

## NINETY-EIGHTH SESSION

**Judgment No. 2377**

The Administrative Tribunal,

Considering the second complaint filed by Mr A. F. against the International Atomic Energy Agency (IAEA) on 6 October 2003, the IAEA's reply of 12 January 2004, the complainant's rejoinder of 23 March, and the Agency's surrejoinder of 28 June 2004;

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, who joined the IAEA in 1974, has been retired since 30 June 2003. Some facts relevant to his career may be found in Judgment 2325 delivered on 14 July 2004 on the complainant's first complaint.

Provisional Staff Regulation 4.05 states:

“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.”

On 23 December 2002 the complainant wrote to the Director of the Division of Personnel, requesting consideration of an extension of his appointment beyond the age of retirement of 60 years. On 7 January 2003 the latter replied that the request could not be considered as such request should be made by the Head of the Department concerned and that the Division of Personnel had not received any recommendation from the Department of Safeguards relating to him. The complainant appealed against that decision to the Director General on 20 January. The Director General upheld the decision on 19 February.

On 13 March the complainant filed an appeal with the Joint Appeals Board. In its report dated 27 June the Board recommended that the Director General uphold the decision not to extend the complainant's fixed-term appointment beyond the Agency's statutory retirement age. On 28 July 2003 the Acting Director General informed the complainant that he had decided to follow that recommendation. That is the impugned decision.

B. The complainant argues that the decision breaches the duty of fair and equal treatment. He submits that it has been a general practice in the Agency to extend staff appointments beyond the retirement age of 60 years for individuals who joined the Agency before 1990. Not only has this practice been applied frequently in the Department of Safeguards, but, he says, within his Division, seven out of nine staff members received extensions beyond the age of 60.

He alleges that it was for “improper reasons” that he was not recommended for an extension, because the Director of his Division overlooked the programmatic needs in the Department as well as the complainant's good work record. The decision not to consider him was arbitrary and taken “out of a vindictive desire” to harm and discredit him. Thus, by failing to conduct a thorough investigation in order to find the real reasons for the refusal of his extension, the Acting Director General has failed to discharge his responsibility to protect the complainant from the “unjust harm” caused by his supervisor. The complainant contends that the extension of his appointment was indeed in the interest of the Agency.

He submits that there had been a series of improper actions taken by his superiors in order to undermine his programme and achievements and to “undercut” his performance. He accuses them of having engaged in a “character assassination and defamation campaign” to block the possibility of any further extension of his appointment long before it was even due to be considered. The Joint Appeals Board breached its procedure, failed to conduct a full investigation into his allegations and its report contains a number of “inconsistencies and mistakes”.

The complainant requests the Tribunal to quash the impugned decision and restore his right to an extension of his appointment until he reaches the age of 62. He claims damages for loss of earnings and benefits. He also claims moral damages and costs.

C. The Agency replies that the decision not to extend the complainant's appointment was lawfully taken. It is clear from the text of the Provisional Staff Regulation that the Director General's authority is discretionary as to whether to extend a staff member's appointment after the statutory retirement age; he is not bound to do so. Furthermore, the programmatic needs of the Agency were taken into account by the Director General when he reviewed the decision not to extend the complainant's appointment.

In subsidiary arguments it pleads that there has been no breach of equal treatment. The complainant has not established that he was in the same position in fact and in law as the colleagues who, he says, have had their appointments extended beyond the mandatory retirement age. The IAEA says that the complainant's allegations of harassment have been fully investigated and that the investigation did not uncover any evidence of abuse of authority.

The Agency submits that there was no breach of procedure by the Joint Appeals Board and that the complainant's arguments are devoid of merit. It provided the opportunity for all parties to be heard, as well as for the complainant to explain his grievances and produce the necessary documents.

D. In his rejoinder the complainant points out that it is not true that his allegations have been thoroughly investigated; he is still awaiting action by the Director of Personnel on the investigation. He says that since the investigation is not complete, any conclusion thereon is premature. Furthermore, he notes that the Joint Appeals Board failed to call on the Head of the Department of Safeguards to determine the "actual reasons" why he was not recommended for an extension of his appointment.

He reiterates his allegations that his Director was prejudiced against him, and he adds that she "manipulated the programmatic needs of [his] work and [his] specific skills" in order to spoil his case. He contends that the Director General has emphasised "the programmatic needs of [his] programme" and that his specific skills have been endorsed by the Head of the Department and well documented in his performance record.

He contends that not only does the Joint Appeals Board have the authority to call members of staff who may be able to provide information relevant to an appeal, but it has an obligation to do so. By not doing so in his case, it has misused its authority. He says that the Board also failed to obtain correct statistics concerning the number of appointments that have been extended after the age of retirement. The complainant asks the Tribunal to request a copy of a document he names, arguing that it will provide proof that he is indeed in the same situation in fact and in law as other staff members who received extensions of appointment.

E. In its surrejoinder the Agency corrects certain statements made by the complainant: the investigation into his allegations of harassment has been completed and his allegations were found to be unsubstantiated. A decision was made to close the case, and the complainant was so informed in a letter from the Director of Personnel dated 21 November 2003. It presses its other pleas.

## CONSIDERATIONS

1. The complainant contests a decision by the Acting Director General not to extend his fixed-term appointment beyond the Agency's mandatory retirement age of 60 for staff members appointed before 1 January 1990. In his submissions he alleges that the decision breached the duty of fair and equal treatment and that he was the victim of deliberate and malicious actions by his superiors, in particular by his Head of Section and his Division Director. There was a series of improper actions meant to undermine his achievements as well as to undercut his performance. He asserts that programmes he had worked on have either been abolished or taken away from him, and in one instance another staff member was unduly enriched by receiving credit for finishing up work he had already largely completed. He contends he was subjected to a hostile and resentful environment and excluded from important meetings related to his work. Lastly, he submits that the Joint Appeals Board breached its standard procedure and did not carry out a full investigation of his case. He requests the Tribunal to restore his right to an extension of appointment until the age of 62 and award him damages in respect of the loss of earnings and benefits to which he would have been entitled if he had stayed in service two additional years. He also claims

moral damages and costs.

2. Most of the complainant's allegations consist of a repetition of his previous complaint which the Tribunal dealt with in Judgment 2325. That complaint concerned his non-appointment to a position for which he had applied but his allegations are essentially the same. The following considerations from that decision are equally applicable here:

“4. The Board found that the complainant had introduced no convincing evidence to support his allegations of fatal procedural irregularities. That situation did not change before the Tribunal. Assertion, though many times repeated, does not, without more, constitute proof. [...]

5. On the issue of alleged prejudice against the complainant by his Head of Section and his Division Director, there is likewise no persuasive evidence. The allegations have been carefully reviewed by the [Office of Internal Oversight Services] which found, as did the Joint Appeals Board, that all of them were unsubstantiated. It is not the role of this Tribunal to reweigh the evidence before the Joint Appeals Board unless it is shown that the latter has acted unreasonably or has committed some palpable and overriding error. There is no such showing here.”

3. The crux of his second complaint is that he somehow had a right to have his retirement age, and his appointment, extended beyond the age of 60, and that the Director General erred in failing to find that such an extension was in the best interest of the Agency. He is wrong on both points.

4. The relevant rule is found in Provisional Staff Regulation 4.05 which provides:

“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.”

This text makes it clear that the decision whether or not to grant an extension to any particular staff member is peculiarly a matter for the exercise of the Director General's discretion. The Tribunal will only interfere with such exercise on very limited grounds, none of which has been established by the complainant. The fact that such extensions may have been granted to a number of other staff members is simply irrelevant in the circumstances. No one has a right to be retained beyond the applicable normal retirement age, which in the complainant's case was 60.

5. Likewise, the question of what would be in the best interest of the Agency is also a matter peculiarly within the knowledge and competence of the Director General. The Tribunal will normally defer to his judgment on such matters and would only intervene if it were shown that he had acted without authority or in breach of a rule of form or of procedure, or if a decision was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. (See, for example, Judgment 1143.) As indicated, there is no such showing here and the Director General appears to have carefully considered all relevant matters in coming to his conclusion. The complaint must, therefore, be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.