

R. (No. 5)

v.

IAEA

136th Session

Judgment No. 4701

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr R. R. against the International Atomic Energy Agency (IAEA) on 17 May 2018 and corrected on 7 July, the IAEA's reply of 25 October 2018, the complainant's rejoinder of 25 February 2019 and the IAEA's surrejoinder of 6 June 2019;

Considering the complainant's letter of 21 April 2023 to the Registrar of the Tribunal seeking the recusal of several judges;

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 decision to defer the review of his contract's extension.

At the material time, the complainant was employed within the Department of Nuclear Energy (NE), under a three-year fixed-term contract from 1 June 2015 to 31 May 2018.

On 20 December 2016, the complainant was informed that the Director General had decided to defer the review of the proposal for extension of his contract until the next meeting of the Joint Advisory

Panel on Professional Staff in June 2017. Following an email correspondence, he was informed on 2 February 2017 that the deferral decision was made because of the ongoing review of the Information Technology (IT) functions in NE.

On 17 February 2017, the complainant requested the Director General to review his deferral decision.

On 10 March 2017, the Director General replied that he saw no reason to change his decision. By letter dated 12 April 2017, the complainant appealed this decision to the Joint Appeals Board (JAB).

In its report of 30 October 2017, the JAB found no reason to doubt that the decision did not breach any applicable rules, that it had been made for valid programmatic reasons and that it was taken in the best interests of the IAEA. It recommended that the Director General dismiss the appeal.

On 20 November 2017, the complainant was informed that the Director General had considered that further consideration was required by the JAB in order for him to make a final decision. On 15 January 2018, the JAB submitted a supplementary report with respect to two pleas which were not explicitly addressed in its initial report. The JAB found that these two pleas were not substantiated.

On 19 February 2018, the complainant was informed that the Director General had reviewed the JAB's initial report, as well as its supplementary report, and that he had decided to endorse the recommendation to dismiss his appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award him material damages in the amount of two years of salary corresponding to the two-year extension he would have received if he had benefited from the maximum tour of service at the IAEA. He also claims moral and exemplary damages, as well as costs, with interest on all sums awarded. In his rejoinder the complainant requests the disclosure of two investigation reports.

The IAEA requests the Tribunal to dismiss the complaint as partly irreceivable and entirely devoid of merit. It points out that it has disclosed one investigation report within the context of the complainant's seventh

complaint and has provided detailed information regarding the outcome of the other investigation thereby satisfying the requirements of due process.

CONSIDERATIONS

1. On 21 April 2023, the complainant submitted a letter requesting the recusal of two of the judges sitting on the panel this session deciding the present case and three other complaints filed by him. His grounds for the recusal are that the judges' recurring participation in a succession of cases involving him and the uniformity of their orders dismissing all of his complaints raise substantial concerns about the right to a fair trial and their impartiality. Additionally, the complainant requests that the pending complaints be heard by a panel of judges without prior involvement in any of his cases, and that another judge who assumes the President's responsibilities be appointed. The complainant has sought the recusal of the two judges in a previous case, and his application was rejected by the Tribunal in Judgment 4520, consideration 1.

2. The principle of impartiality is an inherent element of the right to a fair trial, which is central to the operation of the Tribunal. As the Tribunal's well-established case law states, ordinarily, except in cases of necessity, a judge will not be involved in adjudicating a case if there is a reasonable apprehension that she or he will not take a completely objective view owing to a risk of a lack of impartiality in her or his determination (see Judgments 4584, consideration 2, and 4520, consideration 1). A judge's previous rulings or decisions alone is not a valid cause to challenge her or his impartiality, unless there is specific evidence suggestive of bias. 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. The complainant primarily relies on his lack of success in previous proceedings and cannot present any circumstances which underpin a reasonable apprehension that the two judges might decide a case other than

on its legal and factual merits. The mere fact that he was unsuccessful in previous proceedings before a panel in which the two judges participated does not warrant his application for the recusal of the two judges in subsequent proceedings involving him (see Judgments 4520, consideration 1, and 110, consideration 1). His request is therefore dismissed.

3. The central question in the present case is whether the decision to defer the review of the complainant's contract extension (hereinafter "the deferral decision") was lawful and whether the complainant should be awarded the damages he claims. The IAEA does not challenge the receivability of the complaint as such, but it objects to the complainant's claim for material damages, as those damages flow from a distinct administrative decision, namely the non-renewal of his contract. The Tribunal will, however, *ex officio* consider the issue of receivability.

4. The complainant's fixed-term contract expired on 31 May 2018. The decision to defer consideration of the renewal of his contract until the next meeting of the Joint Advisory Panel on Professional Staff in June 2017 was merely a step in the decision-making process and interim in nature, leading to the Director General's final administrative decision dated 17 May 2018, the lawfulness of which the complainant has challenged in his sixth complaint, which was rejected as entirely unfounded by the Tribunal in Judgment 4346, delivered in public on 7 December 2020.

5. The Tribunal considers that the deferral decision is not a final administrative decision, as the Tribunal has repeatedly stated in its case law, for example, in Judgment 4404, consideration 3: "[o]rdinarily, the process of decision-making involves a series of steps or findings which lead to a final decision. Those steps or findings do not constitute a decision, much less a final decision. They may be [challenged] as a part of a challenge to the final decision but they, themselves, cannot be the subject of a complaint to the Tribunal (see Judgment 2366, consideration 16,

confirmed by Judgments 3433, consideration 9, 3512, consideration 3, 3700, consideration 14, 3876, consideration 5, and 3961, consideration 4).”

6. Moreover, it is difficult to see what direct legal effect the deferral decision could have had on the complainant. The deferral decision was made more than one year prior to the expiry date of the complainant’s contract, and his status, rights and benefits during the appointment remained the same.

7. From the foregoing, the complainant’s claims and allegations regarding the deferral decision are irreceivable. His requests for access to two final investigation reports are also rejected as they have no relevance to the present case.

8. The complainant also contends that the Joint Appeals Board (JAB) breached the provision of Staff Rule 12.01.1(D)(9), which provides that it shall submit its report to the Director General within three months after undertaking consideration of the appeal. Considering that during this period of time the JAB was requested to consider multiple appeals from the complainant, it cannot be said that there was an inordinate delay in the internal appeal process. The Tribunal further finds that the JAB was nevertheless granted by the Director General an additional three months to issue its report and that it submitted its report within the extension. The extension is in line with the provision of Staff Rule 12.01.1(D)(9) that “the Board may, however, with the agreement of the Director General, extend this time limit in exceptional circumstances.” His claims for compensation for unreasonable delay are accordingly dismissed.

9. The complainant’s other allegations including institutional harassment were not raised in his request for review of the deferral decision. They are outside the scope of the present case and are therefore irreceivable.

10. In light of above considerations, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2023, 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 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