

*Registry's translation,  
the French text alone  
being authoritative.*

## **109th Session**

## **Judgment No. 2936**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. W. against the International Atomic Energy Agency (IAEA) on 14 August 2008 and corrected on 23 October 2008, the IAEA's reply of 11 February 2009, the complainant's rejoinder of 24 April and the Agency's surrejoinder of 3 August 2009;

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, an Austrian national born in 1947, joined the IAEA on 10 February 1969 at its Headquarters in Vienna. At the time, he was enrolled in the Austrian Pension Insurance Scheme (APIS). In 1983 an amendment to the Agency's Staff Rules made participation in the United Nations Joint Staff Pension Fund (UNJSPF) compulsory for all eligible staff members. However, under transitional arrangements, APIS participants were given the option to maintain their participation in that scheme or to discontinue it and enrol in the UNJSPF. The complainant chose to continue his participation in APIS.

Following changes in the UNJSPF system in 1990, Staff Regulation 4.05 was amended to the effect that the normal age of retirement was raised to 62 for staff members who had been recruited after 1 January 1990; it remained 60 for those recruited before that date. Staff Regulation 4.05 also provided that the Director General could, in the interest of the Agency, extend these age limits in individual cases.

In 1991 the Maintenance and Operatives Service category was merged into the General Service category. As a result, the complainant, who was formerly in the Maintenance and Operatives Service category, was offered “a final option of remaining in APIS until [his] separation from the Agency or becoming a participant in the [...] UNJSPF”. He again chose to continue his participation in APIS.

Austrian law was amended in 2000, as a result of which the complainant would be entitled to draw an early retirement pension from APIS upon reaching 61½, and not at 60 as under the previous rules. Thus, if he separated from the Agency at 60, he would have to wait one and a half years before being able to draw a pension.

On 16 January 2001 the complainant requested that his participation in APIS be discontinued and that he be enrolled in the UNJSPF with effect from 1 February. The Regulations of the UNJSPF allowed for the payment of an early retirement benefit to “a participant whose age on separation is at least 55 but less than the normal retirement age and whose contributory service was five years or longer”. By a memorandum of 24 January the Administration informed him that his request had been granted; it also pointed out that, although the Agency’s normal retirement age applying to him was still 60, for UNJSPF purposes his normal retirement age was 62. Shortly thereafter, the complainant countersigned and returned the memorandum.

As a result of a further Austrian legislative reform in 2004, the age at which the complainant would be able to draw an early

retirement pension from APIS rose to 62. Indeed, although this reform took into account the situation of long-term participants by allowing them to retire at 60, this option was only available to those who had accrued 540 months of contributions, and not to the complainant who had only 472 months of contributions at the time when he left APIS.

By a memorandum of 3 November 2006 the complainant requested a one-year extension of his contract. He explained that his appointment was going to expire on 28 February 2007 as he would reach normal retirement age that month and that the amount of benefits to which he would be entitled at that date from the UNJSPF would be reduced because he had only six years of contributions; in addition he would receive an APIS pension only upon reaching the age of 62. The Division of Personnel rejected his request on 29 January 2007, on the grounds that the rules of the UNJSPF did not provide a basis for making an exception to the normal retirement age in his case. The complainant consequently asked the Director General to review this decision. By a letter dated 26 February 2007 the Director General denied the request for review. He reminded the complainant that on two occasions, in 1983 and 1992, he had elected not to join the UNJSPF, and that he had decided to discontinue his participation in APIS in 2001, in spite of the Administration's warning that joining the UNJSPF at that stage might have an impact on his pension benefits. The complainant filed an appeal with the Joint Appeals Board on 28 February 2007. He retired that same day.

In its report of January 2008 the Board noted that, as from the end of 2001, the IAEA had developed a practice of granting contract extensions to staff members who had remained APIS participants and who could not draw a pension immediately upon retirement. It considered that the complainant's situation was not substantially different from the situation of those staff members and, taking into account that he had been "officially unemployed" for one year, it recommended that he be offered a one-year appointment with effect from 1 March 2008.

By a letter of 21 May 2008 the Director General informed the complainant of his decision not to endorse the Board's recommendation and to dismiss his appeal. He noted that, unlike other staff members who had remained APIS participants, the complainant had elected to withdraw from APIS and considered that the Agency had no responsibility to shield him from the consequences of such a decision. He added that he believed in 2007 that an exceptional extension of his contract was not in the interest of the Agency and that he remained of that view. That is the impugned decision.

B. The complainant submits that the impugned decision was not duly substantiated. He considers that an extension of his appointment was in the interest of the Agency and he points out in this respect that one of his supervisors had recommended such an extension for programmatic reasons and that, in November 2006, the Administration had told him that his contract would be extended and had instructed him to report to the Medical Service to obtain medical clearance. Yet the Director General did not indicate the lack of programmatic reasons when he denied his request for review in February 2007, and he mentioned the interest of the Agency for the first time in his letter of 21 May 2008. Nor did he provide "clear and coherent reasons", as required by the Tribunal's case law, and the impugned decision thus appears arbitrary.

Further, the complainant submits that the Director General drew erroneous conclusions from the facts in stating, in his letter of 26 February 2007, that he had "accepted the consequences of [his] choice" to join the UNJSPF in 2001. He stresses that the amendments to Austrian law were not foreseeable, nor was the fact that the potential financial hardship entailed by the 2000 amendment would later be alleviated. According to the complainant, in failing to inform him of the Agency's practice of granting contract extensions to APIS participants who could not draw a pension immediately upon retirement, the Administration prevented him from rejoining that scheme in November 2001, which would have allowed him to qualify

for an early retirement pension from APIS. This, coupled with the lack of information concerning the changes in APIS and the Director General's erroneous conclusion that he was solely responsible for his pension situation, shows a lack of respect for his dignity and constitutes a breach of good faith.

The complainant alleges breach of the principle of equal treatment on the grounds that he was in the same situation as other staff members who were also APIS participants and could not draw a pension immediately upon retirement, to whom the contract extension was granted. He also submits that the Director General failed to provide adequate justification for departing from the Agency's practice in his case.

He seeks the quashing of the impugned decision and claims material damages equivalent to what he would have earned if his appointment had been extended for a period of one year from 1 March 2007, including all salaries, allowances and entitlements, as well as the Agency's contributions to the UNJSPF for the period in question, plus interest at the rate of 8 per cent per annum from the date those damages are due. He also claims moral damages in the amount of 25,000 euros and costs in the amount of 15,000 euros.

C. In its reply the Agency denies that the complainant suffered any damage as a result of the Director General's decision not to extend his contract, arguing that it is his request of 16 January 2001 that led to the situation for which he now seeks relief. It emphasises that it warned him of the impact that his enrolment with the UNJSPF would have on his pension benefits. The complainant decided to proceed in spite of this warning and the Administration simply executed his instructions.

It submits that the impugned decision did not exceed the limits of the Agency's discretion and that an extension of the complainant's contract was not in its interest. It contends that the recommendation of the complainant's supervisor could not have given rise to any right or legitimate expectation that his appointment would be extended, nor can a request for medical examination be construed as a promise to that effect.

The Agency considers that there was no breach of equal treatment, since the practice of granting contract extensions to APIS participants who could not draw a pension immediately upon retirement was applied to staff members whose situation was entirely distinct from that of the complainant. As of the end of 2000 the latter had been informed expressly of the changes in APIS and of the Agency's efforts to assist staff members affected by those changes. Unlike the other staff members concerned, he decided to discontinue his participation in APIS and to enrol in the UNJSPF. He was thus entitled to receive a small monthly benefit from the UNJSPF as of his retirement date until he reached the age of 62, whereas the other staff members concerned would receive no pension at all upon retiring at 60. Furthermore, unlike the other staff members concerned, other options were available to him, such as receiving a withdrawal settlement or a lump sum coupled with the monthly benefit.

It rejects the complainant's assertion that he was prevented from rejoining APIS in November 2001 and it stresses that, in any case, once he had joined the UNJSPF, he did not have the option to withdraw from it while still a staff member. It refutes the allegation of bad faith and counters that it is the complainant who displays bad faith in failing to submit evidence of the financial hardship that he claims to have suffered.

D. In his rejoinder the complainant maintains that the Agency breached its duty of good faith, due care and mutual trust by not advising him in 2000 that it was taking steps to assist staff members affected by the changes in APIS. He notes in this respect that the Agency's Administrative Manual provided that the Division of Personnel "shall [...] advise staff members on available options and assist them [...] in exercising rights or obtaining benefits under the schemes". He explains that he chose to opt for a deferred UNJSPF retirement benefit at the age of 62 instead of an early retirement monthly benefit which would have been significantly lower. Furthermore, he amends his claim for material damages, indicating that he would have been entitled to an additional 12,019 euros end-of-service allowance if his appointment had been

extended for a period of one year, and he asks the Tribunal to award him also that amount.

E. In its surrejoinder the IAEA maintains its position in full and submits that the fact that the complainant elected not to receive the early retirement benefit that was available to him from the UNJSPF removes the need to consider financial hardship as an element of his case.

### CONSIDERATIONS

1. The complainant, an Austrian national, was recruited by the IAEA in 1969. When he retired on 28 February 2007 he was performing the duties of Senior Printing Technician, at grade G-5, in the Division of Conference and Document Services.

2. When he joined the Agency the complainant was enrolled in the Austrian Pension Insurance Scheme (APIS) in accordance with the rules applying to him at the time.

IAEA staff members were informed by staff notice SEC/NOT/911 of 24 March 1983 that in consequence of an amendment to the Staff Rules, which had entered into force on 1 January 1983, they would henceforth be enrolled in the United Nations Joint Staff Pension Fund (UNJSPF), save in certain cases. However, pursuant to transitional arrangements, the complainant was then authorised, at his request, to continue to participate in the APIS, rather than the UNJSPF.

3. After the substantial amendment of the Regulations of the UNJSPF introduced with effect from 1 January 1990, which raised the age of entitlement to a full pension from 60 to 62 years for international civil servants who joined the Pension Fund after that date, the Staff Regulations of the IAEA were revised accordingly. Staff Regulation 4.05 setting the retirement age was amended to increase that age to 62 in the case of staff members recruited after 1 January 1990; however, for those who, like the complainant, had joined the Agency earlier, it remained unchanged at 60.

4. When the Maintenance and Operatives Service category – to which the complainant belonged – was merged with that of the General Service in 1991, staff members in the former category who had continued to contribute to the APIS were given the choice of remaining in that scheme until their separation from service or joining the UNJSPF. At that point the complainant confirmed that he opted for participation in the APIS.

5. During 2000, the Austrian legislation governing the APIS in turn underwent substantial amendment that raised the age at which a retirement pension could be drawn. As a result, the complainant could not claim a full pension under the APIS until he reached 65, or an early retirement pension until he was 61½, which meant that he would be temporarily deprived of any income when he first retired. In an attempt to preserve his interests as best he could, on 16 January 2001 he asked to join the UNJSPF as from 1 February because, unlike the APIS, the UNJSPF offered some of its participants the possibility of drawing an early retirement pension at the age of 55. The complainant then officially confirmed his new choice by countersigning a memorandum of 24 January 2001 in which the Agency's services drew attention to the fact that his retirement age with the Agency continued to be 60 although for UNJSPF purposes the normal retirement age in his case was 62.

6. The amendment of the legislation governing the APIS had, however, also placed 17 other Agency staff members affiliated to that scheme in an awkward position, since they faced the prospect of temporarily having no source of income when they first retired. Out of consideration towards those concerned, the Agency introduced a "hardship extension practice" whereby those staff members were retained in service until they were able to draw a pension.

This practice was based on the above-mentioned Staff Regulation 4.05 which, although it specifies that IAEA staff members "shall not normally be retained in service" beyond the age of 62, or in some cases 60, nevertheless stipulates that "[t]he Director General may

in the interest of the Agency extend these age limits in individual cases”.

The practice of extending appointments in cases of hardship, which was formally recommended in a note of 31 October 2001 and approved by the Deputy Director General in charge of the Department of Management, was then applied to all those concerned – although according to this note each staff member’s individual situation was to be examined on a “case-by-case basis”.

7. As a result of subsequent amendments to the legislation governing the APIS, the complainant became entitled to draw a pension from that scheme as from the age of 62 on account of his earlier contributions, but he was not eligible for the relief measures introduced by other amendments to this legislation.

8. On 3 November 2006, as he was approaching normal retirement age, the complainant submitted a memorandum requesting a one-year extension of his contract as from 1 March 2007. In support of his request he explained that, during his first two years of retirement, he would receive a UNJSPF pension of only approximately 350 euros per month. He would also be entitled to Austrian statutory unemployment benefit, but only for the maximum duration of one year, and he would be unable to draw his APIS pension until he reached the age of 62.

Although this request was endorsed by the Director in charge of the division to which the complainant was assigned and was plainly viewed favourably at first by the Division of Personnel, it was rejected by a decision of the Acting Director of the latter division on 29 January 2007. The grounds given for this refusal were that the complainant’s situation was brought about by his own decision in 2001 to ask to be transferred from the APIS to the UNJSPF and that the rules of the UNJSPF did not provide a basis for making an exception in his case to the normal retirement age.

9. Having unsuccessfully appealed against this decision to the Director General, who upheld it on 26 February 2007, the complainant

referred the matter to the Joint Appeals Board. In its report, issued on 11 January 2008, the Board recommended that the complainant's appeal should be allowed. However, by a decision of 21 May 2008 the Director General dismissed it on the grounds that he could not accept the Board's finding that the complainant's situation had arisen through "no fault of [his] own" and that he did not consider that an extension of his contract would have been "in the interest of the Agency".

10. That is the decision impugned before the Tribunal. In addition to the setting aside of this decision, the complainant seeks compensation for the material and moral injury which he considers he has suffered, and an award of costs.

11. The Tribunal has consistently held that a provision such as the IAEA's Staff Regulation 4.05, authorising the executive head of an international organisation, in individual cases, to extend the age limit applying to a staff member if he or she considers that this measure is in the organisation's interests, confers on him or her broad discretionary authority which is subject to only limited review. Hence the Tribunal may interfere if such a decision was taken without authority, breached a rule of form or procedure, was based on a mistake of fact or law, overlooked an essential fact, drew a clearly mistaken conclusion from the facts or was tainted with abuse of authority (see, for example, Judgments 1143, under 3, or 2845, under 5). Nevertheless, such a decision must not be arbitrary and must always be based on clear and coherent reasons, as the Tribunal stated in Judgment 2125, under 6.

12. In the instant case, the complainant submits that the impugned decision breached the principle of equal treatment, since the Agency did not allow him, unlike other staff members unable to draw an APIS pension at the normal retirement age, to benefit from the above-mentioned practice of extending appointments in the event of hardship.

The Agency counters this submission by contending that the complainant's situation was different to that of the staff members in

question because, as he was enrolled with the UNJSPF, he could claim a pension at the age of 60. It infers that he may not therefore legitimately rely on a breach of the principle of equal treatment.

13. However, the Tribunal concurs with the opinion of the Joint Appeals Board that, although the complainant's situation was not identical to that of his colleagues, it was not so different as to warrant dissimilar treatment.

It must be observed that, like all the other staff members concerned, the complainant was entitled to a pension from the APIS – even though he had ceased to be enrolled in that scheme during his working life – and that he too was unable to draw this pension at the age of 60 on account of the amendment of Austrian law in 2000.

Having regard to the purpose of the practice of extending length of service on which he relies, his situation might be considered to be different if the pension that he was entitled to receive from the UNJSPF were large enough for him to escape the financial hardship which was the reason for the introduction of this practice. But the evidence on file shows that, while this pension would in fact have been slightly more than the 350 euros initially mentioned by the complainant in his request for an extension of his contract, and although he ultimately decided to defer its payment until the age of 62 because he could provisionally draw unemployment benefits, the amount was still very small. Indeed, the Tribunal notes that it was well below the official Austrian poverty threshold. Furthermore, the Agency's assertion that the complainant could have chosen other methods of drawing his pension enabling him to obtain immediate payment is immaterial, since such a choice would have considerably and unjustly damaged the complainant's long-term interests. The complainant's foreseeable future on retirement was not therefore substantially different to that of staff members who did benefit from the Agency's practice of extending appointments in cases of hardship.

14. According to the case law, trifling differences in the respective situations of staff members do not justify different treatment where the people concerned are in what may be regarded as

comparable, albeit not identical positions vis-à-vis the rule applying to them (see, for example, Judgments 792, under 7, or 2066, under 8).

15. Furthermore, and contrary to the view put forward by the Agency, the fact that the complainant's situation on retirement was brought about by his earlier choices, especially his decision to join the UNJSPF in 2001, does not alter the fact that he is entitled to be treated in the same way as the other staff members concerned.

In view of the very purpose of the Agency's practice of extending appointments to obviate hardship, the fact that the difficulties encountered by the complainant may have resulted from errors of judgement on his part is in itself no justification for refusing to extend his contract. As the complainant was in an objectively precarious situation, any denial of his right to benefit from this practice would constitute a breach of equal treatment.

Moreover, the Agency's contention that the difficulties in question are the complainant's "own fault", as was stated in the impugned decision, is mistaken. The Tribunal notes that the complainant would have been unable to draw his APIS pension even if he had remained a member of that scheme until his retirement. His decision to join the UNJSPF did not therefore give rise to the precarity on which he relies, and it could even be said that, on the contrary, the staff members who remained with the APIS until the end of their working life are those who, in the final analysis, appear to have made the worst choice as far as entitlement to an immediate pension is concerned. In addition, whatever the complainant's earlier choices regarding enrolment in a pension scheme might have been, any errors of judgement which he might have made in this connection were perfectly excusable in the context of constantly shifting rules governing the various social security schemes at the time. Lastly, the fact that, in the above-mentioned memorandum of 24 January 2001, the Agency pointed out to the complainant that he could not draw a full UNJSPF pension until he reached the age of 62 does not mean that he deliberately accepted to be bereft of income when he first retired, particularly since the option of immediately drawing an APIS pension was likewise unavailable and he therefore had no choice in the matter.

16. The Agency certainly puts forward a more convincing argument when it says that an extension of the complainant's length of service beyond the age limit was not in its interest, and would therefore have been contrary to the requirements of Staff Regulation 4.05. The complainant's contention that the Director of the Division of Conference and Document Services supported his request by indicating that his services would still be useful to the division is not in itself sufficient to call into question the merits of the Director General's discretionary decision. However, because of their very purpose, extensions of contracts in cases of hardship were granted to staff members enrolled with the APIS on the basis of a criterion other than the Agency's interest. Since the Agency had decided to grant such extensions, it was duty bound to apply that practice to all the staff members concerned (see, for example, Judgments 1053, under 6, or 2907, under 22). Moreover, the evidence on file shows that the complainant's request for an extension of his contract was examined mainly in the light of the conditions of entitlement to this practice, rather than in the light of the criterion of the Agency's own interest, which was not even mentioned in the above-mentioned decisions of 29 January and 26 February 2007.

17. Lastly, the Tribunal cannot fail to note that, as can be seen from a memorandum of 12 January 2007 which is in the file, the Division of Personnel recommended that the Director General should grant this request. Contrary to the Agency's submissions, the arguments set out in this memorandum, in particular the circumstance

that the complainant would be unable to draw a pension from the APIS before the age of 62 and that when he first retired he would receive only a small pension from the UNJSPF, implicitly referred to the Agency's practice of extending appointments in cases of hardship. The unlawfulness of the ultimate refusal of the complainant's request therefore seems even less excusable.

18. The complainant submits that the Agency breached the principles of good faith and mutual trust by not advising him of the amendment of national law governing the APIS or of the introduction of a practice of extending appointments in cases of hardship. He contends that such information would have dissuaded him from moving from one pension scheme to another in 2001 and would ultimately have spared him the disputed refusal to extend his contract. However, in view of the evidence on file, it has not been established that this information was lacking. The Agency, which in 2000 had asked the APIS about the individual situation of staff members enrolled in that scheme with a view to finding an appropriate solution to the difficulties encountered by them, has produced a power of attorney from the complainant authorising it to obtain the information about him. It is hard to imagine that the complainant would have been asked to grant this power of attorney without any explanation of the context in which this step was being taken. This casts some doubt on the substance of his allegations that he received no information whatsoever about the Agency's plans. The complainant's submissions in this connection will therefore be dismissed.

19. On the other hand, the complainant does have grounds for submitting that, when the IAEA examined his request for an extension of his contract, it neglected the duty of care which it owes to its staff members and injured his dignity.

As the Tribunal has repeatedly stated in its case law, international organisations have a duty to treat their staff with due consideration, to preserve their dignity and to avoid causing them unnecessary injury (see, for example, Judgments 2067, under 17, or 2116, under 5).

In the instant case, the Agency failed to show the complainant due consideration insofar as it applied the practice of extending appointments to mitigate hardship, from which other staff members benefited, in an unduly restrictive manner and in breach of the principle of equal treatment. Given the complainant's length of service, the undisputed quality of his performance and the difficult social situation he was likely to face, it was on the contrary incumbent upon the Agency to give favourable consideration to his request for an extension of his contract, especially as it concerned a period of only one year. The fact that the Agency has persistently attempted to justify its position by referring to mistakes or errors of judgement on the part of the complainant has unnecessarily exacerbated the injury inflicted on him and impaired his dignity. Lastly, the harsh and unforeseeable decision of 29 January 2007, occurring against a background in which the complainant's request for an extension of his contract had plainly been viewed favourably until then by the IAEA's services, constitutes a further breach of the Agency's duties towards him.

20. It follows from the foregoing that the refusal to extend the complainant's contract for one year beyond normal retirement age was unlawful in several respects. Consequently, and without it being necessary to consider the other pleas in the complaint, the Director General's decision of 21 May 2008 and the aforementioned previous decisions of 29 January 2007 and 26 February 2007 must therefore be set aside.

21. Since the complainant cannot be reinstated at the time of this judgment, he shall receive financial compensation for the material injury which he suffered in consequence of these decisions. The IAEA must therefore be ordered to pay the complainant an amount equivalent to the salary and all the allowances or other material benefits of any kind, including any possible increase in his end-of-service allowance, which he would normally have received if his contract had been extended for the period 1 March 2007 to 28 February 2008. The Agency must likewise pay the complainant an

amount equivalent to the contributions which it would have had to make towards the acquisition of his UNJSPF pension rights for the same period. All the sums in question shall bear interest at the rate of 8 per cent per annum from their due date until the date of payment.

22. The Agency's breaches of its duty of care towards a member of its staff and the injuries to that person's dignity have also caused the complainant manifest moral injury. In these circumstances, the Tribunal is of the opinion that the compensation due to the complainant for this injury may be fairly assessed at 10,000 euros.

23. Since he succeeds to a large extent, the complainant is entitled to costs, which the Tribunal sets at 5,000 euros.

## DECISION

For the above reasons,

1. The decision of the Director General of the IAEA of 21 May 2008 and the previous decisions of 29 January 2007 and 26 February 2007 are set aside.
2. The IAEA shall pay the complainant financial compensation for the material injury suffered owing to the failure to extend his contract beyond normal retirement age and interest thereon, as indicated under 21, above.
3. The Agency shall pay the complainant 10,000 euros in compensation for moral injury.
4. It shall also pay him costs in the amount of 5,000 euros.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 7 May 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron  
Seydou Ba  
Patrick Frydman  
Catherine Comtet