

119th Session

Judgment No. 3415

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. M. P. against the International Atomic Energy Agency (IAEA) on 13 April 2012, the IAEA's reply of 23 July, the complainant's rejoinder of 30 October 2012 and the IAEA's surrejoinder of 4 February 2013;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summarized up as follows:

A. The complainant joined the IAEA in April 2007 under a three-year fixed-term appointment as a Section Head in the Division of Technical Support, Department of Safeguards. According to Staff Rule 3.03.1(C), for staff in the Professional and higher categories, the normal tour of service with the IAEA is five years, but extensions of service beyond that period may be granted in some circumstances at the discretion of the Director General. After two successive one-year extensions, the complainant's appointment was due to expire on 27 April 2012.

In November 2010, the complainant's contract was reviewed by the Safeguards Professional Staff Panel (a meeting of all the Department of Safeguards' Directors chaired by the Deputy Director General for Safeguards which considers all proposals for professional category staff contract extensions, hereinafter the "SG-P Panel") for possible extension. The SG-P Panel concluded that there was no exceptional programmatic reason or other compelling reasons in the interest of the IAEA to extend the complainant's appointment beyond the statutory five-year length of service. On 2 December 2010 the IAEA therefore sent the complainant a letter confirming that his appointment would expire on 27 April 2012.

On 7 January 2011 the complainant requested that the Office of Internal Oversight Services (OIOS) conduct an investigation into possible misconduct by Mr B., a Division Director in the Department of Safeguards, who was a member of the SG-P Panel. In 2007 the complainant had given evidence in the context of an investigation by OIOS into suspected procurement fraud involving Mr B.'s division. According to the complainant, Mr B. had pressured the other members of the SG-P Panel not to recommend an extension of his appointment in retaliation for his participation in the 2007 investigation, in violation of the IAEA Whistle-blower Policy.

On 10 January 2011 the complainant wrote to the Director General requesting that he review the decision not to renew his contract beyond April 2012, alleging that this decision had been taken in retaliation for his cooperation with the OIOS investigation into procurement irregularities. In March 2011 he filed an internal appeal with the Joint Appeals Board (JAB) challenging the implied decision to reject his request for review. On 29 March, however, the Director General wrote to inform the complainant that he would await the findings of the OIOS investigation before giving further consideration to his request for review.

On 9 May the complainant was informed that OIOS had concluded that the evidence obtained in the course of the investigation did not substantiate the reported misconduct by Mr B. and, therefore, that OIOS considered the matter to be closed. On 11 July, after considering

the outcome of the OIOS investigation, the Director General confirmed the decision to allow the complainant's contract to expire in accordance with its terms. He noted that extensions of appointment beyond five years were only granted exceptionally for programmatic or other compelling reasons in the interest of the IAEA. Those circumstances were not found to exist in the complainant's case and there had been no evidence that any prejudice or bias had influenced the decision not to offer him an exceptional extension of his appointment.

In its report of December 2011, the JAB recommended that the Director General maintain his decision to allow the complainant's contract to expire. While the JAB could not completely exclude the possibility that whistleblowing had been a factor influencing the attitude of individual members of the SG-P Panel, it found that there was no clear evidence that Mr B. had retaliated against the complainant by influencing the SG-P Panel not to recommend the extension of his contract. It noted that, according to the OIOS report, other Directors had also spoken against the extension, and their grounds for objection were primarily based on the complainant's perceived lack of judgment and interpersonal skills. The JAB concluded that there were both programmatic and professional performance factors which the SG-P Panel could legitimately take into account in arriving at its decision not to recommend the extension of his contract.

By a letter of 18 January 2012 the complainant was informed that the Director General had decided to accept the JAB's recommendation to maintain his decision. Noting that there was no automatic entitlement to extension beyond the normal five-year tour of service, the Director General stated that there was an "independent basis" not to extend the complainant's appointment. He referred in particular to the SG-P Panel's concerns about the complainant's managerial style, as well as the fact that his supervisor had described to the JAB a programmatic reason for allowing his appointment to expire, namely that the project on which the complainant was working would be almost completed by the end of 2011. That is the impugned decision.

