

NINETY-THIRD SESSION

Judgment No. 2120

The Administrative Tribunal,

Considering the complaint filed by Mr I. M. B. against the International Atomic Energy Agency (IAEA) on 27 June 2001, the Agency's reply of 3 September, the complainant's letter of 27 November 2001 informing the Registrar of the Tribunal that he did not wish to file a rejoinder, the complainant's further brief of 27 March 2002 which was submitted at the request of the Tribunal, and the IAEA's observations thereon submitted on 15 April 2002;

Considering Article II, paragraph 5, 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. The complainant, a British national born in 1965, joined the Agency's staff at grade P.3 on 19 May 1997 in the Safety Co-ordination Section of the Department of Nuclear Safety. At the material time his contract was due to expire on 18 May 2002.

In April 1999 the complainant applied for a P.4 level post - in the Disposable Waste Unit of the Waste Safety Section, Division of Radiation and Waste Safety in the Department of Nuclear Safety - announced in Vacancy Notice No. 99/006. On 19 April the Head of the Recruitment Unit acknowledged receipt of his application and informed him that, in due course, he would be informed of the outcome of his application.

The complainant was never explicitly informed that he was not selected for the post. He drew that conclusion when he saw Vacancy Notice No. 2000/024 which contained a similar post description to that in Vacancy Notice No. 99/006. He then sent an interoffice memorandum on 16 May 2000 to the Director of the Division of Personnel asking for an explanation. On 2 June the Head of the Recruitment Unit confirmed that the post for which the complainant had applied had been readvertised under Vacancy Notice No. 2000/024, and she asked if he would still like to be considered for the post. The complainant replied on 20 June 2000 that he would.

The complainant's wife holds a post in the same Division, but in a different Unit, as the advertised post. Staff Rule 3.03.5 on family relationships sets out the applicable restrictions on the employment of spouses within the IAEA. The relevant provisions state:

"(B) The husband or wife of a staff member may be appointed provided that the spouse is not given any preference by virtue of the relationship to the staff member.

(C) A staff member who bears to another staff member any of the relationships specified in (A) or (B) above:

(i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he/she is related; and

(ii) Shall disqualify him/herself from participating in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related."

The procedures to be followed in the employment of spouses are set out in paragraph 2 of Secretariat Notice SEC/NOT/1325:

"(a) A detailed assessment shall be submitted by the selecting officials, supported by documentary evidence, on what grounds the staff member's spouse is rated as the most qualified candidate; a representative of the Division of Personnel shall participate in all selection processes (including interviews) when a spouse is a candidate;

(b) All proposals for appointment of a staff member's spouse shall be circulated to the advisory committee/panel even in those cases where participation of the committee/panel is normally not foreseen;

(c) The spouse shall normally not be employed in the same department as the staff member and shall not be employed in a post which is superior or subordinate in the line of authority to the staff member to whom he/she is related;

(d) The spouse and the staff member shall not be employed in a post which could lead to financial collusion; and

(e) A staff member shall disqualify himself/herself from participating in the process of reaching or reviewing an administrative decision affecting the status or entitlements of a spouse."

On 4 August 2000 the complainant requested an administrative review by the Director General of the implied rejection of his application for the post under Vacancy Notice No. 99/006. In his request he stated that it had been inferred to him that the reason for his non-selection was that his wife was employed in the same Section as the above-mentioned post and he questioned the legality of the application of SEC/NOT/1325 in his case. On 5 September 2000 the Director General informed the complainant that he had maintained his decision not to appoint any candidate to the post advertised under Vacancy Notice No. 99/006 and to readvertise the post under Vacancy Notice No. 2000/024.

The complainant appealed against this decision to the Joint Appeals Board on 4 October 2000. In its report of 12 March 2001 the Board considered that the complainant's appointment to the post would not have involved any conflict in the line of authority nor would it have given rise to the abuse of position which is foreseen and protected against under Staff Rule 3.03.5 and SEC/NOT/1325. It also found that there was the suggestion of an uneven application of Agency policy since the complainant's wife had been hired to work in the same Department as her husband whereas his application for a different post in that Department had been rejected. The Board recommended that the Director General reconsider his decision not to appoint the complainant to the post in question.

