NINETY-THIRD SESSION

Judgment No. 2138

The Administrative Tribunal,

Considering the complaint filed by Mr M. H. J. against the International Atomic Energy Agency (IAEA) on 17 July 2001, the IAEA's reply of 23 October, the complainant's rejoinder of 9 November 2001, and the Agency's surrejoinder of 18 February 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 1948, joined the IAEA as a Technical Cooperation Expert on 1 September 1986 in the Animal Production and Health Section under a joint programme of the IAEA and the Food and Agriculture Organization of the United Nations (FAO), known today as the Joint FAO/IAEA Division of Nuclear Techniques in Food and Agriculture. He held a project personnel appointment which was extended several times. From 1 March 1991 he was given a fixed-term appointment which was extended until the end of December 1992. On 1 January 1993 he was transferred to a post in the same section but was under a three-year fixed-term contract with the FAO. He retained his IAEA personnel number and any personnel action notices issued during the term of his FAO contract were prepared by the IAEA.

On 25 May 1993 the IAEA Secretariat issued a "notice to all staff" under the reference SEC/NOT/1484. Its purpose was to clarify the "established policy on tenure of appointment and contract extensions of Professional staff" (hereinafter the "rotation policy"). Paragraphs 3 and 4 state:

"3. As an exception to the normal tour of service, contract extensions beyond five years are possible under the following circumstances:

(a) For programmatic or other compelling reasons in the interest of the Agency, an extension of one or two years, which, as a rule, should be a final extension without any further possibility of extension;

(b) 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 (so called long-term contract) which, provided there is a continuing need for the staff member's services and his/her performance and conduct continue to meet the required standards, is subject to further extensions until retirement age.

4. For staff members who are not granted a long-term contract under sub-paragraph 3(b) above, seven years constitute the maximum tour of service in the Agency. In calculating the maximum tour of service of seven years, employment in the Agency preceding the regular fixed-term contract under any other type of contract (such as short-term contracts ...) will be taken into account."

Paragraph 8 sets out the factors to be considered when reviewing proposals for long-term contracts.

In February 1995 the complainant became acting Head of the Animal Production and Health Section and although his contract was under the FAO, from 1 May 1995 onwards he was paid a special post allowance through the IAEA. On 1 May 1996 he was appointed Head of Section, under a three-year fixed-term contract with the IAEA which was extended to April 2001. On 29 June 2000 he was offered a further two-year extension of contract, bringing the expiry date to 30 April 2003, on the understanding that this would be a final extension and that his appointment would not be "extended, renewed or converted to another type of appointment".

In a letter of 25 August 2000 the complainant asked the Director General to review the decision that his contract extension would be the final one. He considered that his employment status with the Agency fell under the category of "long-term contracts" as set out in SEC/NOT/1484, paragraph 3(b), and that no distinction should be made between the periods when he had been appointed by the IAEA and those when he had been appointed by the FAO; any such distinction would be completely "artificial". In a letter of 25 October 2000 the Director General informed the complainant that he was upholding the decision. He reminded him that his transfers between the IAEA and FAO and back again to the IAEA had been made subject to the "Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances", and that with each transfer he started a new appointment subject to the Staff Regulations and Staff Rules of the receiving Organization. On 17 November 2000 the complainant appealed against this decision to the Joint Appeals Board.

In its report dated 6 April 2001, the Board questioned, among other things, whether a number of relevant matters had been considered when the complainant's contract was extended in June 2000. It referred to an internal appeal brought by a staff member in a similar situation and in which the outcome had been to consider that official's employment status as a continuous one and to exempt him from the rotation policy. The Board recommended that the Director General reconsider his decision both in the light of "the unique administrative situation" of the Joint Division and the complainant's exemplary, long and continuous service in the Joint Division and grant the complainant a longer term contract. In a letter to the complainant dated 10 May 2001 the Director General informed him that he had decided not to follow this recommendation. That is the impugned decision.

B. The complainant states that the sole issue in his complaint is whether the Director General was correct in applying a provision of the Agency's rotation policy (i.e. paragraphs 3(a) and 4 of SEC/NOT/1484) that ordinarily limits the tenure of staff members to a maximum of seven years. The complainant contends that the Director General erred in applying this provision in his case, as he has served in the Joint FAO/IAEA Division since 1986; he should have been considered for a long-term contract under SEC/NOT/1484, paragraphs 3(b) and 8. He argues that the distinction between the periods served under IAEA appointments and those under the FAO was "in reality, completely artificial". His transfers occurred for the convenience of the two organisations, because certain posts he held in the Joint Division were funded either by the FAO or by the IAEA. Since he has been kept on in continuous service for over fifteen years he should be employed until his retirement date.

He invites the Tribunal to take into account the reasoning and findings of the Joint Appeals Board, with which he concurs.

He requests that he be considered for a long-term contract and he claims costs in the amount of 2,000 United States dollars.

C. The Agency replies that the Director General properly followed the guiding principles regarding the tenure of staff members as laid down in SEC/NOT/1484. Article VII.C of the Agency's Statute states that permanent staff shall be kept to a minimum and this principle has been incorporated into the Staff Regulations as well as SEC/NOT/1484, which "has been strictly applied" since 1993. When the complainant returned to the IAEA in 1996 the rotation policy was applicable to him. The IAEA contends that although the complainant has worked continuously in the Joint FAO/IAEA Division since 1986, his employment status cannot be treated as continuous. That was made clear in the letters of appointment issued both by the FAO and the Agency. Neither the Inter-Organization Agreement nor the 8 November 1966 Arrangements between the FAO and the IAEA, creating the Joint Division, contain provisions that support the complainant's contention that his employment status should be treated as a continuous contractual relationship with the IAEA.

The internal appeal cited by the Joint Appeals Board in its report has no bearing on the present case: it dates back to 1989, a time prior to the implementation of the policy set out in SEC/NOT/1484. The Agency submits that the complainant's arguments are not supported by the evidence. It concludes that long-term contracts are given at the discretion of the Director General, who exercised his discretion properly when he determined that an exception to the Agency's standard rotation policy would not be warranted.

D. In his rejoinder the complainant observes that the Agency's arguments have been based largely on technicalities of the Inter-Organization Agreement and the 1966 Arrangements between the FAO and the IAEA. He reiterates that since 1986 he has served in the Joint Division, which is an integral part of the Agency's Secretariat and that from time to time he was formally employed by the FAO. Even when he was paid by the FAO, his personnel

number remained that of the Agency and his personnel action notices were drawn up by it as well. Consequently, he has served over 15 years with the Agency and his situation is governed by SEC/NOT/1484, paragraph 3(b). He asserts that the Director General's discretion regarding long-term contracts is not absolute: he must apply "correct criteria" in making such decisions.

E. It its surrejoinder the Agency presses its main arguments. It adds that the complainant has failed to understand the legal implications of the 1966 Arrangements. Even if the complainant's service has been longer than seven years, this would "not automatically prompt a right to claim a long-term contract".

CONSIDERATIONS

1. The complainant was recruited in 1986 for a joint programme of the FAO and the IAEA. For most of the time he has been employed under contracts with the IAEA, with the exception of the period from 1 January 1993 to 30 April 1996; during that period his contract was with the FAO and he was subject to that Organization's Staff Regulations and Staff Rules. He is challenging a decision by the IAEA not to renew his contract beyond 30 April 2003. He argues that based on the years of service he has already completed he is entitled to a long-term contract as provided for in paragraphs 3(b) and 8 of SEC/NOT/1484. He says the Agency erred in applying its rotation policy to the decision on his contract renewal.

2. In August 1995, while under contract with the FAO, the complainant applied for the IAEA post of Head of the Animal Production and Health Section and was appointed to that post, as from 1 May 1996. The IAEA letter of appointment noted as a special condition that:

"This appointment is made pursuant to an agreement between FAO and IAEA for the transfer of the undersigned appointee, and therefore it is subject to the Inter-Organization Agreement concerning transfer, secondment or loan of staff among organizations applying the United Nations Common System of salaries and allowances."

The accompanying transmittal letter drew the complainant's attention to Staff Regulation 3.03(c) informing him that a fixed-term appointment does not "carry any expectation of, or right to extension, renewal or conversion to another type of appointment".

3. The complainant's three-year IAEA fixed-term contract was subsequently extended for two years, from 1 May 1999 to 30 April 2001. On 29 June 2000 the Director of the Division of Personnel offered the complainant a contract extension through to 30 April 2003 with the following special condition:

"This is the final extension of your fixed-term appointment which shall not be extended, renewed or converted to another type of appointment."

4. On 25 August 2000 the complainant wrote to the Director General requesting him, pursuant to Staff Rule 12.01.1(D)(1), to review his decision that the contract extension would be a final one. He pointed out that he had been working within the Joint FAO/IAEA Division on a continuous basis since 1986. He submitted that, in his view, his employment status with the IAEA fell within the category of "long-term contracts" as set forth in paragraph 3(b) of SEC/NOT/1484. He further submitted that the distinction between the periods of IAEA and FAO appointments was completely artificial.

5. The Director General, in his response of 25 October 2000 to the complainant's request for review, upheld his decision to extend the complainant's fixed-term contract for a final two-year period only. The following passage is of particular relevance:

"Having reviewed your case let me recall first that all your employment transfers between the IAEA, FAO and IAEA were made subject to the Interorganization Agreement concerning Transfer, Secondment or Loan of Staff among Organizations applying the United Nations Common System of Salaries and Allowances. With each transfer, you started a new appointment subject to the Staff Regulations and Rules of the receiving organization, the last being your IAEA appointment of 1996. Tenure for professional staff of the Agency is governed by the provisions of Staff Regulations 3.03(a) and 3.03(c) as well as the principles set forth in SEC/NOT/1484 of 1993. According to paragraph 4 of SEC/NOT/1484 seven years of service at the Agency constitute the maximum-tour of service for staff members who are not granted long-term contracts. Paragraph 8 provides that long-term contracts

'...constitute an exception to the Agency's rotation policy and will only be given where it is in the interest of the Agency ...'. In your particular case it has been determined that an exception to the standard rotation policy was not warranted. Accordingly, you were offered a final extension of your fixed term contract for two years, bringing your service with the Agency up to the maximum of seven years."

6. The complainant then appealed to the Joint Appeals Board on 17 November 2000. Despite a favourable recommendation from the Board, the Director General dismissed the appeal and confirmed the original decision. That is the impugned decision.

7. Notwithstanding his arguments to the contrary, the documentation on file simply does not bear out the complainant's position.

8. The complainant was not, as he suggests, transferred arbitrarily on 1 January 1993 from the IAEA to the FAO at the convenience of the organisations but rather chose himself to take up an appointment for which he had applied, and he was transferred to the FAO because that post was financed from the FAO budget. His transfer is evidenced by the FAO "terms of employment", a "clearance certificate" which was issued to the complainant in preparation for his separation from service with the IAEA, and an "initial input sheet for FAO" prepared by the administrative assistant of the Joint FAO/IAEA Division. Thus, his transfer, pursuant to paragraph 8(a) and (b) of the Inter-Organization Agreement, entailed a division into different contractual periods necessitating specific arrangements with the IAEA and the FAO. The respective letters of appointment clearly show that when the complainant was under contract with the IAEA from 1986 to 1992, he was subject to the IAEA's Staff Regulations and Staff Rules, and when he was transferred to the FAO, he was subject to that Organization's Staff Regulations and Staff Rules. With each transfer the complainant started a new appointment subject to the Staff Regulations and Staff Rules of the receiving organisation, the last being his IAEA appointment in May 1996. Thus, even though the complainant worked continuously in the Joint FAO/IAEA Division for approximately fifteen years, his employment status at the IAEA was not, and could not have been - under the 1966 Arrangements and the Inter-Organization Agreement - a continuous one.

9. From the time of his first project personnel appointment in 1986, the complainant was subject to the rotation policy of the IAEA. Under this policy, which has been strictly applied since the issuance of SEC/NOT/1484 in May 1993, staff members are recruited initially on a three-year fixed-term contract, which is usually extended for two years (paragraph 2 of the notice). The resulting five years constitute the normal tour of service. Exceptionally, pursuant to paragraph 3(a), a further extension of one or two years is granted for "programmatic or other compelling reasons".

In the present case, the complainant began an IAEA one-year fixed-term appointment on 1 March 1991, and subsequently signed an extension of that appointment to 28 December 1992. He took up an appointment with the FAO as of 1 January 1993 which was, in theory, extended until 31 December 1997. However, he was appointed in April 1996 to an IAEA post on a three-year fixed-term contract, effective 1 May 1996. At that moment in time, if the complainant really considered that his new appointment with the IAEA in 1996 was an "extension" or continuation of his former appointment with the IAEA from 1986 to 1992, he could have asked the Director General to review his decision and consider him for a long-term five-year contract. He did not do so. Instead, he accepted the three-year contract which was offered to him. He also accepted the two-year extension offered to him. The fact that the final extension (to April 2003) was to bring him to the end of a seven-year cycle with the Agency, can give him no cause for complaint.

10. In the final analysis the complainant, far from being the victim of the system of sharing appointments between the two organisations, has benefited from it.

11. In any event, and even assuming that the complainant had been right in claiming that he had been continuously in service with the IAEA for approximately twelve years and therefore that his employment status with the IAEA falls within the category of a "long-term" staff member, an IAEA staff member who exceeds seven years of service has no automatic entitlement to a long-term contract. A long-term contract is given at the sole discretion of the Director General after the latter has considered several factors outlined in paragraph 8 of the notice. The passage from the letter of 25 October 2000 quoted above shows clearly that paragraph 8 was specifically considered before the Director General came to the conclusion that an extension was "not warranted" in the complainant's case.

12. Lastly, the complainant can take no comfort from the case of another staff member in a somewhat similar

situation who was given a long-term contract. As indicated, the awarding of such contracts is exceptional and wholly discretionary and the fact that a contract is granted to one staff member creates no rights for any other staff member.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 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

Updated by PFR. Approved by CC. Last update: 22 July 2002.