

## SEVENTY-FOURTH SESSION

### *In re* MUELLER

#### Judgment 1245

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Irene Müller against the International Atomic Energy Agency (IAEA) on 13 May 1992, the Agency's reply of 21 July, the complainant's rejoinder of 21 August and the Agency's surrejoinder of 30 October 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 12.01 and Rules 8.01.1, 8.01.3, 8.01.5, 12.01.1(C)(3) and 12.01.1(D)(1) and (4) of the IAEA's Provisional Staff Regulations and Rules, paragraphs 4 and 5 of Section 7, Part II, of the Agency's Administrative Manual and Regulation 21(a) and Supplementary Article A of the Regulations of the United Nations Joint Staff Pension Fund

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. As issued in October 1977 Rule 8.01.1 of the Agency's Provisional Staff Regulations and Rules read:

"Participation in the United Nations Joint Staff Pension Fund

All staff members shall participate in the United Nations Joint Staff Pension Fund if eligible under Article 21(a)\* (\*The text of the footnote is not reproduced) of the Regulations of that Fund, except those participating in the Austrian Pension Insurance Scheme in accordance with Staff Rule 8.01.3 or in another pension insurance scheme in accordance with Staff Rule 8.01.5."

Rule 8.01.3 ran:

"Participation in the Austrian Pension Insurance Scheme

The following staff at Headquarters shall participate in the Austrian Pension Insurance Scheme:

(A) Staff members who are Austrian nationals or stateless persons permanently resident in Austria in:

(1) The Maintenance and Operatives Service category;

(2) The General Service category, upon their request, if they had before joining the Agency's service participated in the Austrian Pension Insurance Scheme and had accumulated less than 15 insurance years (contributory plus substitutional periods) in that Scheme; they shall participate in the United Nations Joint Staff Pension Fund after having accumulated 15 such years in the Austrian Pension Insurance Scheme.

(B) Staff members ineligible for participation in the United Nations Joint Staff Pension Fund in accordance with Article 21(a) of the Regulations of the Fund and also not participating in another pension insurance scheme under Staff Rule 8.01.5. Such staff members shall participate in the Austrian Pension Insurance Scheme only for the period that they are ineligible for participation in the United Nations Joint Staff Pension Fund.

(C) (deleted)

(D) Under special circumstances, staff members in the Maintenance and Operatives Service category who are not Austrian nationals, or stateless persons permanently resident in Austria, may be given permission to continue to participate in the Austrian Pension Insurance Scheme."

Rule 8.01.5, headed "Participation in other pension insurance schemes", said that "Staff members may be authorized, for special reasons recognized by the Director General, to continue to participate in a national governmental pension insurance scheme ..."

The complainant, a United States citizen who was born in 1931 and also has Austrian nationality by marriage, joined the Agency in 1957 as a nurse in the General Service category. She was a participant in the United Nations Joint Staff Pension Fund from May 1958 to December 1966.

At her request the Agency changed her full-time appointment into a part-time one as from 1 January 1967. In the letter of 22 December 1966 offering her the part-time appointment a personnel officer said that her participation in the the Fund would end because "only staff members who are employed on a full-time basis may be admitted to the UN Pension Fund", but that according to the headquarters agreement concluded by the Agency with Austria she would have compulsory pension, health, accident and unemployment insurance under Austrian social security. Since the Staff Regulations and Rules did not expressly provide for part-time employment at the time, the Director General created a "half-day post" for her and let her have an unbroken run of fixed-term appointments until 1992, when she changed over to full-time short-term contracts for conference work.

As from 1 January 1975 the Fund's Regulations were amended to admit officials employed for not less than half the working time of a full-time appointment. The new rules disallowed validation of part-time service before 1 January 1975 but allowed validation of prior full-time service within twelve months of re-entry into the Fund.

By a circular of 24 March 1976, SEC/NOT/477, the Agency announced its intention of amending the Staff Regulations and Rules to provide for part-time employment and informing staff of "the details" after the Director General had approved them. By a circular of 18 July 1977, SEC/NOT/549, it conveyed the Director General's approval of the amendments to the Rules, said that they would be "issued soon", gave information about language and dependency allowances payable to staff already on part-time appointments and advised anyone "interested in more details" to see the Division of Personnel.

On 14 October 1977 the Agency issued an amendment to its rules on social security. In a footnote to Rule 8.01.1 the new text quoted an excerpt from Article 21(a) of the Fund Regulations "as in force as of 1 January 1971" on participation in the Fund: "Every full-time staff member of each member organization shall ... become a participant in the Fund".

By a circular of 8 May 1978, SEC/NOT/596, the Agency informed its staff that the Fund had "issued a revision of [its] Regulations and Rules which includes all amendments up to 1 January 1977"; copies were "available" on request.

The Agency reviewed in 1978 and 1979 the social security coverage of Austrian staff in the General Service category and found that the complainant and five others had not transferred to the Fund but had stayed with the Austrian pension scheme. By a memorandum of 14 September 1979 to the Director General the Director of Personnel suggested letting the six of them stay with the Austrian scheme on the grounds that all but one - the complainant - were close to retirement and would not have time to acquire enough contributory service if they switched to the Fund. The Acting Director General having agreed on 19 September, the complainant got a personnel action notice dated 20 September 1979 that gave the date of her exclusion from the Fund as 1 September 1979.

Having learned that other part-time staff were in the Fund, she sought an explanation from the Administration in correspondence from April to July 1991. By a letter of 4 July 1991 she appealed to the Director General under Rule 12.01.1(D)(1) for review of her exclusion from the Fund. In his reply of 12 July 1991 he said that her appeal was out of time, the latest relevant decision being the personnel action notice of 20 September 1979, which, he said, confirmed a decision "taken in 1967".

On 31 July 1991 she lodged an appeal with the Joint Appeals Committee. In its report of 23 December 1991 the Committee cited Rule 12.01.1(D)(4), which says it "may waive the time limits [set out in Rule 12.01.1(D)(1)-(3)] in exceptional circumstances", and waived the time limit in her case. It held her exclusion from the Fund to be in breach of the terms of her appointment and recommended allowing her appeal. But by a letter of 17 February 1992, the decision under challenge, the Director General rejected the appeal on the grounds that it was time-barred.

B. The complainant submits that the Director General had no authority to overrule the Joint Appeals Committee's waiver of the time limit. Rule 12.01.1(C)(3) says that the Committee "shall decide questions regarding its own competence" and sub-paragraph (D)(4) empowers it, not the Director General, to waive the time limits. The Director General had a duty to decide on the merits.

Though the Agency did from time to time issue circulars about the Fund and part-time employment, it never directly informed her of the amendment to the Fund Regulations which would have allowed her re-entry as of 1 January 1975. The circular of 8 May 1975 that called attention, belatedly, to an updated version of the Fund Regulations and Rules - without citing any particular amendments - hardly touched on the material point, and the Agency did nothing more to tell its staff of the change. Having been excluded from the Fund as from 1 January 1967, could she reasonably be expected to go through each successive version of its Regulations in search of a way back in?

She was not properly informed of the review of the matter of her exclusion from the Fund. Never did the Agency tell her there were grounds for review; indeed the notice of personnel action of 20 September 1979 did not even hint that her continued exclusion required a derogation from the Staff Rules but seemed merely to confirm the long-established fact of exclusion.

The negligence of others in excluding her from the Fund since 1 January 1975 does not extinguish her right to participate under Rule 8.01.1. She should have been admitted to the Fund by December 1990 at the latest, when she first raised the question with the Director of Personnel. Exclusion robs her of some 47 per cent of her pension entitlements and of the benefits the Fund would pay after her death to her permanently disabled child. She must also be reinstated in the Fund before she retires if she is to recover the sum of over 510,000 Austrian schillings which she has contributed to the Austrian pension scheme, and which would enable her to pay to recover her rights with the Fund.

She wants the Tribunal to order the IAEA (1) to arrange for her participation in the Fund as from 1 January 1975 and to restore her participation from 1 May 1958 to 31 December 1966 at its own cost, less the amount - plus interest thereon at the prescribed rate - she would have paid in contributions from 1 January 1975 and the amount - plus interest - of the withdrawal settlement she received for her participation between 1958 and 1966; or (2), failing that, to pay her regularly the difference between what she will receive from the Austrian pension insurance scheme and what she and her husband and disabled child would have got from the Fund less any amounts she would otherwise have had to pay into the Fund; and (3) to pay her, if she may not recover her contributions to the Austrian pension scheme, an equivalent sum to secure full coverage under the Fund. She seeks 1,800 United States dollars in costs.

C. In its reply the IAEA submits that the Director General acted properly in rejecting the complainant's internal appeal as time-barred. Under Rule 12.01.1(D)(1) she had two months in which to lodge it; yet the decision she waited until 1991 to challenge dated back to 20 September 1979. Though the Joint Appeals Committee had authority to waive the time limit for the purpose of its own deliberations, its recommendation was not binding upon the Director General, who set it up under Regulation 12.01 merely to "advise" him.

The Agency denies giving the complainant insufficient information. After its announcement that it would bring in part-time employment she had only to see with the Division of Personnel what her own employment conditions were to be. Besides, Section 7 of Part II of the Administrative Manual requires each staff member "to ensure that he/she fulfills the obligations of participation and obtains the benefits that might be due". Since the purpose of the internal review was to find out why some staff were not in the Fund the complainant was "in all likelihood" consulted on the decision to exempt her from changing from Austrian insurance to the Fund.

Since she did not apply for re-entry in 1990 the Agency may not be held liable for keeping her out. It dismisses as "hypothetical" her estimate of the difference in value between her Austrian pension and the one she claims from the Fund: fluctuation in exchange rates precludes any exact estimate.

D. In her rejoinder the complainant answers the Agency's pleas and enlarges on her own. She points out that it does not dispute her right to participate in the Fund as of 1 January 1975 and to validate her earlier participation. Nor has it questioned the fact that making do with the Austrian pension will cause her "considerable" injury and even more if her employment ends before she re-enters the Fund. The Agency has a duty to arrange for staff participation in the Fund and may not shift the burden of proof to her by suggesting that she was consulted - when she was not - during the review. It is not for her to prove that it never gave her the material information. She presses her claims.

E. In its surrejoinder the IAEA observes that the rejoinder contains no new facts or arguments in law. The facts, it

says, show how greatly the Agency valued the complainant's services and that it treated her with "understanding". So it was "improbable" that it would have sought to pare down her rights. The coverage it offered her under the Austrian scheme was sound and many local employees had preferred it to all others. In any event, since her part-time contracts had never been for more than one or two years she had no legitimate expectancy of staying on until the age of retirement.

#### CONSIDERATIONS:

1. The complainant is a United States citizen by birth and an Austrian citizen by marriage. She became a full-time staff member of the Agency on 24 September 1957 and from May 1958 participated in the United Nations Joint Staff Pension Fund. At her request her appointment was converted as from 1 January 1967 to part-time by way of an exception to the Agency's Staff Regulations and Rules as in force at the time. Since as a part-time staff member she was not eligible for continued participation in the Fund she was enrolled in the Austrian Pension Insurance Scheme. On leaving the Fund on 31 December 1966 she opted for a cash settlement.

2. The Fund Regulations were amended as from 1 January 1975 to allow participation by staff members who were employed at least half time. Part-time employment prior to that date could not be validated, but prior full-time employment might be validated within one year of re-entry.

3. The Agency introduced in 1977 part-time employment for locally recruited General Service and "maintenance and operative services" staff. It so informed the staff by circulars SEC/NOT/477 of March 1976 and SEC/NOT/549 of July 1977. By another circular, SEC/NOT/596 of May 1978, it told the staff that the Fund Regulations had been revised and that copies of the new text were available. There was nothing in any of those circulars to let the complainant know that her position as to pension entitlements had altered.

4. In 1978 and 1979 the Agency's Division of Personnel carried out a review of the social security coverage of its staff. It found that six of them had not transferred to the Fund but had remained with the Austrian pension scheme. There were four men on permanent appointments, born in 1921, 1923, 1923 and 1926, and two women, including the complainant, on fixed-term appointments that were to expire in 1980. The complainant was born in 1931 and the other woman in 1920.

5. In his report dated 14 September 1979 to the Director General the Director of Personnel commented:

"Most of them joined the Agency more than 20 years ago. They are all but one in their fifties and close to retirement age (60). If they were to join the [Pension Fund] to date they would not even accumulate the five years, which is the minimum period of contributory service required to obtain retirement benefit. On the other hand they need these years to draw an Austrian (early retirement) pension at the Agency's statutory retirement age (60).

In view of the special circumstances it is suggested that you exempt these persons from the provision of Staff Rule 8.01.3(A)(2) and give them the opportunity, in accordance with Staff Rule 8.01.5, of remaining in the Austrian Pension Insurance Scheme until their contracts expire or they retire from the Agency."

6. The acting Director General's reply of 19 September 1979 was:

"I approve the proposed exemptions until retirement or expiry dates of contracts of the above mentioned staff. You are requested to ensure that in future Staff Rule 8.01.3(A)(2) is observed."

7. That administrative decision was never notified to the complainant. All that was given to her was two decisions, one, dated 28 August 1978, that her "personnel record" had been amended as from 1 June 1978 to read "Participation in the [Fund] suspended", and the other, dated 20 September 1979, that it had again been amended as from 1 September 1979 to "Exclusion from the [Fund]". She was vouchsafed no explanation for those decisions; as far as she was aware she had ceased to be a member of the Fund in 1967.

8. Not until late 1988 or 1989 did she discover that part-time staff might participate in the Fund. When she made enquiries she was informally granted access to her personnel file and discovered the Director of Personnel's report of 14 September 1979 and the reply from the acting Director General, mentioned in 5 and 6 above.

9. She wrote a memorandum on 25 April 1991 to the Director of the Division of Personnel setting out the facts and asking him to ensure that by the time she retired, at the end of the year, she should be entitled to a pension from the

Fund.

10. The Director replied in a letter of 28 May 1991 that the decision to enrol her in the Austrian scheme had been taken in December 1967 and the decision to maintain her participation in it in September 1979 and that both those decisions had been notified to her in proper form; since the time limits had passed an appeal would be time-barred. On 4 July 1991 she submitted a request for review to the Director General and by a letter of 12 July the Director General gave the same reply.

11. The complainant then appealed to the Joint Appeals Committee. In its report of 23 December 1991 the Committee held that the relevant decision was the one taken on 19 September 1979 to exempt her and five other staff members from participation in the Fund and that the Director of Personnel's letter of 28 May 1991 did not contain a new decision. The Committee has power to waive time limits in exceptional circumstances under Rule 12.01.1(D)(4). It accordingly said that because of the importance of the appeal for the complainant and because she maintained she had never been informed of the possibility of re-entry to the Fund, it was waiving the time limits in her case. It recommended that the Director General reconsider the decision appealed against, though it observed that its recommendation might be followed only if the Fund allowed the restoration of the complainant's prior contributory service and the validation of her prior non-contributory service.

12. The Director General's decision was conveyed to her by a letter of 17 February 1992 and that is the one she impugns. It was brief. He expressed no opinion on the Committee's comments on waiver of the time limit. He simply said that he was rejecting the Committee's recommendation because the appeal had not been lodged within the time limits. Rule 12.01.1(D)(1) requires that a request for review of an administrative decision be sent to the Director General within two months of the date at which the staff member received written notification of the decision. In this case the Director General took it that the two months ran from 20 September 1979, when the Personnel Division issued the decision referred to in 7 above.

#### Receivability

13. The complainant argues that the Director General was wrong to reject her appeal on the grounds that it was timebarred:

- (a) because he was not free to review the waiver of the time limit by the Joint Appeals Committee;
- (b) because at no time had she been informed or could she have known that she might have become a member of the Fund in 1975; and
- (c) because she was not properly informed of the review in 1979 of her non-participation in the Fund.

14. The Agency replies that the notice of her suspension from the Fund as from 1 June 1978 and the notice of her exclusion from the Fund as from 1 September 1979 were adequate. It submits that they must have attracted her attention since previous notices of that kind had made routine reference to her participation in the Austrian pension scheme. Her allegation that they were not so formulated as to arouse her reasonable curiosity is not sustainable; the purpose of the review in 1978 and 1979 and the timing and wording of the two notices warrant assuming that she was in all likelihood consulted on the decision to exempt her from changing pension fund affiliation.

15. The Tribunal accepts the complainant's denial that she was ever consulted: it would not have made sense for her to agree to continued exclusion from the Fund when her pension from the Fund was likely to be better than her pension from the Austrian scheme.

16. The Tribunal holds that the relevant decision was the one which the acting Director General took in response to the Director of Personnel's report dated 14 September 1979 and which was purportedly communicated to the complainant by the notice of 20 September 1979. Both that notice about her exclusion and indeed the earlier one of 28 August 1978 about her suspension from the Fund are enigmatic in the extreme and, as was said earlier, the complainant could not have divined from them that her pension position had altered. The notice of 20 September 1979, even when taken together with the earlier one about suspension, was wholly inadequate to alert her to the purpose and substance of the administrative decision that had been taken. Since she may not be deemed in the circumstances to have received proper "notification" as prescribed in Rule 12.01.1(D)(1), the time limit did not then run. Her present complaint is therefore receivable.

17. Since the complainant's plea (c), set out in 13 above, is upheld, there is no need to entertain her other two pleas, (a) and (b), on the issue of receivability.

18. The complainant argues that she was entitled to participate in the Fund as from 1 January 1975 under Article 21(a) and Supplementary Article A) of the Regulations of the United Nations Joint Staff Pension Fund and under the Agency's Staff Regulations and Rules.

19. The Tribunal is not competent to interpret the Fund Regulations. It is for the Fund, and ultimately the United Nations Administrative Tribunal on appeal, to determine whether the complainant is entitled to participate in the Fund under those Regulations and, if so, as from what date. Insofar as Article 21(a) refers to the complainant's terms of appointment, however, the Tribunal may rule on what those terms are.

20. The complainant received a written offer of appointment dated 22 December 1966. She signed it and returned it on 28 December. She was accordingly given a letter of appointment dated 28 December, which in turn she signed and returned on 30 December 1966. That is the contract with the Agency that was continually renewed.

21. The Agency submits that from the outset the complainant's contract expressly excluded her participation in the Fund.

22. It is true that the offer of appointment - which it wrongly describes in its reply as the letter of appointment - stated that since only full-time staff members might be admitted to the Fund her participation would cease. That was indeed a statement of the then position under the Staff Rules and Regulations. But the letter of appointment, though it made no mention of participation in the Fund, did say that the appointment was subject to the Staff Regulations and Rules as they might be amended from time to time.

23. Insofar as the terms of appointment deal with participation or non-participation in the Fund, the relevant item of evidence is the letter of appointment, taken together with the Staff Regulations and Rules. The note which one Agency official wrote to another on 20 September 1966 about the complainant, and which the Agency relies on, did not form part of the terms of her appointment: it was just an internal minute written in the course of a discussion on what the terms of her contract for part-time employment might be.

The merits

24. The provisions of the Agency's Staff Rules issued in October 1977 and in force at the material time appear under A.

25. The complainant argues that she was a participant in the Austrian scheme under Rule 8.01.3(B) as long as she was ineligible for participation in the Fund under Regulation 21(a) of the Fund Regulations, and that Rule provides that participation in the Austrian scheme is allowed only for the period of such ineligibility. She was not, she maintains, a participant in the Austrian scheme under Rule 8.01.3(A):

(a) because she did not make a "request" for such participation;

(b) because she was not a participant in the Scheme before joining the Agency; and

(c) because she had not "accumulated less than 15 insurance years".

Certainly, she observes, she was not a participant in any "other" scheme within the meaning of Rule 8.01.5. And she says that she qualified for participation in the Fund when its Regulations were amended as from 1 January 1975 to allow participation by staff on part-time employment. In her submission once she qualified for participation under Article 21(a) of the Fund Regulations she might no longer participate in the Austrian scheme under Rule 8.01.3; Rule 8.01.1 thereupon applied to her directly without reference to the exceptions and it became the Agency's duty to ensure that she was duly enrolled as a participant in the Fund.

26. In its reply the Agency relies on provisions of its Administrative Manual which are headed "Responsibility for the Administration of the Social Security Schemes". They appear as paragraphs 4 and 5 in Section 7 of Part II of that Manual, and the text as produced by the Agency is identified as "AM.II/7, page 2, 25 October 1984 (TS/116)". The provisions read:

"4. The Agency does not assume any responsibility in respect of payment of benefits or the exercise of rights under the social security schemes, or for the administration of these schemes unless stated otherwise. The provisions governing these schemes shall apply, and it is the responsibility of each individual staff member to ensure that he/she fulfills the obligations of participation and obtains the benefits that might be due.

5. However, the Agency ... shall provide staff members, upon request, with detailed information about the schemes, including enrolment requirements, contribution payments and benefit structures. [It] shall also advise staff members on available options and assist them, to the extent possible, in exercising rights or obtaining benefits under the schemes, without assuming responsibility for the action to be taken by the staff member or the competent authorities of these schemes."

27. For one thing, the text on which the Agency founds its disclaimer, being dated 1984, is subsequent to the decision that was taken in 1979. For another, it does not cover the question of participation in the Fund. As the complainant says, enrolment in the Fund remains the obligation of the Agency, and indeed that is exactly what the Director of Personnel told her in his letter of 12 July 1991:

"3. The staff member's signature is not required for his/her enrollment as a participant in the [Pension Fund] or in the Austrian pension scheme; in both cases it is an autonomous action undertaken by the employer - also under Austrian law - of which the staff member concerned is duly informed, usually by way of his/her employment contract.

4. As explained on earlier occasions, the Agency has an obligation according to the Headquarters Agreement to provide for social insurance coverage of all of its officials. In 1969, in the absence of an alternative, the Agency enabled you to participate in the Austrian social security scheme."

28. The conclusion is that a duty does lie on the Agency to ensure that a staff member who qualifies should be made a participant in the Fund, and the decision the Agency took in 1979 to exclude the complainant from participation in the Fund was based on several mistakes of fact and of law, namely:

(a) Rule 8.01.3(A)(2) did not apply to the complainant, contrary to what the Director of Personnel stated in his report of 14 September 1979 to the Director General.

(b) The Director was further mistaken in stating in that report that if she joined the Fund she would not accumulate the minimum period of five years' contributory service required to qualify her for a pension. She had already performed full-time service from 1957 to 1966 which could be revalidated under the Fund Regulations, and she could further contribute for the period of her parttime employment as from the time when she qualified for re-entry to the Fund under Article 21(a).

(c) Rule 8.01.5, on "Participation in other pension insurance schemes", had no application to the Austrian scheme.

29. Because the Agency committed those mistakes and failed in its duty to have the complainant readmitted in the Fund as soon as she qualified she is entitled to be put as far as possible in the position that she would be in now had she been readmitted to the Fund at the earliest available opportunity.

30. The Agency must apply to the Fund to determine whether she may now be readmitted to it and, if so, to have the period of her part-time employment validated from the earliest date at which she qualified under the Fund Regulations and Rules and the Agency's Staff Regulations and Rules, and to have the period of her full-time employment from 1957 to 1966 revalidated. If sums she obtained from the Austrian pension insurance scheme proved insufficient to meet the cost of such retroactive readmission to the Fund the Agency must make such financial contribution as may be required to enable her to secure her full entitlements.

31. If it proves impossible to readmit her to the Fund and secure her full entitlements, the Agency must pay her the difference between her benefits under the Austrian scheme and the benefits to which she would have been entitled from the Fund had she been readmitted to it at the earliest available opportunity and revalidated the period of her full-time employment from 1957 to 1966.

32. Lastly, she is entitled to an award of costs.

DECISION:

For the above reasons,

1. The decision of 17 February 1992 is quashed.
2. The complainant is entitled to restitutio in integrum.
3. The Agency shall apply for the complainant's readmission to the United Nations Joint Staff Pension Fund in accordance with 30 above.
4. If it proves impossible to readmit her and secure her full entitlements, the Agency shall pay her, in accordance with 31 above, the difference between her benefits from the Austrian pension insurance scheme and the benefits to which she would have been entitled from the Fund had she been readmitted to it at the earliest available opportunity.
5. The Agency shall pay her the sum of 1,800 United States dollars in costs.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

Mella Carroll  
P. Pescatore  
Michel Gentot  
A.B. Gardner