B. The complainant contends that the impugned decision is tainted with an error of law, as there are no performance issues which could justify the decision not to extend his appointment. All his performance appraisals were positive and he was never informed of any performance deficiency during his entire service at the IAEA. According to the complainant, while Staff Rule 3.03.1(C) provides that the normal tour of service is five years, the practice with respect to professional staff in the Department of Safeguards is to grant extensions beyond 5 years. Failure to do so in his case amounts to a violation of the principle of equal treatment. He submits that the reasons provided for not extending his contract are patently untrue and, therefore, that the IAEA breached its duty to explain the reasons for the decision not to renew his contract. The fact that no proper reason was given for the non-renewal triggers an inference that his whistle-blowing activities were improperly taken into account, in breach of the IAEA Whistle-blower Policy and the Staff Regulations and Staff Rules. He adds that the decision is also tainted with misuse of authority and prejudice. The complainant seeks material damages in an amount equal to two years of his most recent gross salary and benefits, as well as an additional six months of salary and benefits for the lost opportunity to pursue a final contract that would have employed him until the mandatory age of retirement. He claims moral damages for the damage to his professional reputation in the amount of six months of salary and benefits, as well as costs in the amount of 6,000 euros. The complainant also asks the Tribunal to order the production of various documents, including the OIOS investigation report into procurement matters, the OIOS report on Mr B.'s alleged misconduct, statistics on the number of contracts of professional staff extended to at least seven years or more in the Department of Safeguards, and the minutes from the SG-P Panel meetings when his contract extensions were considered.

C. In its reply the IAEA denies that any error of law was made. The decision not to extend an appointment is discretionary and subject to only limited review. There are no grounds to review the impugned decision in the present case. It was properly taken in accordance with Staff Rule 3.03.1(C) and with the case law of the Tribunal. The

complainant offers no evidence that, in allowing his appointment to expire after the normal tour of service of five years, the IAEA violated applicable law. He had no basis for expecting that his appointment would be extended. His allegation that there is an established practice of granting extensions which binds the organization is unsubstantiated. The complainant was well aware that there is no automatic entitlement to extensions in the IAEA. Moreover, he simply did not meet the criteria set forth in Staff Rule 3.03.1(C)(2) for an exceptional extension beyond five years. His allegation of unequal treatment is also unsubstantiated, as he offers no evidence that other staff members who received extensions were in comparable situations. As regards his argument that there were no performance issues that could justify the decision of non-renewal, it underlines that performance is immaterial here, as there is no automatic entitlement to extension. Nor is there any evidence to support his allegation of retaliation. This matter was carefully investigated by OIOS and by the JAB, which both confirmed that the evidence obtained did not substantiate his claim that Mr B. influenced the members of the SG-P Panel. Moreover, after the complainant's involvement in the OIOS investigation, he in fact received two one-year extensions of his appointment. The IAEA objects to the complainant's request to produce documents, in particular the OIOS reports which are strictly confidential. He has been informed of the results of the investigation into Mr B.'s alleged misconduct. Concerning the other documents requested, it submits that they are irrelevant to the subject matter of this complaint.

D. In his rejoinder the complainant maintains his request for the production of documents, arguing that all the documents requested are relevant to the impugned decision and that the IAEA's claims of confidentiality therefore should not preclude their disclosure. The only reasons offered for not extending his appointment, namely performance issues and programmatic considerations, are not true. He points out that he only received excellent performance appraisals and that a person has been recruited to perform his responsibilities. The IAEA ought to have excluded Mr B. from the process to avoid any undue influence. The complainant points out that the IAEA does not deny the existence of the practice on which he relies. Rather, it submits that he

has failed to prove its existence. As the information required to prove this practice is exclusively within the IAEA's control, he has requested its production, failing which the Tribunal should draw the adverse inference that the practice does exist. He emphasises that international organisations have a duty to protect the identity of whistle-blowers and to protect them against any retaliatory actions. The IAEA failed to keep his identity confidential and allowed an employee implicated in the fraud investigation, Mr B., to retaliate against him. He adds that the decision not to extend his appointment amounts to a hidden disciplinary sanction.

E. In its surrejoinder the IAEA maintains its position in full. It explains that after the complainant's departure, there was a restructuring of the complainant's work-area, which was re-organized into two sections. It maintains that there were no programmatic reasons in the interest of the IAEA justifying the extension of his appointment. It reiterates that the complainant provides no evidence to prove the existence of an alleged practice of granting extensions beyond the normal tour of service. It adds that even if he could establish such a general or common practice, the Tribunal's case law has found that a general practice is not a binding rule. His allegation that the IAEA failed to keep his identity confidential is not supported by any evidence.

CONSIDERATIONS

1. The complainant commenced working with the IAEA on 28 April 2007 under a three-year fixed-term contract as the Section Head of Attended and Unattended Non-Destructive Assay (NDA) in the Division of Technical Support (SGIT), Department of Safeguards. Having regard to its terms, this contract would have concluded in April 2010. However on 28 January 2009, the complainant was offered a one-year extension from April 2010 to April 2011 that he accepted. On 9 December 2009 he was offered a further one-year extension from April 2011 to April 2012 that, again, he accepted. Under these arrangements, he was due to serve for five years

concluding on 27 April 2012. This is what happened and his contract was not extended beyond five years. The complainant alleges that the failure of the IAEA to extend his contract beyond five years was tainted by illegality.

2. It was possible for the complainant's contract to be extended beyond the five years though this was regulated by the Staff Regulations and Staff Rules and, in particular by Staff Rule 3.03.1 governing "Types of appointment". This rule identified three types of appointment. One was fixed-term appointments. These appointments were governed by paragraph (C) of Staff Rule 3.03.1. The general position was governed by Rule 3.03.1(C)(1) that provided that fixed-term appointments may be granted "for periods each not exceeding five years". The Rule went on to deal with the specific circumstances of various classes of staff. The first was Professional and higher categories staff. The complainant was such a staff member. Rule 3.03.1(C)(2) and (3) provided in relation to Professional and higher categories staff:

"(2) The initial Fixed-term appointment in the Professional and higher categories made on established posts shall normally be for a period of three years, whereby, normally, the first year shall be subject to a period of probation as set out in Staff Regulation 3.03 (c). This initial appointment may be extended for a period of two years, provided that there is a continuing need for the services of the staff member and that his/her performance and conduct continues to meet the required level. For all other initial Fixed-term appointments in the Professional and higher categories exceeding a period of one year, the first year shall be subject to a period of probation. A total of five years shall constitute the normal tour of service with the Agency.

(3) Extensions of fixed-term appointments in the Professional and higher categories beyond the normal five year tour of service referred to in subparagraph (2) above may be granted exceptionally for programmatic or other compelling reasons in the interest of the Agency, for up to two years, normally without any further possibility of extension, provided that there is a continuing need for the services of the staff member and that his/her performance and conduct continues to meet the required level."

3. Thus, having regard only to the Staff Regulations and Staff Rules, any extension of the complainant's contract beyond April 2012

(five years) would have been granted “exceptionally for programmatic or other compelling reasons in the interest of the Agency”.

4. In November 2010 a review was undertaken of the complainant’s position and whether his contract should be extended beyond five years. The review was undertaken by the Safeguards Professional Staff Panel (SG-P Panel), which concluded that there should be no extension of the complainant’s contract. The SG-P Panel was chaired by the Director General (according to a record of the meeting annexed to the IAEA’s reply). This decision was communicated to the complainant on 2 December 2010. The complainant, by letter dated 10 January 2011, sought review of this decision by the Director General. A consideration of this request was delayed because the complainant had earlier (on 7 January 2011) raised with the Office of Internal Oversight Services (OIOS) a claim that he had been the subject of retaliation because he had exposed procurement irregularities concerning the procurement of software for a particular project being undertaken within the IAEA. Central to this claim was the antipathy towards him of the Director of the Safeguards Information Management Division, Mr B. On the material before the Tribunal it is undoubtedly correct there was such antipathy. In his memorandum to OIOS of 7 January 2011 the complainant alleged, amongst other things, Mr B. had contacted other Directors prior to the meeting of the SG-P Panel indicating his strong opposition to the complainant’s contract extension.

5. It was only after the OIOS reported in May 2011, that the Director General made a decision on the complainant’s request to review the non-extension of his contract. On 11 July 2011 the Director General informed the complainant that his contract would expire according to its terms on 27 April 2012. At this time there was already on foot an appeal to the Joint Appeals Board (JAB) by the complainant about the decision not to extend his contract. That appeal was also in abeyance pending the OIOS report. The internal appeal process was revived after the OIOS report in May 2011 and on 19 December 2011, the JAB provided its report to the Director General. The JAB recommended that the Director General maintain his decision that the

complainant's contract "expire according to its terms on 27 April 2012". This recommendation was accepted by the Director General and communicated to the complainant on 18 January 2012. This is the impugned decision.

6. The complainant's case is that notwithstanding Rule 3.03.1(C)(2) and (3), the actual practice within the IAEA Department of Safeguards is that almost all P-5 Section Heads (which was the same level as the complainant) have their contracts extended beyond five years. This is relevant in two respects. The first is that the complainant argues that the decision not to extend his contract involved retaliation against him because he had played a significant role in the establishment of an OIOS investigation of procurement irregularities. The existence of the actual practice and the failure to follow it in relation to the complainant would support a conclusion that there had been retaliation against him. The second is that the complainant argues that he was the subject of unequal treatment. Unlike others in his position who had benefited from the actual practice, he was denied the benefit of the practice.

7. It is convenient to consider, at this point, whether there had been such a practice. In his brief the complainant describes the practice as summarised at the beginning of the preceding consideration. The complainant also sought in his brief discovery of a number of records including records that would show the number of contracts extended to at least seven years or more. In its reply the IAEA says, amongst other things, "[i]n order for the [c]omplainant to succeed on a claim that the Agency's practice entitled him to an extension, despite the terms of his appointment and the Agency's Rules, he first must prove the existence of that practice" and later "the [c]omplainant has failed to provide any evidence or information with regard to other staff members in comparable situations". In relation to the complainant's request for discovery of documents including documents recording the number of contracts extended to at least seven years or more, the IAEA submits that "the [c]omplainant has failed to indicate how the

production of the documents is relevant to the issues or necessary for fairly disposing of the case”.

8. In his rejoinder the complainant argues that the documents sought should be disclosed, and in the absence of such disclosure the Tribunal can draw adverse inferences against the IAEA. However the complainant does not say, with any particularity, what those inferences would be. In its surrejoinder the IAEA repeats its submission that the complainant has provided no evidence to prove the existence of the alleged practice. However it goes on to say that “even if the [c]omplainant could establish such a practice,” Tribunal precedent establishes that such a general practice is not a binding rule creating either an obligation on the Director General or conferring any right on the complainant. The IAEA referred, in this respect, to Judgment 431, under 4.

9. The approach of the IAEA is entirely unacceptable. The documents sought by the complainant and information about the existence of this alleged practice is, in substance, peculiarly within the knowledge of the organisation. While international organisations are entitled to defend proceedings before the Tribunal, and even do so robustly, it is singularly unhelpful and inappropriate for an organisation to refuse to provide documents sought by a complainant that are patently relevant to his case and then argue that the complainant has not furnished relevant evidence in support of that case. In the absence of a clear and unequivocal denial by the IAEA that the practice, as alleged, had not existed, an inference can be drawn, and is drawn, that there had been a practice as identified by the complainant, namely that almost all P-5 Section Heads have their contracts extended beyond five years.

10. However the complainant’s request for discovery concerned only the number of contracts extended to at least seven years or more. The complainant did not request documents that would have revealed the basis on which the extensions took place. Nor did he contend with any particularity that this practice operated in circumstances which would not have engaged Rule 3.03.1(C)(2) and (3). Thus the complainant has not sought to establish, both through argument coupled with documents

obtained through discovery, that extensions beyond five years had regularly occurred in the past notwithstanding that in all or some situations where it did, there were no programmatic or other compelling reasons for the extension. In the absence of evidence that extensions had been granted which were not in conformity with the basis identified in Rule 3.03.1(C)(2) and (3), an essential underpinning of the complainant's argument of unequal treatment is missing. That is because the complainant does not seek to establish there were programmatic or other compelling reasons warranting the extension of his contract. His argument is that there were no performance issues justifying a decision not to extend. However to compare his position with others to demonstrate inequality of treatment, the complainant would have to have shown that extensions were granted in the past even if there were not programmatic or other compelling reasons for the extension, or that there were programmatic or other compelling reasons justifying the extension of his contract. As this has not been demonstrated, his claim of inequality of treatment must fail.

11. The same is true of the complainant's case based on retaliation. It can be accepted that the complainant's role as a "whistleblower" may have influenced, negatively, the attitude towards him of members of the SG-P Panel. The JAB said it "could not completely exclude the possibility that whistleblowing had been a factor influencing the attitude of individual members of the Panel". This is tantamount to saying that there was some evidence which would justify such a conclusion. Indeed there is. However for the complainant to succeed, it would be necessary for him to show two things. Firstly that there were programmatic or other compelling reasons for the extension of his contract or arguable grounds there were and, notwithstanding that, the SG-P Panel, and ultimately the Director General, were influenced in their decisions not to extend the complainant's contract as a retaliatory measure for his activities as a "whistleblower". The second is that the decision actually made was not objectively justified and was motivated by bias, malice or ill will against the complainant. Not only has the complainant not demonstrated the existence of programmatic or other compelling reasons or even an arguable case that there were (beyond

pointing to the fact that his position as Section Head was filled after his departure), there is unchallenged evidence that his immediate supervisor (who was fundamentally supportive of the complainant obtaining an extension) believed there were good programmatic reasons for allowing the complainant's contract to expire. This is not a case of the type considered by the Tribunal in Judgment 1342, a judgment relied on by the complainant in his rejoinder, where the Tribunal found, under 12, that:

“The refusal to extend the complainant's contract on patently untenable grounds makes it ‘more probable than not’ that the decision was actuated by personal prejudice against him. It therefore cannot stand.”

12. Having regard to the foregoing discussion, the complaint should be dismissed. One unresolved issue is a dispute between the complainant and the IAEA about the discovery of documents (in addition to the documents discussed earlier about the number of previous contract extensions to at least seven years or more). They included the OIOS reports on the contentious procurement process and the misconduct of Mr B., the report on the design and implementation of the re-engineering project in relation to which the contentious procurement process had taken place, the extension request forms for the contract extensions of the complainant which were granted and the minutes of the SG-P Panel where those contract extensions were considered (the request concerning the contract extensions is ambiguous but appears to relate to the two extensions in 2009). Without analysing whether all or some of these documents should have been produced, they would ultimately have been of no decisive probative value given the failure of the complainant to demonstrate the existence of programmatic or other compelling reasons for the extension of his contract when it expired in 2012.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