115th Session **Judgment No. 3215**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms H. S. against the International Atomic Energy Agency (IAEA) on 12 April 2011 and corrected on 1 July, the Agency's reply of 13 October 2011, the complainant's rejoinder of 23 January 2012 and the IAEA's surrejoinder of 30 April 2012;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Facts relevant to this case are to be found in Judgment 3188, delivered on 6 February 2013, concerning the complainant's first complaint. Suffice it to recall that the complainant, who joined the IAEA in 1984 as a Clerk/Typist at level G-4, held various positions before being assigned to the G-5 position of Programme Management Assistant in the Department of Technical Cooperation in June 2009. She suffered three back injuries in December 2003, February 2005 and April 2008, which were found to have been service-incurred.

On 16 June 2009 she wrote to the Director of the Division of Human Resources (MTHR) indicating that she had developed deep depression and burnout syndrome following her service-incurred back injuries, the Agency's lack of action to find her a suitable work assignment and harassment. She stated that she had been on sick leave since February in an attempt to "protect" herself, but was willing to go back to work to perform duties commensurate with her abilities, skills and state of health. However, she held the IAEA responsible for her "physical damage and psychological problem". She also gave detailed examples of actions, which in her view, showed that she had been harassed and humiliated since early 2003. Referring to Appendix D to the Staff Regulations and Staff Rules establishing the "Rules Governing Compensation in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties", she requested that the costs of her "physical and psychiatric treatment" be met by the Agency. Her request for compensation was subsequently referred to the Joint Advisory Board on Compensation Claims (JABCC).

By a memorandum of 26 November 2009 she was informed that the Director General, on a recommendation of the JABCC, had decided inter alia to reimburse her medical expenses, including the costs of her psychiatric treatment, as they were related to her service-incurred back injuries and to the pain caused by these injuries. He nevertheless emphasised that his decision was not based on her allegations of harassment, which he considered to be unsubstantiated. He added with respect to future claims that she should submit in advance a clear treatment plan from her physician in order to enable the JABCC to review it prior to her undertaking the treatment. On 22 January 2010 the complainant wrote to the Director General contesting in particular his refusal to compensate her for past and future pain and suffering, and for the "devastating effect" the Agency's "negligence/harassment" had on her life and career. She asserted that her burnout and depression were also due to harassment, and she asked him to withdraw the requirement that she submit a clear treatment plan to the JABCC in advance.

By a letter of 4 March 2010 the Director General informed the complainant that he did not consider her memorandum of 16 June 2009 to be a report of alleged misconduct within the meaning of Appendix G to the Staff Regulations and Staff Rules concerning the procedures to be followed in the event of reported misconduct, but a request for review of an administrative decision, as foreseen in Staff Rule 12.01.1(D)(1). He stated that he maintained his decision of 26 November on the ground inter alia that Appendix D did not provide for compensation for pain and suffering, either past or future. He added that she was not asked to seek advance approval from the JABCC with respect to her medical treatment but merely to provide information on the proposed treatment and expenses when known, which in fact she had done in January 2010. On 18 March 2010 the complainant filed an appeal with the Joint Appeals Board (JAB) challenging the decisions contained in the Director General's letter of 4 March.

On 24 March she wrote again to the Director General, referring to Staff Rule 12.01.1(D) and requesting him to review those decisions. On 11 May he replied that there would be no further consideration of the matter until the JAB had provided him with its report on the appeal she had filed earlier that month. On 21 May the complainant filed another appeal with the JAB, challenging the refusal to pay her compensation for pain and suffering, and the refusal to award her damages for harassment and/or refer her harassment complaint for investigation under Appendix G. She asked that this appeal be joined with her earlier appeal filed on 18 March.

In its report of 23 November 2010 the JAB found that the Staff Regulations and Staff Rules do not provide for compensation for past and future pain and suffering. It also noted that the procedures to be followed in the event of allegations of misconduct are laid down in Appendix G and that, following a meeting with the Director of MTHR on 6 September 2010, the complainant had reported alleged misconduct in accordance with Appendix G; the Board therefore held that it was no longer competent to consider the allegations of harassment, as the Appendix G procedure had been initiated.

Regarding the issue of compensation for pain and suffering, it recommended that the Director General maintain his original decision as communicated in the letter of 4 March 2010.

By a letter dated 21 January 2011, which is the impugned decision, the Director General informed the complainant that, in his view, she had submitted only one proper appeal to the JAB, namely that of 18 March 2010, which he had decided to dismiss. He endorsed the JAB's conclusion that Appendix D does not provide for compensation for past or future pain and suffering in connection with service-incurred injuries. He added that she would be informed in due course of the outcome of the Appendix G procedure concerning her allegations of harassment.

B. The complainant contends that the Agency showed bad faith and breached its duty of care in considering that her memorandum of 16 June 2009, which contained express allegations of harassment, was not sufficient to trigger the duty to investigate because it was addressed to the Director of MTHR in his capacity as chairperson of the JABCC and not in his capacity as Director of MTHR, and because it referred to Appendix D and not to Appendix G. She explains that when it became plain that the Administration would not investigate her allegations of harassment, she wrote to the Director of MTHR on 9 September 2010 expressly referring to Appendix G. The matter was then referred to the Office of Internal Oversight Services (OIOS) for investigation.

She alleges negligence on the part of the Agency as she was assigned tasks which involved lifting and moving heavy equipment and files despite the fact that such tasks were not part of her job description. She also holds it responsible for not maintaining its premises in a safe condition, which resulted in her slipping on a patch of ice within the Agency's premises and being injured. Moreover, as a result of her working environment, she was put under "psychological strain" which, together with her back injuries, resulted in her suffering burnout and depression as from December 2008. She provides medical certificates to support her view that she suffered from psychological

injury. She also alleges loss of enjoyment of life as a result of the Agency's negligence. She contends that she can no longer engage in some activities, including shopping, sitting or standing for long periods or driving for long periods. On these grounds she claims compensation for pain and suffering.

The complainant asks the Tribunal to set aside the impugned decision and to award her material and moral damages together with costs. She also seeks interest at the rate of 8 per cent per annum on any material damages awarded to her.

C. In its reply the IAEA submits that the complainant's claim of harassment is irreceivable for failure to exhaust internal means of redress. Indeed, the OIOS, to which the matter was referred in accordance with Appendix G pursuant to the complainant's memorandum of 9 September 2010, is currently investigating her allegations.

On the merits, the Agency submits that, according to the Tribunal's case law, it would incur liability beyond the requirements of the Staff Regulations and Staff Rules only if it had exposed the complainant to a degree of danger incompatible with the normal performance of her duties and beyond the requirements of her contract, which it did not. It asserts that she was never requested to perform tasks that were not consistent with the duties normally to be performed in her position, and it attaches to its reply a copy of her job description to support its contentions. It emphasises that the first time she was injured it was as a result of her own decision to lift heavy equipment and furniture, in breach of the Agency's rules on moving objects. Regarding her second injury, it points out that she came to work outside normal working hours when it was dark, but that all necessary and reasonable measures had been taken to ensure her safety, including by retaining a company to spread salt and sand outside the building. As for the third injury, the defendant denies that the complainant was required to lift heavy folders and submits that she again appears to have willingly accepted unnecessary risks, against her better judgement. The Agency acknowledges that it had an

obligation to pay her reasonable compensation for her service-incurred injuries, in accordance with the terms of her appointment and the applicable rules, which it did. But it denies any negligence on its part and submits that, in any event, the complainant has failed to establish the legal basis on which she claims damages over and above the compensation she received pursuant to Appendix D. The IAEA explains that she received the only compensation she was entitled to by virtue of Appendix D, which does not include compensation for pain and suffering, either past or future. It adds that, although the complainant states that she was diagnosed with burnout syndrome in December 2008, the earliest available medical opinion supporting that assertion is dated 4 June 2009.

With regard to the allegations of harassment, the Agency argues that the actions described by the complainant cannot reasonably be characterised as demeaning, belittling or humiliating. Moreover, she has never been threatened, intimidated, blackmailed, coerced, or insulted, which are actions constituting harassment according to Appendix E to the Administrative Manual entitled "Prevention and Resolution of Harassment related Grievances and Appointment of Mediators". She was never asked to do anything but perform her duties according to her job description. It stresses that she was transferred when she asked to be transferred and that she received compensation for her service-incurred injuries when she applied for it.

D. In her rejoinder the complainant indicates that the OIOS investigation into her allegations of harassment is still pending two and a half years after she first raised her allegations of harassment, i.e. in the memorandum of 16 June 2009. She maintains that the duty to investigate was triggered on that date and not on 9 September 2010. On receiving that memorandum the Director General should have either referred the matter to MTHR or advised her what other steps she needed to take to lodge her complaint. She contends that the impugned decision is tainted with an error of law, given that the Agency acknowledged, in its reply to her complaint, that she may recover damages for pain and suffering resulting from its negligence, whereas the Director General, in the impugned decision, asserted that

the compensation was limited to what is stipulated in Appendix D, which does not provide for damages for pain and suffering resulting from service-incurred injuries.

Regarding the relief claimed, she specifies that she seeks 150,000 euros in compensation for pain and suffering on the basis of the expert opinion provided by her physician, who found that she suffered 6 days of severe pain, 15 days of moderate pain and 420 days of mild pain. She further specifies that she claims 15,000 euros in moral damages for the Agency's failure to promptly investigate her harassment allegations, and 5,000 euros in costs.

E. In its surrejoinder the Agency maintains its position, denying any negligence. It reiterates that prior to 9 September 2010 the complainant did not avail herself of any of the available internal mechanisms for addressing the harassment she allegedly suffered.

CONSIDERATIONS

1. Much of the complainant's work history is recorded in Judgment 3188. It is only necessary to recount events relevant to the issues raised in these proceedings. The first group of issues arises in relation to a claim of harassment. The first issue is whether this claim is receivable. If it is, the second issue is whether any reviewable error attended the consideration of this claim by the IAEA and, if so, what is the appropriate relief. The second set of issues concerns the complainant's claim for damages. Damages are claimed in relation to injury the complainant suffered at work. The essence of her case is that on three occasions she injured her back at work, the injuries were caused by the negligence of the IAEA and, as a result, she is entitled to damages for past and future pain and suffering. Damages are also claimed for psychological harm the complainant alleges she suffered from her work.

2. The impugned decision is to be found in a letter of the Director General of 21 January 2011 to the complainant dismissing

an appeal which had been the subject of a report of the JAB of 23 November 2010. Insofar as the complaint now before the Tribunal concerns harassment, the argument on receivability advanced by the IAEA turns on whether the JAB dealt with this claim. The defendant contends it did not and, accordingly, the complainant has not exhausted internal remedies in relation to this claim. If so, Article VII(1) of the Tribunal's Statute prevents the complainant from pursuing the matter before the Tribunal.

3. The complainant sent, on 16 June 2009, a memorandum to Mr N., who was both the Director of the Division of Human Resources (MTHR) and also the chairperson of the JABCC. The subject matter of the memorandum was identified in its heading, namely: "My 4th Appendix D Case: Burn-out/ Burnt-out Syndrome and Depression in connection with my back injuries and harassment/humiliation by two IAEA Departments (SG and MT)".

4. The opening paragraph of the memorandum also identified its character. It was said to be a request to "bring this appendix D case to the attention of the JABCC members for their action". Appendix D to the Staff Regulations and Staff Rules is comprised of a series of rules governing compensation in the event of death, injury or illness attributable to the performance of official duties. The rules identify the circumstances in which compensation is payable and how to calculate compensation together with a range of ancillary provisions. The rules also establish the JABCC whose functions are identified in Article 38 as being to "make recommendations to the Director General concerning claims for compensation under these rules".

5. It is clear that the memorandum of 16 June 2009 was directed, and only directed, to a claim for compensation under Appendix D. It dealt, under the heading of "Harassment", with a series of events (described in over two pages) from 2003 to 2009, concluding with a statement that the complainant "expect[ed] the IAEA to cover the costs of [her] physical and psychiatric treatment".

Annexed to the memorandum were three medical reports, amongst other documents, and it was noted that a further medical report would be submitted, as would the bills for medical treatment.

6. Mr N. responded to the complainant's claim for compensation in a memorandum dated 26 November 2009. He indicated that all the expenses claimed would be met, including the cost of psychiatric treatment. However, he stated that, based on the medical opinion rendered in her case, the expenses claimed and which would be paid "were related to [the complainant's] service-incurred back injuries and to the pain caused by these injuries". He emphasised that the decision to reimburse the expenses was not based on her claim that she had been subjected to "harassment/humiliation at the workplace", as this claim was not substantiated. In the result, the complainant was entirely successful in securing the payment of expenses she had claimed, but not on one of the bases she had advanced.

7. On 22 January 2010 the complainant wrote to the Director General saying (of the memorandum of 26 November 2009) that "the decision [did] not compensate [her] for past and future pain and suffering, the devastating effect to [her] life and career, burn-out and depression caused by the Agency's negligence/harassment, including but not limited to the breach of the duty to provide a safe working environment. Unfortunately, Appendix D, which provides limited compensation on a no-fault basis, does not provide for payment of all damages including past and future pain and suffering on the grounds of negligence". She therefore requested that the Director General "review the decision, and grant [her] damages for past and future pain and suffering".

8. The Director General responded by a letter dated 4 March 2010. In relation to the complainant's claims of harassment/humiliation the Director General noted the JABCC conclusion, in effect, that the claims concerning injury caused by harassment/humiliation had not been substantiated and stated that no additional information had been provided to suggest that this determination or conclusion was incorrect. Importantly, the Director

General went on to say that he did not consider the memorandum of 16 June 2009 to be a report of alleged misconduct in accordance with Appendix G (of the Staff Regulations and Staff Rules) and no basis had been established upon which he could accept that the alleged harassment/humiliation had occurred.

9. It was from this decision that the complainant appealed to the JAB. Relevantly, it made two recommendations or observations. The first was that the Director General should maintain his decision not to provide the complainant with compensation for past or future pain and suffering in connection with her service-incurred injuries. The second was that, as the complainant had submitted a report of alleged misconduct pursuant to Appendix G (on 9 September 2010), it was not competent to make a recommendation on her allegations of harassment.

10. The complainant seeks moral damages for the IAEA's failure to act on her harassment claim. Reference is made to decisions of this Tribunal which make it clear that an organisation is under a duty to investigate claims of harassment promptly and *bona fide* (see Judgments 2552, 2654 and 2910). The gist of the argument on receivability advanced by the IAEA is that, until 9 September 2010 (when a specific complaint of harassment as misconduct was made by the complainant), the complainant had not availed herself of the available internal mechanisms for addressing the claim of harassment and, by virtue of Article VII(1) of the Statute of the Tribunal her claims, in this respect, are not receivable. In her rejoinder the complainant argues that the Director General, on receiving her memorandum of 16 June, should have referred the matter to MTHR or advised her what other steps she needed to take with respect to her claim of harassment.

11. It is not apparent that the complainant is unfamiliar with the procedural steps to be taken to advance any claim under the Staff Regulations and Staff Rules. She expressly raised the question of harassment in her memorandum of 16 June 2009 for a quite specific

and confined purpose, namely to advance a claim under Appendix D. The Administration and, ultimately, the Director General when he wrote his letter of 4 March 2010 were entitled to deal with the alleged harassment on the narrow and confined basis on which it had been raised. The complainant did not say in her submissions to the Tribunal that she was unaware of her right to pursue a claim under Appendix G. Indeed, it was a possibility alluded to by the Director General in his letter of 4 March. The claim of harassment, insofar as it involves allegations of misconduct that might require action on the part of the IAEA against individuals or action to protect otherwise the complainant, was first raised on 9 September 2010. That claim is presently the subject of the internal review. In those circumstances, the complainant's claim is, in this respect, irreceivable and should be dismissed.

12. It is necessary now to consider the complainant's claim for damages for what is said to be the negligence of the IAEA. The complainant suffered a back injury on three occasions. The Tribunal should not be taken to be using, in this discussion, the word "injury" in any technical, legal or medical sense. It has never been an issue that the injuries she suffered were the result of events occurring at work. The legal issue raised in these proceedings is whether that was the result of the negligence of the IAEA. As discussed in Judgment 2804, negligence is the failure to take reasonable steps to prevent a foreseeable risk of injury. Liability in negligence is occasioned when the failure to take such steps causes an injury that was foreseeable. A person seeking damages for negligence bears the burden of establishing the factual foundation on which the claim is based.

