

**TWENTY-SEVENTH ORDINARY SESSION**

***In re* KOTVA**

**Judgment No. 180**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Atomic Energy Agency (IAEA) drawn up by Mr. Johann Kotva, received by the Registrar of the Tribunal on 21 August 1970 and brought into conformity with the Rules of Court on 10 September 1970, and the reply of the Agency of 13 November 1970;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal, Staff Regulations 4.01, 4.03, 4.05, 12.01 and 12.02 and paragraph 3(g) of Annex I of the Staff Regulations and Staff Rules of the Agency;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. Mr. Kotva, who was born on 28 November 1907, joined the Agency in 1957 and became a permanent official in February 1960. Although in 1967 he had reached the age of sixty, the retirement age set in the Staff Regulations and Staff Rules of the Agency, he received several extensions of contract up to 30 September 1969. The purpose of the extensions was to enable him to obtain the necessary number of months of contribution to the Austrian social security system (by which he was covered and to which the Agency was contributing on his behalf) to qualify for a premature old-age pension. On 24 September 1969 Mr. Kotva claimed a termination indemnity. On being refused it he appealed to the Director-General. The decision having been confirmed, he further appealed to the Joint Appeals Committee. On 15 April 1970 the Committee recommended the Director-General to dismiss Mr. Kotva's appeal and on 27 April 1970 the Director-General accepted that recommendation.

B. The Director-General's decision was notified to the complainant on May 1970. On 3 August 1970 he filed an appeal with the United Nations Administrative Tribunal. The Executive Secretary of that Tribunal informed him by letter of 11 August 1970 that the Tribunal was not competent to pass judgment on his complaint and that he must address his complaint to the present Tribunal. On 19 August 1970 Mr. Kotva sent his complaint to the Registrar of the present Tribunal, who received it on 21 August. On the same day the Registrar returned it to him, in accordance with Article 7, paragraph 4, of the Rules of Court of the Tribunal, requesting him to make the necessary corrections in his complaint within one month the complaint, which in its corrected form was dated 10 September 1970, was received by the Registrar on 14 September 1970.

C. Before the Tribunal the complainant contends that the termination indemnity provided for in Staff Regulation 4 03 is due not only in ease of termination of service but also in case of retirement. He further submits that, although paragraph 3(g) of Annex I of the Staff Regulations and Staff Rules (concerning termination indemnities) provides that a staff member who is retired under any permanent pension scheme in which the Agency "participates" shall not be entitled to termination indemnities, this provision was not applicable in his case because he was entitled at the time only to a so-called "premature" partial old-age pension under the national pension scheme and would not be entitled to a full pension until the age of sixty-five. He prays the Tribunal to hold that the Agency should pay him a termination indemnity amounting to 57,978 Austrian schillings

D. In its reply the Agency asks the Tribunal to find the complaint irreceivable. Since the impugned decision was notified on 11 May 1970, the complaint should have been lodged with the Tribunal no later than 9 August 1970. Yet the complaint was lodged with it several days later, after the expiry of the period of ninety days prescribed in Article VII, paragraph 2, of the Statute of the Tribunal. The Agency considers that the complainant's initial error in appealing to the United Nations Administrative Tribunal on 3 August 1970 - before expiry of the prescribed time limit - cannot properly be pleaded by the complainant, who had spent twelve years in the service of the Agency and should have been well aware of the provisions concerning appeals in Staff Regulations 4.01 and 12.01.

E. Subsidiarily, as to the merits, the Agency argues that a termination indemnity is payable only in the case of termination of appointment under Staff Regulation 4.01 but not in the case of retirement under Staff Regulation 4.05, which, though certainly one way in which an official may be separated from service, does not constitute a "termination" within the meaning of Staff Regulations 4.01 to 4.03. The complainant's interpretation of paragraph 3(g) of Annex I is mistaken. The complainant's case is fully covered by this provision since the Austrian social security system comprises a permanent retirement pension scheme to which the Agency has made employer's contributions on his behalf. When he joined the Agency and accepted permanent employment with it the complainant was fully aware of the difference between the retirement age of sixty fixed by the Agency's Staff Regulations and Rules and the age of sixty-five at which a participant in the Austrian social security system becomes entitled to payment of a permanent old-age pension. The Agency has performed more than its obligations by retaining him in its service beyond the normal retirement age of sixty and so enabling him to qualify for the premature old-age pension.

#### CONSIDERATIONS:

1. Under Article VII, paragraph 2, of its Statute, the present Tribunal is competent to hear complaints which have been filed within ninety days after the complainant was notified of the decision impugned. The prescribed time limit must be held to have been observed if a complaint which the Tribunal is competent to hear has been filed with it late, but was sent within the period of ninety days to the Administrative Tribunal of the United Nations. This interpretation is justified because of the links between the international organisations, and in particular by the fact that some staff members who in general fall within the jurisdiction of the present Tribunal come under the jurisdiction of the Administrative Tribunal of the United Nations in matters concerning their pension rights. An exception must be made for cases in which either a provision in the regulations or rules or the impugned decision clearly indicates which of the two procedures should be followed.

In the case at issue the decision impugned was notified to the complainant on 11 May 1970 and the time limit of ninety days accordingly expired on 9 August 1970. The present complaint, although addressed to this Tribunal only on 19 August 1970, was sent to the United Nations Administrative Tribunal before 9 August 1970, and therefore in good time. For the reasons set forth above it follows that the prescribed time limit must be held to have been observed. It would be all the less justifiable to declare the complaint irreceivable inasmuch as it relates to the consequences of retirement on reaching the age limit, a question which a person such as the complainant not familiar with legal matters might confuse with the question of pension rights, and inasmuch as, when notified of his mistake, he immediately lodged his complaint with the competent tribunal. The exception mentioned above does not apply. Although Staff Rule 12.02.1 recognises the jurisdiction of this Tribunal, it makes no reference to the United Nations Administrative Tribunal. As for the decision impugned, it makes no mention of any right of appeal.

2. Under Staff Regulation 4.03 an official whose appointment is terminated by the Director-General is entitled in principle to a termination indemnity, the amount and conditions of award being laid down in Annex I. Paragraph 3(g) of Annex I specifies that no indemnity payments shall be made to a staff member who is retired under any permanent pension scheme in which the Agency "participates".

In the case at issue the complainant left the service of the Agency at the age of 62 years. At that time he was entitled to a pension payable by the Austrian social security services at the rate of about 2,600 schillings per month. In accordance with paragraph 3(g) of Annex I, his entitlement to that pension debars him from claiming a termination indemnity. In the first place the Agency had contributed to the funds by which the pension available to the complainant is financed, thus "participating" in the pension scheme within the meaning of the above-mentioned provision; in the second place a pension must be defined as "permanent" within the meaning of that text if its forfeiture depends solely on the free will of the beneficiary. If, as the complainant claims, he forfeits his present right to a pension by engaging in gainful employment, he does so of his own free will, a circumstance which does not affect the permanent character of the pension. Nor does the fact that the pension to which the complainant was entitled on leaving the organisation is lower than the one which he will receive at the age of 65 deprive that pension of its permanent character. Accordingly, it is unnecessary to consider whether the provisions concerning payment of a termination indemnity apply only to cases of termination in the strict sense of the term and not to termination on retirement, or whether paragraph 3(g) of Annex I covers, besides the case of an official who is entitled to a permanent pension at the time of retirement, the possibility of his entitlement to such a pension at a later date.

DECISION:

For the above reasons, the complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 8 November 1971.

(Signed)

L. Letourneur  
André Grisel  
Devlin

Bernard Spy