] ICP-MS of uranium – and plutonium – containing nuclear samples collected during Agency safeguards inspections". Clearly, this indicated, at the very least, the possibility of handling nuclear material. Although the complainant had had experience in that regard prior to joining the Agency, it seems that the selected candidate had more recent and more extensive experience in that area, a matter that might properly be taken into account in determining who was the better candidate. And, again, as the complainant's experience was well known, there was no need to question him in depth on the matter.

19. The complainant's argument that the selection process involved irregularities by reason of regard having been had to matters not specified in the vacancy notice must be rejected. It remains to consider whether the Director of the Agency's Laboratories

improperly intervened in the selection process by stating that his rating should be changed from "well qualified" to "qualified". The evidence before the Joint Appeals Board was that all five of the interviewed candidates were initially rated as "well qualified" but, after their interviews, only two of the candidates retained their "well qualified" rating. A note by a member of the Joint Advisory Panel on Professional Staff appended to the selection panel's report confirms that the complainant's rating was changed following his interview but does not indicate that that was not in accordance with normal practice or that the same process did not apply to other candidates. However, the member of the Joint Advisory Panel also speculated in that note that, because the selection panel had referred to some personnel problems concerning the complainant, "he may have had a personality clash with a supervisor or manager, while working at Seibersdorf, and this is now being held against him unjustifiably". As the complainant's former supervisor, the Director of the Agency's Laboratories, admitted to tension between them, it is convenient to consider whether she improperly intervened in the selection process in the context of the other matters advanced by the complainant in support of his claim of bias and improper purpose.

20. The complainant's first contention is that the reasons advanced for the abolition of his post in Seibersdorf were not genuine. In this regard, he points out that, in a proposal for the extension of his contract signed by his former supervisor in March 2003, it was stated that his work was carried out in support of three sub-programmes, including one involving human health, and that it was anticipated that his work would "continue for many years to come". He also contends that the work he previously did is still being done, albeit by a staff member of the General Service category. The evidence before the Joint Appeals Board was that "the Human Health programme [had been] restructured and no longer provided the [funding] which had previously financed ICP-MS activities" and that it had been decided by the Director of the Division of Human Health that there was no longer a need for experimental support. Although there is evidence

that ICP-MS work is still being performed in the Chemistry Unit, there is no evidence that the work covers the full range of work previously performed by the complainant for the Division of Human Health. Indeed, the fact that it is performed by a staff member in the General Service category at grade G-6 suggests that it does not. Accordingly, the evidence does not support the conclusion that the reasons given for the abolition of the complainant's post were not genuine.

21. Apart from the decisions not to renew the complainant's contract and not to appoint him to the post of Analytical Chemist, the only other matter relied upon in his pleadings before the Tribunal in support of his claim of bias and/or improper motive is that his former supervisor, the Director of the Agency's Laboratories, indicated in the autumn of 2007 in response to the complainant's request, approved by the Director of the Monaco Laboratory, for a transfer to Austria on compassionate grounds, that there were no suitable positions arising in Seibersdorf in the near future. The complainant contends that this was not true as a post at the Seibersdorf Laboratories was advertised soon afterwards. However, there is no evidence that the complainant could appropriately be transferred to that post pending completion of the selection process.

22. Once it is accepted, as it must be, that the complainant was subject to the rotation policy and that it was open to the selection panel and, later, the Director General to find that, by reason of his work on a multi-collector ICP-MS and experience in handling nuclear material, the selected candidate was better qualified than the complainant for the vacant position at the Seibersdorf Laboratories, much of the foundation for the complainant's argument of bias and/or improper purpose disappears. And neither of the other matters upon which he relies in his pleadings will support a finding in that regard either in relation to his former supervisor or any other person in the Administration. Without a finding to the effect in relation to the complainant's former supervisor, there is no basis for a finding that

she improperly intervened in the selection process to have the complainant's rating for the vacant post changed from "well qualified" to "qualified".

23. It remains to consider the complainant's argument that there was a denial of due process in the proceedings before the Joint Appeals Board in relation to his appeal with respect to his non-selection for the vacant post at the Seibersdorf Laboratories. The complainant contends that certain documents submitted by him were not annexed to the Board's report, that apart from the Director of the Agency's Laboratories members of the selection panel were not interviewed, and that the Board's recommendation does not reflect "an independent review" of his appeal. These arguments must be rejected. There was no duty on the part of the Board to attach to its report all documents to which it had had regard. Moreover, the Board was correct in its conclusions that the complainant was subject to the rotation policy and that it was open to the selection panel and the Director General to conclude that the selected candidate was better qualified for the post of Analytical Chemist at the Seibersdorf Laboratories. Once it reached these conclusions, there was very little to support the complainant's other allegations and it was not the duty of the Board to do more than consider the matters on which he then relied.

24. The complainant also contends that he was denied due process by reason of the fact that the Joint Appeals Board conducted interviews with the Director of the Agency's Laboratories and a staff member from the Administration in his absence and afforded him no opportunity to question them with respect to their statements. In Judgment 2513, under 11, the Tribunal pointed out in relation to the Agency's internal appeal process that "in the absence of special circumstances such as a compelling need to preserve confidentiality, internal appellate bodies [...] must strictly observe the rules of due process and natural justice and […] those rules normally require a full

opportunity for interested parties to be present at the hearing of witnesses and to make full answer in defence". There were no special circumstances warranting a departure from those rules in the present case. Although those rules were not observed, the nature of the evidence relied upon by the complainant in these proceedings is such that no different result would have been reached if the rules had been observed. However and by reason of their non-observance, the complainant is entitled to moral damages in the sum of 500 euros and to costs in the sum of 300 euros for breach of due process.

DECISION

For the above reasons,

1. The Agency shall pay the complainant moral damages in the sum of 500 euros and costs in the sum of 300 euros.

2. The complaints are otherwise dismissed.

In witness of this judgment, adopted on 14 May 2010, Ms Mary G. Gaudron, 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 8 July 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet