NINETY-NINTH SESSION

Judgment No. 2437

The Administrative Tribunal,

Considering the complaint filed by Mr T.E. against the International Atomic Energy Agency (IAEA) on 22 January 2004 and corrected on 27 February, the IAEA's reply of 9 June, the complainant's rejoinder of 20 July, and the Agency's surrejoinder of 27 October 2004;

Considering Articles II, paragraph 5, and VII 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. On 25 May 1993 the IAEA Secretariat issued SEC/NOT/1484. Its purpose was to clarify the "established policy on tenure of appointment and contract extensions of Professional staff". It provides in part:

"2. Regular staff members (i.e. those recruited to an established post on a competitive basis, following vacancy notice action) will, initially, be appointed under a three-year fixed-term contract. The first contract may be extended for a two-year period provided there is a continuing need for the services of the staff member and his/her performance and conduct continues to meet the required standards. A total of five years constitutes the normal tour of service which a regular Professional staff member in the Agency can expect and the presumption is that there will be no further extension of the contract.

3. As an exception to the normal tour of service, contract extensions beyond five years are possible under the following circumstances:

(a) For programmatic or other compelling reasons in the interest of the Agency, an extension of one or two years, which, as a rule, should be a final extension without any further possibility of extension;

(b) To provide for the necessary continuity in essential functions or for other compelling reasons in the interest of the Agency, an extension of five years (so called long-term contract) which, provided there is a continuing need for the staff member's services and his/her performance and conduct continues to meet the required standards, is subject to further extensions until retirement age.

4. For staff members who are not granted a long-term contract under sub-paragraph 3 (b) above, seven years constitute the maximum tour of service in the Agency. […]

[…]

6. Staff members subject to the maximum tour of service of seven years are, however, free to apply for vacant positions. If such vacancy is within the same division or in a position related to the staff member's current function, his/her contractual situation remains unchanged, and if selected, his/her service in the new post will be counted towards the seven-year maximum tour of service. If the vacancy is outside his/her division and in a position unrelated to his/her current function, the staff member, if selected, will start a new tour of service with an initial contract of three years."

The complainant, a Canadian national, is a former staff member of the IAEA. He was appointed on 17 June 1997 under a three-year fixed-term contract as a Senior Training Officer in the Division of Technical Support of the Department of Safeguards. He was offered a two-year extension of his appointment on 12 July 1999 and a one-year extension on 7 June 2001.

On 4 April 2002 the complainant's Director recommended him for a long-term contract. The Joint Advisory Panel on Professional Staff met in May 2002 to discuss this recommendation. On 24 June the complainant was offered a one-year final extension of his appointment and he signed it on 30 September. According to the complainant, he

contacted the Director of the Division of Concepts and Planning to enquire about vacancies in that Division and was informed that post No. 16041-46-P4 in the Standardization Section was vacant; he was interviewed on two separate occasions by the Director of the Division and the Head of the Section to discuss the requirements of the position for which two other staff members had also applied. On 12 December 2002 the Head of the Human Resources Planning Section informed the complainant that, in accordance with a request from the Deputy Director General in charge of his Department, his transfer from his current position to post No. 16041-46-P4 had been approved with effect from 1 January 2003.

On 18 December 2002 the Director of the Division of Personnel informed the complainant that, in accordance with his last extension of contract and the relevant policy specified in SEC/NOT/1484, his contract with the Agency would expire on 16 June 2004. The complainant wrote to the Director General on 22 January 2003, stating that a proposal had been put forward by his Division that he be granted a long-term contract and also that he had been selected to fill a post in a different Division. He asked for a review of the decision regarding his contract extension and requested that he be granted "a new tour of service with an initial contract of three years" in accordance with paragraph 6 of SEC/NOT/1484. On 20 February 2003 the Acting Director General informed him that the decision to offer him a final extension of his fixed-term contract had been taken after careful consideration by the Joint Advisory Panel on Professional Staff and recalled that, at the time, he had accepted that his appointment would be "the final extension of [his] fixed-term appointment". The Acting Director General added that the Department of Safeguards had decided – in order to utilise his skills more fully, and in the interest of the Agency's programme – to transfer him to a different Division. As the change in his post was the result of an internal transfer he had not been subjected to the normal selection process, that is through a competitive process, and thus paragraph 6 of SEC/NOT/1484 did not apply.

The complainant appealed to the Joint Appeals Board on 10 March 2003 against the decision not to grant him a new tour of service with an initial contract of three years. He also addressed the issue of the long-term contract. In its report dated 2 October 2003 the Board noted that, in order for paragraph 6 of SEC/NOT/1484 to apply, there must be an application and selection for a vacant position which must be outside the division in which the staff member works and which must be unrelated to the staff member's current functions. It concluded that the complainant's move from one post to another was "in the nature of an internal transfer rather than a formal selection process" and that "the new position was related to the staff member's previous function". Considering that paragraph 6 did not apply in this instance, the Board recommended that the decision not to grant the complainant a new tour of service be upheld. The Acting Director General informed the complainant by a letter dated 31 October 2003 that he would follow the Board's recommendation not to grant a new tour of service and that consequently his contract would not be extended beyond 16 June 2004. That is the impugned decision.

B. The complainant submits that the decision not to grant him a long-term contract is flawed by procedural defects and an error of law and has been taken in breach of the principle of good faith. He says he was promised on several occasions by the Department's management that he would be granted a long-term contract in accordance with the Division's "succession plan". But he has never been advised of the contents of this plan nor the criteria used in deciding who would be included in the plan and granted a long-term contract. The succession plan is not part of his contract nor is it part of the Staff Regulations and Rules; it constitutes unlawful legislation. The complainant contends that since the Director General considered the plan when he took his decision on the complainant's long-term contract, the decision is consequently flawed. He also contends that he was not provided with the reasons why he was not granted a long-term contract, thus the decision was not duly substantiated as required by the Tribunal's case law.

The decision not to grant him a new three-year contract is flawed by an error of law. He was selected for a vacancy outside his division and in a position unrelated to the functions of his previous post; having met the stipulated criteria, he was entitled to a new contract of three years. The complainant notes for the Tribunal that he had not been advised during the interview process that the Department had decided to transfer him and that he had not requested a transfer. He submits that the Joint Appeals Board had also committed errors in evaluating the facts and reaching its conclusions.

On the basis that the impugned decision has affected his career prospects and has entailed an important financial loss, the complainant makes the following claims for relief: that the impugned decision be quashed; that he be reinstated and granted either a long-term or three-year contract with all salary, emoluments and entitlements retroactive to the date of reinstatement; or in lieu of reinstatement that he be granted all salary, emoluments and entitlements that he would have received in the event that he had been granted a new three-year contract beginning

from the date of his separation from service. He also claims moral damages in the amount of 10,000 euros, legal fees, and costs.

C. In its reply the Agency states that the complaint is irreceivable insofar as the complainant is challenging the decision not to grant him a long-term contract. The complainant was informed on 24 June 2002 that he was being offered a final extension of his appointment, which would not be "extended, renewed, or converted to another type of appointment". He failed to appeal against that decision within the time limit set out in the Staff Rules and he signed the contract extension on 30 September 2002. Furthermore, he has raised the issue for the first time during the proceedings before the Tribunal, having only requested in his internal appeal that he be given a new tour of service.

On the merits, it points out that the decision not to grant a long-term contract is a discretionary one and only subject to limited review by the Tribunal. As the Joint Appeals Board noted, the succession plan "did not supersede any established Agency procedure" and the Director General, in taking note of the document, did so subject to the recommendations of the Joint Advisory Panel on Professional Staff. The Agency denies that there was any error of law committed concerning the decision not to grant the complainant a long-term contract. Concerning the decision not to grant him a new tour of service in his new position, it points out that there was no vacancy notice issued for the post nor was a recruitment process carried out. As concluded by the Board, the complainant's move from one post to the other was "in the nature of an internal transfer" thus it was correct not to grant him a new tour of service under paragraph 6 of SEC/NOT/1484. The Agency submits that to consider internal transfer as falling under paragraph 6 would contravene the principle of equality to be maintained between candidates during a recruitment process.

D. In his rejoinder the complainant rebuts the Agency's arguments on receivability. He asserts that after he received the final extension of his appointment he had discussions and meetings with various senior officials and he finally signed the extension after receiving assurances from his Head of Section that the Deputy Director General in charge of his Department would attempt to have the decision on his contract reconsidered. It was only when the Director of Personnel wrote to him on 18 December 2002 to inform him that his contract would expire on 16 June 2004 that he knew that these attempts had been unsuccessful. He requested a review of that decision within the time limit set out in the Staff Rules and the Joint Appeals Board confirmed that the request complied with the Staff Rules. He argues that the Tribunal's case law has held that when a staff member has been misled to believe that the organisation will reconsider its decision, then the exercise of the right to appeal will be deemed to run from the time the staff member could reasonably be expected to challenge that decision. Additionally, the Agency is wrong to assert that he only raised a challenge concerning the long-term contract for the first time in his complaint; the issue was raised in his appeal and the Board decided the issue on the merits.

The complainant notes that the Agency has only addressed the issue of the long-term contract and the succession plan by quoting from the Joint Appeals Board report. However, he points out that the Board never requested to review a copy of the plan and that even though he made repeated requests for a copy he was informed that it was "privileged information" and protected under the Agency's rules on confidential information. By withholding the plan from him his right to due process has been breached. He asks the Tribunal to review the plan to assess the extent to which it impacted the decision not to grant him a long-term contract.

He argues that the Board's interpretation of paragraph 6 of SEC/NOT/1484 is untenable. Firstly, it ignores the plain language of the provision which does not refer to a formal selection process. Secondly, it ignores the fact that the complainant was subjected to a formal selection process when he was initially recruited, thus there is no logical need for another formal selection process when he had already been with the Agency for more than five years and his performance and reputation had been well documented.

Lastly, he contends that the Agency implicitly acknowledged the ambiguity in paragraph 6 when it issued SEC/NOT/1962 entitled "Guidelines for the Implementation of the Staff Mobility Policy" on 15 August 2003. He should not be penalised because the Agency waited until that point to clarify its policy on internal vacancies.

E. In its surrejoinder the Agency presses its objections to receivability. It says that the complainant has misrepresented the Joint Appeals Board's report in asserting that the Board accepted that his appeal, against the decision not to grant him a long-term appointment, was receivable.

On the merits, it reiterates that the decision to offer the complainant a final one-year extension of his appointment

had been taken under proper discretionary authority and was not flawed by any of the criteria that would subject it to review. It denies that SEC/NOT/1962 was issued to remove any ambiguity in SEC/NOT/1484; no such ambiguity exists. It asserts that the complainant was transferred to a post with related functions to his previous post and therefore he was not entitled to a new tour of service.

CONSIDERATIONS

1. The complainant accepted a “final” one-year extension of his contract, on 30 September 2002, thus bringing his total term of employment with the Agency to seven years (the normal maximum set out in SEC/NOT/1484). Before his final contract expired he sought other employment within the Agency, and was, with other employees, interviewed for a position as a Safeguards Analyst. He took the position, and received a letter stating that his transfer had been approved with effect from 1 January 2003. He was told in a further letter that his fixed-term contract would still expire on 16 June 2004. On 22 January 2003 he asked the Director General to review the “decision on [his] current contract extension”, stating that the new position should have with it a new contract of three years, based on paragraph 6 of SEC/NOT/1484. The complainant claims that he also appealed, in January 2003, the decision not to grant him a long-term contract extension, instead of the one-year extension that he in fact received.

2. There are thus two impugned decisions before the Tribunal: the decision not to give the complainant a long-term contract extension, and the decision that the new position would not start with a three-year term.

3. The Agency argues that the claim regarding the long-term contract is not receivable. It is right to do so. The applicable regulation is Staff Rule 12.01.1, paragraph (D)(1) of which provides that “[a] staff member who [...] 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/her. Such letter must be sent *within two months* from the time the staff member received notification of the decision in writing.” (emphasis added)

4. The relevant date for the commencement of the two-month period is 30 September 2002, the date when the complainant’s final contract extension was accepted by him. The two-month period expired on 30 November 2002. The request for review, received by the Director General’s Office on 22 January 2003, is beyond the two-month time period. In addition, the complainant’s letter, asking for that review, only explicitly mentions the “new tour of service with an initial contract of three years”. Reference to a long-term contract is only made in passing: “I feel it is worth noting that, in conjunction with the Department’s succession planning programme, a formal proposal through the [Deputy Director General in charge of the Department of Safeguards] was put forward supporting me for a long-term contract extension.” The complainant did not ask for a review of the failure to offer a long-term contract; he merely mentioned the proposal to support his position that he should be offered a new tour with an initial three-year contract.

5. It is otherwise with the second issue dealing with the Agency’s failure to offer him a new three-year contract with his new position. The relevant portion of SEC/NOT/1484 is paragraph 6, which reads as follows:

“Staff members subject to the maximum tour of service of seven years are, however, free to apply for vacant positions. If such vacancy is within the same division or in a position related to the staff member’s current function, his/her contractual situation remains unchanged, and if selected, his/her service in the new post will be counted towards the seven-year maximum tour of service. If the vacancy is outside his/her division and in a position unrelated to his/her current function, the staff member, if selected, will start a new tour of service with an initial contract of three years.”

6. A plain reading of this text indicates that there are three questions which must be answered in the complainant’s favour before he can claim a new three-year contract under its terms:

(a) Was there a vacancy outside the complainant’s division?

(b) Was the complainant “selected” for the vacancy?

(c) Was the position unrelated to his former function?

7. The first question is readily answered. The new job which the complainant accepted was outside his old

division. As for the vacancy, while there was no vacancy notice issued for the post, the Tribunal has previously ruled that "[t]here need not even be a vacancy notice for every post" (see Judgment 1698, under 9). The issuance of a vacancy notice is not a prerequisite of paragraph 6 quoted above and the Agency does not deny that the post to which the complainant went on 1 January 2003 was vacant at that time.

8. As regards the second question, the Joint Appeals Board held, and the Agency argues, that the quoted paragraph requires that there must be a new appointment following upon a competitive selection process and that a mere internal transfer such as the complainant received does not meet the test. There is nothing in the text of the quoted paragraph to support this view. The word used is "selected" which is not a term of art, especially in the context where paragraph 2 of the same text indicates that the draftsperson knew how to specify a competitive selection process when that was what was meant. Nor does it assist the Agency to cite Tribunal case law to the effect that a transfer does not give an employee a right to a new appointment (see Judgments 190 and 1358) for in the circumstances of the present case that right flows from the very terms of SEC/NOT/1484 itself. It is not explained by the Agency how, if he was not selected for it, the complainant came to be in his new position. Finally in this connection, it may be noted that the Agency does not deny the complainant's evidence that at least two other persons were interviewed for the vacancy prior to his being selected, a fact which implies at least some measure of competition for the job.

9. The third portion of the analysis is the determination of whether the functions are related. The Joint Appeals Board found that they were related but in the present proceedings the Agency simply does not respond to the complainant's contention that the Board compared the wrong job descriptions.

10. Furthermore, the Board's analysis contains a manifest error insofar as it appears to rely on the fact that the two positions have similar educational requirements. While the Board is entitled to significant deference on its findings of fact, it is not immune from review where its errors are patent and palpable. A comparison of the job descriptions of the complainant's former post and his new one gives the following results:

<u>OLD JOB – Senior Training Officer</u>

40% of time: Management, mainly developing procedures for carrying out the training function.

20% of time: Analysis, that is evaluating previous training experience and course applications, and assessing instructor performance and effectiveness.

20% of time: Design, such as instructional objectives and sequences, lesson plans and schedules for training functions.

15% of time: Implementation, mainly consulting with and training instructors.

5% of time: Other, such as performing inspections.

The minimum requirements of the job included a university degree with a focus in a nuclear discipline; formal training in instructional design technologies, presentation skills and testing methodologies; and ten years experience in nuclear industry.

The work role required that the incumbent must be a professional training specialist.

<u>NEW JOB – Safeguards Analyst</u>

40% of time: Preparation of standards for the Department of Safeguards.

10% of time: Assistance to other units in Quality Control activities.

10% of time: Analysis of safeguards technical documents.

30% of time: Interaction with Operations and Support Divisions.

10% of time: Participate in inspections.

The minimum requirements of the job included a university degree with a focus in a nuclear discipline; knowledge or experience in safeguards equivalent to a second university degree; and six years experience at national level, six years at international level (combination must be over ten years).

The work role required that the incumbent must be an analyst for quality assurance activities.

11. While there are clearly some points of connection and even of overlap between the two positions (they are after all in the same organisation) there are far more points of difference than of similarity between the descriptions of the two sets of functions. If the provisions of paragraph 6 of SEC/NOT/1484 are to have any meaning at all they must be read reasonably as requiring more than a purely minimal difference in the functions of the new and old posts. That requirement is clearly met here.

12. The complainant was accordingly entitled to be given a new tour of three years' duration commencing 1 January 2003. He asks that this now be granted to him but, since he was separated from the IAEA in June 2004 and only a few months would remain for him in the position, the Tribunal will not make such an order. Instead, it will order that the Agency pay to the complainant the balance of all salary and benefits which he would have received from his new position for the entire period of January 2003 to December 2005. He must account to the Agency for any net earnings received by him from other employment during that period. He is entitled to moral damages in the sum of 10,000 euros as well as costs in the amount of 10,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The Agency shall pay the complainant the balance of salary and benefits that he would have received from his new position up to and including December 2005, as set out under 12 above, together with interest at the rate of 8 per cent per annum from the due date.

3. It shall pay him 10,000 euros as moral damages.

4. It shall also pay him costs in the amount of 10,000 euros.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.