Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A.

v.

IAEA

139th Session **Judgment No. 4953**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S. A. against the International Atomic Energy Agency (IAEA) on 19 October 2021 and corrected on 23 November 2021, the IAEA's reply of 8 March 2022, the complainant's rejoinder of 3 June 2022, the IAEA's surrejoinder of 2 September 2022, the complainant's additional submissions of 14 October 2022 and the IAEA's final comments of 16 December 2022;

Considering the information provided at the Tribunal's request by the IAEA on 25 June 2024 and 5 August 2024 and by the complainant on 10 July 2024;

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 contests the decision not to extend her fixed-term appointment.

The complainant joined the IAEA in 2010. At the material time, she was working as Team Assistant, at grade G-4, in the Division of Nuclear Fuel Cycle and Waste Technology, Department of Nuclear Energy (NEFW), and held a fixed-term appointment funded from extra-

budgetary resources. On 7 March 2019, the complainant accepted an extension of her fixed-term appointment until 31 August 2020. The letter of contract extension stated that "[t]his extension shall not be deemed to carry any expectation of or right to another extension, renewal or conversion to another type of appointment" and included the following: "3. Special Condition: This appointment is funded through extra-budgetary resources and may, subject to the relevant Staff regulations, be terminated prior to its expiry date if the necessary extra-budgetary resources are not available".

On 6 December 2019, the complainant filed a complaint with the Office of Internal Oversight Services (OIOS), alleging harassment by two NEFW colleagues. As part of its preliminary assessment of the complaint, on 7 February 2020, OIOS invited the complainant's supervisor for an interview. The interview took place on 17 February 2020. OIOS ultimately closed the complaint following the preliminary assessment.

On 18 February 2020, the complainant sent an email to her supervisor in which she wrote that she "[did] not agree with [her supervisor's] statements" in her performance development review report for 2019. She concluded her email stating "I am very surprised to read it and see [a] sudden change of your attitude towards me while assessing my performance".

By email of 29 June 2020, the complainant's supervisor notified the complainant that she had been in contact with government donors and she had "received a clear message that they do not intend to offer [the complainant] a further extension" of her contract since "[t]he implementation rate dropped significantly due to COVID-19 and the foreseen implementation rate for 2020 is considerably low. Therefore, the donors have decided to cease the agreement to co-sponsor one Team Assistant" and "[t]he remaining [...] project funds will be used for other means of implementation on non-[human resources (HR)] basis which has a higher priority for the donors for now". She further stated that, in view of the complainant's maternity leave scheduled from 11 July 2020 to 31 October 2020, an extension of the complainant's appointment would be issued "to bridge the gap" but she had asked the Division of

Human Resources (MTHR) to issue a letter to confirm the non-extension beyond 31 October 2020.

On 3 July 2020, the complainant filed a complaint of retaliation under the Whistle-Blower Policy, AM.III/3, in which she alleged, among other things, that the non-extension of her contract constituted retaliation by her supervisor for filing her 6 December 2019 harassment complaint.

By letter of 21 July, the Acting Director, MTHR, wrote to the complainant that "[a]s [she was] aware [...] [i]n accordance with clause 3 of [the complainant's] Letter of Appointment for [her] Fixed-Term Extrabudgetary appointment [...] there [would] be no further extension of [her] services" beyond 31 October 2020. The complainant's appointment was ultimately extended until 14 November 2020 to cover the entire duration of her maternity leave as well as a two-week period of certified sick leave.

On 5 September 2020, the Chief of Ethics advised the complainant that, following the preliminary assessment, he had referred her allegations of retaliation to OIOS for investigation and that she "w[ould] be informed of the Ethics determination of whether retaliation occurred following conclusion of the OIOS investigation".

On 17 September, the complainant requested the Director General to review the decision "not to extend [her] Fixed-Term Extrabudgetary Appointment", alleging again that the non-extension of her contract was retaliatory.

On 14 October 2020, OIOS completed its investigation into the complainant's retaliation complaint. OIOS concluded that the decision not to renew the complainant's contract was reasonable and would have been taken regardless of her 6 December 2019 harassment complaint.

