

## THIRTY-THIRD ORDINARY SESSION

### ***In re* MEYER**

#### **Judgment No. 245**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Atomic Energy Agency (IAEA) drawn up by Mr. John Meyer on 11 January 1974, the Agency's reply of 11 April 1974, the complainant's rejoinder of 15 July 1974 and the Agency's surrejoinder of 16 August 1974;

Considering Article II, paragraph 5, and Article VII of the Statute of the Tribunal, Article VII.C of the Statute of the Agency, IAEA Staff Regulations 3.01, 3.02, 3.03 and 12.01 and IAEA Staff Rules 8.01.4 and 12.01.1;

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. The complainant entered the service of the Agency on 14 January 1969 and received an appointment for two years and eighteen days at grade P.4. On 15 July 1970 he accepted an extension of his appointment for one year, on 10 June 1971 an extension for another year and on 28 June 1972 a final extension for eleven months. All the contracts of appointment stated that fixed-term appointments carried no expectation of extension. The complainant left the Agency on 31 December 1973.

B. In accepting the final extension of his appointment the complainant asked that its length should be reconsidered. For want of thirteen days the appointment offered to him did not enable him to complete the five years' continuous service required to entitle him to a pension from the United Nations Joint Staff Pension Fund, in which he had become a compulsory participant, as was the usual practice. His request for an extension of more than eleven months was rejected. Being uncertain of the duration of his appointment to the Agency, he had already asked to be allowed to resume membership of the national occupational fund of which he had been a member before joining the staff of the Agency. That request had also been rejected. The complainant appealed to the Joint Appeals Committee. While holding that he had no "right" to extension of his final appointment, the Committee unanimously recommended extending it so as to bring his total length of continuous service to five years and so entitle him to a retirement benefit. By letter of 10 December 1973 the Director General informed him that he could not endorse the Committee's recommendation. The complainant is now impugning the decision of 10 December 1973.

C. In the claims for relief in his original memorandum the complainant asks the Tribunal to order the Director General of the Agency

(a) to extend his contract either for a reasonable period or for as long as the programme on which he is engaged continues; or

(b) to restore his retirement benefit by extending the duration of his fixed-term appointments to a minimum of five years;

or, if neither of these solutions proves practicable, to award such suitable compensation as the Tribunal sees fit. In the claims for relief in his rejoinder the complainant asks the Tribunal

(a) to quash the Director General's decision of 10 December 1973;

(b) to order that his appointment should be extended so as to entitle him to a retirement benefit from the United Nations Joint Staff Pension Fund; and

(c) to award him fair compensation for having been induced to conclude a contract of appointment with the agency without being clearly informed of its policy of granting appointments for a period of less than five years.

D. The Agency maintains that the Director General's refusal to endorse the Joint Appeals Committee's recommendation was not an "administrative decision" within the meaning of Staff Regulation 12.01 and that the true decision in this case is the decision of 28 June 1972 to extend the complainant's appointment by eleven months. The Agency points out that, as is stated in paragraph A above, each of the appointments offered to the complainant, which he accepted and signed, included a clause stating that they carried no expectation of extension; such a clause forms part of the Staff Regulations; and the complainant cannot therefore allege any infringement of the Staff Regulations or the terms of his appointment. The Agency points out that its general policy, as provided for under Article VII.C of its Statute, is to keep its permanent staff to a minimum and generally to grant contracts of a total duration of not more than four years. Entitlement to a retirement benefit is not unconditional but is governed by certain rules, including the rule that the staff member should have completed at least five years' continuous service.

E. The Agency asks the Tribunal to dismiss the complaint as irreceivable and unfounded.

#### CONSIDERATIONS:

As to the receivability of the complaint:

1. On 28 June 1972 the Director of the Personnel Division notified to the complainant the Director General's offer of a final extension of his appointment to 31 December 1973. In accepting that offer on 4 October 1972 the complainant asked, among other things, that the length of his new appointment should be reconsidered. His request was refused on 15 November 1972 and then, after he had made further submissions, on 22 June and 1 August 1973. At the Director General's invitation on 16 August 1973 he gave the reasons for his claim. On 31 August the Director General replied denying any infringement of the terms of the complainant's appointment and refusing to reverse his decision. On 21 September 1973 the complainant accordingly appealed to the Joint Appeals Committee, which reported on 19 October 1973. Before declaring his final decision, on 7 November the Director General asked the Joint Appeals Committee for clarifications, and he received them on 5 December. Finally, on 10 December 1973 the acting Director General informed the complainant that the Director General saw no reason to reverse his previous decision.

There is no need to consider whether the offer made by the Agency on 28 June 1972 and its replies on 22 June and 1 August 1973 to the complainant's requests are administrative measures and therefore real decisions which may be impugned. It need only be said that on 31 August 1973, in dismissing, with stated reasons, the complainant's claim for an extension of the duration of the appointment offered to him, the Director General took a decision in the true meaning of that term which was correctly submitted to the Joint Appeals Committee and that in the light of the Committee's recommendations and clarifications he took a further decision, in the legal meaning of that term, upholding his original one. There is therefore no bar to the receivability of the complaint; it was lodged in accordance with Article VII of the Statute of the Tribunal within the ninety-day time-limit and after the internal means of redress had been exhausted.

As to the merits:

2. The impugned decision refusing to extend the complainant's appointment beyond 31 December 1973 is a matter of discretion. Hence the Tribunal may interfere with it only if it was taken without authority, is irregular in form, or tainted by procedural irregularity or by illegality, or is based on incorrect facts or if essential facts have not been taken into consideration, or if it is tainted with misuse of authority, or, again, if clearly mistaken conclusions have been drawn from the documents in the dossier.

3. The complainant first argues that in dismissing his request for extension of his final appointment the Director General infringed the Agency's contractual obligations. For the following reasons this argument cannot be accepted.

The original appointment of 20 January 1969 ran for two years and expressly provided that it carried no expectation of extension or conversion. A similar proviso is to be found in the letter of 15 July 1970, which preceded the conclusion of the contract of 6 August 1970, and was incorporated in the contract of 23 September 1971. That

proviso denies the complainant any contractual right to have his appointment extended beyond 31 December 1973.

It is true that on 7 June 1968 the Director of the Personnel Division informed the complainant in reply to his request that the practice in the Agency was to grant initial fixed-term appointments for two years, but that they "can be followed by fixed-term contracts depending upon the needs of the Agency's programme and work performance of the Staff member concerned". The complainant could not infer from that statement, however, any right to continue in the Agency's service until completion of the programme to which he had been assigned and for as long as his work performance was satisfactory. On the contrary, by using the word "can" the Agency reserved the right to terminate his appointment even if the stipulated conditions were fulfilled.

It is immaterial, moreover, that the complainant was not informed that he had no right to renewal or extension of his appointment until 20 January 1969, when he signed the contract and had already given up employment in Canada and ceased to contribute to the private pension fund to which he belonged. From reading the letter of 7 June 1968 he should have realised that although it was possible that his contract might be extended in specific circumstances it was not certain that it would be.

The complainant cannot properly take the Agency to task for appointing him without informing him of its general practice of not granting fixed-term appointments of more than five years' duration. It may of course be regrettable that he was not informed at the outset of that restriction, as new Staff members of the Agency apparently now are. But since he should have expected his appointment to be terminated on grounds other than the completion of a programme or the inadequacy of his services he cannot find any claim on the omission which he attributes to the Agency.

4. In his rejoinder the complainant seeks mainly to prove that the Director General's refusal to extend his appointment beyond 31 December 1973, which deprived him of his entitlements as a participant in the United Nations Joint Staff Pension Fund, was a misuse of authority. This argument can be accepted only if the Director General was actuated by improper motives. Since it is the Director General's duty to safeguard the Agency's interests at all times, the question arises whether the impugned decision is in accordance with those interests. The Tribunal will not substitute its own opinion of the nature of the Agency's interests for that of the highest authorities of the Administration, which are the sole judges.

In asking that the complaint be dismissed on the merits the Agency observes that its general practice is to limit the total period of appointment of staff members to four years and to grant to only a few of them appointments of a total duration of over five years. There are grounds for holding that practice to be in accordance with the Agency's interests since it is based on Article VII.C of its Statute and approved by its General Conference and Board of Governors. In offering to extend the complainant's total length of service to four years, eleven months and seventeen days the Director General no doubt intended to act in the Agency's interests as viewed by its highest authorities. Hence in the absence of other evidence to support the allegation of misuse of authority, that allegation cannot be regarded as established.

5. It appears however from the circumstances of the case that the Director General drew unwarranted conclusions from the evidence before him. Although the complainant has not expressly put forward this argument, the Tribunal feels bound to consider it since its jurisdiction requires it to apply the law.

The refusal of the complainant's request deprives him of his pension entitlements. It therefore has substantial effects on the financial interests of a staff member whose services were consistently regarded by the Agency as satisfactory.

Moreover, at least in so far as the complainant was claiming merely an extension of thirteen days to secure his entitlements as a participant in the Fund, his claim was not such as to cause any prejudice whatever to the Agency. It is probable that the Director General's purpose in refusing to increase the total duration of the complainant's service to five years was to avoid setting a precedent on which other staff members might later rely. But in order to avoid future claims like the complainant's the Agency need only refrain from extending the appointment of fixed-term staff members beyond four years. Moreover, by limiting the period of the complainant's service to five years the Director General would not have departed from the practice of regarding only appointments of more than five years as permanent. In any case, as the Agency itself acknowledges, its pecuniary interests are not at stake.

Under the circumstances, by causing the complainant serious loss which was not justified by the need to safeguard

any interest of the Agency the Director General drew from the dossier conclusions which are clearly mistaken.

6. In sum, although the impugned decision does not infringe the complainant's contractual rights and is not tainted with misuse of authority, it draws from the dossier conclusions which are clearly mistaken, that is, it is tainted by a flaw which warrants quashing it. The Agency should therefore extend the complainant's final appointment so as to bring his total period of service to five years and so entitle him to the benefits of participation in the United Nations Joint Staff Pension Fund. On the other hand, a longer extension of appointment, for example until the date of completion of the programme to which the complainant was assigned, is not warranted in the circumstances of the case, since it is not required to remedy the flaw in the decision.

#### DECISION:

For the above reasons,

1. The complaint is allowed in that the Agency should extend the complainant's final appointment so as to bring his total period of service to five years and so entitle him to the benefits of participation in the United Nations Joint Staff Pension Fund.
2. The remainder of the complainant's claims in his complaint and his rejoinder is dismissed.
3. Mr. Meyer is awarded a sum of four thousand Swiss francs in respect of costs.

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, Morellet, Registrar of the Tribunal.

Delivered In public sitting in Geneva on 21 October 1974.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet