

The Administrative Tribunal,

Considering the complaint filed by Mr J.F. against the International Atomic Energy Agency (IAEA) on 19 January 2005 and corrected on 1 February, the IAEA's reply of 11 May, the complainant's rejoinder of 10 June, and the Agency's surrejoinder of 8 July 2005;

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 national of the United States who was born in 1942, joined the IAEA in September 1983, at grade P.4, under a special service agreement in the Department of Safeguards. In 1985, he was offered a two-year fixed-term appointment in the same department. His appointment was extended several times; his last extension was to expire on 31 December 2003, one year beyond the statutory retirement age – which in his case was 60. At the material time he was a Safeguards Inspector in the Division of Operations B.

In a memorandum of 26 June 1998 the Director General announced that a list of six criteria had been laid down, on the basis of which he might, in the interest of the Agency, authorise an extension of contract beyond retirement age. In March 2003 the Deputy Director General for Safeguards received a Divisional Succession Plan from the Director of the Division of Operations B. Referring to the succession plan he had received, the Deputy Director General for Safeguards, on 28 April 2003, wrote to the Director of the Division of Personnel requesting extensions of contract beyond retirement age for seven staff members in the Division of Operations B, including the complainant. It was recommended that his appointment should be extended “by one final year” to 31 December 2004 “for the benefit of the Agency”.

On 26 September 2003 the complainant received a letter, from the Division of Personnel, concerning separation procedures. The Acting Director of the Division of Personnel wrote to the complainant on 1 October 2003 notifying him that in accordance with Staff Regulation 4.05 concerning the retirement age, his contract would expire on 31 December 2003. By a memorandum of 7 November 2003 to the Director General, the complainant sought reconsideration of the decision not to extend his appointment to 31 December 2004. The Director General not having replied to his request for review within the prescribed one-month period, the complainant filed an appeal with the Joint Appeals Board on 22 December 2003. The Board issued its report on 25 October 2004 recommending that the Director General uphold the decision to separate the complainant from service on 31 December 2003. By a letter of 11 November 2004, which is the impugned decision, the Acting Director General informed the complainant that he had decided to follow the recommendation of the Joint Appeals Board.

B. The complainant is challenging the Director General's decision not to extend his contract for a further year beyond retirement age. He considers that the impugned decision is tainted on the following four grounds.

Firstly, he was not at any time given reasons for the decision – either in writing or otherwise. In his view, he met all the criteria set out in the Director General's memorandum concerning extensions beyond retirement age, and considers that the decision not to offer him an extension was arbitrary and was not duly substantiated. The only justification mentioned was that communicated by the letter of 1 October 2003 from the Acting Director of the Division of Personnel which stated that “in accordance with Staff Regulation 4.05” his contract with the Agency would expire on 31 December 2003. He further points out that the Joint Appeals Board recommended that “there should be a greater degree of transparency in the process by which requests for extension beyond retirement age are dealt with”, and “in particular [...] there should be a written and timely notification to the staff member concerned of the outcome of the request”. Recalling the case law of the Tribunal, in particular Judgment 2125, the

complainant asserts that the Agency has disregarded one of the basic and fundamental procedural safeguards intended to protect staff members against arbitrary decisions, namely that a decision must be based on proper reasons.

Secondly, essential facts were overlooked. Incomplete information was provided to the Director General, which prevented him from making an appropriate evaluation of the facts in reaching his decision, and thereby tainted the process. Referring to the memorandum of 28 April 2003 sent by the Deputy Director General for Safeguards to the Director of the Division of Personnel, the complainant says that it contained a detailed justification for granting him a further contract extension of one year, but that it was not forwarded to the Director General. Instead of sending it on, the Acting Director of the Division of Personnel wrote a one-page memorandum to the Director General on 23 June 2003; she paraphrased the initial memorandum of 28 April and did not give all the grounds for extension. Consequently, at the time when he made his decision, the Director General did not have complete and accurate information, and could not make “an informed decision”.

