

112th Session

Judgment No. 3081

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mrs C. M. against the International Atomic Energy Agency (IAEA) on 3 August 2009, the IAEA's reply dated 9 November 2009, the complainant's rejoinder of 9 February 2010 and the Agency's surrejoinder of 19 May 2010;

Considering the second complaint filed by the complainant against the IAEA on 16 November 2009 and corrected on 6 December 2009, the Agency's reply dated 15 March 2010, the complainant's rejoinder of 18 June and the Agency's surrejoinder of 21 September 2010;

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

Having examined the written submissions;

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

A. Facts relevant to this case are to be found in Judgment 2604, delivered on 7 February 2007, and in Judgment 2656, delivered on 11 July 2007. Both judgments concerned complaints filed by the complainant's partner, Mr M. R., who contested, in the first complaint, the decision to suspend him with pay pending an investigation into a

formal internal complaint of misconduct filed against him and, in the second complaint, the decision to dismiss him for serious misconduct.

The complainant is a French national born in 1958, who joined the Agency in 1989 as a typist in the French Translation Section. At the material time she was working as Document Support Assistant in the Division of Conference and Document Services.

In June, July and August 2008 she wrote eight memoranda to the Director of the Division of Human Resources, alleging misconduct on the part of several staff members for their actions in relation to the events that led to her partner's dismissal. In November 2008 she wrote four additional memoranda to the same Director, again alleging misconduct on the part of several staff members for their actions in relation to those same events. In accordance with Appendix G to the Staff Regulations and Staff Rules, the Director reviewed the complainant's allegations and requested the staff members concerned to give their observations thereon. He then referred the matter to the Deputy Director General, Head of the Department of Management, in order that he might determine the procedure to be followed.

On 25 January 2009 the complainant wrote to the Director General asking him to grant her compensation. Referring to her memoranda of June, July, August and November 2008, she claimed material damages for the consequences faced by her "household" as a result of the decision to dismiss her partner, as well as moral damages. She submitted that the dismissal decision was illegal.

The Director of the Division of Human Resources wrote to the complainant on 4 February 2009 to inform her that the Deputy Director General, Head of the Department of Management, had considered the allegations of misconduct she had raised in June, July and August 2008 together with the statements of the staff members concerned and that, in accordance with paragraph 4(d) of Appendix G, he had decided to close each of the cases because no misconduct had been found. The complainant wrote to the Director General on 8 February asking him to review that decision and to provide her with the statements received from the staff members she accused of misconduct. She also asked him to state the reasons for deciding that

her allegations of misconduct were unfounded. In the event that her request for review was denied, she asked him to waive the jurisdiction of the Joint Appeals Board and to grant her leave to appeal directly to the Tribunal. Having received no reply from the Director General, she filed an appeal with the Joint Appeals Board on 12 March, challenging the decision of 4 February 2009.

By a letter of 8 May the Director General informed the complainant that the decision to close the cases of reported misconduct had been upheld on the ground that her allegations were unfounded. He stated that she was not entitled to compensation because the prejudice she identified merely resulted from an administrative decision taken against her partner, and not from a decision concerning her terms of appointment. He also decided not to provide her with the documents she had requested, as she had no special interest in the information contained therein that could justify overriding the duty of confidentiality the Agency owed to the staff members she accused of misconduct. The Director General agreed to waive the jurisdiction of the Joint Appeals Board, but reminded her of her duty to act in compliance with the provisions of the Standards of Conduct for the International Civil Service. He drew her attention to paragraph 19 thereof, which provides that: “[a]n international civil servant who [...] in good faith [reports any breach of the organisation’s rules or regulations] has the right to be protected against reprisals or sanctions”, adding that “[w]here such good faith is shown to be lacking, the inverse shall apply”. That is the decision the complainant impugns in her first complaint.

The Director of the Division of Human Resources informed the complainant by a letter of 11 September 2009 that the Deputy Director General, Head of the Department of Management, had considered the allegations of misconduct she had raised in November 2008 together with the statements of the staff members concerned and that, in accordance with paragraph 4(d) of Appendix G, he had decided to close the cases because no misconduct had been found. On 15 September the complainant wrote to the Director General asking him to review that decision and to provide her with the statements received from the staff members she accused of misconduct. She also

requested him to state the reasons for deciding that her allegations of misconduct were unfounded. In the event that her requests were denied, she asked him to waive the jurisdiction of the Joint Appeals Board and to grant her leave to appeal directly to the Tribunal.

By a letter of 19 October 2009 the Director General informed the complainant that the decision to close the cases of reported misconduct had been upheld because her allegations were unfounded. He stated that the matters to which she referred did not constitute facts warranting administrative or disciplinary action against the staff members concerned. He added that he would not provide her with a copy of the statements of the staff members she accused, on the grounds that they were confidential. Referring to his letter of 8 May 2009, he reiterated that she had no special interest in that information that could justify overriding the duty of confidentiality the Agency owed to the staff members in question. The Director General agreed to waive the jurisdiction of the Joint Appeals Board but reminded the complainant that, even though she had a right to submit legitimate reports of suspected misconduct, she also had an obligation to act in compliance with the provisions of the Standards of Conduct for the International Civil Service. Considering the volume and tone of her allegations, together with the fact that they did not relate to her personally, he observed that she might not be acting in compliance with the aforementioned Standards. That is the decision the complainant impugns in her second complaint.

The complainant again wrote to the Director General on 12 November 2009 stating that she disagreed with his decision and requesting payment of the compensation listed in her first complaint before the Tribunal, plus a further 100,000 euros for additional physical and moral injury.

B. The complainant criticises the Agency's failure to take adequate measures to improve the unhealthy working environment in the Division where she works. She submits that her dignity and reputation have been and continue to be harmed, in particular because she works in the Division where her partner used to work. Thus, her colleagues include staff members who were "against" her partner. She argues

that the impugned decision is tainted with abuse of power insofar as the Director General refused to disclose his reasons for confirming the closure of the cases of reported misconduct. She further contends that her partner suffered “severe material prejudice” as he was illegally dismissed and did not find other employment thereafter.

She indicates that she is concerned that the Agency might take “reprisals or sanctions” against her for having reported misconduct. She stresses that the Director General threatened her with “reprisals or sanctions” in the first impugned decision and that the expiry date of her appointment is approaching.

In addition, she alleges undue delay in dealing with her reports of misconduct. She indicates that it took almost ten months for the Agency to reply to her memoranda of November 2008.

In her first complaint the complainant asks the Tribunal to set aside the impugned decision and to order the Agency to pay her 200,000 euros “for the physical damage and for the moral prejudice [she] suffered”. She claims exemplary damages for the “very serious material damage, for the consequential damage and for the moral and professional prejudice [her partner] suffered”. The exemplary damages should include compensation in an amount equivalent to the gross salary and allowances her partner would have received had he been working between March 2006 and the date of statutory retirement, as well as 3,459 euros – which corresponds to the last net base salary paid to her partner – for each month between May 2004 and February 2006. She also claims reimbursement of the costs incurred by her partner “for his defence” together with all the medical costs he has incurred since 4 March 2006. Lastly, she seeks 8 per cent interest on all amounts claimed in relation to her partner. In her second complaint she asks the Tribunal to quash the impugned decision and to grant her the relief claimed in her first complaint. She also claims 100,000 euros for the “additional physical damage and [...] moral prejudice [she] suffered”. In both complaints, she asks the Tribunal to hear her partner as a witness.

C. In its replies the IAEA submits that the complaints are irreceivable. It contends that the complainant has consistently characterised her grievances in terms of actions that were taken by the Agency, through its officials, solely with respect to her partner. Indeed, she reported misconduct in relation to actions that did not concern her terms of appointment but those of her partner. Moreover, she has failed to produce evidence of direct injury, as the financial consequences of her partner's dismissal for the "household" are unconnected with any decision taken with respect to her. In its view her claims are *res judicata* so far as her partner is concerned, and her complaints amount to a request for review of Judgments 2604 and 2656. This, it argues, constitutes an abuse of process and an attempt to undermine the Tribunal's rulings. It indicates that the complainant's submissions during the Appendix G procedure were similar to those previously received from her partner. Referring to the case law, the defendant asks the Tribunal to impose a "monetary penalty" on the complainant for having filed a vexatious complaint.

The Agency emphasises that it acted in good faith and examined the complainant's allegations of misconduct in accordance with applicable procedure. All the accused staff members were informed of the allegations made against them and they were requested to provide their statements thereon. The defendant wonders how the complainant obtained a copy of an e-mail of 19 December 2007, which was not addressed to her. It indicates that the e-mail was printed from the computer of one of the recipients who asserts that she did not give a copy to the complainant or anybody else.

D. In her rejoinders the complainant maintains her pleas. She contends that she was personally injured and that she witnessed some of the acts of misconduct she reported. She asserts that these acts were not considered by the Tribunal in Judgments 2604 and 2656, and that her complaints are not requests for review of these judgments.

She alleges a serious breach of due process in that the IAEA withheld her written statement of 22 December 2004 from the Office of Internal Oversight Services and thus prevented her from being

able to show that she herself had suffered prejudice. She adds that she cannot be sure that the Agency reviewed her allegations of misconduct in accordance with the applicable rules, since it refused to provide her with the statements made by the staff members she accused of misconduct and did not explain why it had concluded that her allegations were unfounded. With respect to the alleged abuse of process, she points out that it is the first time that she has filed complaints with the Tribunal.

E. In its surrejoinders the Agency maintains its position. It rejects the allegation of breach of due process, adding that the written statement of December 2004 concerned the suspension of the complainant's partner. With respect to the statements made by the staff members accused of misconduct, it reiterates that the complainant had no special interest in the information contained in the documents she requested that would have justified overriding the duty of confidentiality owed to the staff members accused of misconduct. Indeed, she was a mere reporter of misconduct and not the accused. Furthermore, it had already explained to her that her allegations of misconduct were considered to be unfounded because her accusations involved administrative matters pertaining to a third party, namely her partner.

CONSIDERATIONS

1. The facts and legal issues raised in the complainant's two complaints are in all material respects the same; consequently, the complaints are joined to form the subject of a single ruling.

2. The complaints arise from a series of interoffice memoranda that the complainant sent to the Director of the Division of Human Resources in 2008, in which she made allegations of misconduct on

the part of a total of 15 staff members of the Agency. The alleged misconduct concerned the treatment of the complainant's partner, Mr M. R., a former staff member, who was suspended from duties in December 2004 and subsequently dismissed, 14 months later, for serious misconduct. The complaints Mr M. R. lodged with the Tribunal against his suspension and dismissal were dismissed in Judgments 2604 and 2656 respectively.

3. Following a review of the complainant's allegations, the receipt of statements from each of the staff members accused of misconduct and a recommendation from the Director of the Division of Human Resources (the key document), the Deputy Director General responsible for the Department of Management determined, in two separate decisions, that each case was unfounded and should, accordingly, be closed.

4. The complainant requested a review of these decisions, together with leave from the Director General to appeal directly to the Tribunal in the event of a negative reply. She also requested copies of the staff members' statements and the key document. On 8 May and 19 October 2009 the Director General upheld the decisions to close the misconduct cases, denied all of the claims for compensation, and declined to provide the requested documents. The complainant impugns these decisions in her two complaints, since the Director General also agreed to waive the jurisdiction of the Joint Appeals Board and to authorise the filing of direct complaints with the Tribunal.

5. The complainant claims a breach of the Agency's obligation to treat staff members with dignity and to avoid causing them unnecessary injury. She also pleads that the IAEA abused its power. She asks the Tribunal to quash the impugned decisions and to award exemplary damages "for the very serious material damage, for the consequential damage and for the moral and professional prejudice Mr [M. R.] suffered", detailed under B above, and an award of damages for the "physical damage and for the moral prejudice [she]

suffered”. She also seeks costs, including costs arising from Mr M. R.’s previous complaints before the Tribunal.

6. The defendant submits that the complainant lacks standing on the ground that she pleads no real connection between herself and the impugned administrative actions. She also lacks standing insofar as she seeks to challenge substantive aspects of decisions, namely the decisions to close the misconduct cases. In this regard, it submits that the complainant has only procedural rights pursuant to the terms of her appointment. The Agency refers to the doctrine of *res judicata* and argues that the complaints are an abuse of process. It asks the Tribunal to dismiss the complaints as irreceivable and to award costs against the complainant along with any other penalty it deems appropriate.

7. The Tribunal concludes that, with the exception of two matters considered below, the complaints are irreceivable. Article II(5) of its Statute provides, inter alia, that the Tribunal is “competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations”. Further, it is well established in the case law that standing is contingent on a complainant demonstrating injury, although that need not be present injury. As the Tribunal stated in Judgment 1712, under 10, “[t]he necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury”.

8. First, it is observed that the complaints are not directed at the complainant’s terms of appointment. Instead, the complaints are cast in terms of actions taken with respect to Mr M. R. To the extent that the complainant claims financial and personal harm stemming from her partner’s suspension and later dismissal, the Tribunal notes that this has no connection with the present complaints. Rather, as the Tribunal stated in Judgment 1423, under 3, “[a] decision by an international organisation is challengeable before [a court] only if it causes the complainant injury”. The present case concerns the emotional and financial fallout from a dismissal that affects a third

party, consequently the decision being challenged has caused no injury to the complainant.

9. The Tribunal also accepts the Agency's submission that the complainant lacks standing to bring a complaint against the substantive outcome of the misconduct reviews, even though she reported the alleged misconduct in question. The complainant has the right to submit a report alleging misconduct on the part of a staff member and has the same right as all other staff members to expect that the procedures followed as a result of this report will be carried out in accordance with Appendix G of the Staff Regulations and Staff Rules. However, in the absence of evidence that she herself suffered or is likely to suffer injury as a result of the alleged misconduct, the complainant does not have a corollary right to challenge the substantive outcome of the process. As will be shown later, she has not established that she has suffered or is likely to suffer any injury.

10. The complainant also alleges injury to her dignity on account of the Agency's handling of her partner's case and the fact that she continues to work with some of the staff members who were involved in that case. This, she argues, breached her right to be treated with dignity, a right which the Tribunal acknowledged in Judgment 2067, under 17. The Tribunal observes that this alleged injury is in no way related to the subject matter of the present complaints.

11. With regard to the two above-mentioned matters, the Agency admits that in relation to one of the matters raised in the complainant's pleadings there is a connection between the complainant and the administrative action. In her report of 27 June 2008 alleging misconduct, the complainant claims that the Division of Human Resources failed on 22 December 2004 to forward an unsolicited written statement of which she was the author to the Office of Internal Oversight Services. She contends that the failure to transmit the statement was an oversight of possibly determinative import in Mr M. R.'s case and constitutes an abuse of power by the Agency.

12. Without deciding whether there was in fact a failure to transmit the letter, the Tribunal observes that the harm alleged is in relation to Mr M. R. and not to the complainant. As such she has neither standing nor a cause of action in this regard.

13. The complainant also claims that she was entitled to receive detailed reasons for the decisions to close the various cases, the staff members' statements in response to her misconduct allegations and the "key document" containing the recommendations of the Director of the Division of Human Resources to the Deputy Director General.

14. In Judgment 1369, under 28, the Tribunal made the following observations on the duty to give reasons:

"The duty to explain a decision is a general principle of administrative law: the decision-maker must at least give such statement of the reasons for the decision that anyone it affects may defend his rights and the Tribunal may rule on any case before it. But the content of the duty will vary with the nature of the decision."

15. Under a principle of administrative law, as a reporter of misconduct and a person not affected in any way by the alleged misconduct itself, the complainant is not a person affected by the decision and, accordingly, is not entitled to be given any reasons for the decision. The Tribunal also observes that the Appendix G procedure does not make any provision for the reporter of alleged misconduct to receive any kind of notification.

16. As to the complainant's reliance on Judgment 2752 for the proposition that she is entitled to disclosure of the statements of the staff members in response to her allegations of misconduct and the key document, it is misplaced. That decision concerned disclosure to the staff member accused of misconduct and not to the reporter of the misconduct.

17. The remaining question is whether the two complaints constitute abuses of process. The Agency submits that they do. It argues that the complaints are "thinly-disguised" attempts on the part

of Mr M. R. to re-litigate his case and collateral attacks on the Tribunal's two judgments. The Agency takes the position that by challenging issues and sub-issues relating to decisions that have already been confirmed by the Tribunal, the complainant is engaging in the sort of vexatious behaviour to which the Tribunal referred in Judgment 885, under 3, when it held that an organisation in an appropriate case could "[...] invite the Tribunal not just to dismiss [the] complaint but to declare it vexatious and, where appropriate, take any further action it thinks fit". In response, the complainant notes that while her pleadings are "user-unfriendly", her most important claims are that each of the above-mentioned reports concern very serious misconduct and that the decisions of the Tribunal in Judgments 2604 and 2656 were rendered on the basis of "overriding misapprehensions of fact", as confirmed by the Tribunal in Judgment 2752. From a reading of the complainant's pleadings it is evident that her argument is grounded on her belief that these judgments were miscarriages of justice.

18. The Tribunal finds that the complaints are an attempt to re-litigate matters already decided in which the complainant has no legitimate interest. They therefore amount to an abuse of process and the application for hearings of the complainant's partner must be dismissed. Without wishing to condone the bringing of these complaints in any way, the Tribunal will not now make an award of costs against the complainant. However, should she persist in attempting to re-litigate matters already decided in which she has no legitimate interest, the Tribunal may be left with no alternative but to award significant costs against her for persistent abuse of process.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 10 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