

NINETY-THIRD SESSION

Judgment No. 2139

The Administrative Tribunal,

Considering the complaint filed by Mr D. H. U. against the International Atomic Energy Agency (IAEA) on 26 June 2001, the Agency's reply of 16 October 2001, the complainant's rejoinder of 11 January 2002 and the IAEA's surrejoinder of 2 April 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. Secretariat notice SEC/NOT/1484, dated 25 May 1993, sets out the Agency's policy on tenure of appointment and contract extensions of Professional staff. It provides that:

"1. The Agency's policy is based on the following principles:

...

(iv) At no time shall fixed-term appointments be deemed to carry any expectation of, or right to extension, renewal or conversion to another type of appointment (Staff Regulation 3.03(c)).

2. ... 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.

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."

The complainant, an American national born in 1940, joined the Agency in March 1993 in a P.4 post in what later became the Division of Nuclear Fuel Cycle and Waste Technology. He was recruited on a three-year fixed-term contract, which was extended on several occasions. In August 1998, he signed a contract extension until 10 March 2000. The contract contained a special clause indicating that it was the final extension.

In a memorandum of 22 September 1999, the Director of the above Division requested the extension of the complainant's appointment up to 31 December 2000 for work programming reasons. In November 1999, the Agency granted the extension, maintaining the same special clause. On 20 December 1999 the complainant wrote to the Director General asking him to review that decision and extend his appointment to 8 December 2002, when he would reach retirement age - at 62. The Director General replied on 10 April 2000 that in accordance with the above-mentioned clause and under the terms of SEC/NOT/1484 he could not grant his request.

By a memorandum of 10 May 2000, the Director of his Division requested an extension of the complainant's appointment until the end of June 2001. The Agency granted the extension, subject once again to the special clause. On 3 August 2000 the complainant again requested an extension of his appointment until 8 December 2002. For the

same reasons as those set out above, the Director General refused on 4 September 2000 to grant this request. On 4 October 2000 the complainant appealed to the Joint Appeals Board, which issued its report on 14 March 2001. It recommended extending the complainant's contract until 31 March 2002, on the grounds that his presence until that date was necessary for "programmatic" reasons. By a letter of 30 March 2001, which is the impugned decision, the Director General rejected the complainant's appeal.

B. The complainant explains that, in order to obtain an extension of his contract, it was essential for him to have the support of the Deputy Director General in charge of the Department of Nuclear Energy; but, although the latter had first been in favour of extending his contract he changed his position when he became aware of the filing of the internal appeal. The complainant refers to a memorandum dated 27 February 2001 in which his head of Section justified extending his contract to December 2002, and submits that despite the fact that the Board had asked to see it, the Deputy Director General did not pass it on to the Board; instead, he simply returned it to the head of Section. The Board's recommendation was therefore flawed because it was made without taking into account the important information contained in the memorandum. The complainant submits that the Director General took his decision on the basis of that flawed recommendation. He took it without having seen either the memorandum in question or three letters written by representatives of member States - requesting the extension of his contract with a view to completing certain projects - since the Deputy Director General had failed to pass them on to him.

The complainant asks the Tribunal to set aside the impugned decision and order his reinstatement, with retroactive effect, from 1 July 2001 to 31 December 2002. Failing this, he seeks an award of damages - particularly for any reduction of pension benefits, repatriation grant and other benefits. He also seeks moral damages and costs.

C. In its reply the Agency asserts that the Director General was in possession of all the material facts, including the above-mentioned memorandum and letters, when he took his decision of 30 March 2001. Some of the letters had been copied to the Director General. The Agency observes that on three occasions the complainant signed a contract extension containing the special clause. Furthermore, under the Provisional Staff Regulations, the extension of a fixed-term appointment is at the discretion of the Director General and such an appointment does not carry any expectation of extension. By signing their letters of appointment, staff members accept that their tour of service in the Agency will be a maximum of seven years. The Agency contends that if a staff member's appointment is nevertheless extended for programmatic reasons, this cannot give rise to an expectation that the contract will be extended again. Even though the Agency has on occasions, as in the complainant's case, shown flexibility in the implementation of its policy concerning the duration of appointments, this policy has been applied constantly, regardless of the performance or age of the staff members concerned. In the present case, the Director General examined all the reasons put forward in favour of a further extension, but did not consider that any of them justified granting the complainant's request. He therefore properly exercised his discretionary power.

D. In his rejoinder, the complainant submits that the Agency has failed to prove that the Director General had the memorandum and letters in his possession when taking his decision. He reaffirms that the memorandum of 27 February 2001 was not submitted to the Board.

E. In its surrejoinder, the Agency retorts that the complainant's assertions are mere speculation.

CONSIDERATIONS

1. The complainant, who was born on 8 December 1940, was recruited by the IAEA on 11 March 1993. His appointment, which was initially for three years, was extended on several occasions: firstly until 10 March 1998, then until 10 March 1999 and subsequently until 10 March 2000. The letter of 23 July 1998 offering the complainant this last extension stated that it was the "final" extension and that the appointment would not be "extended, renewed or converted to another type of appointment". The Director of the Division in which the complainant was employed indicated on 22 September 1999 that he considered it "highly desirable" for work programming reasons that the complainant's employment should continue until 31 December 2000. On 15 November 1999 the Administration granted a further extension up to that date, indicating once again that this was to be the last.

2. On 20 December 1999 the complainant wrote to the Director General asking him to review this decision and to extend his appointment until 8 December 2002, when he would have reached the retirement age applicable to him,

namely age 62. In his reply of 10 April 2000, the Director General referred to the Agency's general policy on the duration of appointments as defined both in notice SEC/NOT/1484, which limits the tour of service to seven years, and in provisional Staff Regulation 3.03(c), and indicated that he was not prepared to agree to a further extension of the complainant's appointment. The complainant lodged an appeal against this decision, but withdrew it on learning that the Director General was offering him a further extension until 30 June 2001, whilst reaffirming that this was the last. Having once again requested an extension until 8 December 2002, which was refused by the Director General for the same reasons in a letter of 4 September 2000, the complainant lodged an appeal with the Joint Appeals Board.

3. In its report of 14 March 2001, the Board recommended that the Director General should grant him another extension until 31 March 2002. In support of this recommendation it referred to a programmatic reason justifying the extension as well as the arrival of a new head of unit. On 30 March 2001 the Director General informed the complainant that he would not follow this recommendation and that he, therefore, refused to extend his appointment again.

4. It is this decision that the complainant is challenging before the Tribunal. He contends that the Deputy Director General was initially in favour of extending his appointment, but reversed his position when he learnt that he had appealed to the Joint Appeals Board. He refers to a memorandum dated 27 February 2001 in which his head of Section set out the reasons why it was essential that he should remain in service until December 2002, and says that the Deputy Director General simply returned it to the head of Section. He adds that this memorandum was not disclosed to the Board. Moreover, neither that document nor letters from representatives of member States, written in support of his request for an extension, had been brought to the attention of the Director General, at least not before he took the impugned decision. He concludes that the procedure followed by the Joint Appeals Board was flawed, even though its recommendation was partially in his favour, and that the Director General's decision, taken on the basis of an incomplete file, must therefore be set aside.

5. In rebuttal, the Agency recalls that it told the complainant on three occasions that the extensions granted to him were final and that notice SEC/NOT/1484 in principle limits the tour of service to seven years, even though this rule has been applied with some flexibility. It therefore asserts that the Director General did not violate any of the provisions of the Staff Regulations in considering that there were no special reasons for acceding to the request made by the complainant, who could not reasonably expect a further extension. When the Director General took his decision he had in his possession all the necessary information, including the memorandum from the head of the complainant's Section and the letters from the representatives of certain member States.

6. Even though the complainant has not proved that the Director General's decision of 30 March 2001 was taken on the basis of incomplete information, it seems clear to the Tribunal that the Joint Appeals Board was not provided with the memorandum from his head of Section, since the Deputy Director General had simply sent it back to him. This memorandum was essential for assessing the situation within the complainant's unit and the difficulties that might be encountered in the implementation of the work programme as a result of his departure. The complainant's allegation that the Deputy Director General, who had initially been in favour of his extension, changed his view after learning that the complainant had gone to the Joint Appeals Board, is substantiated by the written evidence and is not denied by the Agency. The right of international officials to resort to all internal and jurisdictional remedies available to them without detriment to their career is an essential guarantee to which the Tribunal attaches the greatest importance.

In the present case, it considers that the appeal lodged by the complainant against the decision not to extend his appointment should not in any way have been prejudicial to him. The reasons which led his head of Section to stress the need for an extension until December 2002 in the memorandum of 27 February 2001 should have been brought to the attention of the Joint Appeals Board. Even if the Agency asserts that a copy of the memorandum in question was received by the Office of the Director General and brought to his attention before he took his decision, it acknowledges that the memorandum had been prepared without the head of Section being aware of the internal appeal filed by the complainant. It also recognises that after learning of the internal appeal, the Deputy Director General, who had initially been in favour of the extension, had decided to withdraw his support and had sent the memorandum back to the head of Section. Thus, the Deputy Director General, whose opinion was essential to an informed decision by the Director General, changed his mind for reasons completely alien to the interests of the service. Although the Director General had the discretionary power to waive the seven-year rule again for the complainant, in exercising that discretion he was bound to observe all the procedural safeguards granted to international civil servants. He failed to do so in the present case.

7. The Tribunal therefore sets aside the impugned decision and orders the Agency to restore the rights which the complainant would have enjoyed since the date his appointment came to an end, and to reinstate him in his post until 8 December 2002. It grants him moral damages, which it sets at 2,000 euros.

8. The complainant is entitled to costs, which the Tribunal sets at 500 euros.

DECISION

For the above reasons,

1. The decision taken by the Director General of the IAEA on 30 March 2001 is set aside.
2. The complainant shall be reinstated in his post until 8 December 2002 and shall recover the rights he would have enjoyed since the date his appointment ended.
3. The IAEA shall pay the complainant 2,000 euros in moral damages.
4. It shall pay him 500 euros in costs.

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.

(Signed)

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet