

**SIXTY-SECOND ORDINARY SESSION**

***In re* FERRER DE MONCADA**

**Judgment 823**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Albano Ferrer de Moncada against the International Atomic Energy Agency on 24 October 1986 and corrected on 21 November, the Agency's reply of 9 January 1987, the complainant's rejoinder of 27 March and the Agency's surrejoinder of 30 April 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Agency Staff Regulation 3.03 and Staff Rules 303.2 and 12.01.1(B) and (D);

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Portuguese citizen born in 1939, joined the Agency in 1975 at grade P.2 under a two-year appointment. He has since held several posts in the Department of Safeguards. He had his appointment extended in turn to 1979, to 1980 and, by five years, to 31 January 1985. He was promoted to P.3 in January 1979.

In August 1983 the Director of the Division of Development proposed a five-year extension and Mr. Tempus, the Deputy Director General in charge of the Department, agreed. But in a letter of 27 June 1984 the Division of Personnel offered him only two years and added: "This extension has been approved ... so that your performance can be assessed with a view to your suitability for further extension". He wanted five years and on 11 July wrote seeking review of the offer under Agency Staff Rule 12.01.1(D)(1). On 24 August the Director General refused, and on 7 September he appealed to the Joint Appeals Committee under Rule 12.01.1(D)(2). On 14 December 1984 the Committee recommended rejecting the appeal and on 19 December the Director General did so. By a letter of 19 March 1985 the complainant informed the Director General that he would not be appealing to the Tribunal. In 1985 and 1986 the complainant's work was kept under "close scrutiny". He carried out many inspections in Europe, South Africa and Central and South America. He was involved in what the Agency calls "incidents", one at headquarters and one in Venezuela. On 14 March 1986 Mr. Rautjaervi, the head of his section and his immediate supervisor, wrote a good report on him and recommended five years, but Mr. Thorstensen, the Co-ordinator of the Division of Operations, and Mr. Agu, the Director, thought Mr. Rautjaervi too indulgent and proposed only two years. The fault Mr. Thorstensen found, and recorded in a memorandum also of 14 March, was that he could not steer clear of trouble and did not get on well with staff outside his section. There was a third "incident" about that time, in South Africa, and it prompted his supervisors to question his ability to withstand stress. The upshot was a memorandum which Mr. Tempus wrote on 7 May 1986 to the Director of the Division of Personnel and in which he concluded that the complainant was "not adequately qualified for the profession of an international inspector" and recommended no extension at all. A joint committee that makes recommendations on extensions and promotions also concluded that extension would be in nobody's interests. The Director so informed the complainant in a letter of 27 June. His objections of 1 July were rejected by the acting Director General on 7 July. He applied on 24 July for review under Rule 12.01.1(D)(1). In a letter of 1 August, the final decision impugned, the acting Director General confirmed the decision and by a letter of 7 August 1986 the Director of the Legal Division told him that he was authorised under Rule 12.01.1(B) to appeal directly to the Tribunal.

B. After recounting the facts of the dispute the complainant alleges (1) a practice in the Agency of extending five-year appointments by five-year periods and contends that he was entitled to a five-year extension in 1984, especially since there was not a word of reproach against him and Mr. Tempus actually proposed it. (2) He submits that it was wrong to put him on probation after ten years' service, when the rules make no provision for it. (3) In any event the Agency ignored its undertaking to renew at the end of the two years if his work came up to standard. Other criteria were applied. Those who could assess him in 1985-86 recommended extension: Mr. Rautjaervi by five years, Mr. Thorstensen and Mr. Agu by two. That makes it hard to follow Mr. Tempus, who did not see him

from day to day and whose attitude nevertheless swayed the Director General. Essential facts were overlooked and mistaken conclusions drawn from the evidence. (4) That the basis of the decision is unsound is clear from the acting Director General's remark in his letter to the complainant of 7 July 1986 that his "personality was not suited". That reason was simply trumped up: how could the Agency suddenly find him unfit after over ten years' service?

Observing that he has sustained serious material and moral injury, he seeks the quashing of the decision, an award of one French franc in token moral damages, material damages equivalent to seven years' salary, allowances and pension entitlements, and 30,000 French francs in costs.

C. The Agency replies that according to Staff Regulation 3.03 and Staff Rule 3.03.2 a fixed-term appointment carries no promise of extension, which is at discretion. The exercise of the Director General's discretion in this case shows none of the flaws the complainant alleges. In the Agency's submission its account of the facts and evidence it appends establish that his behaviour in its employ was unsatisfactory. His supervisors often told him so orally. It was made plain enough to him in 1984 that for years he had not been up to standard and that the purpose of the extension was to let him show his mettle. Nothing came of many attempts to find him work he could do. The Director General took full account of the reports by his supervisors, of his own letter of 24 July 1986 applying for review and of papers on the three incidents, which showed up his weakness under stress. The Director General is in any event free to reject his subordinates' views: the fact that he does need not mean he overlooked any essential fact or drew wrong conclusions. He properly stressed the importance of personality in inspection work, the success of which demands an ability to get on well with national authorities. That is just what the complainant lacked. The Agency did not, as he alleges, suddenly become aware of the defects of his personality: it cites several instances of "inappropriate behaviour", "recorded difficulties" in getting on with Agency staff and people in host countries and inability to withstand stress. The Agency asks the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant submits that the Director General must show that the reasons for his decision were proper. They are not. Some of the facts alleged to show that the complainant's personality was unsound date from 1980 or earlier and were never mentioned when the non-renewal was being mooted. More telling is a memorandum which the head of his section wrote on 31 January 1984 and which says he got on well with others. Knowing full well that what happened in 1976-80 cannot warrant a decision taken in 1986, the Agency blows up the three "incidents". As he seeks to show, they were of little or no significance and can be set down to the difficulties of inspection work. The suggestion that he lacks balance and maturity does not withstand scrutiny. The Agency broke its promise of an extension if his work came up to standard: not only did his work please his supervisors, but the promise and good faith precluded reviving old and trifling grievances against him. He presses his claims.

E. In its surrejoinder the Agency develops its main pleas, namely that the complainant had no right to renewal, that it had entered into no commitment to renewal and that the Director General's decision was in keeping with the Staff Regulations and Staff Rules and taken in exercise of his discretionary authority and with due regard to all the material facts. It seeks to refute the arguments in the rejoinder, observing that the complainant fails to cite a single material fact that was overlooked either by the joint committee on extensions or by the Director General, or any mistaken conclusion from the evidence. He belittles his awkwardness and prickliness in dealing with other people and the importance of the incidents. The reason for the decision was the shortcomings of his personality and behaviour.

## CONSIDERATIONS

The alleged right to renewal

1. The complainant submits that the "general practice" in the Agency is to renew almost automatically the appointments of staff who have held contracts for long and to renew them for the same period; that in its report of 14 December 1984 on an earlier dispute the Joint Appeals Committee found the existence of such a practice; and that it entitles him to renewal.

What the Committee actually said was that it was "uncertain whether an established administrative practice existed in this area and, if so, whether it formed part of the terms of appointment, thereby creating obligations for the Agency and rights for Mr. Moncada". The Committee gathered from a minute of 3 December 1984 by the Director of the Division of Personnel that the practice did exist but held that it did not entail automatic extension of a long-

term contract "without regard to the performance of a staff member or to the requirements of the service".

The Tribunal concludes that there is no more than a practice, and there was no rule that was binding on the Director General or conferred any rights on the complainant.

The plea fails.

The decision not to renew

2. The limits on the power of review the Tribunal will exercise over a decision not to renew a fixed-term appointment have been set in many earlier judgments, are indeed acknowledged by both parties, and need not be stated again.

The complainant's main plea is that the decision of 1 August 1986 was unlawful because it overlooked essential facts and because it drew wrong conclusions from the evidence. If either plea succeeded the decision would have to be set aside.

In fact both pleas fail.

3. The complainant maintains that the Director General took account of matters extraneous to any objective assessment of his performance in 1985-86. The head of his section, Mr. Rautjaervi, recommended granting him another five years, the Co-ordinator, Mr. Thorstensen, and the Director of the Division of Operations, Mr. Agu, another two, and only Mr. Tempus, who was in charge of the Department of Safeguards, made the recommendation, which the Director General endorsed, of giving him no extension at all.

He is not actually saying - he hardly could - that the authorities ignored altogether the recommendations in his favour.

The decision of 1 August 1986 not to renew his appointment merely upheld the earlier ones of 27 June and 7 July. The decision of 7 July was based on a report of 18 June 1986 by a joint body that considers extensions, promotions and renewals, known as the "extension panel". The panel made its recommendation on the complainant with due regard to the "recommendation and supporting documentation provided by the Department of Safeguards".

The Tribunal also notes that the report on his performance in 1985-86 was sent up by Mr. Rautjaervi to Mr. Thorstensen and Mr. Agu and then to Mr. Tempus, who passed it on, with his own recommendation, to Mr. Camcigil, the Director of the Division of Personnel. In the light of the panel's report Mr. Camcigil decided on 17 June 1986 not to renew, and on 1 August the Director General rejected the complainant's application for review and upheld that decision.

The conclusion is that the Director General was in full possession of the facts and the supervisors' comments when he decided not to renew. In approving the recommendation to that effect he was exercising his discretion in the Agency's interests, and for that reason the Tribunal may not review his decision.

In short, he overlooked no essential fact.

4. Nor did he draw any mistaken conclusion from the evidence. It is plain from the foregoing that he exercised his discretion in choosing between the different recommendations before him and preferring the one not to renew. This plea too fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1987.

(Signed)

André Grisel  
Jacques Ducoux  
E. Razafindralambo  
A.B. Gardner

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