Thirdly, the Agency breached the principle of equal treatment. The complainant draws attention to the fact that it was unclear why some requests for extension were granted and others were not. He adds that the Board’s recommendation concerning the need for greater transparency in the process by which requests for extension beyond retirement age are dealt with supports “a strong inference that the decision was in fact discriminatory”. He argues that he was treated in a manner that was discriminatory and in a manner that “impaired his dignity and professional reputation”.

Fourthly, his right to due process was not respected in the internal appeals procedure and he thereby suffered injury. In this regard, he points out that the Joint Appeals Board did not investigate the reasons for the Director General’s initial decision and abdicated its fact-finding function. The Board’s recommendation was therefore tainted, and since the Director General’s decision was based on it, that decision was also tainted.

The complainant is not seeking reinstatement. Instead, he claims material damages equivalent to the amount he would have obtained in salary and benefits had his contract been extended for a further year, plus interest on the sum due, calculated from 31 December 2003 – the date of his separation. He also claims 12,000 euros in moral damages and 5,000 euros in costs.

C. In its reply the IAEA concedes that the complainant should have received some direct notification that the application made by the Department of Safeguards for another extension of his contract beyond retirement age had not been acceded to. However, it denies that the Director General’s decision was arbitrary. It points out that, pursuant to Staff Regulation 4.05 as well as the Agency’s relevant policy, the complainant could have had no expectation of a further “exceptional” extension considering that he had passed the statutory retirement age. It further refutes the complainant’s allegation that he satisfied all of the criteria set out in the Director General’s memorandum of 26 June 1998. Indeed, the memorandum of 23 June 2003 sent by the Acting Director of the Division of Personnel to the Director General showed that the proposal for another extension of the complainant’s service did not satisfy the criterion laid down in paragraph 3.a) of the memorandum, namely that “an extension beyond retirement age can only be a stop-gap measure and is no substitute for proper succession planning and passing on of institutional memory”. The Director General accordingly, by virtue of his discretionary power, decided not to offer a further appointment extension to the complainant.

Regarding the alleged mistakes of fact, the Agency indicates that the Director General was provided with the Acting Director of the Division of Personnel’s “expert opinion” on the adequacy of the succession plan provided by the Department of Safeguards, and on the basis of that and other relevant matters, he properly considered the Agency’s interest. It adds that, in order to determine whether the criteria on extensions had been satisfied, the Director General had recourse to the Division of Personnel.

The defendant denies that there was unequal treatment. In its view, none of the four staff members to whom extensions were granted was in a similar position to the complainant; it asserts that each case was different and the Director General considered each one on its merits.

As regards the internal appeals procedure, the Agency contends that the complainant received a fair hearing and that his allegations were found to be without substance.

D. In his rejoinder the complainant maintains his position and seeks the quashing of the impugned decision. He

highlights that the Agency admits that he should have been directly informed that the application made by his Department for another extension of his service had not been granted. This, he submits, is proof that the defendant failed to treat him with dignity and respect, and that entitles him to damages for moral injury. He further points out that, by virtue of paragraphs 4 and 7 of the Director General's memorandum of 26 June 1998, the Acting Director of the Division of Personnel did not have the power to rewrite the proposal drafted by the Department of Safeguards and add her own "expert opinion".

Referring to the internal appeals procedure, the complainant maintains that he was denied due process. He indicates that he was not provided with the opportunity to attend the hearing during the testimony of the Acting Director of the Division of Personnel in order to cross-examine her; neither was he given the possibility to call his own witnesses.

E. In its surrejoinder the Agency maintains its arguments. Additionally, it points out that the Department of Safeguards' request for the extension of the complainant's service was not copied to him; nor was he officially informed that the request had gone through to the Director General. In those circumstances, he cannot argue that by not informing him personally of the outcome, the Agency failed to treat him with "dignity and respect".

With regard to the role of the Acting Director of the Division of Personnel, the Agency affirms that she was under no obligation to justify her opinion to the Director General. She offered her expert opinion to the Director General because the Division of Personnel has an overall view of the functioning of the entire Agency. The IAEA contends that the complainant has offered no evidence of any weight to suggest that the opinion she gave was incorrect.

As regards the calling of witnesses during the internal appeals procedure, the defendant states that proceedings before the Board are not adversarial in nature and that this matter was not raised with the Joint Appeals Board.

CONSIDERATIONS

1. The complainant entered the service of the IAEA in 1983. He reached the statutory retirement age of 60 in December 2002. He was given a one-year contract extension, ending 31 December 2003, but a second such extension was refused by the Director General and he was compulsorily separated on the latter date at the age of 61. His performance record with the Agency was excellent. His internal appeal against his compulsory retirement was unsuccessful and he now appeals to the Tribunal against a final decision confirming that his contract was not to be extended. There is no issue as to the receivability of the complaint.

2. At issue is the Agency's retirement policy as set forth and published in a memorandum of 26 June 1998 from the Director General, the relevant portion of which reads as follows:

"1. The number of requests for extension of contracts beyond retirement age and for re-employment of retirees which I regularly receive, has shown me the need to establish clear policies. Following consultations with the Staff Representatives, I have therefore decided to apply the following criteria when considering proposals by Departments and Divisions for extensions of contract beyond retirement age and for re-employing retirees.

Contract extensions beyond retirement age

2. Staff Regulation 4.05, as approved by the Board of Governors, stipulates a split statutory age of retirement which depends on the date a staff member has been recruited. All staff members who were recruited before 1 January 1990 reach the statutory age of retirement at 60, whereas for all staff members recruited thereafter the retirement age is 62. However, Staff Regulation 4.05 also gives me the authority to extend these age limits in the interest of the Agency in individual cases.

3. Such exceptions cannot be automatic and each case has to be justified on its own merits on the basis of the following criteria:

- a) An extension beyond retirement age can only be a stop-gap measure and is no substitute for proper succession planning and passing on of institutional memory;
- b) The loss of the specific expertise the staff member brings to the job would severely hamper programme delivery as it cannot easily be replaced during the period of the proposed contract extension;

- c) The staff member has consistently performed at a level of excellence;
- d) The proposed extension would not delay necessary organizational, programmatic, budgetary or staffing changes in the area concerned;
- e) The staff member is medically fit for work; and
- f) Normally, no extension will be granted beyond age 62.”

3. In the spring of 2003 the Deputy Director General for Safeguards submitted a memorandum requesting one-year extensions of contract for the complainant and six of his professional colleagues. That memorandum went to the Division of Personnel and, in June 2003, the Acting Director of the Division of Personnel wrote separate memoranda to the Director General summarising the request and adding in each case the following comment:

“The provisions of the policy approved by the Director General in 1998 have been met, apart for paragraph 3.a) which states that ‘an extension beyond retirement [age] can only be a stop-gap measure and is no substitute for proper succession planning and passing on of institutional memory.’”

4. On 17 July 2003 the Director General dealt with all seven requests. Three were granted. Two were never decided because it was learned that the persons concerned had chosen to take retirement prior to the expiry of their first contract extension beyond retirement age. In one case, the request for a one-year extension was refused but a six-month extension was later given to the staff member concerned. In the complainant’s case, the request for a further extension was simply turned down without any reason being given.

5. The Agency concedes that the complainant was not directly notified of the refusal of his department’s request for an extension of his contract. In fact, all he received in that regard were two form letters, sent on 26 September and 1 October 2003, reminding him that his appointment term would end on 31 December 2003. Upon his enquiring as to the status of the request for an extension, all he received was another copy of one of the same form letters previously sent to him.

6. At no time during the period leading up to his separation from the Agency nor in the subsequent internal appeal proceedings has the Agency given any reasons for the Director General’s decision. In its pleadings in reply to the present complaint the Agency relies on the previously quoted memorandum of June 2003 from the Acting Director of the Division of Personnel indicating that all the criteria of the memorandum of 26 June 1998, other than paragraph 3.a) had been met.

7. It is settled law that a provision such as Staff Regulation 4.05 gives to the Director General a wide measure of discretion and that the Tribunal will not interfere in the exercise of that discretion except in extremely limited circumstances. The Tribunal recently confirmed as much in Judgment 2377 which also concerns the IAEA retirement policy. That case differed markedly from the present complaint, however, in that not only was the request for an extension not supported by the complainant’s superiors and the director of his division, but the complainant in that case also failed to prove his allegations of prejudice on the part of such superiors. There was simply no question of compliance or otherwise with the criteria set forth in the 26 June 1998 memorandum. Judgment 2377 is not authority, however, for the proposition that the power to extend appointments beyond normal retirement age can be exercised arbitrarily.

8. The facts of the present case are far closer to those dealt with by the Tribunal in Judgment 2125 which is relied on by the complainant. It is significant that the Agency, which had been the defendant in that earlier case, simply makes no reply to, or comment on the complainant’s reliance on that judgment. In its decision the Tribunal found that by issuing the memorandum of 26 June 1998, the Director General had fettered his own discretion and bound himself to follow the criteria he had established. It said, under 6:

“In the memorandum of 26 June 1998, the IAEA established for itself a number of rules which it must apply.”

9. Here, not only has the Agency failed to give any timely reasons in support of the decision not to extend the complainant’s appointment, but its belated attempt to rely on the allegation in the Acting Director of Personnel’s memorandum to the Director General to the effect that paragraph 3.a) of the memorandum of 26 June 1998 had not been complied with is clearly spurious.

10. It will be recalled that paragraph 3.a), which is not strictly speaking a criterion at all, is in effect an exhortation to senior staff to undertake proper succession planning. In fact, it appears that a Divisional Succession Plan for the Division of Operations B had been drawn up and no criticism of that plan appears anywhere in the recommendation from the Acting Director of the Division of Personnel to the Director General, or anywhere else in the material submitted by the parties to the Tribunal. Even more significantly, the Acting Director of the Division of Personnel made precisely the same allegation of non-compliance with paragraph 3.a) with regard to each of the seven cases from the Department of Safeguards and there is simply no rational explanation as to why some of those requests were granted and some refused. It is impossible to conclude other than that the decision in the complainant's case was made for some undisclosed or purely arbitrary reason. Therefore, it cannot stand.

11. Before leaving this case, the Tribunal would comment on an allegation of failure of due process in the proceedings before the Joint Appeals Board (JAB), which was made in general terms in the complainant's brief. In his rejoinder the complainant expands on the point and makes serious allegations to the effect that the JAB heard a witness in his absence and denied him the right to cross-examine witnesses. In its surrejoinder the Agency appears to defend and justify this practice, but again only in general terms. The question has not been properly pleaded or explored in the present case and therefore does not form the basis of the present decision. The Tribunal notes, however, that in the absence of special circumstances such as a compelling need to preserve confidentiality, internal appellate bodies such as the JAB must strictly observe the rules of due process and natural justice and that those rules normally require a full opportunity for interested parties to be present at the hearing of witnesses and to make full answer in defence. If that is not the practice observed by the JAB, the Agency should waste no time in instituting necessary reforms.

12. The impugned decision will be set aside. The Agency will be ordered to pay to the complainant all salaries and benefits, with interest from due dates, which he would have received had his appointment been extended for a further year to the end of December 2004, the month in which he reached the age of 62.

13. The complainant has also suffered moral damage which has been aggravated by the demeaning and discourteous manner in which the Agency dealt with his request for information on the status of the application for an extension of his contract; that was incompatible with its duty of good faith and respect for his dignity. It will pay him damages in the amount of 12,000 euros and costs in the amount of 5,000 euros.

DECISION

For the above reasons,

1. The complaint is allowed and the impugned decision is set aside.
2. The IAEA shall pay the complainant all salaries and benefits to which he would have been entitled if his appointment had been extended to 31 December 2004, together with interest from due dates.
3. It shall pay him damages of 12,000 euros and costs of 5,000 euros.

In witness of this judgment, adopted on 28 October 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

