

**110th Session**

**Judgment No. 2979**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. G. against the International Atomic Energy Agency (IAEA) on 18 March 2009 and corrected on 24 April, the IAEA's reply of 13 August, the complainant's rejoinder of 16 October 2009 and the Agency's surrejoinder of 25 January 2010;

Considering Article II, paragraph 5, 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. The complainant, who has dual French and Australian nationality, was born in 1946. She joined the Agency's Marine Environment Laboratory in Monaco as a clerk in 1994. Her initial appointment was continuously extended until 31 March 2008, the date on which she reached the statutory retirement age in accordance with Staff Regulation 4.05.

Prior to her retirement, on 5 November 2007, she wrote to the Director of the Division of Human Resources requesting an extension of her appointment beyond retirement age. Having been advised that

her request would have to be endorsed by her department, the complainant submitted it by a memorandum of 12 February 2008 to the Deputy Director General in charge of the Department of Nuclear Sciences and Applications, expressing the belief that her accumulated knowledge and experience would continue to be of considerable use to her department. By an e-mail of 14 February the Deputy Director General declined to endorse the complainant's request on the grounds that there was "no real programmatic justification" upon which it could be submitted to the Director General and that the selection process for her replacement was ongoing.

By a memorandum of 4 March 2008 to the Director General, the complainant requested a review of that decision, arguing that Staff Regulation 4.05 was discriminatory and contrary to international conventions and agreements. The Director General replied on 14 April dismissing the complainant's allegations of discrimination and advising her that there was no basis upon which an exceptional extension of appointment beyond retirement age could be offered to her. The complainant lodged an appeal against that decision on 12 May. In its report of 22 October the Joint Appeals Board recommended that the Director General uphold his decision not to offer the complainant an exceptional extension of appointment beyond retirement age. By a letter dated 19 December 2008 the complainant was informed that the Director General had decided to endorse the Board's recommendation and to dismiss her appeal. That is the impugned decision.

B. The complainant challenges the Director General's decision not to offer her an exceptional extension of appointment beyond retirement age on the grounds that it is tainted with an error of law and abuse of authority, that it constitutes discrimination based on age and that it violates her right to be treated with dignity and with the requisite good faith.

She argues that Staff Regulation 4.05, which stipulates a mandatory retirement age, is contrary to the principles of equal treatment and non-discrimination as guaranteed under a number of

international conventions, in particular the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Labour Organization Convention concerning Discrimination in Respect of Employment and Occupation of 1958. She points out that no mention of a final extension was made in her last letter of extension of appointment.

The complainant requests that the impugned decision be quashed and that she be reinstated in her post with retroactive effect from 31 March 2008. Alternatively, she requests material damages for loss of income and pension benefits from 31 March 2008, the date of her mandatory retirement, until the date of her voluntary retirement or inability to work. She claims moral damages and costs.

C. In its reply the IAEA submits that the impugned decision was taken by the Director General in the proper exercise of his discretionary authority and is therefore subject to only limited review by the Tribunal. It denies that the decision was tainted with an error of law or that it constituted discrimination.

It explains, by reference to the Tribunal's case law, that an organisation has the right to adopt regulations establishing a retirement age. In light of the fact that the Tribunal has never called into question the existence and validity of such regulations, the Director General was entitled to proceed on the basis that Staff Regulation 4.05 stipulates a valid limit on the period of service of staff members.

The Agency argues that the complainant is wrong to allege unequal treatment by reason of the application of Staff Regulation 4.05. This is so not only because the establishment of a retirement age is a legitimate and common policy, but also because the said regulation applies equally to all staff members. The defendant also argues that there is no basis for the complainant's reliance on various international conventions, since they are not binding on the IAEA and do not form part of her terms of employment.

With regard to the absence of any reference to a final appointment in the complainant's last letter of extension, the Agency states that the complainant was at all times subject to the Staff Regulations, including Staff Regulation 4.05, and was therefore aware that her appointment would end upon reaching the statutory retirement age. It adds that it was under no obligation to give her advance notice.

D. In her rejoinder the complainant asserts that in addition to being unlawful, discriminatory and contrary to a number of international conventions, Staff Regulation 4.05 is in breach of the Statute of the IAEA, the Agency's policy on harassment, the Standards of Conduct for the International Civil Service and United Nations General Assembly Resolution 2542. She submits that performance, not age, is an appropriate criterion for determining when a staff member should retire.

E. In its surrejoinder the Agency dismisses the assertions made by the complainant in her rejoinder. It otherwise maintains its position.

### CONSIDERATIONS

1. The complainant is impugning the Director General's decision of 19 December 2008 to uphold, in line with the Joint Appeals Board's recommendation, his earlier decision not to offer the complainant an exceptional extension of appointment beyond retirement age.

2. She contends that it is tainted with an error of law and an abuse of authority, that it constitutes discrimination based on age and that it breaches her right to be treated with dignity and the requisite good faith. It should be noted that the complainant challenges the legality of Staff Regulation 4.05, not the application of it. Nor does she allege any procedural errors in the Agency's conclusion that she was subject to retire when she did. Instead, she argues that the Staff

Regulation itself constitutes “discrimination on the basis of age”. Additionally, the complainant raises in her complaint – as she did before the Joint Appeals Board – the matter of her last letter of extension of appointment not having specified that it was a final contract, that is a final extension of her appointment.

3. Staff Regulation 4.05 provides that:

“Staff members shall not normally be retained in service beyond the age of sixty-two years or – in the case of staff members appointed before 1 January 1990 – sixty years. The Director General may in the interest of the Agency extend these age limits in individual cases.”

4. The claim that Staff Regulation 4.05 violates the principle of non-discrimination, which is a general principle of law also provided for in many international conventions and agreements, is unfounded. The principle of non-discrimination requires the adoption and implementation of impartial, reasonable and objective rules which provide the same juridical treatment for similar cases. What it forbids is any arbitrary and/or unjustified distinction between individuals or groups in similar or identical positions, not the differentiated or graduated treatment of situations which are intrinsically and objectively different. It is clear that set standards and rules are an administrative necessity in order to ensure the most fair and balanced practice towards all employees while maintaining the efficient operation of the organisation. Staff Regulation 4.05 is an example of a set standard which differentiates according to age, but cannot be considered as an arbitrary or unjustified distinction. Considering the present-day general health standards and longevity, it is not unreasonable to set a retirement age at 62 years – which already constitutes an increase in the years of service, given that 60 years is the retirement age for those appointed prior to 1990 – in order to support the broadest range of capability in retirement-age employees and maintain the continued proper functioning of the organisation. The complainant’s suggestion, that all employees be treated individually with regard to their retirement, would be ideal but is not a practical option due to the

unreasonably heavy administrative burden that it would place on the organisation. Determining retirement age on an individual basis would require supervisors to determine regularly an employee's "fitness" and its probable duration.

5. Regarding the question of the complainant's last extension of appointment not being specifically labelled as a "final contract", the Tribunal concurs with the Joint Appeals Board's finding that the contract clearly indicated the date on which it would come to an end and stated that it was governed by the Staff Regulations and Staff Rules. Given her length of service with the Agency the complainant must have been aware and must have expected that in accordance with Staff Regulation 4.05 the date of expiry of her contract would coincide with her 62nd birthday.

6. It may be concluded from the above that, as the claims are unfounded, the complaint is also unfounded and must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet