

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**K.**  
**v.**  
**IAEA**

**139th Session**

**Judgment No. 4954**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. K. against the International Atomic Energy Agency (IAEA) on 5 January 2021 and corrected on 6 February 2021, the IAEA's reply of 27 May 2021, the complainant's rejoinder of 27 July 2021 and the IAEA's surrejoinder of 2 November 2021;

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 may be summed up as follows:

The complainant challenges the decision to close his harassment complaint and not to provide him with a copy of the investigation report.

The complainant joined the IAEA in 2000. Following a period of extended sick leave, his contract was ultimately terminated for health reasons, effective September 2019.

On 30 November 2019, after having separated from the IAEA, the complainant sent to the Director of the Office of Internal Oversight Services (OIOS) a harassment complaint directed against three IAEA staff members, including his then supervisor. The Director of OIOS decided to procure the services of an investigative firm to support OIOS

in undertaking the review of the complainant's complaint of harassment.

On 31 August 2020, the Head of the Investigation and Evaluation Unit of OIOS wrote to the complainant that OIOS had "finalized its investigation" into his complaint of harassment and was "not able to find evidence on the reported matters which would amount to misconduct of a particular IAEA staff member", as a result of which the case had been closed. According to the Head of the Investigation and Evaluation Unit, "OIOS conducted an in-depth investigation which included interviews with several staff member[s] and a review of documents, emails and other material related to [the complainant's] allegations". The Head of the Investigation and Evaluation Unit further wrote that "the sole objective of an OIOS investigation is to establish facts whether misconduct occurred and if so, whether senior management should consider disciplinary action against a staff member responsible for this". He concluded his email stating that he remained at the complainant's disposal "to explain to [him in] more detail[s] [OIOS'] investigation and investigative methodology". On the same day, the complainant asked the Head of the Investigation and Evaluation Unit to be provided with a copy of the OIOS investigation report, to which the latter objected "[d]ue to the protection of the integrity of the independent investigation and to maintain confidentiality". He nevertheless reiterated that he was at the complainant's disposal "to explain to [him in] more detail[s] the OIOS investigation" by phone or via a Skype call.

On 14 September 2020, the complainant requested the Director General to "review the evidence submitted [...], and the OIOS report and all evidence gathered, and award [him] moral damages for harassment" and asked again to be provided with a copy of the "final OIOS report".

By letter of 9 October 2020, the Director General responded to the complainant that he found "on the preponderance of evidence that [the complainant's] claim of harassment was un-substantiated" and that, accordingly, his claim for moral damages was rejected. The Director General further wrote in his letter that, regarding the complainant's

“request for disclosure of the OIOS Assessment Report [...] this document w[ould] not be disclosed to [him], in order to protect the individuals against whom these un-substantiated allegations were made and in order to protect confidentiality. Notwithstanding, [...] OIOS remain[ed] at [his] disposal to explain in more detail OIOS’s review”. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. He further asks that the matter be remitted to the IAEA for a new investigation or, alternatively, that he be awarded material damages in the amount of 15,000 euros “for the lost opportunity of proving his case and thereby having his complaint of harassment duly investigated”. He also claims moral damages in the sum of 40,000 euros as well as the reimbursement in full of his legal costs. Finally, he seeks the payment of interest and “any other consequential or punitive relief that the Tribunal may determine to be necessary, just, appropriate and equitable”.

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

### CONSIDERATIONS

1. The complainant impugns the Director General’s decision of 9 October 2020 to close his harassment complaint as unsubstantiated and not to provide him with a copy of the investigation report.

2. In support of his claim, the complainant essentially advances the following pleas:

- (a) OIOS applied the wrong standard of proof of “beyond reasonable doubt” during the investigation, instead of the “balance of probabilities”;
- (b) OIOS conducted the investigation in violation of the adversarial principle, thereby infringing the complainant’s due process rights;
- (c) the Director General’s determination that the complainant’s claim of harassment was unsubstantiated was made *ultra vires*;

- (d) the investigation into the complainant's complaint of harassment was unduly delayed and the OIOS investigation lacked thoroughness;
- (e) the investigation was conducted by a subcontractor whose authority, impartiality and qualifications were questionable; and
- (f) the complainant is a victim of institutional harassment, of which the impugned decision is an instance.