13. In the present case, there is little reason to doubt that the injuries the complainant suffered were foreseeable. Of central importance is whether the defendant took steps to prevent them. The complainant first suffered a back injury on 3-4 December 2003. She was involved in establishing a temporary office. She made a request to take a printer from a storeroom and did so by lifting it onto a chair and moving it to the proposed office space. The printer was heavy. It was

placed on a desk and it then became necessary to move the desk so it was closer to a power outlet. She participated in pushing the desk with the printer on it. The second incident resulting in back injury, which occurred on 16 February 2005 at 7:45 a.m., was when the complainant slipped on black ice outside a building for which the IAEA was, in part, responsible. In the complainant's submissions, it is asserted that no salt or grit had been distributed on the surface. The third incident occurred on 9 April 2008. The complainant handled 40 files each weighing more than three kilos by placing them on a trolley and moving and unloading them.

14. As to the first incident, it occurred in circumstances where the IAEA had issued an instruction to staff that they should not attempt to rearrange, shift or lift heavy furniture themselves, but should submit a work order request to assist with those matters. It had thus taken reasonable steps to prevent situations of the type which occurred on 3-4 December 2003. It was not negligent.

15. As to the second incident, the IAEA had retained a company to spread salt and sand on the plaza outside the building (which was where the complainant slipped) and the company was apparently engaged in the process of spreading salt and sand shortly after the complainant slipped (when a security guard arrived). Engaging a company to undertake this activity was a reasonable step taken by the Agency to prevent an incident of the type that led to the complainant's back injury on this occasion. To establish negligence, the complainant would need to demonstrate that the contractual arrangements the IAEA had entered into with the company did not require it to undertake the task of spreading salt and sand before staff were likely to arrive, or that it did not adequately supervise the execution of the contract. In any event, what is important is that the complainant has not proved either of these matters, which are important in demonstrating negligence on the part of the Agency.

16. As to the third incident, the complainant alleges she was asked to move files weighing more than three kilos each. The

defendant seeks to cast doubt on this asserted fact because the complainant did not identify who it was who asked her to undertake this task. It also asserts that moving files of this character was not part of her job description. The Tribunal is prepared to assume that such a request was made and that the Agency, which was then aware of the complainant's back injuries, had not taken steps to prevent such a request being made (by providing her with a job description clearly indicating that lifting was not part of her duties and/or giving instructions to her supervisors that she should not be requested to engage in lifting). On this assumption the IAEA may have been negligent. However, the complainant confronts a fundamental difficulty in that there is no medical evidence that establishes that this event aggravated or exacerbated her pre-existing back injury from a clinical point of view. The Agency is not liable in negligence for damages in relation to the injuries suffered on the two earlier occasions and would only be liable in relation to the third incident, if it could be established that it caused further injury. The evidence falls short of doing so.

17. The last aspect of the complainant's claims relates to psychological injury (depression/burnout) arising from, in her view, the IAEA's negligence. The existence of this injury was said to be demonstrated by reports from Dr P., Dr G. and Dr S. The medical reports from these practitioners are dated, respectively, 8 June 2009, 10 June 2009 and 4 June 2009. The first two address psychological issues, the last does not. However, what the complainant has not demonstrated is a causal link between what the Agency did, or failed to do, (which might, alone or together, constitute negligent conduct) and the condition described in the reports of Dr P. and Dr G. Undoubtedly, on the evidence of these two practitioners, the complainant was suffering from what was described as "burnout syndrome" and reactive depression. In her brief under the heading "Negligence/Harassment With Respect to Depression/Burn-Out", the complainant identified two, or possibly three, events which caused her stress. One concerned the identification of her position in the Agency's records and the date of her assignment to a particular

position. The second concerned the content of her job description when she returned from sick leave on 15 September 2008 (she went on sick leave on 13 May 2008). The third was the alleged need for the complainant to fend for herself to ensure that she was not in a position which required her to do work involving lifting liable to cause back injury. But while the complainant was on sick leave, MTHR advised (on 18 June 2008) her supervisor that the complainant should avoid any type of lifting and carrying, as recommended by the complainant's treating specialist. This was repeated in a later memorandum of 14 October 2008. The mere demonstration of events at work which caused stress and possibly psychiatric injury falls short of demonstrating negligence on the part of the employer. The complainant's case of negligence resulting in psychological injury has not been made out.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet