

R. (No. 11)

v.

IAEA

134th Session

Judgment No. 4521

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh 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 short-term appointment of a staff member.

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

In November 2017 Mrs M.K. was appointed to the P-4 position of Waste Safety Specialist on a monthly short-term basis to replace a staff member who was on maternity leave. The complainant wrote to the Director General on 27 December 2017 contesting her appointment on the ground that she did not "meet one of the conditions stipulated in the

vacancy [notice]”. He added that he was a potential internal candidate for that position, was misled and “unjustly dissuaded” from applying for the position because he did not have the required diploma. He asked the Director General *inter alia* to set aside Mrs M.K.’s “appointment”, “to call for a new competition” and to award him moral damages.

The Director General replied on 29 January 2018 that Mrs M.K.’s appointment was made on a short-term basis. Hence, no competitive process took place and no vacancy notice was issued since the appointment on a short-term basis was made at the Director General’s discretion in accordance with Staff Rule 3.03.1 of the Administrative Manual, taking into account the type and duration of the functions to be performed, the nature of the proposed appointment and the best interests of the Agency. He therefore rejected the request for review as irreceivable.

The complainant filed an appeal with the Joint Appeals Board (JAB) on 12 February 2018 challenging the appointment of Mrs M.K. and seeking pecuniary compensation for the consequential injury to his rights, in particular his right to career development, his right to be treated fairly and without discrimination and his right of appeal. In its report of 14 June, the JAB concluded that the fact that the complainant had allegedly lost an employment opportunity and a career development opportunity due to the absence of competitive recruitment was not an “identifiable non-observance of [his] terms of [...] appointment”. Consequently, his appeal was not against an administrative decision and was irreceivable.

By a letter of 5 July 2018 the Director General informed the complainant that he endorsed the JAB’s conclusion. He added that some of the allegations made by the complainant before the JAB exceeded his initial request for review of 27 December 2017, in particular the allegation that Mrs M.K.’s appointment was made because of a “government sponsorship” and that the recruitment process was tainted with bias on the part of the Director of the Division of Human Resources. Hence these allegations fell outside the JAB’s consideration. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, and the decision to appoint Mrs M.K. to the position of Waste Safety Specialist, together with any other subsequent appointment. 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. 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 (including step adjustment and pension entitlements) between the amount he actually earned and the amount he would have earned had he been promoted to the contested position calculated from the date of Mrs M.K.’s appointment to the last day of his contract with the Agency (31 May 2018). 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 when the impugned decision was taken.

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

CONSIDERATIONS

1. In his request for review, dated 27 December 2017, the complainant requested the Director General to set aside Mrs M.K.’s appointment to the P-4 post of Waste Safety Specialist in the Radioactive Waste and Spent Fuel Management Unit of the IAEA. Mrs M.K. had only been appointed to that post on 9 November 2017 on a monthly basis while the incumbent of the post was on maternity leave. In his request for review, the complainant contested Mrs M.K.’s appointment on the basis that she did not meet the academic conditions to be appointed to the post in that she did not hold an “Advanced University (or equivalent) degree in nuclear, chemical or a related science”. Regarding his cause of action, the complainant stated that he was a staff member and potential internal candidate for the subject post, but that he

was “evidently misl[ed] and unjustly dissuaded” from applying for it because he also did not meet the stipulated requirement, which was “evidently waiv[ed] in due course of recruitment, as it was not applied to the successful candidate”. He cited consideration 8 of Judgment 2712.

2. In addition to requesting the setting aside of Mrs M.K.’s appointment, the complainant asked that there be a new selection process for the post with the stipulated academic requirement amended. He also requested moral damages for the injury to his dignity “sustained having been misled and unjustly dissuaded [from participating] in the competition, and for the loss of opportunity”.

3. In rejecting the complainant’s request for review, the Director General informed him that Mrs M.K. was appointed to the post on a short-term basis; that no vacancy notice was issued and that there was no competitive recruitment process for the appointment because he made it under Staff Rule 3.03.1. The Director General recalled that this Rule conferred upon him discretion to make the short-term appointment without such processes and that he made it taking into account the type and duration of the functions to be performed; the nature of the appointment and the best interests of the IAEA. Noting this in its report on the complainant’s internal appeal against the rejection of his request for review, the JAB relevantly concluded that notwithstanding the complainant’s arguments that Mrs M.K.’s appointment to the post caused him to lose an employment and a career development opportunity, there was no identifiable non-observance of his terms of appointment under Staff Rule 12.01.1(C)(1) because it was not necessary to issue a vacancy notice and there was no competitive recruitment process. The JAB consequently concluded that the appeal was irreceivable. Staff Rule 12.01.1(C)(1) states that the JAB shall be competent to hear appeals by staff members against administrative decisions alleging the non-observance of the terms of appointment.

4. The IAEA submits that the complaint is irreceivable as the complainant does not have a cause of action and legal standing to challenge Mrs M.K.’s appointment to the subject post. It refers to

paragraph 5 of Article II of the Tribunal's Statute, which relevantly states that "[t]he Tribunal shall also be 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 of any other international organization [...]". The IAEA recalls that, in the impugned decision, the Director General had informed the complainant that there was no vacancy notice to fill the post and there was no competitive process because Mrs M.K.'s appointment to it was made on a short-term basis at the Director General's discretion pursuant to Staff Rule 3.03.1. The Tribunal notes that under paragraphs A and B of the above-mentioned Staff Rule, fixed-term, temporary-assistance or short-term appointments of staff members of the IAEA are at the discretion of the Director General, who, when deciding on an appointment in an individual case is to take into account the type and duration of the functions to be performed, the nature of the proposed appointment and the best interests of the Agency, subject to Staff Regulation 3.01. Under Staff Rule 3.03.1(H), short-term appointments may be issued for the purpose of staffing a project or other programmatic activity for which service is expected to be required for a period of less than one year and does not carry any expectation of, or right to extension, renewal or conversion to another type of appointment.

5. Whilst Staff Rule 3.03.1(G)(1) contemplates that an initial temporary-assistance appointment may be made after a competitive process in accordance with section 3 of part II of the Administrative Manual, there is no provision requiring a competitive process for the appointment of staff on a short-term basis. The Director General was entitled to exercise his discretion to make a short-term appointment to the subject post to fill a programmatic need (to replace the holder of the post who was on maternity leave) without issuing a vacancy notice or organising a competitive process.

6. As noted earlier, Mrs M.K.'s short-term appointment to the subject post was made on a non-competitive basis. The complainant has not demonstrated that there was any illegality attending that appointment. Accordingly, the complaint is unfounded and 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