In a letter of 30 March 2001 the Director General informed the complainant that he had decided not to follow the Board's recommendation. He cited the reason stated in his decision of 5 September 2000 - that the decision not to fill the post advertised in Vacancy Notice No. 99/006 had taken into account "various statutory and policy requirements" - and added that these requirements included the need for gender balance and adequate representation of developing countries. That is the impugned decision.

B. The complainant contends that the application in his case of SEC/NOT/1325 was fundamentally flawed; it is Staff Rule 3.03.5 that should be applied in this case. He points out that the post in question was at the same grade as his wife's post and it was not in the same line of authority, therefore the Agency was not entitled to apply SEC/NOT/1325 as it did.

It was only in the Director General's letter of 30 March 2001, rejecting the recommendation of the Joint Appeals Board, that other reasons were given as to why the complainant could not be appointed to the post. The complainant submits that these are not relevant in his case as he is currently on a post subject to geographical distribution, and his appointment would not affect any gender or geographical balance. He expresses his concern about the prospects of a fair and equal selection process under Vacancy Notice No. 2000/024.

He asks the Tribunal to order the Agency to appoint him to the post advertised in Vacancy Notice No. 99/006 with retroactive effect from 25 February 2000. He also claims costs.

C. In its reply the IAEA argues that the decision to appoint a candidate is a discretionary one and as such is open only to limited review by the Tribunal. Furthermore, the executive head of an international organisation is free to decide not to appoint any of the candidates if he concludes that none meets the specified requirements. It cites the Tribunal's case law in support of both arguments and it submits that none of the circumstances warranting a review by the Tribunal exists in this case.

The complainant had been clearly informed that the Director General based his decision on the need to take into account various statutory and policy requirements. Thus, the fact that the complainant and his wife would be working in the same Division was merely one among many factors considered, but not a predominant one. It was

appropriate to apply SEC/NOT/1325 to the complainant's case. Secretariat Notices are promulgated by the Director General and legally binding on all staff.

It considers the complainant's argument about geographical distribution to be flawed; by not appointing the complainant to the post in question the Director General would be able to correct various imbalances in the composition of the Agency staff.

D. The Tribunal asked the parties to reply to the following question: does the Secretariat Notice SEC/NOT/1325 discriminate improperly in that it distinguishes between persons applying for a position on the basis of irrelevant personal considerations namely family or marital status? The complainant provided the Tribunal with arguments supporting his position that the Secretariat Notice does discriminate improperly. The Agency defended its position that the Secretariat Notice does not.

CONSIDERATIONS

1. The complainant and his wife are both employed by the IAEA in the same Department but in different Sections. The complainant applied for a vacant post in the same Section as his wife, but in a different Unit and falling under a different hierarchical structure. Those responsible for the selection process were aware of this fact and nevertheless recommended the complainant for the post; they were of the opinion that the complainant's appointment to the post would involve no conflict or breach of the applicable regulations and rules on the employment of spouses.

2. When he learned that the Agency had advertised a new competition for what appeared to be substantially the same post as the one he had applied for, the complainant made inquiries. When he correctly inferred that he had not been appointed he requested a review of the administrative decision by the Director General.

3. In his reply dated 5 September 2000 the Director General relied on his general discretionary powers as to whether or not to make an appointment and on the fact that he "retains the discretion not to make any appointment to a given vacancy, to make an appointment at a lower grade or to make an appointment with a modified job description or for a shorter duration than indicated". It was on this basis and "taking into account various statutory and policy requirements" (emphasis added) that it was decided not to appoint the complainant to the post in question and that the decision to re-advertise the position was made.

4. It is clear, however, that this reference to general discretionary powers was misleading. The Joint Appeals Board, in its report of 12 March 2001, makes reference to an internal communication dated 25 February 2000, in which the Director of the Division of Personnel was informed that "after taking into account various factors involved in this submission, the Director General has decided not to approve this submission particularly in view of paragraph 2(c) of SEC/NOT/1325 [on Employment of Spouses in the Agency's Secretariat]" (emphasis added).

5. The relevant part of paragraph 2(c) reads as follows: "The spouse shall normally not be employed in the same department as the staff member ...".

6. In its report on the complainant's appeal against the Director General's decision not to appoint him, the Board found as a fact that "the decision had been based on the provisions of SEC/NOT/1325". The evidence clearly justified that finding and the Tribunal will not interfere with it.

7. However, it was only in the impugned decision that he took on 30 March 2001 that the Director General stated that the original decision had been motivated by other factors and in particular by "'various statutory and policy requirements' such as adequate representation of developing countries and the need for gender balance and not on the basis of SEC/NOT/1325 alone". That assertion, coming as it does, at the very end of the internal appeal process and in the impugned decision itself, does not carry conviction. Furthermore, in additional submissions filed at the Tribunal's request, the Agency appears now to concede that the principal, if not the only relevant factor, was the complainant's marital relationship: "... a discretion is vested in the Director General to permit or not to permit the employment of spouses in the same department. In this case, the discretion was exercised to stop employment in the same department". In any event, and even if the suggested "other factors" were considered, it is clear that the terms of SEC/NOT/1325 were critical to the decision not to appoint the complainant.

8. The complainant's main argument is that the quoted provisions of SEC/NOT/1325, being subordinate legislation, are incompatible with the corresponding provisions of the primary legislation, namely the Staff Rules, and in particular Rule 3.03.5, which reads as follows:

"Rule 3.03.5 - Family relationships

(A) ...

(B) The husband or wife of a staff member may be appointed provided that the spouse is not given any preference by virtue of the relationship to the staff member.

(C) A staff member who bears to another staff member any of the relationships specified in (B) above:

(i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he/she is related; and

(ii) Shall disqualify him/herself from participating in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related

(D) If two staff members marry, the benefits and entitlements which accrue to them shall be modified as provided in the relevant staff rules; their appointment status shall not, however, be affected."

9. The complainant is clearly right. The only restrictions on the appointment of spouses are found in paragraphs (B) and (C)(i) above, namely that no preference be given and that the spouses not be in a direct hierarchical relationship. SEC/NOT/1325 purports to go much further and to impose a specific restriction on the hiring of spouses in the same department. It does not merely implement or clarify the staff rule; it purports to extend its reach substantially. It cannot stand.

10. There is more, however. Having sought submissions from both parties on the matter, the Tribunal is of the view that paragraph 2(c) of SEC/NOT/1325 is unenforceable because it is contrary to fundamental principles of law. In fact, the provision improperly discriminates between candidates for appointment based on their marital status and family relationship. (The Tribunal is not required to pronounce itself on the propriety of provisions of Staff Rule 3.03.5.) Discrimination on such grounds is contrary to the Charter of the United Nations, general principles of law and those which govern the international civil service, as well as international instruments on human rights. The principles of Article 26 of the International Covenant on Civil and Political Rights (1966), although not strictly binding on the Agency are relevant. That article provides that:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

11. The list by its very terms is not limitative ("... any ground such as ...") and all forms of improper discrimination are prohibited. What is improper discrimination? It is, at least in the employment context, the drawing of distinctions between staff members or candidates for appointment on the basis of irrelevant personal characteristics. Manifestly, the fact that two staff members may be married to each other is not relevant to their competence or the capacity of either one of them to fulfil their obligations. And, if it is thought that marital or intimate personal relationships between staff members may create management problems, such problems must be dealt with in ways that do not discriminate against either of them as a result of such relationships. The Tribunal notes that SEC/NOT/1325 as it is written, besides being too broad, is not even effective in dealing with the presumed possibility of undue influence or favouritism for it is silent on non-marital intimate relationships. It also fails to deal with marriages taking place after appointment which are specifically protected by the terms of paragraph D of Staff Rule 3.03.5. The impugned decision being based on the Secretariat Notice, it cannot stand.

12. In its observations, the Agency points out that the complainant's present post which was at grade P.3, was reclassified to grade P.4 as of 1 January 2002 and that he is currently being considered for appointment to that post at that level. Since that is the same level as the post for which he was not appointed due to improper discrimination, the Tribunal considers that the complainant's main claim is no longer relevant; the Agency will be ordered to pay him damages equal to the amount of the increased salary and other benefits which would have been

attached to the post in the Disposable Waste Unit from 25 February 2000 (the first documented date of the original administrative decision not to appoint him) to the date of his appointment to grade P.4 or to the termination of his employment with the Agency, whichever shall first occur. The Agency shall pay the complainant's costs in the amount of 500 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Agency shall pay to the complainant damages equal to the difference between his actual salary and the amount of the increased salary and other benefits which would have been attached to the grade P.4 post, to which it failed to appoint him, from 25 February 2000 to the date of his appointment at grade P.4 or to the termination of his employment with the Agency, whichever shall first occur.
3. It shall pay him 500 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet