

**R. (No. 10)**

*v.*

**IAEA**

**134th Session**

**Judgment No. 4520**

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr R. R. against the International Atomic Energy Agency (IAEA) on 20 September 2018 and corrected on 5 November 2018, the IAEA's reply of 25 February 2019, the complainant's rejoinder of 18 July and the IAEA's surrejoinder of 4 November 2019;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the appointment of a staff member.

The complainant, who joined the IAEA in April 2013 under a temporary assistance contract, holding grade P-3, was granted a fixed-term appointment on 1 June 2015. He was placed on sick leave in February 2017 until his separation from service on 31 May 2018.

In March 2018 the IAEA issued vacancy notice 2018/0183 for the P-4 post of Decommissioning Safety Specialist. On 30 May 2018 the complainant, who did not apply for the position, wrote to the Director General contesting what he described as the "decision to appoint [Mrs M.K.] to the post of 'Decommissioning Safety Specialist'". Mrs M.K. was at that time working as a Decommissioning Safety

Specialist under a monthly short-term contract. The complainant alleged that she did not meet one of the conditions stipulated in the vacancy notice, and asked the Director General to set aside her “appointment” and “to call for a new competition”. The Director General replied on 20 June 2018 stating that the complainant had no standing to file a request for review since he had not applied for the post of Decommissioning Safety Specialist and his claim did not concern the terms of his former appointment. He added that the recruitment for the contested position was ongoing and that no candidate had yet been appointed. He granted the complainant’s request for waiver of the jurisdiction of the Joint Appeals Board, noting that the complainant had separated from service on 31 May 2018.

The complainant therefore filed a complaint directly with the Tribunal impugning the decision of 20 June 2018.

The complainant asks the Tribunal to set aside the impugned decision and the decision to appoint Mrs M.K. to the contested position, as well as any other subsequent appointment based on it. He also asks that the recruitment for that position be done anew while having him appointed *ad interim* to the position for the duration of the new competition procedure. If such appointment is not possible, he seeks an “equitable material redress”. In addition, he seeks an award of material damages in an amount equivalent to the difference in salary between the amount he would have earned had he been promoted to the contested position (including step adjustment and pension entitlements), calculated from the date of Mrs M.K.’s appointment to the last day of his contract with the Agency (31 May 2018), and the amount he actually earned. He further claims moral damages, damages for the consequential “biological damage suffered” and for the “consequential loss of enhanced earning capacity, for diminished job prospects” as well as exemplary damages and costs. Lastly, he claims interest at the rate of 5 per cent per annum calculated from the date of the impugned decision.

The IAEA asks the Tribunal to reject the complaint as irreceivable for lack of a cause of action and devoid of merit. It argues that the complaint is frivolous.

## CONSIDERATIONS

1. By an email dated 27 January 2022, the complainant requested, in effect, the recusal of two of the judges sitting on the panel this session deciding this and other complaints filed by the complainant. This request had been preceded by correspondence to the same effect in relation to the same and other judges in other proceedings involving the complainant. Ordinarily (that is, other than in cases of necessity) a judge would not sit to hear and determine a case if there was a reasonable apprehension that the judge was biased and could not bring an open mind to the determination of the case. The complainant does not point to any facts which would sustain such a conclusion. He does refer to the fact, in earlier correspondence, that one of the judges on the present panel has participated, as a panel member, in a succession of cases in which the complainant was unsuccessful. But nothing was pointed to by way of commentary in the judgments disposing of these cases suggestive of bias against the complainant. The mere fact that a litigant is unsuccessful in proceedings determined by a judge, without more, does not warrant the recusal of the judge in subsequent proceedings involving the same litigant (see Judgment 110, consideration 1). Indeed, a judge has a duty to hear and determine a case allocated to her or him and a decision to recuse which was not properly founded would constitute a breach of that duty.

2. The Tribunal observes that neither party sought the joinder of this case with any of the complainant's other cases examined at this session.

3. Vacancy notice 2018/0183 was issued in March 2018 advertising the P-4 post of Decommissioning Safety Specialist. The closing date for applications was 23 April 2018. The vacancy notice stated, among other things, that the contract for the post was for a duration of 24 months on a fixed-term appointment with a one-year probation period. Regarding qualifications, the notice required, among other things, an advanced university degree in Physical Sciences or Engineering. The notice also

encouraged applications from qualified women and candidates from developing countries.

4. As of 1 April 2018, Mrs M.K. worked in the IAEA as a Decommissioning Safety Specialist on a monthly short-term contract. She separated from service on 31 December 2018. She was never appointed to that post pursuant to the recruitment procedure under vacancy notice 2018/0183, nor did the complainant applied to this position.

5. On 30 May 2018, the day before he separated from the IAEA, the complainant requested the Director General to set aside Mrs M.K.'s appointment on the basis that she did not meet one of the conditions stipulated in vacancy notice 2018/0183. He relevantly complained that the IAEA had appointed Mrs M.K. who did not possess the requisite advanced university degree in Physical Sciences or Engineering. He submitted that he had a cause of action as a staff member and potential internal candidate for the post and complained that he had been "evidently misl[ed] and unjustly dissuaded from applying to [fill] the vacant position" because he also did not hold an advanced university degree as required. He stated that that "requirement was evidently waiv[ed] in due course [of] recruitment, as it was not applied to the successful candidate". He referred to the Tribunal's case law, stated in consideration 4 of Judgment 3073 and consideration 8 of Judgment 2712. The complainant requested that the post be re-advertised with the university requirement amended "so as to reflect the criteria for appointment to the post, as modified during the selection process" and that he be paid moral damages.

6. The Director General noted, correctly in the Tribunal's view, that the complainant did not apply for the post advertised in vacancy notice 2018/0183 and accordingly held that the complainant had no standing to request the review as he had failed to raise a claim that concerned the terms of his former appointment. The Tribunal has stated, in consideration 2 of Judgment 3449, for example, that "[a]ny employee of an international organisation who is eligible for a post may challenge an appointment to that post, regardless of his or her chances of successful

appointment to it (see Judgment 2959, under 3) [, but that i]n order to be entitled to take such action, however, he or she must have applied for the post or, failing that, must have been prevented from doing so through no fault of his or her own". As the complainant, who did not apply for the subject vacant post, provides no evidence that he was prevented from doing so through no fault of his own, he does not have a cause of action. Accordingly, the complaint will be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 23 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