By letter of 6 November 2020, the Chief of Ethics provided the complainant with his determination that retaliation had not occurred. According to his letter, "[f]ollowing an independent review of the OIOS investigation and the supporting documents, Ethics consider[ed] that the record shows that the IAEA had non-retaliatory reasons not to renew [her] contract" and that "[t]here is clear and convincing evidence that

management would have taken the alleged retaliatory action of not renewing [her] contract absent [her 6 December 2019 harassment complaint] and that this decision was not made for the purpose of punishing, intimidating or injuring [her]". The Chief of Ethics concluded his letter stating that the Ethics Office considered the complainant's retaliation complaint closed. The complainant did not appeal this decision internally.

On 13 November, the Director General notified the complainant of his decision to reject her request for review. In his response to the complainant's request for review, the Director General stated that he "ha[d] decided to accept the determination of the Chief of Ethics that there ha[d] been no retaliation in [her] case". He noted that the complainant's fixed-term appointment was funded from extra-budgetary resources and explained that "[i]n June 2020, the donor elected to re-allocate its funds from [HR] to non-[HR] costs, thereby rendering extrabudgetary resources unavailable to fund [the complainant's] position". The Director General further determined that "the decision not to renew [the complainant's] appointment beyond 14 November 2020 was made in accordance with Staff Rule 3.03.1(F)(7)(ii), further to which the extension of a fixed-term appointment in the General Service category is subject to the availability of funding" and that this decision was also in accordance with paragraph 95 of AM.II/3. He also wrote that "the decision not to renew [the complainant's] appointment beyond 14 November 2020 was made by the Acting Director of [MTHR]" and that "[the complainant's supervisor] email of 29 June 2020 incorrectly mention[ed] that 'the donors [...] [did] not intend to offer [her] a further extension', as it is not within a donor's authority to do so".

On 14 November, the appointment of the complainant expired and she left the service of the organization.

On 12 December 2020, the complainant lodged an appeal with the Joint Appeals Board (JAB), directed against the 13 November 2020 decision.

In its report dated 22 June 2021, the JAB recommended to dismiss the complainant's appeal. The JAB found "no reasons to doubt the findings of OIOS and the Ethics Office that retaliation as alleged by the [complainant] had not taken place". Specifically, the JAB observed that "there were clearly email exchanges between the [Cost Free Experts (CFEs) provided by a Government donor] and [the complainant's supervisor] during the period 29 January to 3 February 2020 concerning the possibility that the [complainant]'s contract would not be extended and the Board considers that this was a solid basis for the determination by OIOS that retaliation as foreseen in AM.III/3 had not taken place". After noting the explanations of the complainant's supervisor and the Administrative Officer, NEFW, regarding lack of funding for the complainant's position, the JAB concluded that "it is clear that the extrabudgetary-funded post held by the [complainant] was of a time-limited nature". The JAB further concluded that "[w]ith regard to the CFEs monitoring implementation of the projects, the Board saw no evidence that they were involved in a managerial or decision-making role with regard to the [complainant]'s contract, and that the decision not to extend the [complainant]'s contract was at all stages handled within the framework of the [complainant]'s line management".

On 23 July 2021, the Director General informed the complainant that he had decided to accept the JAB's recommendation to reject her appeal. The Director General noted that "the Board looked closely at the explanations provided by [the complainant's supervisor] and found that the decision not to extend [the complainant's] appointment was 'a result of the pandemic, and the cancellation of all physical events and travel' which caused a decline of the workload for the position, prompting the donor of the relevant extra-budgetary funds to re-allocate them to non-[HR] costs". The Director General further stated that he "concur[red] with the Board's assessment and consider[ed] the non-extension of [the complainant's] appointment to be based on a valid, non-retaliatory basis". That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement with retroactive effect or, alternatively, that she be paid material damages corresponding to one

year's salary, including pension contributions. She also asks to be paid 15,000 euros as material damages for the loss of future earning capacity. She further requests to be granted material damages or "the equivalent of the [IAEA]'s total contributions to the pension fund for one year" due to the "expected loss of retirement benefits". Finally, she seeks moral damages in the amount of 30,000 euros and costs in the sum of 8,000 euros.

The IAEA asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. In the decision, dated 23 July 2021, which the complainant impugns, the Director General endorsed the unanimous recommendation of the Joint Appeals Board (JAB) in its 22 June 2021 report, to dismiss her internal appeal against the decision not to extend her fixed-term appointment when it eventually expired. She was informed of this in the 21 July 2020 letter from the Acting Director of the Division of Human Resources (MTHR).

2. At the material time, the complainant held a fixed-term appointment as Team Assistant, at grade G-4, in the Division of Nuclear Fuel Cycle and Waste Technology, Department of Nuclear Energy (NEFW). Her appointment was solely funded from extra-budgetary contributions provided by the Government of Japan through its Ministries of Economy, Trade and Industry (METI) and Education, Culture, Sports, Science and Technology (MEXT). The JAB noted that, during that time, the Government of Japan provided a number of Cost-Free Experts (CFEs) who were assigned to the activities supported by extra-budgetary funding in the IAEA. The complainant's subsisting fixed-term appointment was due to expire on 31 August 2020. However, pursuant to Staff Rule 7.04.2(A)(1)(d), she was given "an administrative extension" to 31 October 2020 to the end of her maternity leave, which had been approved on 15 March 2020, and a further extension to 14 November 2020 to cover two weeks of certified sick leave.

3. The Acting Director, MTHR, informed the complainant in a letter of 21 July 2020 that in accordance with Clause 3 of her letter of appointment, her extra-budgetary appointment would not be extended. Clause 3, which was under the heading "Special Condition" stated that the complainant's appointment was "funded through extra-budgetary resources and may, subject to the relevant Staff regulations, be terminated prior to its expiry date if the necessary extra-budgetary resources are not available". The complainant's subsisting contract was not terminated prior to its expiry date but was not renewed when it expired. Notably, Clause 2 of her letter of appointment stated "2. Termination: This extension shall not be deemed to carry any expectation of or right to another extension, renewal or conversion to another type of appointment". Clauses 2 and 3 of her letter of appointment gave effect to paragraph 99(a) of AM.II/3, which are in similar terms.

4. The Tribunal recognizes the wide discretion an international organization enjoys under such provisions, whether contained in an international organization's regulatory regime or in a staff member's letter of appointment, in deciding whether or not to renew a fixed-term appointment. The Tribunal respects an organization's discretion to determine its own requirements and the career prospects of staff. However, the discretion is not unfettered but is subject to only limited review. The Tribunal will normally set aside a decision not to renew or extend an appointment if taken without authority; in breach of a rule of form or of procedure; if the decision rested on an error of fact or of law; if some essential fact was overlooked; if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see Judgment 4503, consideration 7). The Tribunal's role in reviewing a decision not to renew a fixed-term contract for budgetary reasons is limited (see, for example, Judgments 4834, consideration 2, and 3367, consideration 11).

5. In challenging the impugned decision, the complainant contends that it was based on a flawed report by the JAB, which contains errors of fact and law. The Tribunal finds it convenient to summarize the grounds of her challenge as follows:

(1) The non-extension decision was flawed by abuse of authority. It constituted a breach of paragraph 3 of AM.II/11, IV, as well as of Staff Regulation 1.04, because the non-extension was not decided independently by the Acting Director, MTHR, but was based on the instruction of her (the complainant's) supervisor following the decision of the donor government which was not empowered to make such a decision.

(2) In taking the decision not to extend her appointment, the IAEA did not comply with the provisions of Staff Rule 3.03.1(F) since funding for her position was available and her functions were still required.

(3) The decision not to extend her contract was taken in retaliation against her.

(4) The IAEA did not make efforts to reassign her to another post.

(5) The IAEA breached its duty of care and mutual trust towards her, particularly given her personal circumstances that existed at the material time.

6. Regarding the fourth ground, the complainant states that the Administrative Officer, NEFW, testified that "the Department had sought to re-assign [her], but there [was] no available position", and contends that the JAB accepted this statement without requesting or receiving any evidence to verify it. She insists that there was no indication from the IAEA that it had made any effort at all to reassign her to another post. However, the complainant acknowledged that she was placed on a "roster for placement" as of 1 November 2020 and that she eventually received a temporary assistance appointment with the IAEA for a three-month period from 10 November 2021 to 9 February 2022. The fourth ground is therefore unfounded.

7. The Tribunal accepts the complainant's statement with respect to the third ground that although she did not appeal the final decision to reject the retaliation complaint that she filed on 3 July 2020, she considers that she may plead retaliation as a general plea against the decision not to extend her employment when her contract expired in 2020. The Tribunal notes that the JAB and the Director General (in the impugned decision) treated that plea as such.

8. The complainant states that she filed a retaliation complaint under AM.III/3 in July 2020, which the Ethics Office dismissed after an investigation by the Office of Internal Oversight Services (OIOS), but that in its report, the JAB wrongly relied on that outcome and did not independently assess the complainant's plea involving retaliation. It its report, the JAB observed that the complainant emphasized her allegation of harassment and considered the timeline of events the complainant had submitted to support her contention that the non-extension of her appointment was the result of retaliation against her by her supervisor. The JAB noted that the complainant had submitted a harassment complaint in December 2019 and OIOS conducted an investigative assessment in which it interviewed the complainant's supervisor and others in February 2020 but determined that the complaint did not warrant further investigation: a decision the complainant has not contested. The JAB also noted that the complainant filed a complaint against her supervisor under the Whistle-Blower Policy, AM.III/3. In it she alleged that the decision not to extend her contract was in retaliation for her earlier harassment complaint. The JAB noted that OIOS investigated that complaint and found on the evidence that discussions regarding possible reallocation of funds used for the complainant's extra-budgetary position had been initiated before any other party outside of OIOS had been contacted regarding the complainant's harassment complaint and that, as a result, OIOS concluded that the decision not to extend her contract was a natural consequence of the donor government reallocating funds away from her position and would have occurred regardless of the complainant's harassment complaint. The JAB further observed that it is on this basis that the Ethics Office concluded that the decision not to extend the

complainant's contract was not taken in retaliation for her harassment complaint and closed the case.

9. In concluding that it had no reason to doubt OIOS's and the Ethics Office's findings that the decision not to extend the complainant's contract was not retaliatory, the JAB considered the complainant's submissions supporting her allegation that it was. The JAB noted, among other things, that during the period from 29 January to 3 February 2020 – before the complainant's supervisor was contacted by OIOS about the complainant's harassment complaint – there were email exchanges between the complainant's supervisor and the CFEs concerning the possibility that the complainant's contract would not be extended and that this "was a solid basis for the determination by OIOS that retaliation as foreseen in AM.III/3 had not taken place". The JAB further noted in its report the following explanation the complainant's supervisor gave to it concerning the background to the creation and eventual termination of the complainant's position:

> "[T]he initial Japanese contribution and pledges in support of the activities did not include funding for the [complainant]'s post and [...] further consultations and negotiations with the donors were held as a result of which it had been agreed that, as a temporary measure, the donors would fund a G4 position subject to yearly approval. Subsequently, as a result of the pandemic, and the cancellation of all physical events and travel, the workload for the position had declined and there was no longer a programmatic need or justification to continue the contract for another year (ie. September 2020 to August 2021)."

10. The Tribunal finds that the JAB's conclusion on this issue (which the Director General accepted in the impugned decision) was open to it on its analysis and on the record in this complaint. The complainant's argument that in violation of the adversarial principle the JAB did not obtain a copy of the OIOS report nor provided it to her for comment is, on the one hand, unfounded, since, as the IAEA points out, the complainant was duly provided with the Chief of Ethics' preliminary and final determination reports. On the other hand, the argument is inconsequential, since through the present complaint the complainant is not impugning the decision to close her retaliation

complaint but the decision not to extend her fixed-term appointment. Her argument that the JAB's analysis was terse and failed to assess the facts it considered material in deciding this issue is also unfounded since the JAB's analysis was fairly comprehensive and balanced and fairly relied on the available evidence. The third ground is therefore unfounded.

11. The complainant's submissions supporting the first ground, are mainly premised on correspondences between her and her supervisor. She states that these caused her to believe that the decision not to extend her contract was made by the donor, which she contends constituted an abuse of authority. In her complaint, she refers particularly to the following statements her supervisor made in her 29 June 2020 email to her (the complainant) appearing to explain why her contract was not being extended:

> "**I was also in contact with the Japanese donors** from MEXT and METI to enquire on their future plans. I regret to inform you that I have received a clear message that **they do not intend to offer you** a further extension. The implementation rate dropped significantly due to COVID-19 and the foreseen implementation rate for 2020 is considerably low. Therefore, the donors have decided to cease the agreement to co-sponsor one Team Assistant. The remaining [...] project funds will be used for other means of implementation on non-[Human Resources (HR)] basis which has a higher priority for the donors for now." (Emphasis added by the complainant.)

The complainant argues that these statements make clear that the NEFW Department had taken instructions from the donors not to extend her contract and the JAB committed an error when it concluded that it "saw no evidence that [the CFEs] were involved in a managerial or decision-making role with regard to [her] contract, and that the decision not to extend [her] contract was at all stages handled within the framework of [her] line management". She also recalls that she had argued, in effect, in her internal appeal, that those statements showed that the donor made the decision not to extend her contract and submits that this was unlawful by virtue of paragraph 3 of AM.II/11, IV, as well as of Staff Regulation 1.04.

12. The purport of paragraph 3 of AM.II/11, IV, might be better appreciated in its context with paragraphs 1, 3, 4 and 7. They state:

> "1. Cost-Free Experts (CFEs) are provided by donor States or institutions at no cost or partial cost to the Agency to perform specific functions or tasks for which no resources are readily available within the Agency's budget.
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> [...]
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> 3. CFEs shall not be engaged in a managerial, supervisory, representative, policy-formulating or decision-making capacity or for functions that may lead to collusion between the CFE and the donor State or institution, or that may lead to a conflict of interest, or an appearance thereof, between the Agency and the donor State or institution.
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> 4. During the period of service at the Agency, CFEs are under the authority of the Director General and shall neither seek nor accept instructions from any Government or from any authority external to the Agency. A CFE shall not engage in any activity which is incompatible with his/her status or with the proper performance of his/her duties at the Agency.
>
> [...]
>
> 7. [...] Before the Agency can make an offer to a CFE, the donor(s) must provide a pledge letter outlining the commitment to meet the Agency's obligation under such arrangement."

Staff Regulation 1.04 states:

> "In the performance of their duties, members of the Secretariat shall neither seek nor accept instructions from any government or from any other authority external to the Agency."

Rule 110.21 of the Financial Rules states:

> "Transfers of funds from projects funded from extrabudgetary contributions shall be made with the written agreement of the donor/contributor and the recipient, if so required."

13. The complainant notes that in his reply to her request for review, the Director General had stated that the decision not to extend her contract was made solely by the Acting Director, MTHR, and that her supervisor was mistaken as to who made the decision. She points out that the JAB did not agree with the Director General and concluded that the decision was taken by officials in the NEFW based on a practice described by the Administrative Officer of the said Department. The

complainant reproduced the relevant aspect of the JAB report which relevantly states as follows:

> "Ms [J.], the [Administrative Officer, NEFW] [...] described a practice in the [NEFW Department] whereby the Japanese donors requested their CFEs to monitor implementation of associated projects including expenditure of funds and report thereon to their national authorities. [...] The Board was led to understand that in this case, the donors in consultation with their CFEs and the relevant managers in the Department of [NEFW] had decided not to extend the funding of the G4 position because of the effects of the pandemic."

14. The complainant argues that this was wrong since it would mean that the practice to which the JAB referred would be in breach of paragraph 3 of AM.II/11, IV, as well as of Staff Regulation 1.04. The Tribunal recalls that, according to its case law, a practice cannot become legally binding where it contravenes specific rules which are already in force (see, for example, Judgments 4770, consideration 14, and 4555, consideration 11, and the case law cited therein). Although on its face the complainant's argument may seem to have some force in light of this jurisprudence, the Tribunal considers that the following statements in the JAB report and the impugned decision properly contextualize the issue centrally raised in the first ground whether the decision not to extend the complainant's contract was unlawfully taken by the donor government.

In its report, the JAB noted that the practice in question was reflected in the Japanese pledge letters, which stated that "the project of work funded through this contribution should be managed and implemented by [the CFE] who is dispatched to the [NEFW], as well as its Section Head".

In the impugned decision, the Director General stated the following:

> "I note that the Board, having thoroughly reviewed the decision-making process, concluded that it 'saw no evidence' that 'CFE's monitoring implementation of the projects [...] were involved in a managerial or decision-making role with regard to the [complainant]'s contract' nor that the latter was handled outside of the [complainant]'s 'line management'. I concur and recall in this connection my letter of 13 November 2020, correcting the erroneous email of 29 June 2020 ('I regret to inform you that

> I have received a clear message that they [the donor] do not intend to offer you a further extension'). I reiterate that it is not within a donor's authority to offer extensions. However, it is within the [IAEA's] Financial Regulations and Rules to allow a donor to reallocate funds, which was the case in this instance as evidenced by the terms of the pledge letter accepted by the Agency. The resulting allotment transfer was also done in accordance with the relevant Financial Regulations and Rules."

15. It is apparent from the above statement from the Director General, which the Tribunal accepts, particularly in light of Rule 110.21 of the Financial Rules, that the donor government acted lawfully within the terms of the pledge letter between itself and the IAEA by reallocating support funds it provided to the project, and, given the extra-budgetary manner in which the complainant's post was established, it was within the IAEA's discretion to take the decision not to extend her contract when it expired in 2020, which decision was made in that behalf by the Acting Director, MTHR, and communicated to the complainant in the letter of 21 July 2020. Accordingly, the first ground is unfounded.

16. Regarding the second ground, the IAEA's central submission on Staff Rule 3.03.1(F)(7) is that as the complainant held a fixed-term extra-budgetary appointment, the decision not to extend it was lawfully taken because funding for the post became unavailable because the donor government did not continue to fund it after it expired in 2020. Staff Rule 3.03.1(F)(7) states as follows:

> "(F) Fixed-term appointments may be issued for established posts and for periods each not exceeding five years.
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> [...]
>
> General Service category
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> [...]
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> (7) The initial fixed-term appointment may be extended or renewed, normally for a period of two years, taking into account the following criteria:
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> (i) The need for continuity in the specific functions assigned to the staff member's post;
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> (ii) The availability of funding;

(iii) The staff member's conduct and overall performance meets or exceeds the Agency's expectations; and

(iv) The best interests of the Agency."

17. The complainant contends that budgetary limitations did not preclude the extension of her appointment. She argues that funds were available to permit its extension because the government donor did not cease its funding and there is evidence that as of 12 June 2020 sufficient money remained from the project to fund both HR and non-HR components, including her HR-related post. The complainant argues that, moreover, most of the extra-budgetary activities had been postponed to the following year (2021). She further argues that there was need for the continuity of her post because after her contract was not extended the duties of her post were performed on ad hoc temporary assistance assignments of two to three months each funded from the regular budget. She observes that the JAB noted that consideration of extensions for extra-budgetary positions are conducted on an ad hoc basis by the relevant departments, with the decision being reached on the criteria reflected in Staff Rule 3.03.1(F)(7) relating to the need for continuity of the functions, availability of funds, performance, and the best interest of the IAEA and that the JAB had further noted that her "extrabudgetary position was no longer funded" by the donor government.

18. Noting that the complainant was appointed to an extra-budgetary position and that Staff Rule 3.03.1(F) applied to "established posts", the Tribunal sought to confirm whether the complainant's position was in fact an established post by directing that question to the parties, pursuant to Article 9, paragraph 6, of its Rules. In its reply, the IAEA relevantly advised the Tribunal that the complainant held a fixed-term extra-budgetary appointment, within the meaning of paragraphs 95-99 of AM.II/3 ("Staffing"), which is issued for positions funded from extra-budgetary resources, and that such positions are not considered an "established post" within the meaning of Staff Rule 3.03.1(F). It further stated that the reference to Staff Rule 3.03.1(F) in the impugned decision and in its pleadings before the Tribunal was by oversight.

19. Pursuant to AM.II/3, "Staffing", paragraph 95 on "Appointment of staff funded from extrabudgetary resources":

> "The duration of appointments of staff members funded from extrabudgetary resources should normally not exceed the period for which extrabudgetary funds have been received. The duration of such appointments may only exceed the period for which extrabudgetary funds have been received by an additional period of up to two years for which funds have been committed by the donor, if the following conditions are met:
>
> (a) The Division Director of the receiving area confirms in writing the availability of sufficient regular and/or extrabudgetary funding in order to ensure that such staff members could still be funded if the donor is unable to comply with his/her earlier commitment; and
>
> (b) [The Director, MTHR] concurs with the Division Director's confirmation of the availability of sufficient regular and/or extrabudgetary funding if the donor is unable to comply with his/her earlier commitment."

20. If the conclusion of the JAB, after its inquiries in the internal appeal proceedings, that consideration of extensions for extra-budgetary positions is conducted on an ad hoc basis of the criteria reflected in Staff Rule 3.03.1(F)(7) was correct, it would be appropriate to also treat the requirements of this Staff Rule as relevant considerations.

21. The complainant further refers to the Tribunal's statement in considerations 19 and 20 of Judgment 3586 that "all relevant documents should have been disclosed [by the Organization in question] to the [internal appeal body], without its request, to enable it to thoroughly investigate the central question: whether funds were or would have been available or were 'expected to be assured' at the material time to fund the extension" of the contract of the complainant in that case. The complainant states that she provided evidence to the JAB that as of 12 June 2020, there was a balance of over 2 million euros in the IAEA's budget to fund the HR and non-HR functions in her department and the latter should have produced to the JAB all the documents related to the allotment transfer in June 2020 and whether it was done in line with its Financial Regulations and Rules in order to determine, in effect, whether funds were available to continue to fund her position. She submits that the IAEA's failure to produce the

documents to her and to the JAB constituted a breach of due process. She cites the Tribunal's statement in consideration 17 of Judgment 3586 that the organization in that case "breached due process by not disclosing all of the agreements and related information, which could have assisted the [internal appeal body] to have made a properly informed determination whether financial constraint was a valid reason for not extending [her] contract".

22. The foregoing submissions show that the complainant has failed to appreciate, first, that in Judgment 3586, the question of whether funds were "expected to be assured" was an enquiry dictated by a specific provision (Paragraph III.5.12 of WHO's e-Manual) which is not applicable in the present case, where both paragraph 95 of AM.II/3 and Staff Rule 3.03.1(F)(7) condition the extension of appointments to the "availability of funding". In the second place, Judgment 3586 was not concerned with the non-extension of an appointment to a position funded by extra-budgetary contributions by a donor government wherein the IAEA was under no obligation to allocate funds from its regular budget to fund the position when the donor government withdrew its funding for it in the terms stated in consideration 9 of this judgment, which the Tribunal accepts, as did the JAB. Notably, paragraph 95 of AM.II/3 relevantly stated that the duration of appointments of staff members funded from extra-budgetary resources should normally not exceed the period for which extra-budgetary funds have been received. Moreover, as the Director General stated in the impugned decision it was within the IAEA's Financial Regulations and Rules to allow a donor to reallocate funds, which occurred in the present case. Stated in another way, the essential question regarding this aspect of the third ground is not (as the complainant suggests) whether as of 12 June 2020 sufficient funds remained in the Department's budget to cover the complainant's position as well as non-HR functions thereby justifying the disclosure of documents to prove that there was. The question is whether funds had been allocated by the donor government to continue to fund the complainant's extra-budgetary post when its term expired in 2020, and they were not. There was therefore no basis for the IAEA to disclose

information concerning the question whether funds were or could have been made available from the IAEA's regular budget or were "expected to be assured" to continue to fund the complainant's position. It was therefore unnecessary for the JAB to order the disclosure of the documents she seeks or for the IAEA to share them with the JAB without its request.

23. Regarding the substantial questions raised pursuant to Staff Rule 3.03.1(F)(7), the JAB noted in its report the explanation from the complainant's supervisor recalled in consideration 9 above that "the initial Japanese contribution and pledges in support of the activities did not include funding for the [complainant]'s post and [...] further consultations and negotiations with the donors were held as a result of which it had been agreed that, as a temporary measure, the donors would fund a G4 position subject to yearly approval. Subsequently, as a result of the pandemic, and the cancellation of all physical events and travel, the workload for the position had declined and there was no longer a programmatic need or justification to continue the contract for another year (ie. September 2020 to August 2021)." It further received confirmation from the Administrative Officer, NEFW, that the complainant's extra-budgetary position was "no longer funded" and concluded that "it [was] clear that the extrabudgetary-funded post held by the [complainant] was of a time-limited nature". The Tribunal further recalls its case law stated, for example, in consideration 5 of Judgment 4674, that it is not its role to reweigh the evidence before an internal appeal body which, as the primary trier of fact has had the benefit of actually seeing and hearing many of the persons involved, and of assessing the reliability of what they have said and for that reason the body is entitled to considerable deference. So that where such a body has heard evidence and made findings of fact based on its appreciation thereof, the Tribunal will only interfere in the case of manifest error. The Tribunal is satisfied that there is no manifest error in the JAB's analysis. Moreover, regarding the complainant's argument that her position could have been funded from other sources of funding, in Judgment 4834, consideration 9, quoting Judgment 3163, consideration 8, the Tribunal considered a contention that alleged lack of funding for the

position of the complainant in that case was due to the diversion of funds for that position, and although funds could have been available, the organization chose for a dubious reason not to use them. The Tribunal stated the following, and that reasoning can be applied to the present case:

> "It is unnecessary to descend into greater detail about whether funds were or were not available to fund the complainant's position beyond the beginning of 2010. That is because this Tribunal has set its face against assessing the exercise of a discretionary power, such as the power not to renew a fixed-term contract, unless it is demonstrated that the competent body acted on some wrong principle, breached procedural rules, overlooked some material fact or reached a clearly wrong conclusion (see, for example, Judgments 1044, under 3, 1262, under 4, and 2975, under 15). The substance of the complainant's case on this issue is that other decisions could have been made which would have resulted in funding being available for the position. The error of fact identified in the complainant's submissions does not involve the identification of a material fact assumed by the decision-maker to exist, which did not exist. Rather, she identifies facts which would sustain a decision other than the decision actually made. To impugn the exercise of a discretionary decision-making power by reference to, and based on, the factual matrix in which the decision was made, a complainant must demonstrate something more than that other decisions might reasonably have been made on the known facts. It is necessary to establish that the exercise of the discretionary power miscarried because the decision-maker was led into error by proceeding on a misunderstanding about what the material facts were. As the complainant has failed to do so, this plea must be rejected."

Based on the foregoing, the second ground is unfounded.

24. Regarding the fifth ground, by reference to consideration 2 of Judgment 1526, among others, in which the Tribunal stated that "[g]ood faith must govern relations between administration and official" the complainant submits that, because she is from a developing country and was an expectant mother at the time she was notified of the decision not to extend her contract (the stress of which allegedly caused her to give birth early), and given the circumstance which caused her to lodge the harassment complaint, the IAEA "should have been vigilant to ensure [that] every effort was made to ensure due process and fair dealing". She further submits that, as she was available to work again after

maternity leave and was placed on a roster for placement as of 1 November 2020, the IAEA could have given her a temporary appointment in the NEFW Department instead of employing two ad hoc temporary assistance staff on assignments of two to three months each to cover her functions. There is no factual basis in this case to lead to a conclusion that the IAEA breached its obligations of good faith and mutual trust towards the complainant. To the contrary, it appears from the file that the complainant was given a contract extension to cover the time of her maternity leave and that she was granted a temporary assistance appointment with the IAEA from 10 November 2021 to 9 February 2022. Moreover, her harassment complaint was duly assessed by the IAEA and found unsubstantiated. The fifth ground is therefore unfounded.

25. In the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 23 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER