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

EIGHTY-FIFTH SESSION

***In re* Trofimov**

Judgment 1735

The Administrative Tribunal,

Considering the complaint filed by Mr Anatoly Trofimov against the International Atomic Energy Agency (IAEA) on 15 September 1997 and corrected on 6 October, the Agency's reply of 12 December, the complainant's rejoinder of 13 January 1998 and the IAEA's surrejoinder of 20 February 1998;

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

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. According to paragraph 49(i) of section 7, part II, of the Agency's Administrative Manual former members of its staff who get a retirement benefit from the United Nations Joint Staff Pension Fund or some other recognised pension scheme may qualify for participation in its After-service Medical Insurance Plan (AMIP). According to paragraph II.7.51(i) of the Manual the IAEA contributes to the cost of membership of AMIP for any former staff member who has participated "for ten consecutive years prior to retirement" in its Full Medical Insurance Plan (FMIP), the Austrian Health Insurance Scheme (Gebietskrankenkasse) (AHIS) or the Supplementary Medical Insurance Plan (SMIP).

According to Staff Rule 8.03.1 all staff members must have medical insurance coverage either under one of the Agency's own schemes or, as laid down in paragraphs II.7.43 and 44, under some other scheme, provided that on recruitment the official makes a formal request backed up by documentary evidence of such coverage.

The complainant is a Russian who was born in 1936. He joined the Agency's staff in February 1986 as head of its Russian translation section. He held a fixed-term appointment for three years at grade P.5. The Agency extended his appointment four times, the last until 30 April 1997, when he retired.

Before joining the IAEA he had been employed from 1966 to 1971 and again from 1977 to 1982 by the United Nations. To validate such prior contributory service with the United Nations Joint Staff Pension Fund he filled up a form headed "Statement on Insurance Matters" on 7 May 1986. The first four sections - where he was supposed to say whether he wanted to join any of the Agency's schemes for medical insurance, including the FMIP, AHIS and SMIP - were struck out.

On 1 January 1989 he joined the FMIP. He sent a memorandum on 22 October 1996 to the Director of the Division of Personnel about the terms of his joining AMIP on retirement. He asked whether the Agency would be contributing to the cost of his participation under Manual paragraph II.7.51. He had not, as that paragraph required, paid into the FMIP for ten years since he had been prevented from joining a medical insurance scheme by the Soviet Government until 1 January 1989, but he did have more than 10 years of service with the Agency.

In a memorandum of 25 February 1997 the Director of Personnel told him that since he had himself applied for exemption from the Agency's insurance schemes there could be no waiver of the requirement of 10 years' prior membership of the FMIP. By a letter of 14 March the complainant asked the Director General to review the Director's decision. The Director General replied in a letter of 15 April confirming the decision. The complainant appealed to the Joint Appeals Board on 28 April. In a report dated 7 July 1997 the Board recommended rejection.

By a letter of 10 July 1997 the Director General informed the complainant that he endorsed the recommendation by the Board. That is the decision under challenge.

B. The complainant submits that the impugned decision is unlawful. He has two main pleas. The first is breach of Staff Rule 8.03.1 and of the procedures set out in paragraphs II.7.43 and 44 of the Manual. Although it had no evidence to suggest that he had outside medical coverage the Agency neither asked him whether he had any nor offered him membership of its own scheme. The form that the Agency sent him in 1986 to validate earlier contributory service came with the first four sections already crossed out; so his signature applied to pension matters only.

Secondly, he pleads breach of equal treatment. As a citizen of the Soviet Union he did not have the same entitlement to health care as nationals of other member States. What is more, Soviet citizens employed by United Nations agencies in Geneva took part in their own organisation's health scheme, whereas such citizens employed by agencies in Vienna did not.

The complainant asks the Tribunal to set aside the impugned decision and order the IAEA to pay its share of his participation in the AMIP or award him "other compensation".

C. The Agency replies that its contributions to AMIP for the complainant would amount to 152 United States dollars a month. By signing the "Statement on Insurance Matters" in May 1986 the complainant decided not to take part in any of its own medical insurance schemes. He himself points out that the Government of the Soviet Union did not allow Soviet citizens employed in organisations in Vienna to join such health plans until January 1989, and the Agency could not have enrolled him without his express consent. So it was not to blame for his failure to join. In any event the Soviet Government had assured it that he had adequate coverage in his own country. Even if on recruitment he "had followed the relevant rules and applied for permission to continue", as before, to take advantage of social security provision available from the Soviet Union, his position would have been no different.

D. In his rejoinder the complainant corrects what he sees as factual mistakes and rebuts arguments in the reply. If, as the defendant makes out, his signature on the insurance form constituted refusal of an offer to enrol in the Agency's health schemes, it would have had a duty to seek documentary evidence of alternative coverage. It has not put forward any valid reasons for departing from its own rules. He presses his claims.

E. In its surrejoinder the IAEA says that his rejoinder offers no new facts or arguments to make it change its position. It had no need to produce documentary evidence to show that the circumstances which kept him from joining its medical plan were beyond its control: he himself observes that the Soviet Government banned such participation until January 1989.

CONSIDERATIONS

1. The complainant, who is Russian, used to work in the civil service of the Soviet Union and in the secretariat of the United Nations. The International Atomic Energy Agency (IAEA) recruited him on 17 February 1986 to head its Russian translation section. It regularly extended his appointment until 30 April 1997, when he retired. He had contributed from 1966 to 1971 and from 1977 to 1982 to the United Nations Joint Staff Pension Fund. On recruitment he resumed those contributions, but he expressed no interest in joining the Agency's Full Medical Insurance Plan (FMIP), the reason being that Soviet citizens, including those employed in the international civil service already had their state medical insurance coverage. Not until January 1989, when things in that country seemed to have changed, did he and other Soviet citizens join the FMIP.

2. In October 1996, some six months before he was to retire, he looked into the matter of his entitlement to coverage after retirement. In a memorandum of 22 October to the Director of Personnel he asked that the Agency contribute to the cost of his membership of its After-service Medical Insurance Plan (AMIP). But in a reply of 25 February 1997 the Director refused: he had not been a member of the FMIP for at least ten years; paragraph II.7.51(i) of the Manual required that a former staff member should have had ten consecutive years' membership of the Agency's health scheme to qualify for contributions from the Agency to the AMIP on his behalf; and there would be no exception to that rule.

3. On 14 March 1997 the complainant asked the Director General to review that decision. He argued that he had never claimed exemption from FMIP and that, though the IAEA, which he had served for 11 years, had done nothing to clear up his status before 1 January 1989, he was not liable on that account. The Director General disagreed and upheld the refusal by a decision of 15 April 1997. The complainant then appealed to the Joint Appeals Board under Staff Rule 12.01.1(c)(1).

4. The Board met five times to consider his case. It concluded that, though the Administration had not strictly applied the procedure laid down in the rules for exempting him - and the other staff members from the Soviet Union in like case - from participation in the health insurance scheme, it was he himself who had chosen not to join and the Agency had no means of compelling him to leave his national insurance scheme for its own. By a letter dated 10 July 1997 the Director General endorsed the Board's recommendation to uphold the decision, and the complainant duly filed this complaint against the rejection of his appeal.

5. He has two main pleas: that the Agency broke the provisions of Rule 8.03.1 and paragraphs II.7.43 and 44 of the Manual, and that it unlawfully discriminated against him.

6. According to Rule 8.03.1 an official of the Agency shall belong to a medical insurance fund, be it the FMIP, the Austrian scheme or "another health insurance scheme for special reasons recognized by the Director General". Paragraph 43 reads:

"A staff member may, on recruitment, apply to the [Director of Personnel] for permission to continue participation in his/her national health insurance plan or that of his/her previous employer ... The application must include the special circumstances justifying an exception to the established policy of compulsory participation in the Agency's health insurance schemes and documentary evidence of the continued participation in the scheme under which the staff member was covered prior to joining the Agency."

And paragraph 44 vests authority in the Director of Personnel to decide on such application and says:

"If continued participation in another health insurance plan is approved, the staff member will be excluded from participation in the Agency's health insurance schemes by a letter constituting an amendment to his/her terms of appointment."

7. As the complainant submits and as the Appeals Board held, the Agency plainly failed to follow the procedure. It knew that the Soviet Union wanted to continue to let its citizens have medical insurance coverage after recruitment, although the Agency has produced no official text from that country to that effect. It concluded that it need not apply to those staff the letter of a rule that could be of no benefit to them. It is tempting to hold that the procedural flaw impaired the complainant's rights. But the defendant is relying on a form, headed "Statement on Insurance Matters", which he filled up and duly signed at the time of appointment. In it he applied for readmission to the United Nations Joint Staff Pension Fund, and the sections about membership of a medical insurance fund are crossed out. Whatever he may contend, his signature on the form denotes his consent to exclusion from the Agency's scheme and to exemption from contribution thereto. The Agency could not have him join willy-nilly. It may be a pity that it did not bring the issue of exemption into the open - though the attitude of the Soviet Government probably left it no choice - and strictly follow its own rules of procedure. But there is no question of correcting retroactively a situation that both parties accepted. The complainant was not a member of the Agency's scheme from February 1986 to January 1989 and so could not show the ten years' unbroken membership that paragraph II.7.51(i) of the Manual required.

8. His plea of discriminatory treatment fails too. All of the Agency's officials in like case - i.e. those who were in the Soviet Union's health insurance scheme up to 1989 - were relieved of the duty of joining one of the funds that other staff joined. Again, it may be a pity that the Agency did not take a clearer and firmer stance towards both the Soviet Union and the staff members concerned; but there is no breach of the rule that international civil servants in like case must fare alike.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Julio Barberis
Jean-François Egli

A.B. Gardner

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