

EIGHTIETH SESSION

In re PISSAREV

Judgment 1469

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Boris Panteleimonovich Pissarev against the International Atomic Energy Agency (IAEA) on 12 October 1994, the Agency's reply of 22 December 1994, the complainant's rejoinder of 14 February 1995 and the IAEA's surrejoinder of 27 March 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

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

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

A. The complainant, a Russian who was born in 1922, joined the staff of the IAEA on 1 June 1962 under a two-year appointment as senior legal officer at grade P.5. The last of his three extensions of contract ran until 28 May 1967. The total period of his service fell three days short of five years.

During that period he was an "associate participant" in the United Nations Joint Staff Pension Fund and so had coverage for death and disability but not for retirement. He did not himself contribute to the Fund or get any withdrawal settlement upon separation. Only full participants in the Fund qualify for a pension, after five years' continuous service.

From 1977 the complainant was on the staff of the United Nations in Geneva. While there he became a full participant in the Fund but chose not to validate his prior non-contributory service at the Agency.

When he retired in 1982 a lump sum was transferred to the Government of the then Soviet Union in lieu of pension payments. At present he receives a state pension.

In a letter of 26 November 1993 he asked the Director General of the Agency to extend his final appointment retroactively to the end of May 1967 to afford him the "benefits of participation" in the Fund.

By a letter of 19 January 1994 to the secretary of the Joint Appeals Board he gave notice of his intention to appeal if the Director General rejected his claim.

In a letter dated 1 February 1994 the Director General rejected it.

On 25 March he appealed to the Joint Appeals Board. In its report of 13 July 1994 the Board recommended rejecting his appeal on the grounds that it was time-barred.

By a letter of 21 July 1994 the acting Director General informed the complainant that he was endorsing the Board's recommendation. That is the decision impugned.

B. The complainant submits that the IAEA's refusal to extend his contract by three days wrongfully deprives him of pension entitlements. In Judgment 245 (*in re Meyer*), on which he relies, the Tribunal held that the Agency had improperly deprived another former official of a pension by refusing to extend his appointment by 13 days.

The complainant says that he put off submitting a claim not only because he was unwell in 1991 and 1992 but above all because it was the policy of his country, the then Soviet Union, to confiscate any pension entitlements he might have had from the Fund. That is also why he did not validate his service at the IAEA when he became a staff member of the United Nations at Geneva. His situation warrants waiver of the time limits, as is plain from the Fund's safeguarding in its Regulations benefits whose "exercise has been prevented by circumstances beyond the control of the beneficiary".

He seeks such retroactive extension of his appointment as will bring his total service at the Agency to five years

and payment of a pension as from the date of his retirement, less any amounts he may owe for the purpose of validating non-contributory service. Failing that, he claims payment of "the maximum amount" of pension due to him "as a full participant" in the Fund from the date at which he retired. He also claims costs.

C. In its reply the Agency submits that the complaint is time-barred and in any event devoid of merit.

The complainant's internal appeal was over 26 years late and neither political circumstances nor the state of his health warrant waiving the time limit. He was free to challenge the decision in time, the political circumstances in his home country notwithstanding. His complaint is irreceivable for failure to exhaust his internal remedies.

On the merits the Agency points out that it had never given him grounds for expecting a long-term appointment of five years or more. He was aware of its policy and accepted the benefits of coverage as an associate participant in the Fund.

D. In his rejoinder the complainant describes himself as the victim both of a "system" which made it "dangerous" to claim a pension for service at the IAEA and of the Agency's refusal of a three-day extension. The system having disappeared, the Agency alone is liable for his loss of pension.

E. In its surrejoinder the IAEA maintains the arguments it put forward in the reply. It is not to blame for his drawing no pension from the Fund: had it extended his appointment to the full five years he would still not have qualified for a pension. Even if he had been a full member his entitlements would have been transferred to the Government of his country under the terms of its agreement with the Fund. So he had no reasonable expectation of the pension he is seeking.

CONSIDERATIONS:

1. The complainant, a citizen of the then Soviet Union, joined the staff of the IAEA, in Vienna, on 1 June 1962 as a senior legal officer at grade P.5. His initial appointment ran for two years to 31 May 1964. He was granted an extension of two years to 31 May 1966. On 18 February 1966 he applied for and got an 11-month extension, to 30 April 1967. His last extension was again made at his request, and his last day on the Agency's payroll was 28 May 1967.

2. In January 1977 he took up employment at the Office of the United Nations in Geneva.

3. He wrote a letter to the Agency on 7 June 1979 saying that it had deliberately shortened by a few days the last extension of his appointment with it so as to prevent his having a total period of service of five years. He maintained that its intention had been to deprive him of the right to full participation in the United Nations Joint Staff Pension Fund, five years being the minimum period of service that qualifies a staff member for such participation. He asked for "detailed information concerning [his] service" so that he might submit a claim to the "re-establishment of [his] rights as a staff member with five years' service".

4. He received a letter dated 15 February 1980 from the acting Director of the Division of Personnel giving the dates of his appointments with the Agency and reminding him that he had been an associate participant in the Fund. The letter added that associate participation, which by then no longer existed, had provided "death and disability coverage for staff not expected to remain in service for longer than five years, thus not qualifying for retirement benefits".

5. The complainant wrote again on 8 September 1982 to the Division of Personnel saying that according to his recollection he had been paid "the total withdrawal amount from the Fund" on separation and asking what the exact amount had been.

6. The Director of the Division replied in a letter of 15 October 1982, again observing that he had been an associate participant in the Fund while serving with the Agency; as an associate participant he had paid no contributions to the Fund; nor had the Agency made any; and so "no cash withdrawal settlement" had been payable to him.

7. Not until 26 November 1993 did he make his next approach to the Agency. He then wrote a letter to the Director General making a request for review of his pension status and asking that his final appointment with the Agency be extended to the end of May 1967 so as to bring the total period of his service up to five years and entitle him to full participation in the Fund.

8. In answer to an inquiry the deputy secretary of the United Nations Joint Staff Pension Board informed the Director of the Agency's Legal Division by a letter of 14 January 1994 that at the time of his separation from the Agency the complainant had not been entitled to any benefits from the Fund; but that after serving one year on his later post with the United Nations in Geneva he could have become a full participant and within another year thereafter could have chosen to validate his "prior non-contributory service as an associate participant from 1962 to 1967".

9. The Director General wrote to the complainant on 1 February 1994 refusing the request for review in his letter of 26 November 1993. The complainant submitted an appeal to the Joint Appeals Board on 25 March 1994.

10. Paragraphs (1) and (4) of Rule 12.01.1(D) read as follows:

"(1) A staff member who, under the terms of Provisional Staff Regulation 12.01, wishes to appeal against an administrative decision, shall, as a first step, address a letter to the Director General, requesting that the administrative decision be reviewed or reconsidered by him. Such a letter must be sent within two months from the time the staff member received notification of the decision in writing.

(4) An appeal shall not be considered by the Joint Appeals Board unless the above time limits have been met, provided that the Board may waive the time limits in exceptional circumstances."

11. In its report dated 13 July 1994 the Board held that the complainant had failed to observe the time limit of two months in Rule 12.01.1(D)(1). It then considered whether there were "exceptional circumstances" within the meaning of Rule 12.01.1(D)(4) which would warrant waiver of that time limit.

12. The Board considered the complainant's contention on that score that Judgment 245 (in re Meyer) was applicable. In that case a staff member of the Agency who had been a full participant in the Fund was denied a 13-day extension of contract that would have brought the total period of his service up to five years and so entitled him to the benefits of participation. He brought his appeal in time. Even though there had been neither infringement of his rights nor misuse of authority the Tribunal held that by causing the complainant serious loss unjustified by the need to safeguard any interest of the Agency the Director General had drawn mistaken conclusions from the evidence. Accordingly the Tribunal directed the Agency to grant the extension. Drawing several distinctions between that case and this, the Joint Appeals Board concluded that the complainant's circumstances were so different from Mr. Meyer's as to warrant no waiver of the time bar.

13. In particular the Board considered whether the complainant's status as a former civil servant of the Soviet Union constituted an exceptional circumstance warranting waiver. He had argued that he would have been forced to make over to the Soviet State Bank any pension entitlements he derived from service in the United Nations common system and that because he had therefore not expected to get a pension himself he had neither bothered to contest the length of the extension in 1967 nor validated prior service as an associate participant when later given the chance to do so during employment by the United Nations in Geneva.

14. The Board concluded that it could not, some 27 years later, properly waive the requirements of the Staff Regulations and Rules when the former staff member, despite long-standing dissatisfaction with his situation, had never taken steps to contest the decision he was challenging. The Board observed that the rules must be equally applied to everyone and that the complainant's situation was probably due to his own omissions as well as to the policy of the former Soviet Government rather than to any action or omission on the Agency's part. In conclusion it found no exceptional circumstances under Rule 12.01.1(D)(4) which would merit waiver. It recommended rejecting his appeal as time-barred.

15. By a letter dated 21 July 1994 the Director General accordingly informed the complainant of the rejection of his request for review, and that is the decision impugned.

16. Article VII(1) of the Tribunal's Statute reads:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

Under Rule 12.01.1(D)(1) the complainant was required to put his request for review to the Director General within

two months of receiving notice of the decision to extend his last appointment to 28 May 1967. He failed to do so. To satisfy the requirement in Article VII(1) the complainant must not only follow the prescribed internal procedure for appeal, but follow it properly and in particular observe any time limit that may be set for the purpose for internal procedures. In this case the complainant brought his initial request for review 26 years after he had received notice of the decision.

17. The complainant's case is that the time limit should not apply to the situation in which he was in 1967, and which he likens to that of someone under some sort of duress. He also cites the Pension Fund's Rules and Regulations.

18. The complainant is not contending that the Soviet Government prevented him from challenging the decision not to extend further his final appointment. He merely argues that while the Soviet Union existed there was no point in his making any claim or taking any other action to get a pension from the Agency since in the end he would never have received it himself anyway. The conclusion is that the reason why he did not appeal was not any duress the Government may have put on him but the fact that appeal would have brought him no personal benefit. This case is not about the former Soviet Union's practice of requiring citizens to cash pension entitlements from the Fund and have the proceeds paid to the State Bank, but about the complainant's failure to pursue the possibility of getting a pension. The complainant's plea of duress is not sustained. Nor can his ill health in 1991-92 serve to revive a claim which even by them was long since time-barred. Lastly, the Fund's Regulations and Rules do not fall within the Tribunal's competence.

19. The internal means of redress not being exhausted, the complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas
Mella Carroll
Julio Barberis
A.B. Gardner