

EIGHTY-FIFTH SESSION

In re Leontiev

Judgment 1749

The Administrative Tribunal,

Considering the complaint filed by Mr. Leonid Antonovich Leontiev against the International Atomic Energy Agency (IAEA) on 9 July 1997, the Agency's reply of 30 October 1997, the complainant's rejoinder of 5 February 1998 and the IAEA's surrejoinder of 9 April 1998;

Considering Articles II, paragraph 5, and VIII 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 1940, joined the staff of the Agency on 1 August 1991 under a three-year fixed-term appointment as a translator at grade P.3 in the Russian translation section of its Division of Languages. The Agency extended his appointment by two years in 1994 and by a further year in 1996.

In staff notice SEC/NOT/1484 of 25 May 1993 the Agency set out its policy on tenure of appointment and extensions of contract. It said that "a total of five years constitutes the *normal* tour of service which a regular Professional staff member in the Agency can expect and the presumption is that there will be no further extension of the contract". The policy allowed for an extension of five years, known as a "*long-term* contract", which is subject to further extension up to the age of retirement, "provided there is a continuing need for the staff member's services and his/her performance and conduct continue to meet the required standards"; otherwise "seven years constitute the *maximum* tour of service in the Agency".

By a letter of 14 June 1996 the Director of the Division of Personnel told the complainant to get in touch with the Division about the formalities to be carried out on the expiry of his contract on 31 July 1997. In a letter of 1 July 1996 he asked the Director General to reconsider the non-renewal of his appointment on the grounds that the decision rested on wrong information about his performance. The acting Director General answered by a letter of 31 July that his request was still under review. The Director General replied on 22 November 1996 that the Agency was under no obligation to extend his appointment and that he did not work well enough anyway to warrant it.

By a memorandum of 18 December 1996 he lodged an appeal with the Joint Appeals Board. In its report of March 1997 the Board held that he "should have been advised of the negative comments" put to the competent body, the Joint Advisory Panel on Professional and G.8 staff, about the extension of his contract, "should have been offered the opportunity to respond to them" and may have misunderstood the "significance" of remarks in his performance appraisal reports; but it recommended rejecting his appeal. By a letter of 14 April 1997, which he impugns, the Director General endorsed that recommendation.

B. The complainant submits that the decision not to extend his appointment was arbitrary and "unfair". He alleges mistakes of fact and of law.

There were, he says, no grounds for the finding of "shortcomings" in his work that the Director General relied on. Contrary to what the Administration made out, the texts he was translating were of all sorts and of varying difficulty. Though his appraisal report called for further improvement in the quality of his work, that meant no more than that there was "always room for every member of the Section to improve". As is plain from his records, he was always up to standard.

The Agency infringed his right to a hearing: former supervisors of his gave the Joint Advisory Panel "incorrect" information behind his back. The Director General relied on it, and also failed to take account of his express wish to stay on with the Agency until he retired. He pleads breach of equal treatment: other translators who worked no better got long-term contracts. The impugned decision causes him and his family hardship.

He wants the Tribunal to quash the impugned decision and in particular order (1) his reinstatement as from 31 July 1997 or, failing that, payment to him of damages in an amount equivalent to his salary and allowances, including contributions to the United Nations Joint Staff Pension Fund, from 1 August 1997 to 25 September 2000; (2) payment of damages for material and moral injury in an amount to be set by the Tribunal; and (3) an award of costs.

C. In its reply the IAEA says, "first and foremost", that his is not a case of hardship, but a "regular" one of refusal to extend a fixed-term contract. He had no rightful expectation of continuing employment. After thorough review of his work the Joint Advisory Panel concluded that he had already had enough time to improve and was unlikely to do so. So it was in the Agency's interests to grant him no further extension. As to his appraisal reports, he had only to follow the procedure in the Administrative Manual if he wanted to challenge them.

D. In his rejoinder the complainant enlarges on his pleas and answers those in the reply. He accuses the Director General of improper exercise of discretion by denying him the opportunity of answering the adverse comments that constituted the real, but unstated, reason for the decision. The Director General failed, too, to take account of the "precarious" plight the decision left him in and drew mistaken conclusions about the nature and quality of his work. The reason why he did not challenge his appraisal reports was that they confirmed that he had fully taken part in the work of the section and done all that was expected of him. It was his supervisors who were at fault for making "defamatory and completely false submissions" to the advisory bodies after praising his performance in interviews with him.

E. In its surrejoinder the Agency observes that the rejoinder contains no new facts or arguments that refute the reply. It presses its earlier pleas and maintains that the "true" reason for not renewing his contract was poor performance. There can be no question of breach of his right to a hearing insofar as he chose not to comment on the shortcomings his appraisal reports accused him of.

CONSIDERATIONS

1. The complainant joined the IAEA as a Russian translator on 1 August 1991 under a fixed-term contract for three years in the Russian translation section of its Division of Languages. His contract was twice extended, first by two years, and then by one up to 31 July 1997. This complaint challenges the refusal of a further extension.

2. The IAEA's policy on tenure of appointment and extension of contract is laid down in a staff notice, SEC/NOT/1484, issued by the secretariat on 25 May 1993. Some parts of it are relevant to this case and may be summed up as follows:

(a) Regular staff members are initially appointed under a three-year fixed-term contract, which may be extended by two years, five years constituting the "*normal* tour of service" and the presumption being that there will be no further extension.

(b) There are two exceptions. The first is that, in order to provide for "the necessary continuity in essential functions or for other compelling reasons in the interest of the Agency", an extension of five years, known as a "*long-term* contract", may be given to a staff member who meets required standards, one being that his "qualifications, conduct and performance ... must be of the highest degree of excellence". The second exception is that "for programmatic or other compelling reasons in the interest of the Agency" a staff member who is not given a long-term contract may get an extension of one or two years, which as a rule "should be" final, so that the maximum "tour of service" will be seven years.

(c) As for the procedure, division directors and department heads must ensure that "any performance-related information contained in the proposal for contract extension is in line with the latest performance appraisal", and "should such proposal" contain adverse information on conduct or performance, the staff member "must be given a chance to comment thereon".

3. When the complainant's first extension was considered his latest appraisal report, signed by him and his supervisor on 27 November 1992, was the one for 1992. His supervisor said: "In a number of cases his draft translations contain many handwritten changes and corrections which create certain difficulties for revisers and typists"; and "In general the staff member's performance is satisfactory"; but he "should continue his efforts to improve the quality of his translations". On 9 June 1993 he got a two-year extension from 1 August 1994, bringing

the total duration of his contract to five years, "the *normal* tour of service".

4. Reports appraising his performance in 1993 and 1994 were available by the time the matter of a second extension was considered in 1995. While the report for 1993 contained remarks similar to those in the report for 1992, the report for 1994 said: "The staff member's performance is satisfactory in general. However further improvements in the quality of his translations are still desirable": it said nothing, as had the two previous reports, about handwritten changes and corrections. His first-level supervisor observed in a memorandum of 2 March 1995 to the Director of Personnel that his level of performance had "never reached the degree of excellence required for ... a long-term contract" and recommended a one-year extension. That is what he was given, until 31 July 1997, and he did not claim that he should have been granted a long-term contract.

5. When the complainant's next extension was being considered, his report for 1995 was the latest available, and it was much the same as the one for 1994. The Director of the Division of Languages, who was also his second-level supervisor, commented in a memorandum of 27 February 1996 that his performance, though "satisfactory in general, requires further improvements". He went on:

"This has been repeatedly stated in his [appraisal reports] including the latest. His translations require, both linguistically and substantially, a higher degree of revision than those of his other colleagues. He is not assigned to make self-revised translations. ... His ability to cope with texts of specialized and technical nature is limited. In general, his level of performance does not meet the standards established for awarding a long-term contract."

The Director recommended a final extension by one year, up to 31 July 1998, which would have brought his total "tour of service" to the maximum of seven years.

6. At a meeting held on 6 June 1996, however, the Joint Advisory Panel refused by a majority to recommend any further extension, citing "the shortcomings in the staff member's translation work, which had repeatedly been identified in performance appraisals".

7. The same first- and second-level supervisors evaluated the complainant's performance in his four reports for 1992 to 1995. In those reports he was rated as having "met ... objectives" in respect of all his "activities", one of which was "translation of administrative, scientific, legal and technical texts". The adverse remarks by his higher-level supervisor were thus not in line with his reports, and he had not been given any opportunity of commenting on them.

8. In its report dated March 1997 the Joint Appeals Board acknowledged that the complainant should have been informed of those adverse remarks and offered an opportunity of responding to them before they were forwarded to the Joint Advisory Panel. The Board concluded, however, that it was unlikely that his response would have changed the proposal of the Director of the Division of Languages or the Panel's recommendation. The Board acknowledged that the complainant's practice of making handwritten changes and corrections to draft translations was appropriate, as the alternative would have been to "let mistakes pass on to the reviser". Nevertheless it was of the opinion that -

"there were other factors, specifically cuts in the budget and the need to retain the best translators, on the basis of which [the Division of Languages] concluded that [the complainant's] performance was not such as to warrant a long-term extension, and as a consequence, the Panel's recommendation not to further extend his contract."

The Director General accepted the Board's recommendation, confirmed the decision not to extend the complainant's contract, and so informed him by letter dated 14 April 1997. That is the impugned decision.

9. The Tribunal holds that the proposal by the Director of the Division of Languages for extension of the complainant's contract was not in line with the latest report on his performance, nor even with any of his previous ones; that he had not been given the chance to comment on the adverse remarks which it contained; and that such remarks were entirely contrary to all his appraisal reports. The conclusion is that the impugned decision was made in breach of the IAEA's rules on extension of contract and of due process and must therefore be quashed.

10. If the complainant had been given the extension the duration of his "tour of service" would have reached the maximum on 31 July 1998. Reinstatement is therefore not now advisable. The Tribunal will award him under Article VIII of its Statute damages in lieu of reinstatement in a sum equivalent to the amount he would have earned in salary and allowances had his contract been extended up to 31 July 1998, without deduction of pension and

health insurance contributions, but less any net professional earnings from 1 August 1997 to that date. He is also entitled to awards of damages for the moral injury he suffered and of costs.

DECISION

For the above reasons,

1. The Tribunal quashes the Director General's decision of 14 April 1997.
2. The Agency shall pay the complainant damages equivalent to the amount he would have earned in salary and allowances had his contract been extended up to 31 July 1998, without deduction of pension and health insurance contributions, but less any net professional earnings from 1 August 1997 up to that date.
3. The Agency shall pay the complainant a sum of 10,000 United States dollars in damages for moral injury.
4. It shall pay him \$5,000 in costs.
5. His other claims are dismissed.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Mella Carroll
Mark Fernando
James K. Hugessen

A.B. Gardner