

D. M. (No. 2)

v.

IAEA

127th Session

Judgment No. 4089

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms M. D. M. against the International Atomic Energy Agency (IAEA) on 12 January 2017 and corrected on 15 February, the IAEA's reply of 29 May, the complainant's rejoinder of 4 September and the IAEA's surrejoinder of 13 December 2017;

Considering Articles II, paragraph 5, and VII 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 may be summed up as follows:

The complainant challenges the decision not to extend her appointment beyond the statutory retirement age.

On 15 December 2011 the complainant, who joined the IAEA in 1987, was offered an extension of her fixed-term appointment from 21 March 2013 to 31 August 2016, the last day of the month in which she would reach the statutory retirement age, which in her case was 60. The complainant accepted that offer on 18 January 2012.

On 12 February 2016 the Deputy Director General, Department of Safeguards (where the complainant was then working), sent to the acting Director of the Division of Human Resources (MTHR) an Interoffice

Memorandum in which he requested that the complainant be granted an extension of her contract for one year beyond the retirement age.

On 2 August 2016 the complainant requested the Director General to grant her an extension of her contract beyond the retirement age. She indicated that the “problems with [her] contract extension” were not disclosed to her. By a letter of 22 August 2016, the Director of MTHR, acting on behalf of the Director General, informed her that the “difficulties” in relation with her contract extension were related to the upcoming modification of the mandatory retirement age to the age of 65. The Director stated that she had never received any proposal of extension as required by the Administrative Manual, but that the Director General had nevertheless considered the complainant’s request and had decided to maintain the “decision” of 15 December 2011. She also explained why this decision was considered to be in the interest of the IAEA. Among other things, the Director noted that the complainant had been ordered by an Austrian court to pay an indemnity to her housekeeper as it had found that she had breached the minimum wage requirements for domestic staff under Austrian law. As she had not complied with the order, the IAEA had made deductions from her salary. While a settlement had eventually been reached with her housekeeper, the complainant had not shown the highest standards of integrity during her employment, as required by the applicable rules.

On 19 September 2016 the complainant, who had separated from service on 31 August, requested the Director General to review that decision. On 14 October 2016 the Director General replied that, contrary to what was previously stated, “a submission” had been made to the acting Director of MTHR at the relevant time, a fact that the current Director of MTHR was unaware of when she replied to the complainant’s request of 2 August. Nevertheless, he had decided to maintain his decision. He indicated that he authorised the complainant to refer the matter directly to the Tribunal. That is the impugned decision.

The complainant asks the Tribunal to order the IAEA to set aside the impugned decision and to order her reinstatement in her former post or an equivalent one. She claims material damages equivalent to all salaries, allowances and benefits she would have earned from her date

of separation to the date of her reinstatement, with interest from due dates. In the event that the Tribunal does not order her reinstatement, she claims material damages equivalent to what she would have earned if she had remained in service until 31 August 2021. She also claims material damages equivalent to the IAEA's contribution to the United Nations Joint Staff Pension Fund for the 12-month period following her separation, moral damages and costs. Lastly, she asks the Tribunal to order the IAEA to disclose various documents and to "remove any adverse material from [her] personnel file".

The IAEA requests that the complaint be dismissed as entirely unfounded.

CONSIDERATIONS

1. The complainant commenced working with the IAEA in 1987. In December 2011 she was informed in writing that she would be separating from the Agency on 31 August 2016, being the end of the month in which she would reach the retirement age of 60 years.

2. In due course, attempts were made to have the IAEA extend her appointment beyond the age of 60. The IAEA decided not to extend her appointment and she separated from the IAEA on 31 August 2016. The then applicable provision in the Staff Regulations was Regulation 4.05, which said:

"The mandatory age of separation for staff members shall be as follows:

[...]

(iii) Age sixty years in the case of staff members appointed before 1 January 1990.

The Director General may, in the interests of the Agency, extend these age limits in individual cases."

3. The relevant events immediately preceding and following the complainant's separation may be summarised as follows. On 29 July 2016, the complainant received a letter from MTHR informing her of the clearance steps to be taken in view of her upcoming separation.

On 2 August 2016 the complainant wrote to the Director General requesting that he approve an extension of her appointment for one year beyond 31 August 2016. By letter dated 22 August 2016 the complainant was informed by the Director of MTHR, on behalf of the Director General, that a decision had been taken not to extend her appointment. Shortly thereafter the complainant sought to challenge that decision including by seeking, in a letter dated 19 September 2016, a review of the decision. In the result, by letter dated 14 October 2016, the Director General adhered to his decision not to extend her appointment. This is the decision impugned in these proceedings. Also by that letter, the Director General granted the complainant's request to appeal the decision directly to this Tribunal.

4. The complainant's legal arguments may be summarized as follows. Firstly, no reasons or adequate reasons were given in relation to aspects of the reasoning of the Director General in deciding not to extend the appointment. Secondly, there was a fundamental breach of procedures attending the impugned decision. Thirdly, the complainant was not given an opportunity to address or answer the case relied upon for deciding not to extend the appointment. Fourthly, that decision not to extend "amount[ed] to a violation of the principle of double jeopardy". Fifthly, the decision not to extend was tainted by mistakes of fact. Lastly, the IAEA breached its obligation to treat the complainant in good faith and mutual trust. The complainant also added an argument that she was not given adequate notice of the decision.

5. It is important to focus on what is truly in issue in these proceedings. That is because the IAEA, in its reply, makes two concessions. The first is that the IAEA had the programmatic needs and the funds to retain the complainant. The second is that the complainant had performed satisfactorily in her role. It seeks to defend the decision not to extend the complainant's appointment based on her conduct, invoking, by analogy, the criteria in the Staff Rules (Rule 3.03.1(F)(2)-(3)) for the extension or renewal of a fixed-term appointment. Two criteria relied upon by the IAEA and identified in the Rule were, firstly, "[t]he staff member's conduct" and, secondly, that "the conduct and performance of the

staff member must have been of the highest degree of excellence”. In addition, it relies on the express criterion in Staff Regulation 4.05 referred to earlier that an extension beyond retirement age can be granted if it is in “the interests of the Agency” together with the case law of the Tribunal indicating that, when considering those interests, the private conduct of a staff member can be relevant, including the settlement of private financial obligations (see Judgments 2944, consideration 48, 872, consideration 8, and 53, consideration 7).

6. At the core of the impugned decision was the conduct of the complainant in her dealings with her domestic staff and her conduct in responding to and following a judgment of 4 March 2013 of the Vienna Labour and Social Court against her requiring her to pay a person who had been her household help, the sum of 30,493.03 euros. The Court found the complainant had breached the minimum wage requirements for domestic staff under Austrian law. The Austrian Supreme Court in a judgment of 27 February 2014 rejected the complainant’s appeal against that judgment. No voluntary payments were made by the complainant to satisfy this judgment debt before a settlement was effected between the parties and notified to the Agency in early August 2015, though, well after the judgment was given, periodic deductions were made from her salary to satisfy the debt. Before the settlement the complainant, it can fairly be said, resisted attempts to compel payment including, in the context of a request to the IAEA in the latter part of 2014 to deduct amounts from the complainant’s salary to satisfy the judgment debt, the complainant saying that she was “innocent of the charges imputed” and that “[t]here is no doubt that the circumstances of the court decision go beyond the rule of law and are politically influenced”.

7. There is no doubt, in the Tribunal’s view, that it was open to the Director General to view the complainant’s conduct giving rise to and the subsequent conduct in relation to the judgment debt as falling short of the standards demanded of international civil servants. Accordingly, and subject to the various legal arguments of the complainant, it was open to the Director General to conclude it was not

in the interests of the Agency to extend the complainant's appointment beyond the mandatory retirement age.

8. In considering the complainant's arguments, it is convenient to recall that the Tribunal has said of the power to extend an appointment beyond retirement age (in relation to the IAEA) that "the decision whether or not to grant [such] 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" (see Judgment 2377, consideration 4) and, in the context of another organisation, that "[s]ince the career of a member of staff normally ends automatically when that person reaches retirement age, any such prolongation is, by definition, an exceptional measure" (see Judgment 3285, consideration 9).

9. The first argument is that no reasons or adequate reasons were given in relation to aspects of the reasoning of the Director General in deciding not to extend the appointment. This argument concerns an observation made on behalf of the Director General in the letter of 22 August 2016, referring to the "upcoming change in the mandatory retirement age to 65". It is true that the relevance of that change is not made clear in the letter. However on a fair reading of both that letter and the letter of 14 October 2016 containing the impugned decision, the reason relied upon was the conduct of the complainant. Both letters provide an adequate explanation and reasons for the ultimate decision not to extend the complainant's appointment beyond retirement age. This argument is unfounded and is rejected.

10. The second argument is that there was a fundamental breach of procedures attending the impugned decision. There are two elements to this argument. One is that the Joint Advisory Panel on Professional Staff (JAPPS) was bypassed and particularly so in relation to a proposal submitted in February 2016 by the Deputy Director General, Department of Safeguards (where the complainant was then working), that the complainant be granted an extension beyond retirement age for a period of one year. However that proposal was withdrawn within days though,

inadvertently, it continued to be processed. Ultimately, the withdrawal was effectuated within a month and the proposal was never submitted to the Director General. In any event, the IAEA has established to the Tribunal's satisfaction both that there was no requirement in any normative legal document that the JAPPS be involved nor that it was involved as a matter of practice. The second element was that the February 2016 proposal was "blocked" by MTHR. The complainant has not established that, as a matter of fact, this occurred and, indeed, the material advanced by the complainant would not even warrant an inference that, *prima facie*, this might have occurred. This argument is unfounded and is rejected.