3. In his second plea, the complainant further contends that he was not afforded the opportunity to review and comment on the testimony of the witnesses, nor was the OIOS investigation report shared with him, even in a redacted form. He argues that receiving a copy of the investigation report was the only way of understanding the reasons on which the Director General based the impugned decision. Additionally, the complainant asserts that his hearing deficit prevented him from following up with OIOS.

4. In response, the IAEA contends that it acted adequately and promptly upon the complainant's harassment allegations. Citing Judgment 4378, consideration 25, the IAEA argues that since the complainant was not the subject of the allegations of misconduct, he was not in an adversarial situation and the principle of due process did not apply. The IAEA further submits that the complainant's harassment complaint was thoroughly addressed but did not proceed to the stage of a formal investigation following which a final investigation report was issued; only an assessment report was issued which could not be disclosed to the complainant "in order to protect the individuals against whom these un-substantiated allegations were made and in order to protect confidentiality". The IAEA stresses that the complainant was offered the possibility to meet with OIOS for a detailed explanation, but he did not avail himself of this opportunity. The IAEA includes a five-page case summary in its reply before the Tribunal that summarizes OIOS' findings with regard to the complainant's allegations of harassment. The case summary indicated that 14 witnesses were interviewed as part of the investigation, without providing their content.

5. The IAEA's failure to disclose to the complainant the OIOS investigation report was central to the case. It is true that the IAEA's applicable legal framework for handling harassment complaints, at relevant times, including the OIOS Procedures for the Investigation of Staff Members (AM.III/4) and the Prevention of Harassment and Sexual Harassment Framework (AM.II/7), do not specifically grant a complainant of harassment access to the investigation report. However, the Tribunal's case law obliges an organisation to communicate to the official who has filed a harassment complaint the report drawn up at the end of the investigation (see, for example, Judgment 3347, considerations 19 and 20). As the Tribunal stated in that judgment:

“19. It is well settled that a staff member must have access to all evidence upon which a decision concerning that staff member is based. As the Tribunal observed in Judgment 3264, under 15:

‘It is well established in the Tribunal’s case law that a “staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him”’. Additionally “[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality” (see Judgment 2700, under 6). It also follows that a decision cannot be based on a material document that has been withheld from the concerned staff member (see, for example, Judgment 2899, under 23).’

It is equally well settled that a statement in a staff regulation or other internal document that a report is confidential will not ‘shield a report [...] from disclosure to the concerned official’. Moreover, ‘[i]n the absence of any reason in law for non-disclosure of the report, such non-disclosure constitutes a serious breach of the complainant’s right to procedural fairness’ (Judgment 3264, under 16).

20. [...] [I]t is not an answer to say that the complainant was given a summary of the report. In addition to the fact that she was entitled to the entire report, the summary did not contain any of the evidence upon which the conclusion was based. [...] The complainant was effectively precluded from challenging the factual assertions and credibility of the witnesses interviewed and was left not knowing what evidence if any should be marshalled to counter the investigator’s conclusions.”

6. Moreover, the Tribunal has clarified in its case law that an international organisation is bound to grant a request from the staff member concerned for a copy of the report delivered by the investigative

body at the end of an investigation into a harassment complaint, even if that means the report must be redacted in order to maintain the confidentiality of some aspects of the investigation, in particular the testimony gathered during that investigation (see, in particular, Judgment 4547, consideration 10).

7. In the present case, the complainant requested a copy of the OIOS investigation report himself and through his counsel. This was in the context of him having launched his complaint of harassment after he left the employment of the IAEA but in which he sought a significant amount of compensation for the harassment he alleged.

These requests were rejected by the IAEA on the grounds of confidentiality and aimed at protecting the interests of third parties. Considering that the Director General based the impugned decision on the OIOS assessment report, but failed to provide the complainant with this report, even in a redacted form, the IAEA unlawfully deprived the complainant of the opportunity to review the report and the witness statements gathered, provide comments, and challenge the findings of the investigation, which is essential to the complainant's due process rights. The limited communication offered to explain to him in more detail the OIOS findings does not meet the disclosure requirement set by the Tribunal's case law.

It follows that the impugned decision, tainted by procedural flaws, must be set aside, making it unnecessary to address the complainant's first, third and fifth pleas. The complainant was denied his right to due process. For this breach, the Tribunal will order the IAEA to pay him moral damages in the sum of 10,000 euros. No basis exists for remitting the matter as is sought by the complainant.

8. Regarding the complainant's fourth plea, the Tribunal's case law emphasizes that investigations into cases of harassment in particular should be prompt and thorough, in order to protect staff members from unnecessary suffering, but attention must also be paid to thoroughness and procedure (see, for example, Judgment 4253, consideration 3). The complainant argues that the length of the

investigation, over nine months, constituted an excessive delay. Given the complexity of the case and the fact that 14 witnesses were interviewed, the nine-month period to complete the harassment investigation in the present case is not considered inordinate or excessive delay. Therefore, no award of moral damage is warranted on this basis.

9. Regarding the complainant's sixth plea, as the complainant did not raise the issue of institutional harassment in his request for review dated 14 September 2020, his claim for institutional harassment is a new claim and is therefore irreceivable (see, for example, Judgment 4703, consideration 3).

10. The complainant requests that he be awarded material damages "for the lost opportunity of proving his case and thereby having his complaint of harassment duly investigated". The legal foundation for this claim is far from clear and is thus rejected. His claim for punitive damages is also rejected, as an award of such damages is only warranted in exceptional circumstances, which are not evident in this case (see, for example, Judgment 4659, consideration 14). The complainant's claim for other consequential relief that the Tribunal may determine to be necessary, just, appropriate and equitable is too vague to be receivable (see, for example, Judgment 4719, consideration 7, and the case law cited therein).

11. The complainant also seeks interest on his monetary relief awards, calculated at the rate of 5 per cent per annum from 31 August 2020. However, the Tribunal's case law relevantly provides that "[s]ave where there is express provision in a clause of a contract or in some general text, interest will not be payable until a formal demand for payment of the principal has been made" (see, for example, Judgment 874, consideration 3). As neither condition for the payment of interest is satisfied in this case, the claim is rejected.

12. There are two final procedural requests to be addressed. The first is the complainant's request to be provided with copies of all documents generated or received by OIOS in connection with his

request for an investigation of 30 November 2019, all documents relied on by OIOS to conclude that the reported conduct did not constitute misconduct, and all documents relied on by the Director General to conclude that the complainant's harassment complaint was unsubstantiated "on the preponderance of evidence". The complainant clarified that by the word "documents" he meant "any and all notes, e-mails, witness transcripts or recordings, records, memos, or any other documentation in written or electronic form". Given the broad scope of this request, it can only be characterized as an impermissible "fishing expedition" and is rejected (see, for example, Judgment 4086, consideration 9). The second is the complainant's request for oral proceedings. It is also rejected, as the Tribunal finds that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly informed of their arguments and the relevant evidence.

13. As the complainant succeeds in his application to set aside the impugned decision, he is entitled to an order for costs for which the sum of 10,000 euros is awarded.

#### DECISION

For the above reasons,

1. The Director General's decision of 9 October 2020 is set aside.
2. The IAEA shall pay the complainant moral damages in the amount of 10,000 euros.
3. The IAEA shall pay the complainant costs in the sum of 10,000 euros.
4. All other claims are 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 Hongyu Shen, 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

HONGYU SHEN

MIRKA DREGER