

**112th Session**

**Judgment No. 3055**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. A. G. against the International Atomic Energy Agency (IAEA) on 12 March 2010 and corrected on 16 June, the IAEA's reply of 27 September 2010, the complainant's rejoinder dated 11 January 2011, corrected on 11 February, and the Agency's surrejoinder of 25 May 2011;

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. The complainant, who holds dual Canadian and American nationality, was born in 1958. He joined the Agency at its Headquarters in Vienna on 15 June 2005 as a Public Health Specialist, at grade P-5, in the Department of Nuclear Sciences and Applications. He was hired as a Cost-free Expert under a two-year fixed-term contract, the first year of which constituted a probationary period. His letter of appointment stipulated that his appointment was funded through extra-budgetary resources and might, subject to the relevant Staff

Regulations, be terminated prior to its expiry date if the necessary extra-budgetary resources were not available. His salary was funded by a donor State, the United States of America, and the funds for the first year of his contract were provided to the IAEA in advance.

During his tenure with the Agency the complainant worked in the IAEA's Programme of Action for Cancer Therapy (PACT) under the supervision of Mr S. In late March 2006 he signed his performance review report for the period from 15 June to 31 December 2005, in which Mr S. stated that it was necessary to request an extension for the second year of his appointment based on his high level of performance.

By an e-mail of 14 June 2006 the complainant was informed that an extension of funding had been requested from the donor State. On 28 June he received a personnel action notice which indicated that he had received a step increase with effect from 1 June 2006 and that his appointment would expire on 14 June 2007.

On 13 November 2006 the United States Mission to International Organizations in Vienna informed the Deputy Director General in charge of the Department of Nuclear Sciences and Applications that the United States Department of State had authorised the extension of the complainant's appointment as a Cost-free Expert until 31 December 2006. Upon learning of this, the complainant had an e-mail exchange with Mr S. on 16 November 2006 in which Mr S. stated, inter alia, that he did not know why the letter from the State Department had arrived at that late date, because he had heard as early as May of that year that there were "concerns" relating to the complainant's appointment.

The complainant met with the Director of the Division of Personnel on 27 November 2006 and expressed concern that Agency staff members had made statements to officials of the United States Mission which had negatively influenced the funding for his appointment. In a letter of 5 December 2006 the Director informed the complainant that both Mr S. and Ms M., an official from the Division of Personnel, had indeed been contacted by the State Department and

had discussed issues that it had raised in relation to his behaviour. By another letter dated that same day, the Director informed the complainant that his appointment would be terminated with effect from 9 January 2007 as a result of the loss of funding for his position.

Following his separation from service, by a letter of 30 January 2007 to the Director General, the complainant accused Mr S. of coercive, retaliatory and punitive behaviour and asserted that the termination of his appointment was based on thinly disguised personnel issues. He requested that the IAEA honour the commitments made to him by paying him his salary and benefits until 14 June 2007. In a letter of 28 February 2007 the Director General upheld the decision to terminate the complainant's appointment, stating that it had been taken in accordance with the terms of his letter of appointment owing to a lack of extra-budgetary resources.

On 7 March 2007 the complainant filed an appeal with the Joint Appeals Board in which he alleged that the decision to terminate his appointment had been the result of the actions of Agency officials, in particular Mr S., and had been retaliatory in nature, and that he had been denied the right to due process. On 11 June 2007 he filed a complaint with the Director of the Division of Human Resources in which he accused Mr S. of, inter alia, harassment, retaliation and creating a hostile work environment. The Director General subsequently referred the matter to the Office of Internal Oversight Services (OIOS) and pending the outcome of the investigation by the OIOS the proceedings of the Joint Appeals Board were suspended.

The OIOS issued two reports in July 2008 in which it respectively examined the issues of harassment and the termination of the complainant's appointment. It concluded that there was no evidence to support a finding of harassment, retaliation or the creation of a hostile work environment and that there was no evidence that Mr S. or other staff members had attempted to influence the decision taken by the State Department. By a letter of 22 October 2008 the complainant was informed that the Deputy Director General in charge of the Department of Management, having considered the two reports, had

decided that no action would be taken against Mr S. and that the case against him would be closed. That same day the reports were submitted to the Joint Appeals Board.

In its report of 14 October 2009 the Board recommended that the Director General maintain his decision to uphold the termination of the complainant's appointment with effect from 9 January 2007. By a letter of 27 November 2009 the Director General informed the complainant that he had accepted the Board's recommendation and that his appeal was dismissed. That is the impugned decision.

B. The complainant contends that he was harassed by Mr S. and that this harassment took the form of a pattern of communications and actions which included repeated threats to terminate his appointment. Over time, this resulted in a hostile work environment. He produces copies of e-mails between himself and Mr S. in support of these contentions. He alleges that he was subjected to inappropriate and undeserved criticism, coercion, ridicule and intimidation by Mr S.

In the complainant's view, the OIOS investigation of his complaints was flawed. By treating his complaints of harassment and early termination separately, it obscured a causal link between the Agency's provision of negative feedback about his performance to officials of the United States Mission and the decision by the State Department to fund his appointment only until 31 December 2006.

He asserts that the Agency failed to communicate the lack of funding for the full second year of his contract to him in a timely manner. Both the Administration and Mr S. were aware as early as May 2006 that concerns had been raised about his behaviour, yet he was not informed of this until he had worked for six months of the remaining year of his contract. Having relied on communications he received from the Administration, which were *de facto* indications that his appointment had been renewed and that the second year of his contract was fully funded, he entered into personal commitments, in particular for housing and the education of his children, until the expiry date of his contract. As a consequence of its early termination, he suffered damage because he was compelled to remain in Vienna

with his family for six months while he was unemployed, with no income or benefits. In addition, the IAEA acted negligently and in breach of its own administrative policies by not securing sufficient funds to meet its contractual obligation to him before he began to perform his duties for the second year of his appointment.

The complainant submits that funding for the second year of his contract was not exclusively dependent on the availability of funds from the donor State. His letter of appointment simply stipulated that his appointment was to be funded through extra-budgetary resources. He argues that the PACT programme had ample extra-budgetary funds from which the salary for the remaining five months of his contract could have been paid.

He contends that the Agency breached his due process rights. It failed to deal with him in a truthful and transparent manner and to inform him of any performance, behaviour or personnel issues related to his employment. Indeed, Ms M. and Mr S. provided negative feedback about him to officials of the United States Mission without informing him of this beforehand and without providing him with the opportunity to challenge their assertions. Furthermore, he accuses the Administration of bad faith and points to its failure to follow through on assurances that he would be offered a Consulting Services Agreement for the period from January to June 2007.

The complainant asks the Tribunal to call evidence from two individuals and to order the disclosure of all documents that were reviewed by the Joint Appeals Board. By way of relief, he asks the Tribunal to quash the impugned decision and to award him material damages equivalent to the salary, allowances and other benefits he would have received between the date of his separation and 14 June 2007, together with interest on that amount. He claims consequential damages in respect of medical fees and other losses which he has incurred, moral damages and costs.

C. In its reply the IAEA submits that the complainant's allegations of harassment against Mr S. may be considered only to the extent that they have probative value in determining whether its decision to

terminate the former's appointment was tainted by a lack of good faith. Indeed, the complainant did not request a review of the OIOS report on his harassment complaint or the Director General's decision to accept the OIOS findings, as required by the Staff Regulations and Staff Rules. Consequently, he has failed to exhaust the internal means of redress in this respect.

Referring to the Tribunal's case law, the Agency argues that the decision to terminate the complainant's appointment was taken at the discretion of the Director General and is subject to only limited review. It can be set aside only if it was taken without authority or in breach of a rule of form or procedure, if it was based on a mistake of fact or of law, if some material fact was overlooked, if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence.

The defendant contends that the complainant's appointment was terminated in accordance with the terms of his letter of appointment and that there was no bad faith on its part. It denies his allegations that Ms M. and Mr S. unduly influenced officials of the United States Mission. It asserts that there was no violation of due process and that it is not required to include the complainant in conversations between Member States and its Secretariat, regardless of the subject matter.

The Agency considers that, whilst it was obliged to notify the complainant in a timely manner of the termination of his appointment, it had no duty to inform him that funds had not been transferred by the donor State. It points out that although funds had not yet been provided midway through the second year of his contract, it had requested those funds and had received no indication that they would not be forthcoming. Immediately upon learning that the State Department would not provide funds beyond 31 December 2006, the Agency fulfilled the requirements of the complainant's letter of appointment and provided him with one month's notice of termination.

Lastly, the IAEA asks the Tribunal to deny the complainant's request for the disclosure of documents.

D. In his rejoinder the complainant develops his pleas and presses his claims of bad faith on the part of the Agency. He asks the Tribunal to order the IAEA to disclose all documents related to the funding of his appointment, including external communications between it and the United States Mission and the State Department, and all related internal communications. He asks the Tribunal to order the Agency to confirm whether or not the OIOS has investigated the PACT programme.

E. In its surrejoinder the defendant maintains its position. It points out that the complainant was employed as a Cost-free Expert “Type A” and that his position could only be funded by the donor State. It submits that there are no undisclosed documents which could assist the complainant.

## CONSIDERATIONS

1. The complainant, a former staff member of the IAEA, challenges a decision of the Director General of 27 November 2009 dismissing his internal appeal with respect to the termination of his appointment. The complainant was appointed as a “Cost-free Expert” within PACT for a period of two years commencing on 15 June 2005, subject to a probationary period of 12 months. It was stated in his letter of appointment that his appointment was “funded through extra-budgetary resources and might, subject to the relevant Staff Regulations, be terminated prior to its expiry date if the necessary extra-budgetary resources [were] not available”. His first year was funded in advance by the United States Department of State and, it seems, it was anticipated that that funding would be continued for the second year. In March 2006 the complainant received his first performance review report in which it was said that the IAEA “need[ed] to request his extension for the 2<sup>nd</sup> year based on the high level of performance”. It seems that the complainant’s supervisor, Mr S., requested funding for the second year from the

State Department sometime in May 2006. On 28 June 2006 the complainant received a personnel action notice confirming a step increase and showing an expiry date for his appointment of 14 June 2007. He received no other formal communication in this respect until 5 December 2006 when he was informed that his appointment would be terminated with effect from the close of business on 9 January 2007 because of “the loss of funding for [his] position”.

2. On 13 November 2006 the United States Mission to International Organizations in Vienna wrote to the IAEA informing it that it was authorised to extend the complainant’s assignment until 31 December 2006. Although it was not stated in the letter that funding was not available thereafter, that is how it was interpreted. At or about the same time, the complainant learned that there was some difficulty with the transfer of funds from the State Department. He made enquiries of his supervisor who sent him an e-mail on 16 November, referring to certain work-related matters and suggesting that he, the complainant, had a reputation for not being “flexible” and for “ask[ing] for too much”. He added:

“The US Mission and the State [Department] also know about these issues and surely have been concerned that as you are a US [Cost-free Expert] and they want the best reputation. So in summary, in many eyes, you have been difficult to work with and to please.”

In that e-mail the complainant’s supervisor also stated that “the [State Department] has already made up their mind and cut the funds”. In response to the complainant’s query as to why this had occurred when it did, the complainant’s supervisor informed him in a later e-mail on the same day that he did not know why it had happened then, rather than sooner, adding:

“I kept hearing they have concerns since last May when we asked for extension but we did not get something in writing.”

3. The complainant spoke with the Director of the Division of Personnel on 27 November 2006 and questioned whether the IAEA staff members had made statements to the United States Mission that had led to the decision not to fund his position beyond 31 December 2006. By a letter of 5 December 2006 the Director



informed the complainant that he could identify only two persons who had had contact with the State Department, namely, Ms M. (of the Division of Personnel) and Mr S., the complainant's supervisor. The letter continued:

"Ms. [M.] advises that she had contact with the State Department. In those conversations, the State Department expressed concern that your behaviour had been inappropriate as a representative of your country, and that they were inclined to discontinue their financial support for your continued employment. Ms. [M.] made no particular representations regarding your personal performance or behaviour but acknowledged that she was aware of the behaviour that was referred to by the State Department, and respected their right to make such decisions as they saw fit.

Mr. [S.] was also contacted by the US State Department in relation to their concerns. He advises that he was obliged to agree with concerns that they had raised in relation to your behaviour, as he had experience with you that concurred with their assessment. Mr. [S.] also restricted his comments to matters that the US State Department had raised, which related to questions regarding negative observations that you have made outside the Agency about the competence of the Agency and its staff to perform its mission, and related behaviours that have undermined the reputation and credibility of the Agency in the eyes of partner institutions. Mr. [S.] was also obliged to agree that you had been inflexible in your requirements for travel arrangements, and that you took a negative approach to your 'entitlements' associated with travel and your wider employment. Mr. [S.] advised the US State Department that you were technically a competent professional, and that the Agency had a need for such assistance in the PACT programme."

In a separate letter of the same day, the complainant was informed of the termination of his appointment.

4. In seeking review of the decision to terminate his appointment, the complainant referred to certain actions on the part of his supervisor, Mr S., which, he said, created a hostile work environment and propounded the view that Mr S. had been "centrally involved" in the events that led to the termination of his appointment and claimed that his actions constituted "retaliatory action". The complainant's request for review was unsuccessful and he lodged an internal appeal on 7 March 2007. Later, on 11 June 2007, he lodged a formal complaint of "harassment, retaliation and creation of a hostile environment" against Mr S. The internal appeal proceedings were

suspended pending investigation by the Office of Internal Oversight Services (OIOS).

5. In separate reports in July 2008 the OIOS concluded that there was no evidence to “support a finding of harassment, retaliation or creation of a hostile work environment by Mr. [S.]” or that “Mr. [S.] or others attempted to influence the US in their decision”. On 22 October 2008 the Deputy Director General in charge of the Department of Management informed the complainant that he had decided to close the case against Mr S. That same day the OIOS reports were forwarded to the Joint Appeals Board. The Board accepted the conclusions of the OIOS and, also, found that the termination of the complainant’s appointment was in accordance with the IAEA Regulations and Rules. It recommended that the decision to terminate the complainant’s appointment be upheld. The Director General accepted that recommendation.

6. The complainant’s primary argument is directed to establishing harassment and a hostile work environment. In support of his contentions in that regard, he asks the Tribunal to call for evidence from staff members who make similar claims with respect to Mr S. and his management of PACT. He also asks that the Tribunal require the IAEA to indicate whether or not an OIOS investigation has been requested with respect to PACT and its management. These applications are refused. The complainant did not institute an internal appeal with respect to the decision to close the case of harassment against Mr S. The decision to uphold the termination of the complainant’s appointment is the only matter before the Tribunal and is the only decision upon which the Tribunal can adjudicate. That does not mean that the matters which the complainant contends constituted harassment are entirely irrelevant to the question whether Mr S. or other officials of the Agency were involved in the decision by the State Department to discontinue funding for the complainant’s position.

7. Before turning to the question of the involvement of Mr S. or other IAEA staff members in the decision of the State Department, it is

convenient to note that the complainant has asked the Tribunal to order the production of all internal and external correspondence relating to the continued funding of his position. The defendant contends that there are “no undisclosed documents that could help the Complainant in his arguments” and that the Director of the Division of Personnel supplied all relevant information in his letter of 5 December 2006. Consistent with the Tribunal’s case law that “it will not order the production of documents on the speculative basis that something might be found to further the complainant’s case” (Judgment 2510, under 7), the complainant’s application is refused. However, that does not mean that the letter of 5 December 2006 should be taken at face value, particularly as that letter is silent as to when and the circumstances in which the conversations in question took place.

8. So far as concerns the matters that the complainant contends constituted harassment, it is apparent from the OIOS reports that the relationship between the complainant and Mr S. was marked by some hostility, with robust disagreements in which Mr S., from time to time, made statements that could be construed as veiled threats. For example, in an e-mail of 8 November 2005, Mr S. stated:

“[Y]ou need some rethinking about your work in the Agency. This is not a social club ... I suggest we sit down and see what exactly you have in mind to do for PACT as a Cost Free expert ... This will help me decide whether we can use the U.S. offer in a more efficient manner.”

And in e-mails of 21 July and 27 July 2006, respectively, he informed the complainant that “there [is] still time [...] to leave PACT” and that as he, Mr S., was obviously making the complainant sick, he, the complainant, “should not stay”. At the very least, these e-mails suggest that Mr S. may not have wished the complainant to remain with PACT.

9. The first e-mail that Mr S. sent to the complainant on 16 November 2006 and set out above indicates something more than

is stated in the letter of the Director of the Division of Personnel of 5 December 2006. As already indicated, Mr S. referred in that e-mail to certain work-related matters. Those matters were identified as “always ask[ing] to get the max out of what the Agency offered; like your HiFi storage, all the arguments with the transport guy, some other stuff related to your installation here, then signing the contract for 2 years and not 1 year that they offered, then the higher steps, and then many little or bigger things in the office in relation to tasks, travels, claims etc [...] all the discussions about your second year and the conditions you put to stay on [...] your arguments with me and with a few others [...], which also creates a negative atmosphere”. If, as stated in that e-mail, the United States Mission and the State Department also knew about these issues, that information could only have come from someone within PACT and as Mr S. was the only person from within PACT who has been identified as having spoken to the United States authorities, it was to be assumed that he was the source of the information. In this regard, it is to be noted that Mr S. stated in his second e-mail of 16 November 2006 that he “kept hearing they [the State Department] ha[d] concerns since last May”, thereby strongly suggesting that he had been in contact with the United States Mission or the State Department over a period of six months, even if he did not initiate that contact. Moreover, it is more probable than not that Mr S. was the source of whatever information Ms M. provided in her conversations with the State Department. In this last regard, the complainant claims, and it is not denied, that he never met Ms M. nor had any discussions with her. Moreover, according to the OIOS report examining the issue of termination and contrary to what is said in the letter of the Director of the Division of Personnel of 5 December 2006, Ms M. told a US official that “Mr. [S.] had informed her that there had been performance and attitude problems [on the part of the complainant]”.

10. As the OIOS pointed out in that report, the evidence does not establish that “Mr. [S.] or others had attempted to influence a termination of the [complainant’s] contract”. However, and in the

absence of more detailed information than is contained in the letter of 5 December 2006 from the Director of the Division of Personnel, it is sufficient to establish that Mr S. did not merely “agree” with matters raised by the State Department, but that he was the source of the information on which the latter relied for its decision with respect to the funding of the complainant’s position. And although the evidence does not permit of a finding that he did so specifically by way of retaliation, the finding that he was the source of the information combined with the evidence of hostility between him and the complainant leads to the conclusion that he was at least motivated by ill will in so doing. In this last regard, it is also pertinent to note that at least two of the matters raised against the complainant, namely, “behaviours that [...] undermined the reputation and credibility of the Agency in the eyes of partner institutions” and, as recorded in the OIOS report concerning termination, “performance and attitude problems”, might properly have been the subject of disciplinary and/or personnel action. This notwithstanding, there is no evidence that these matters were even the subject of a warning or of an official report.

11. As pointed out in Judgment 2116, under 5, “[r]elations between an organisation and its staff must be governed by good faith”. And as explained in that case, this means that “an organisation must treat its staff with due consideration and avoid causing them undue injury. In particular, it must inform them in advance of any action that may imperil their rights or rightful interests.” It also means that, as a general rule, an organisation should refrain from passing on damaging information about a staff member. If the recipient of that information has a legitimate interest in knowing the truth – and it may be assumed that that was so in the present case – it should refrain from passing on damaging information without first giving the staff member an opportunity to challenge it and give his or her own account.

12. In the present case the Agency breached its duty of good faith in several ways. Even though Mr S. knew as early as May 2006 that the State Department had “concerns” about the complainant, he

did not inform him of this fact. Further, it must have been apparent to someone in the Agency by early June 2006 that funding had not been provided for the complainant's position. Again, he was not informed. Rather, the personnel action notice of 28 June 2006 was such as to lead him reasonably to believe that everything was in order. Moreover and more importantly, neither Mr S. nor Ms M. should have provided information to the State Department that had not been the subject of any official action and that the complainant had not had an opportunity to challenge. The failure of the Agency in this last regard undoubtedly led to the termination of funding and, hence, the early termination of the complainant's appointment. He is entitled to compensation on that account.

13. There are two other matters that should be noted. The first is that the letter from the United States Mission of 13 November 2006 did not specifically state that funding was only available until 31 December 2006. Either there were conversations between United States and Agency officials that made that clear or there were not. If there were, they are not referred to in the letter of 5 December 2006 from the Director of the Division of Personnel. If there were not, the Agency had a duty to ascertain the precise meaning of the letter of 13 November and to ascertain whether funding could be made available for the balance of the complainant's contract. The second matter that should be mentioned is that the complainant contends that the continuation of his appointment was not dependent on the availability of funds from the United States as his letter of appointment refers only to "extra-budgetary resources". He also claims that there were other extra-budgetary resources available. The Agency seeks to resist this argument by asserting that the complainant was a Cost-free Expert "Type A" and that the only funds that could be used to fund his position were those made available by the particular donor or sponsor – in this case the State Department. That is not what is said in the letter of appointment. Whether it was a condition of the complainant's continuing appointment that funds be made available by the State Department and not otherwise is a matter that depends on

the dealings between the Agency and the complainant at the time of his appointment. However, none of these matters need be explored. Even if decided in the complainant's favour, they would not add to the compensation to which he is entitled by reason of the Agency's breach of the duty of good faith. And that being so, there is no occasion to order the production of PACT budget documents as requested by the complainant.

14. It is clear from the materials that the complainant was obliged to remain in Vienna until his contract would otherwise have expired and that he did not engage in gainful employment in that period. In these circumstances, he is entitled to compensation in an amount equal to what he would have received if his appointment had continued until 14 June 2007, including salaries and all emoluments, benefits, entitlements and allowances, together with interest at the rate of 5 per cent per annum from due dates until the date of payment. The complainant also seeks material and moral damages, including for the cost of medical treatment that he says was necessary as the result of harassment. As earlier indicated, the question of harassment is not before the Tribunal and, accordingly, damages cannot be awarded on that account. However, the complainant is entitled to material damages in the amount of 10,000 euros for the damage done to his reputation and to moral damages in the amount of 10,000 euros for the affront to his dignity inherent in the course taken by the Agency in its dealings with the State Department. He is also entitled to costs in the amount of 1,000 euros.

## DECISION

For the above reasons,

1. The decision of 27 November 2009 is set aside.
2. The IAEA shall pay the complainant compensation in an amount equal to what he would have received if his appointment had continued until 14 June 2007, including salaries and all emoluments, benefits, entitlements and allowances, together with

interest at the rate of 5 per cent per annum from due dates until the date of payment.

3. The Agency shall pay the complainant the sum of 20,000 euros by way of material and moral damages.
4. It shall also pay him 1,000 euros by way of costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 4 November 2011, 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 8 February 2012.

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