11. The third argument is that the complainant was not given an opportunity to address or answer the case relied upon for deciding not to extend her appointment. She refers to consideration 83 of Judgment 2861, which concerned a staff member whose contract was not renewed because of misconduct. The Tribunal observed that in such a situation "the obligation of good faith requires that an organisation at least give the staff member concerned the opportunity to answer the matters levelled against him or her". The IAEA resists the suggestion that the decision not to extend the complainant's appointment was based on a finding of misconduct. However, in substance it was. Moreover, as the complainant points out, the Office of Internal Oversight Services (OIOS) investigated the complainant's conduct in relation to the judgment debt and said in a letter to the complainant dated 16 June 2016: "OIOS has found no evidence to substantiate a finding that you have violated the Standards of Conduct, and therefore this matter is being closed unsubstantiated". It should be noted that this conclusion appears to have been substantially influenced by the fact that, by mid-2016, the complainant had presented evidence that she had made all the necessary arrangements to satisfy the outstanding judgment debt.

12. It is unnecessary to determine whether, in a case such as the present, the IAEA had an obligation as a matter of law to give the staff member an opportunity to be heard. In its reply, the IAEA argues that as a matter of fact, the complainant was given such an opportunity.

It points to the complainant's response to the initial advice that her appointment would not be extended in the letter of 22 August 2016. In that response, by letter dated 19 September 2016, the complainant requested the Director General to reverse the decision not to extend her appointment and advanced reasons why it should be reversed. The complainant, in fact, canvassed the issue of whether she had acted at the appropriate high standard and argued she had. In her rejoinder, the complainant does not seek to challenge this analysis advanced by the IAEA. The Tribunal is satisfied that, as a matter of fact, the complainant had the opportunity to answer the case underpinning the decision not to extend her appointment, before the impugned decision was made. This argument is unfounded and is rejected.

13. The fourth argument is that the decision not to extend "amount[ed] to a violation of the principle of double jeopardy". The complainant refers to Judgment 2861, consideration 50, in which the Tribunal said "a person [...] [cannot] be subject to two separate and distinct adverse administrative decisions for the same conduct". The short answer to this argument is that there was no adverse administrative decision concerning the complainant referable to the judgment of the Austrian court and what followed, before the decision not to extend her appointment was made. There were no two separate and distinct adverse administrative decisions. This argument is unfounded and is rejected.

14. The fifth argument is that the decision not to extend the complainant's appointment beyond retirement age was tainted by mistakes of fact. Those facts centrally concerned the period for which the judgment debt was outstanding. In particular, the complainant challenges the Director General's observation in the impugned decision that the "[...] debt had remained unresolved for several years" prior to the settlement agreement in mid-2015. The debt arose from a judgment given in early March 2013. Agreement to settle was reached in August 2015. This was a period of a little under two and one half years. The word "several" normally denotes not a large number but more than two. It may be correct to say that the period in question was not "several years". But such a misdescription of the period is *de minimis*.

The substance of the complainant's conduct was her failure to satisfy the judgment debt over a lengthy period in which she resisted satisfying the obligation to pay her employee the amount due. Any error in the characterisation of the period for which the debt was outstanding was immaterial in the face of the fact that, on any view, it was a lengthy period. No other potentially material erroneous finding of fact was identified by the complainant. This argument is unfounded and is rejected.

15. The complainant argues the IAEA breached its obligation to treat her in good faith and mutual trust. Nothing of substance is raised on this point and the argument is unfounded and is rejected.

16. The complainant also advanced an argument that she was not given adequate notice of the decision not to extend her appointment. This argument is based on the premise that the complainant was informed only nine days before the expiry of her appointment of the decision not to extend it. However, the complainant was aware from at least late 2011 or early 2012 that she would be separated from the IAEA upon reaching retirement age. Indeed in late July 2016 she was informed by MTHR of the clearance steps to be taken in view of the upcoming separation. The complainant's argument that she was not given adequate notice proceeds on a false premise. It is, in effect, that she had a reasonable expectation of securing an extension because earlier in 2016 she had been advised by her Director that she could expect an extension and, in fact, was scheduled for inspections into September 2016. But as the IAEA points out, the decision to extend was solely at the discretion of the Director General, and the case law of the Tribunal establishes that "[e]ven though colleagues of the complainant's thought him suitable and recommended extending his appointment, the decision was not theirs to make" (see Judgment 1038, consideration 4). While those observations concerned the extension of an appointment (without an impending retirement), they are apt to apply in a case such as the present. The complainant's argument is unfounded and is rejected.

17. One other matter should be mentioned. In her pleas in her brief, the complainant asserts other staff members factually and legally in the same position were granted extensions. Thus, so the argument goes,

the complainant was the subject of unequal treatment. The factual foundation for this assertion is what is said to be an admission by the Director General. It is difficult to discern where and how the admission was made. But in any event, the argument presupposes the complainant was factually and legally in the same position as others who were granted extensions. As the IAEA points out, correctly, this presupposition is not borne out by the evidence. The complainant's individual circumstances founded the decision not to extend her appointment. No material is provided in the complainant's pleas which is even suggestive of the fact that one or a number of other staff members were in the same or similar circumstances. This argument is unfounded and is rejected.

18. In the result, the complainant has not made out any basis for the relief she seeks based, as it is, on the assumption that the decision not to extend her appointment beyond her retirement age was legally flawed. The complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 26 October 2018,
Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