

113th Session

Judgment No. 3108

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. K. against the International Atomic Energy Agency (IAEA) on 3 May 2010, the IAEA's reply of 16 August, the complainant's rejoinder of 25 October 2010 and the Agency's surrejoinder of 31 January 2011;

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 national of Bosnia and Herzegovina born in 1948, joined the IAEA in 1985 at its Headquarters in Vienna as a safeguards inspector in the Division of Operations A, within the Agency's Department of Safeguards. His fixed-term appointment was extended until 30 September 2008, when he separated from service, having reached the statutory retirement age of 60 years.

On 5 October 2007 the complainant wrote to the Director of his Division to request an extension of his contract beyond retirement age. In February 2008 Mr C., of the Office of the Deputy Director General

in charge of the Department of Safeguards, invited the complainant to meet with him to discuss the possibility of a contract extension in relation to activities concerning the Democratic People's Republic of Korea (DPRK).

On 13 August 2008, approximately two months before his retirement date, having received no news regarding an extension of his contract, the complainant sent a memorandum to both the Director General and the Deputy Director General in charge of the Department of Safeguards, explaining that he felt that he had been discriminated against and asking them to reconsider his request. Having recently learnt that three other inspectors had been granted an extension beyond retirement age, he alleged "unequal treatment in a selection process that was not transparent".

On 15 September 2008 the Director General replied that he had reviewed the process followed by the Department of Safeguards in planning for staff members to undertake inspections in the DPRK and noted that there were sufficient inspectors to address anticipated requirements in that country. The Director General explained that the complainant's Department had therefore not requested an exceptional extension of his appointment. Consequently, the Director General was not in a position to offer him an extension beyond the statutory retirement age, as there was no exceptional programmatic reason to do so.

Having retired from the Agency on 30 September 2008, the complainant lodged an appeal with the Joint Appeals Board (JAB) on 10 October, contending that he had been led by the Agency to believe that he would receive a contract extension, that he had suffered unequal treatment in comparison with colleagues of his who had been granted an extension beyond the statutory retirement age and that the process by which they had been selected for an extension was not based on the proper criteria as set out in a memorandum of June 1998 and was arbitrary, non-transparent and otherwise flawed.

The Board issued its report on 20 October 2009. It found that, while the complainant had not been formally offered an extension of

his appointment, he had been led to believe by senior staff in the Department of Safeguards that his request was being positively considered, whereas this was not the case, and he had undertaken financial commitments on the strength of this. Further, it found that the circumstances in which certain colleagues had been selected for extension did not appear to conform to the Agency's policy as set out in the Director General's memorandum of June 1998. The Board concluded that the complainant's request for extension had not received proper consideration and that this would have been avoided had there been a more formal selection process. Nevertheless, the Board held that this in itself did not warrant reinstating him. It therefore recommended that the Director General should maintain his decision not to offer the complainant an extension beyond the statutory retirement age, but that "more stringent and formal procedures should always be followed in considering applications for extension beyond retirement age, in order to ensure that such applications receive fair consideration and are properly assessed in accordance with the applicable criteria".

By a letter dated 3 February 2010, which constitutes the impugned decision, the Director General informed the complainant that he accepted the Board's recommendation to maintain his decision. However, he rejected its second recommendation concerning "more stringent and formal procedures", because it was based on a memorandum of June 1998 which was no longer in force and because, in his view, there was no need for any additional formal procedure. It was simply necessary to demonstrate that an extension beyond retirement age was in the Agency's interest.

B. The complainant contends that the impugned decision is unlawful, given that it resulted from a flawed selection process. In his view, the testimony of certain officials of the Department of Safeguards before the JAB leads to the conclusion that the selection process was negligent, improperly motivated, or arbitrary.

He argues that the statement by the Director General in his letter of 3 February 2010, that "[t]he fact that other staff members in [his]

Division were extended beyond retirement age was a function of the programmatic needs of the relevant time”, cannot be described as a clear and coherent reason for denying him an extension, as required by the Tribunal’s case law. That statement also appears to suggest that there was a time frame when contract extensions were considered and during which he was not available. He points out that, regardless of how the “relevant time” is to be defined, he was available during that period and he requests the Tribunal to order the Agency to provide documentary evidence to show when his application and those of his three colleagues were processed and what the conclusion was. He adds that a total of eight extensions were granted in his Division from mid-2007 to early 2009.

The complainant further contends that the selection process was not transparent, given that he applied for an extension in October 2007, yet never received a written reply to his application, in clear violation of his right to due process. Another violation of due process was the denial of his right to be present at the JAB’s hearing and to cross-examine witnesses. He also considers that there were undue delays in the internal appeal proceedings.

According to the complainant, the IAEA breached the principle of equal treatment during the “selection process” which led it to extend the appointments of certain inspectors beyond their retirement age. Indeed, he was the only one who met all the criteria stipulated in the June 1998 memorandum, as two of his colleagues exceeded the age limit of 62 years, and one of those allegedly had a poor medical record and no experience whatsoever of the DPRK, the only area of work and the sole reason for the contract extensions in question. He points out that, by contrast, he was 60 years old, had served 23 years within the Division of Operations A as an inspector or as an alternate Unit Head, had very good performance review reports throughout and had also accumulated 15 years’ experience of the DPRK.

The complainant disputes the Director General’s assertion that the 1998 memorandum had ceased to have any relevance in 2003, and notes that the Director General did not explain which other criteria he had applied instead. Referring to the statements made before the JAB

by two former Section Heads of the Department of Safeguards that “they were not looking for the best people, but simply people who fulfilled minimum technical requirements” and that the complainant “had simply been forgotten”, he submits that he was excluded from the selection process without any reason being given and without having been informed. Moreover, by failing to investigate irregularities committed during the selection process, the Director General failed to protect him from an abuse of authority. He adds that his right to be treated with dignity and respect was also violated as a result of the secrecy surrounding the process, which fuelled rumours that impaired his dignity and professional reputation.

The complainant asks the Tribunal to quash the impugned decision and to grant him the salary and benefits he would have received had his appointment been extended until September 2009, plus interest. He also claims 15,000 euros in moral damages and 3,000 euros in costs.

C. In its reply the IAEA submits that the Director General appropriately exercised his discretionary power when deciding not to grant the complainant an extension. It points out that, in accordance with Staff Regulation 4.05, the presumption was always that the complainant would not receive an extension beyond retirement age. Recalling the Director General’s broad discretion in determining what is “in the interest of the Agency” for the purposes of Staff Regulation 4.05, it emphasises that the complainant’s own managers did not propose that he be granted an extension because there was no programmatic need. The IAEA explains that, contrary to the complainant’s assertions, the fact that three other staff members were offered an extension beyond their retirement age was essentially a matter of timing, as they were due to separate from the Agency before the complainant and only short-term staffing needs had been identified.

The Agency also underlines that there was no “selection process” involved, as there was never a competition between the complainant and other staff members. Accordingly, the complainant is wrong to

invoke a breach of the principle of equal treatment, since he was not in the same factual situation as his colleagues who received extensions. Indeed, the complainant was to retire later, and at a time when the Agency had no anticipated need for his services. Given that the resources potentially available exceeded the programmatic needs, the Department of Safeguards chose, from among those inspectors with relevant expertise of the DPRK, to offer extensions on a “first come” basis. Each of the inspectors concerned had the necessary qualifications and it was not appropriate to conduct any selection process, given that the Agency’s need was not long term. It denies that there was any abuse of authority or bad faith on its part and argues that, in the absence of written information to the contrary, the complainant had no basis to believe that his contract would be extended beyond his retirement age.

Regarding the allegation that the complainant was denied due process, the IAEA states that, following Judgment 2125 and with the introduction of new Staff Rules in 2003, it discontinued the use of the 1998 memorandum as a guideline with respect to contract extensions beyond retirement age. Just as the Director General did not announce to staff members the introduction of that document in 1998, given that it was primarily meant as a tool to assist his senior management in advising him on the interests of the Agency, he similarly did not owe the complainant an explanation concerning its discontinuation in 2003. The defendant strongly denies that performance-based criteria were downplayed for the reasons suggested by the complainant, and maintains that the impugned decision has consistently been justified on the basis of programmatic considerations.

Lastly, while the Agency recognises that the complainant had a right to be present during the Board’s hearing of witnesses, it denies that due process requirements, as identified in the Tribunal’s case law, extend to a right to cross-examine witnesses. It argues that the nature of the evidence relied on by the complainant is such that no different conclusions would have been reached by the Board had the complainant been present during witness interviews. Similarly, his presence during interviews would not have altered the testimony

offered by other witnesses. The IAEA underlines that it provided the complainant with a written copy of all of the witnesses' statements made before the JAB and afforded him the opportunity to comment on them, which he did.

D. In his rejoinder the complainant presses his pleas. While acknowledging the Director General's broad discretion in defining "the interest of the Agency", he maintains that specific training and experience were required to work with the DPRK and that the Agency spent considerable resources to train him for that specific country, so that selecting three other candidates, one of whom had no experience of the type of work foreseen or indeed of the DPRK, cannot be said to be "in the interest of the Agency". Moreover, "the interest of the Agency" as the standard to determine whether or not to extend the contract of a staff member beyond retirement age is so general that it could be used to justify improper decisions.

The complainant rejects the Agency's argument that there was no unequal treatment because he was due to retire later than the colleagues who received an extension and was therefore in a different administrative situation. Being scheduled to retire only one month after one colleague and two months after another he submits that this difference does not warrant the difference in treatment. He points out that the Agency in fact contradicts itself, since it stated before the JAB that it was "not looking for the best people, but simply people who fulfilled minimal technical requirements", while in its submissions before the Tribunal it states that "the Department of Safeguards chose [...] on a 'first come' basis". In his view, the "first come" criterion has no legal basis and the characterisation of these extensions as "not long term" is misleading, as they were for six months with possible extensions. Similarly, the Agency's contention that there was no selection process contradicts its statement before the JAB that "the Department had a contingency plan for what was needed for DPRK", illustrating the Agency's bad faith. The complainant disputes the IAEA's assertion that his managers did not support his request for extension.

E. In its surrejoinder the IAEA maintains its position in full. It notes that the complainant himself acknowledges the broad discretion bestowed upon the Director General by Staff Regulation 4.05, and it denounces his attempt to substitute his definition of the interests of the Agency for that of the Director General.

CONSIDERATIONS

1. The complainant is a former safeguards inspector for the Agency. He joined the Agency in 1985 and separated from service upon reaching his statutory retirement age of 60 in September 2008. On 5 October 2007 the complainant submitted a request for an extension of his contract beyond his statutory retirement date, citing as qualifications for an extension his good performance, his familiarity with the DPRK, and his health.

2. In February 2008 the Agency's senior inspector for the DPRK met with the complainant and discussed a potential contract extension in some detail. The complainant states that the IAEA Section Head responsible for the DPRK gave him clear indications between inspection trips that the Agency was addressing his request. He also states that his meeting with the senior inspector and other senior staff led him to believe that the Agency would offer him an extension.

3. In August 2008, as the complainant had not received any news regarding his request and having learned that other staff members had been granted contract extensions beyond retirement age, he wrote to the Director General and the Deputy Director General in charge of the Department of Safeguards, complaining of possible procedural irregularities. On 15 September 2008 the Director General informed the complainant that his contract would not be extended. The Director General explained that the discretion to extend age limits is only exercised for exceptional programmatic reasons, which were not present in the circumstances. He added that he reviewed the

process followed by the complainant's Department in planning for sufficient staff to conduct inspections in the DPRK and noted that there were sufficient inspectors to address anticipated requirements and, accordingly, the Department did not request an extension of the complainant's contract.

4. The complainant appealed the decision to the JAB, alleging flaws in the process by which staff members are selected for contract extensions. In its 20 October 2009 report, the JAB found that senior staff in the Department of Safeguards led the complainant to believe that his request was being positively considered, when that was not, in fact, the case and that the Administration's conduct gave rise to a reasonable expectation that his contract would be extended. On its own, however, this reasonable expectation was not sufficient to permit the JAB to conclude that he should be reinstated. Accordingly, the Board recommended that the Director General maintain his decision not to grant the complainant a contract extension beyond his statutory retirement age. The JAB also observed that a more formal selection process would have ensured that the complainant's request would have received proper attention. Based on this observation, the JAB recommended that more stringent and formal procedures be followed in considering these kinds of applications to ensure that they receive fair consideration and are properly assessed in accordance with the applicable criteria.

5. On 3 February 2010 the Director General informed the complainant that he accepted the JAB's recommendation to maintain his earlier decision. However, the Director General rejected the JAB's recommendation in relation to the implementation of more formal procedures to deal with applications for contract extensions beyond the statutory retirement age. He observed that these types of contract extensions are exceptional in nature and may only be granted in the interest of the Agency. In his view, the only formal procedural requirement imposed by Staff Regulation 4.05 is that the extensions must be in the Agency's interest and no additional formal procedure is necessary. He found that the complainant's request received

proper consideration and that no programmatic need was established. Accordingly, it was not demonstrably in the Agency's interest to grant an extension.

6. The complainant advances a number of arguments involving a violation of his due process rights by the JAB, the inadequacy of the Director General's reasons for his decision, the arbitrary selection process and unequal treatment.

7. The complainant submits that the JAB's refusal to permit him to attend its interviews of witnesses and to cross-examine the witnesses constitutes a violation of his rights of due process. The Agency concedes that the JAB erred by not permitting the complainant to attend the interviews but contends that the right to attend the interviews does not include a right to cross-examine the witnesses. In advancing this position, the Agency relies on the following statement in Judgment 2946, under 24:

"The complainant also contends that he was denied due process by reason of the fact that the Joint Appeals Board conducted interviews [...] in his absence and afforded him no opportunity to question [witnesses] with respect to their statements. [...] Although [Judgment 2513 was] not observed, the nature of the evidence relied upon by the complainant in these proceedings is such that no different result would have been reached if the rules had been observed."

8. The Agency argues that in the present case the JAB would have reached the same conclusions with or without the complainant's presence at the proceedings. The primary issue in this case, the Agency submits, is whether the Director General erred in not making an exception to Staff Regulation 4.05. As decisions to extend staff members beyond retirement age are discretionary, the JAB's role was limited to the question of whether the Director General abused his discretion in reaching his decision. Since the JAB's deliberations did not turn on contested questions of fact, it would not have been aided by the complainant's presence at its inquiry. The JAB learned from the complainant's managers that his appointment was not extended due to a lack of programmatic need. This, the IAEA submits, was not a point

in dispute. Accordingly, the outcome would have remained the same even if the complainant had attended the interviews and had an opportunity to cross-examine the witnesses. Further, the complainant received written copies of the witnesses' statements and could have raised any of the issues he now claims were omitted with the JAB at the time of his own interview.

9. An internal appellate body is the primary fact-finding body in the internal appeals process. It is the body that sees and hears the witnesses and must assess the reliability of the evidence adduced. A full appreciation of the evidence can only occur in circumstances where individuals whose interests may have been adversely affected have an opportunity not only to be present to hear the evidence but also to test the evidence through cross-examination. As the Tribunal stated in Judgment 2513, under 11, "in the absence of special circumstances such as a compelling need to preserve confidentiality, internal appellate bodies such as the JAB must strictly observe the rules of due process and natural justice and [...] those rules normally require a full opportunity for interested parties to be present at the hearing of witnesses and to make full answer in defence".

10. The Agency's suggestion that there were no significant factual matters in dispute before the JAB is disingenuous. Among other things, the timeline on which extensions were proposed to the Director General is important to the resolution of matters at issue, including, for example, the question of arbitrariness and whether the application had, in fact, ever been considered.

11. This lack of due process in the internal appeal procedure and the Director General's subsequent adoption, in part, of the JAB's recommendations alone requires that the impugned decision be set aside and entitles the complainant to an award of moral damages.

12. In relation to the complainant's assertion that his application was not properly considered, the Tribunal agrees with the JAB's finding in this regard. There is no evidence in the record to suggest

that it was duly considered. However, the JAB's finding does not support its recommendation to maintain the decision. To the contrary, it leads to the conclusion that the decision must be set aside.

13. Having submitted his application in good faith, the complainant was entitled to have it considered on its merits and in a timely manner. While it cannot be said that the complainant's contract would have been extended, the Agency's lack of diligence in its consideration of his application effectively foreclosed any possibility to have his contract extended. In these circumstances, he is not entitled to an award of the salary and benefits which he would have received if his contract had been extended as he has claimed. However, he is entitled to moral damages for the flaws identified above in the amount of 10,000 euros.

14. Having partially succeeded, the complainant is entitled to his costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The Director General's decision of 3 February 2010 is set aside as is his earlier decision of 15 September 2008.
2. The IAEA shall pay the complainant moral damages in the amount of 10,000 euros.
3. It shall also pay him costs in the amount of 1,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2012, Mr Seydou Ba, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba
Dolores M. Hansen
Patrick Frydman
Catherine Comtet