

NINETY-THIRD SESSION

Judgment No. 2125

The Administrative Tribunal,

Considering the complaint filed by Mr R. J. L. against the International Atomic Energy Agency (IAEA) on 25 September 2001, the Agency's reply of 14 January 2002, the complainant's rejoinder of 20 February and the IAEA's surrejoinder of 10 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. The complainant, a Belgian national born in 1940, joined the staff of the Agency in May 1980 at grade P.4 under a two-year fixed-term contract which was extended several times. He was promoted to grade P.5 in 1990 and transferred to the Division of Operations B of the Department of Safeguards from January 1993. During his career, he worked in particular as an inspector.

In a memorandum of 26 June 1998 the Director General announced that he had established a list of six criteria, on the basis of which he may, in the interest of the Agency, authorise an extension of contract beyond retirement age.

By a memorandum of 18 October 1999 the Director of the above-mentioned Division informed the Director of the Division of Personnel that the complainant would reach retirement age - set at age 60 in his case - on 6 July 2000, but was interested in obtaining a further extension of contract. He recommended extending the complainant's contract for one year - until 31 July 2001. On 15 December 1999 the Director of Personnel informed the complainant that this request had been rejected. On 5 April 2000 the complainant wrote to the Director General asking him to reconsider that decision. The Director of Personnel wrote to the complainant on 3 May, pointing out that pursuant to Article 4.05 of the Provisional Staff Regulations staff members are not normally retained in service beyond retirement age, but that the Director General may extend that limit in the interest of the Agency, provided that the criteria listed in his memorandum are satisfied; in this instance, however, he had not considered that to be the case.

On 29 June 2000 the complainant sent a letter to the Director General and to the Secretary of the Joint Appeals Board. Referring to the fact that the age of retirement was fixed at 62 years for staff members recruited after 1990, he requested an extension of contract until he had reached that age. The Director General replied on 21 July that the complainant's case did not warrant an exception to the provisions of Article 4.05. On 31 July 2000, the date on which he retired, the complainant filed an appeal against that decision. The Board issued its report on 11 June 2001, recommending that the appeal be rejected. By a letter of 28 June 2001, which is the impugned decision, the Acting Director General informed the complainant that he had decided to follow the Board's recommendation and hence not to extend the complainant's contract beyond the age of 60.

B. The complainant argues that the refusal to grant him an extension of contract is based on improper reasons. Indeed, he believes that he satisfied all the criteria listed in the Director General's memorandum of 26 June 1998. For example, he points out that his performance reviews were invariably excellent and that the extension of his contract would have ensured continuity of work in his section whilst contributing to the efficiency of the IAEA.

Furthermore, the complainant considers that the Director General committed an "abuse of discretion". He argues that an extension of his contract would have been in the interest of the IAEA since, at the time of his request, the Agency and the section in which he was working were facing major structural reforms.

The Joint Appeals Board, he says, deliberately delayed the processing of his appeal, in breach of the provisions of Article 12.01.1(D) of the Staff Regulations. As a result, the Board member whom the complainant wished to have participate in the examination of his case was prevented from doing so, since he had retired in the meantime. The complainant alleges that the Board thus breached the standard procedure. In addition, it did not carry out a full investigation of this case, since it failed to obtain the statistics concerning the number of cases in which a contract has been extended beyond the age of 60. Lastly, the complainant claims that the Agency's Administration committed a breach of procedure by sending him an incomplete copy of the Board's report. It thus infringed his right of defence.

The complainant asks the Tribunal to set aside the impugned decision and to award him damages in respect of his loss of earnings for the period from 1 August 2000 to 31 July 2001, and in respect of his loss of pension rights. He also asks for an award of costs.

C. In its reply the Agency argues that the impugned decision complies with the rules and that the Director General properly exercised his discretion. Pursuant to Article 4.05 of the Regulations, the complainant could not be retained in service beyond the age of 60. Insofar as the Agency has discretion in staff matters, the Tribunal cannot substitute its opinion for that of the organisation. It was because of a desire to rejuvenate the inspectorate of the Department of Safeguards that the Director General refused to grant the complainant's request. For that reason, many inspectors did not have their contract extended beyond the mandatory retirement age. On this issue, the Agency points out that there is no rule that allows staff members of the professional category who so request to obtain an extension of their contract beyond retirement age. Furthermore, in the complainant's case, the request for an extension sent to the Director General did not indicate that the complainant satisfied all the criteria stipulated in the memorandum of 26 June 1998.

The IAEA acknowledges that the processing of the complainant's appeal was delayed but denies that this delay was the result of stalling tactics. It points out that the document which was not disclosed to the complainant was confidential: in accordance with the Agency's Administrative Manual, it could not be made available to the complainant.

D. In his rejoinder the complainant argues that the IAEA cannot claim that its refusal to extend his contract was based on the need to rejuvenate the team of inspectors, because that reason, which is mentioned by the Agency for the first time, is not among the criteria listed by the Director General. The Agency committed a serious procedural breach by failing to inform him of the actual reason for that refusal. Furthermore, the claimed reason was arbitrary, since several inspectors of the Department obtained an extension of their contract beyond the age of 60. The complainant emphasises that under the provisions of the Administrative Manual, the report of the Joint Appeals Board, in its entirety, may not be classified "privileged information". He claims that nowhere is it indicated that a request for an extension of contract beyond retirement age must satisfy all the criteria listed in the memorandum of 26 June 1998.

E. In its surrejoinder the Agency observes that the wish to rejuvenate the staff is the reason for the obligation to retire staff members at 60. It points out that the reason for the refusal to extend the complainant's contract was that the complainant did not satisfy all the criteria established by the Director General, whereas it was clear from the memorandum in question that they all had to be fulfilled. The complainant has not proved that he was in the same position as the inspectors whose services were extended beyond retirement age. Lastly, the IAEA denies that it breached the provisions of the Administrative Manual.

CONSIDERATIONS

1. The complainant, who was born in July 1940, joined the staff of the IAEA on 1 May 1980 under a fixed-term contract which was extended six times. The last renewal, offered in June 1995, stipulated that his services would be terminated on 31 July 2000. On 18 October 1999 the Director of the complainant's division sent a memorandum to the Director of the Division of Personnel requesting an extension of the complainant's contract until 31 July 2001,

that is to say beyond the normal age of retirement which, in his case, was set at 60. The Director of Personnel replied, on 15 December 1999, that the Director General had rejected this request. In March 2000 the complainant asked the Director of Personnel for a written reply to the request for an extension of his contract; then, in April, he asked the Director General to reconsider his decision. On 3 May 2000 the Director of Personnel replied that, pursuant to Article 4.05 of the Provisional Staff Regulations, staff members should not normally be retained in service beyond retirement age, and that although the Director General is empowered to extend the age limits in particular cases in the interest of the Agency, such exceptions were only granted on the basis of "specific criteria" which were not satisfied by the complainant. On 29 June the complainant appealed against the Director of Personnel's decision. On 31 July he filed an internal appeal against the decision taken on 21 July 2000 by the Director General upholding that decision.

2. The Joint Appeals Board, before which the appeal was brought, met first on 17 January 2001 and issued its report on 11 June 2001 after a further ten sessions. It examined the arguments put forward by the department for which the complainant had worked in the light of the criteria established by the Director General. Having concluded that some of these criteria were not satisfied and that the department in question had not even alleged that they were satisfied, the Commission recommended to the Director General that he should maintain his decision.

3. The complainant asks the Tribunal to set aside the decision of 28 June 2001, by which the Acting Director General declared that he was following the recommendation of the Joint Appeals Board and maintaining the decision not to extend the complainant's contract beyond the age of 60. The complainant argues in particular that the impugned decision was based on improper reasons and that it was made without taking into account the interest of the department, which would have benefited from the continued exercise of his functions; that the Director General committed an "abuse of discretion"; and that the procedure before the Board was flawed by irregularities. In his rejoinder, he submits that the Agency has modified its reasons for refusing his request in the course of the proceedings before the Tribunal, since it is no longer arguing that the criteria defined in the memorandum of 26 June 1998 were not satisfied, but instead is emphasising the desire to rejuvenate the Agency's team of inspectors.

4. The IAEA rejects these arguments on the grounds that the Director General merely exercised his power of discretion; that the reasons for his decision were known to the complainant; that it was not contradictory to state that he did not satisfy the stipulated criteria whilst also emphasising that the policy of the organisation was to rejuvenate its management; and lastly that the internal appeal procedure was followed correctly.

5. On the merits, the Agency is undoubtedly right in pointing out that the Director General has discretion in the matter, over which the Tribunal has only a limited power of review. This discretion enables the Agency to depart from the rule governing the normal age of retirement. However, the decisions that are made must be based on proper reasons. Article 4.05 of the Staff Regulations provides that:

"Staff members shall not normally be retained in service beyond the age of sixty-two years or - in the case of staff members appointed before 1 January 1990 - sixty years. The Director General may in the interest of the Agency extend these age limits in individual cases."

The memorandum of 26 June 1998 explains to the Agency's department heads and division directors that such extensions should not be automatic, but that they must be justified on the basis of six criteria. The Joint Appeals Board - whose recommendation was followed by the Acting Director General - considered that the request submitted by the complainant's department did not specify whether three of these criteria were satisfied. However, it is in fact clear from the highly detailed report attached to the request for an extension of contract that this request was based on the complainant's experience, which was of fundamental importance at a time when the safeguards system was undergoing extensive modifications, and which was particularly necessary for the training of new inspectors during the transition period. Indeed, the persons who had initiated the request indicated to the Board that they were aware of the criteria listed in the memorandum and considered that they had taken them into account, adding that in their opinion the complainant satisfied the criteria.

6. Thus, the grounds for refusing the request for an extension of the complainant's contract appear to be highly questionable. In fact, the reason which explains the impugned decision is presented very clearly in the Agency's reply: to rejuvenate the Agency's team of inspectors. This reason is not in itself reprehensible, but it could be used to justify a systematic refusal to depart from the rule governing the normal age of retirement. In the memorandum

of 26 June 1998, the IAEA established for itself a number of rules which it must apply. Although the Director General can determine the interest of the Agency, his decisions must be based on clear and coherent reasons. In this case, the reason given - that the request for an extension contained no indication as to whether any of the criteria stipulated in the memorandum had been satisfied - is not valid, and the reason based on "rejuvenation" of the staff is too general to constitute a sufficient justification for the refusal of the complainant's request.

7. Consequently, without there being any need to rule on the complainant's pleas concerning the procedure followed before the Joint Appeals Board, the impugned decision must be set aside. Since no measures may be envisaged for reinstating the complainant, the Tribunal awards him damages. The Agency shall pay him a sum equal to the salary and benefits to which he would have been entitled had he remained in service from 1 August 2000 to 31 July 2001. The complainant's pension rights for the aforementioned period shall be restored.

8. Since his claim succeeds, the complainant is entitled to an award of costs, set at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 28 June 2001 is set aside.
2. The Agency shall pay the complainant damages in an amount determined as indicated under 7, above.
3. The complainant's pension rights shall be restored for the period from 1 August 2000 to 31 July 2001.
4. The Agency shall pay the complainant 2,000 euros in costs.

In witness of this judgment, adopted on 3 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet