Registry's translation, the French text alone being authoritative.

SEVENTY-FOURTH SESSION

In re FILATKIN

Judgment 1230

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Anatoly Filatkin against the International Atomic Energy Agency (IAEA) on 23 December 1991 and corrected on 8 January 1992, the IAEA's reply of 16 March, the complainant's rejoinder of 21 July and the Agency's surrejoinder of 30 September 1992;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Regulations 3.03 and 12.01 and Rule 12.01.1(D)(1) and (4) of the IAEA's Provisional Staff Regulations and Staff Rules;

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. The complainant, a citizen of the former Union of Soviet Socialist Republics (USSR) who was born in 1934, joined the IAEA in January 1977 at grade P.5, step 1. He started in the Development and Technical Support Division and was transferred in June 1977 to the Division of Operations B in the Department of Safeguards. In January 1978 he was given a fixed-term appointment and in June 1979 became head of the section covering central and northern Europe.

He left on 29 September 1981 to serve as an expert with the Soviet Union's state committee on the uses of atomic energy.

In December 1984 he came back under a two-year fixed-term contract, at grade P.5, step 6, as Head of the Standardization Section of the Standardization, Training and Administrative Support Division. In April 1989 he was appointed head of Section 3 of the Division of Operations C in the Department of Safeguards.

In a report signed on 9 and 10 August 1989 the Director of the Division of Operations C and the Deputy Director-General in charge of the Department of Safeguards proposed extending his contract by five years up to 31 January 1994, the date of his retirement. In the autumn of 1989 the Head of the Recruitment Unit of the Division of Personnel asked him to see with his country's Permanent Mission in Vienna whether his contract might be extended. There was apparently no word of the Mission's reply. So the competent body, the Joint Committee to Consider Appointments, Promotions and Extensions of Professional and G.8 Staff, decided on 7 December 1989 to adjourn the matter to its next meeting.

In a report signed on 26 and 27 February 1990 the complainant's supervisors again recommended a five-year extension but stated that it was their "understanding that Mr. Filatkin may be available only through the end of 1991". By a memorandum of 28 May 1990 the Head of the Recruitment Unit informed the Director of Personnel that the complainant had told him over the telephone that he would be available "as long as the Agency wishes". But the memorandum also said against his name "(Available for 6 months only)".

According to the record of its meeting of 7 June 1990 the Joint Committee to Consider Appointments, Promotions and Extensions of Professional and G.8 Staff noted that "according to the information received from Mr. Filatkin, he would only be available until the end of June 1991".

The Director of Personnel told the complainant by a letter of 20 June 1990 that the Director General had decided to extend his contract, which was to expire on 31 December 1990, by six months to 30 June 1991.

By a memorandum of 31 May 1991 the complainant asked the Director General to reconsider, under the procedure in Rule 12.01.1(D)(1)* (*The Rule reads: "A staff member who, under the terms of Provisional Staff Regulation

12.01, wishes to appeal against an administrative decision, shall, as a first step, address a letter to the Director General, requesting that the administrative decision be reviewed or reconsidered by him. Such a letter must be sent within two months from the time the staff member received notification of the decision in writing." Under Regulation 12.01 of the Provisional Staff Regulations, a staff member may allege non-observance of the terms of his appointment when appealing against an administrative decision.), the decision not to extend his contract to 31 January 1994, the date his supervisors had twice recommended. He observed that he had just learnt that the decision to extend his contract by only six months had been taken on the assumption that he had said he was available only until June 1991, though he had told the Head of the Recruitment Unit that he would be free as long as the Agency wished. He added that an extension of two years and six months, up to the age of retirement, would enable his daughter to get through her studies at the University of Vienna and, even more important, much increase his pension. Moreover, because there were many vacancies in the Division of Operations C such an extension would be in the Agency's own interests too.

The Director General replied in a letter of 10 June 1991 that, taking into account the information provided in the complainant's memorandum, he saw no reason to reconsider the decision. But by a letter of 14 June the Director of Personnel informed the complainant that the Director General had decided to offer him another three months, to 30 September 1991.

On 9 July the complainant appealed to the Joint Appeals Committee against the Director General's decision of 10 June as amended by the letter written by the Director of Personnel on 14 June 1991 on the Director General's behalf.

In its report of 23 August 1991 the Joint Appeals Committee held:

(a) The decision appealed against was the one of 20 June 1990, not the one of 10 June 1991. The complainant had made a request for review on 31 May 1991, the two-month time limit in Rule 12.01.1(D)(1) had passed, and so his appeal should ordinarily have been declared irreceivable. The Committee nonetheless decided to treat it as receivable on grounds of "exceptional circumstances".

(b) The decision appealed against was based partly on wrong and partly on unreliable information.

(c) It was not clear that in handling the case the Agency had not given priority to the wishes of the Soviet Mission in Vienna.

The Committee accordingly recommended that the Director General reconsider his decision.

By a letter of 26 September 1991 the Director General told the complainant that he had rejected the Committee's recommendation for the following reasons. The complainant had, he observed, been informed on 20 June 1990 of the decision to extend his contract by only six months - to 30 June 1991 - yet had signed the "Extension Letter" on 28 September 1990 without demur. That seemed to imply that the extension had been "in accordance with [his] availability at that time". By the time he challenged the decision, nearly a year later, the Agency had taken steps to fill his post and his successor had been appointed. It was therefore impossible to change the arrangements already made and there was no suitable position to which he could be appointed; but his appointment was extended by one month, to 31 October 1991, to give him time "to proceed with necessary clearance formalities".

That is the decision impugned.

B. The complainant submits that the impugned decision is unlawful for three reasons.

First, the Agency is in breach of the general principle that reasons must be given for any decision not to renew a contract. It has never told him why the Director General decided in June 1990 not to extend his appointment up to the date of his retirement. Had the Director General explained in his letter of 20 June 1990 that the Joint Committee to consider Appointments, Promotions and Extensions of Professional and G.8 Staff understood him to be free only until June 1991, he could have set the record straight, since that was not what he had said to the Head of the Recruitment Unit.

Secondly, the impugned decision rests on a mistake of fact. He stated quite plainly that he would stay on as long as the Agency wished: on that score the memorandum of 28 May 1990 from the Head of the Recruitment Unit to the Director of Personnel is unambiguous. What that memorandum does not reveal is who said that he would be free

for only six months. In any event he may not be held liable for the mistake. The Soviet Mission's opposition to extension of his contract did not mean that he would be unavailable after June 1991. It was quite clear from what he said to the Head of the Recruitment Unit that the complainant was not willing to comply with instructions from the Mission. Lastly, when his case was in such a muddle why did the administration not ask him to shed light on it? The mistake of fact is a serious one because it underlies both the recommendation by the Joint Committee and the Director General's decision.

Thirdly, there was misuse of authority. According to the Tribunal's case law the Agency ought to have found a sound reason for not extending his contract up to retirement. The written evidence shows that there was none: he had a good record, his conduct was satisfactory, and his post had not been abolished. So the main or even sole reason why his contract was not extended up to retirement was that the Agency was kowtowing to the Soviet Mission, in breach of the fundamental principle of the independence of international civil servants.

Lastly, the administration refused to let him see some privileged documents that were put to the Joint Appeals Committee. He asks that they be disclosed because they may prove indispensable to his case.

He seeks the quashing of the impugned decision, reinstatement as of the date of separation and the extension of his contract up to the date of his retirement or, failing that, a suitable award of damages for material injury, and awards of damages for moral injury and of 54,000 French francs in costs.

C. In its reply the Agency challenges the receivability of the complaint. It points out that the decision which the complainant asked to have reconsidered, namely that his contract be extended by six months, was notified to him on 20 June 1990 and he accepted the extension on 28 September 1990. His request for review was not put to the Director General until 31 May 1991, almost eleven months after the offer had been made and eight months after he had accepted it. He lodged his appeal under Rule 12.01.1(D)(1) on 9 July 1991. The Joint Appeals Committee noted that his appeal was "beyond the time limit" and was "a priori time-barred". So he did not meet the requirements of Article VII of the Tribunal's Statute.

In reply to the allegation that the decision of 20 June 1990 was unsubstantiated the Agency points out that the text explained that "this extension shall not be deemed to carry any expectations of or rights to another extension, renewal or conversion to another type of appointment". The complainant was familiar with that clause because he not only signed the text but had already held several contracts with the same rider. Moreover, the Agency's practice from the outset has been to employ most of its technical and scientific staff on fixed-term contracts. That is in line with the principle - laid down in Regulation 3.03 - that "its permanent staff shall be kept to the minimum". There is no evidence that the complainant sought information from anyone competent on the reasons for the limited extension either in the three months he was given in which to sign the extension or even thereafter. Besides, the reasons for the contested decision are in the records of the Joint Committee to Consider Appointments, Promotions and Extensions of Professional and G.8 Staff. The text is in the complainant's personal file, which is in the Division of Personnel and to which he had access.

The Agency contends that it made no mistake of fact over his availability. It asked him as early as November 1989 whether he would be available for a two-year extension. The Joint Committee was informed in June 1990 that he would be free until June 1991 and the complainant's remark to the competent officer in the Division of Personnel was taken to be in line with his "assumed availability". In agreeing to the six-month extension offered on 20 June 1990 he must have realised that what he had said had been taken to mean he was free "until the end of June 1991".

The Agency denies abusing its authority or acting against its own interests. Its policy and custom are not to seek sponsorship or approval from the government of a staff member's country for any extension of contract. It is up to the staff member to make it plain whether he is free to accept it. So in asking the complainant to say in good time whether he was available for an extension the Agency acted in keeping with established procedure and practice and in the interests of sound management.

Lastly, the material the complainant wants to have disclosed contains privileged information that has no bearing on this case, but the Agency will produce it if the Tribunal so orders.

D. The complainant observes in his rejoinder that in addressing the issue of receivability the Agency fails to point out that in his case the Joint Appeals Committee availed itself of Rule 12.01.1(D)(4), which allows it to waive the time limit in exceptional circumstances. The relevant circumstances were that he failed to challenge the decision of

20 June 1990 at once because he did not realise that it rested on a mistake of fact and his supervisors had pledged that he might stay on after the proposed six months. The Agency is also misreading Article VII of the Tribunal's Statute: it is the Director General's final decision of 26 September 1991 that he is challenging, and he duly lodged his complaint against it within the ninety days prescribed in VII.

On the merits the complainant submits that the Agency has not answered his argument that there were no reasons given for the impugned decision. Although there is ordinarily no entitlement to renewal of contract, non-renewal is not automatic: the reasons for it must be stated and are subject to judicial review. The Agency never explained why it was not extending his contract up to retirement.

The complainant maintains that there was a mistake he cannot be blamed for over his availability. It came about in the contacts between the Agency and the Soviet authorities, though he himself had clearly stated that he wanted to stay on until retirement.

He repeats that there was abuse of authority and submits that it would be borne out by the privileged papers which the Agency has refused to produce but which he knows about. Some of them, of which he reveals the contents, prove that the Agency did consult the Soviet Government, in breach of the independence of international civil servants and contrary to its professed policy and its own interests

E. In its surrejoinder the Agency submits that the complainant's rejoinder contains no new issues or pleas.

On receivability it argues that the Joint Appeals Committee's report is ambiguous on the question of time limits and maintains that the impugned decision, having been taken in June 1990, was immune to challenge by May 1991.

As to the merits it questions the complainant's statement that he had no idea what the reasons might have been for the limited extension and rejects his argument that the reasons should have been spelled out in the offer. It presses its plea that there was neither mistake of fact nor abuse of authority.

CONSIDERATIONS:

1. The complainant, a citizen of the former Soviet Union, held a fixed-term contract as a head of section with the International Atomic Energy Agency. His appointment was to expire on 31 December 1990, but on 20 June 1990 he was granted a six-month extension, to 30 June 1991. On 31 May 1991 he submitted to the Director General of the Agency a request for review and for extension of his contract up to the age of retirement, 31 January 1994. By a letter of 10 June 1991 the Director General rejected his request. By a letter of 14 June the Director of the Division of Personnel extended his contract by three months, to 30 September 1991, but refused to grant him any more. He appealed to the Joint Appeals Committee.

The Committee held that his appeal was out of time but waived the time bar. It concluded discussion of the special circumstances of his case with a recommendation to the Director General for review of his position. The Director General nevertheless upheld his decision of 26 September 1991, though he granted one last extension of a month, to 31 October 1991.

The complainant seeks the quashing of the Director General's refusal to extend his appointment to the age of retirement. He submits that he was given no reasons for the decision of 20 June 1990 to extend it by only six months; that that offended against the general principles that should have applied; and that there was a mistake of fact and abuse of authority. Besides the quashing of the decision he seeks reinstatement or, failing that, material damages. He claims awards of moral damages and costs.

Receivability

2. The Agency submits that his complaint is irreceivable. It points out that, though he had notice of the decision of 20 June 1990 the same day, he did not make his request for review until 31 May 1991, long after the time limit in the Provisional Staff Regulations and Rules.

Rule 12.01.1(D)(1) reads:

"A staff member who, under the terms of Provisional Staff Regulation 12.01, wishes to appeal against an administrative decision, shall, as a first step, address a letter to the Director General, requesting that the

administrative decision be reviewed or reconsidered by him. Such a letter must be sent within two months from the time the staff member received notification of the decision in writing."

In the Agency's submission the complainant did not meet that two-month time limit and has failed to exhaust the internal means of redress; his complaint is therefore irreceivable under Article VII of the Tribunal's Statute.

3. Rule 12.01.1(D)(4) says that though the Committee shall not ordinarily entertain an appeal out of time it "may waive the time limits in exceptional circumstances". In the complainant's case the Committee decided to waive the time limit because of the nature of his appeal and because not until May 1991 had he been told the reasons for the challenged decision; in its view those were "exceptional circumstances" warranting the waiver.

Is the Committee's ruling binding on the Agency and may the Agency therefore no longer plead the time bar?

The rule is that for his complaint to be receivable the staff member must not only meet the time limit in Article VII(2) of its Statute but have properly followed the internal appeal procedure.

In this case the internal procedure was duly followed: although the complainant's request for review was out of time the Committee chose to exercise the discretion the rules confer on it and waive the time limit.

The Agency submits that the Committee's ruling on the issue is wrong, "ambiguous" and not binding on it.

Only where the Committee's appraisal of the circumstances is flagrantly wrong or based on plainly mistaken facts may the Director General disregard it, and even then his decision will be subject to review by the Tribunal.

Those conditions are not met here. The Committee held that the complainant had delayed because not until May 1991 had he discovered the reason for not extending his contract to 1994 to be a mistake about his wishes. He had told the Agency that he would stay on as long as it wanted, whereas it had based its decision on the assumption that he had himself said he was available only until the end of June 1991. The Committee was guilty of no obvious mistake or misrepresentation of fact in holding the circumstances to be "exceptional" within the meaning of 12.01.1(D)(4).

The conclusion is that the objection to receivability fails.

The merits

4. The complainant has three pleas: he was given no reasons for the impugned decision; it rests on a mistake of fact; and there was abuse of authority.

The Tribunal will take up neither the first nor the third plea since it upholds the second one, and that alone warrants setting the decision aside.

A decision by an international organisation to grant only a short extension of appointment or none at all, though it is discretionary, must still be based on correct findings of fact. The evidence shows - in particular the records of a meeting of the competent committee - that the decision to grant the complainant only a short extension rested on the assumption that he himself had said he would be free "only until the end of June 1991". Yet a memorandum of 28 May 1990 informed the Director of the Division of Personnel that he had said he would stay on as long as the Agency wanted.

Even supposing that the defendant is right in finding his exact meaning unclear, what he did make plain was that he wanted to remain available for service and that in any event the Agency might not base its decision on his supposed statement that he did not.

It tries to get round that by making out that it took his remark about availability to imply consent to the short extension proposed and to mean "until the end of June 1991".

His words do not bear that construction. He obviously had no wish to limit the length of his appointment, especially since he knew that his supervisors had recommended five years and he might expect to carry on with the Agency until retirement. As the Committee held, the impugned decision misread his wishes and was therefore based on a mistake of fact. The more is the pity because the Agency must have known that the Government of the

USSR, with which its officers had been in touch, wanted him to go back home. That being so, it ought to have paid especial heed, for the sake of the independence of the international civil service, and his own in particular, to finding out just what he really intended and conveying it accurately to the competent committee.

The conclusion is that the impugned decision cannot stand.

5. But the complainant is not on that account entitled to the extension of his appointment. The Agency must reconsider in the light of this judgment whether to grant him extension up to 31 January 1994 and, if it decides not, must say why not. At all events it must pay him damages in an amount equivalent to the salary and allowances he would have been paid in the period from 1 November 1991 up to the date of the new decision to be taken and restore his pension entitlements for the same period.

For the moral injury, which the Agency does not really question, he is awarded 20,000 French francs in damages.

He is awarded the same amount in costs.

6. In view of the foregoing his claim to the disclosure of several items of evidence serves no purpose.

DECISION:

For the above reasons,

1. The Director General's decision of 26 September 1991 refusing to extend the complainant's contract beyond 31 October 1991 is set aside.

2. The complainant is sent back to the Agency for a new and substantiated decision on the extension of his contract.

3. The Agency shall pay him damages in an amount equivalent to the salary and allowances he would have been paid in the period from 1 November 1991 to the date of the new decision.

4. It shall restore his pension entitlements for the same period.

5. It shall pay him 20,000 French francs in moral damages.

6. It shall pay him 20,000 French francs towards 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.

(Signed)

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

Updated by PFR. Approved by CC. Last update: 7 July 2000.