

The Administrative Tribunal,

Considering the complaint filed by Mr B. G. against the International Atomic Energy Agency (IAEA) on 16 November 2001 and corrected on 27 November 2001, the IAEA's reply of 28 February 2002, the complainant's rejoinder of 22 March as well as his additional submission of 22 April, and the Agency's surrejoinder of 25 June 2002;

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, a Bulgarian national born in 1944, joined the IAEA's staff on 8 January 1995 in the Department of Nuclear Energy and Safety, Division of Nuclear Power, as a Nuclear Power Plant Engineer at grade P.4. His initial contract was for three years. On 15 June 1995 he was appointed Section Head of the Nuclear Power Engineering Section, at grade P.5. On 6 December 1996 he was offered a two-year contract extension, from 8 January 1998 to 7 January 2000.

On 26 August 1998 the Division Director and the Deputy Director General for the Department sent an interoffice memorandum to the Director of the Division of Personnel, requesting an extension of the complainant's contract for an additional five years, that is to say until 7 January 2005. On 19 October 1998 the Deputy Director General informed the complainant that because of his excellent contribution to the work of the Section, he had been awarded a Merit Award. On 15 December the complainant was offered a one-year contract extension, until 7 January 2001.

On 1 September 1999 the Division Director and the Deputy Director General for the Department once again sent an interoffice memorandum to the Director of the Division of Personnel, requesting a five-year extension of the complainant's contract, until 7 January 2006. On 26 November 1999 the complainant was offered a one-year contract extension, until 7 January 2002.

On 29 September 2000 the Division Director and the Deputy Director General for the Department requested an extension of the complainant's contract until 31 October 2006, at which point he would reach the statutory retirement age of 62 years. On 18 December 2000 the complainant was offered a one-year contract extension, until 7 January 2003. The offer specified that this would be his final contract extension.

On 21 December 2000 he met with the Director General's Special Assistant for Management. The complainant explained to the latter that his Section had one of the lowest percentages of long-term contracts in the Agency and would have a heavy turnover of Professional staff in the next two years; consequently there was a need for maintaining some continuity in the Section. He also explained the personal hardships he would face if he was separated from service in January 2003. The Special Assistant promised to discuss the matter with the Director General.

Having received no follow-up information from the Special Assistant, on 16 February 2001 the complainant wrote to the Director General, requesting a review of the administrative decision to offer him only a one-year final contract extension. The complainant received no reply to this letter within the statutory time limit, and on 30 March he filed an appeal with the Joint Appeals Board. On 2 April he received the Director General's reply to his request for review. The Director General recognised the complainant's performance and contributions to the Agency's work, but citing the IAEA's rotation policy, he informed the complainant that he was maintaining his decision not

to extend the complainant's contract. That same day the complainant confirmed that he was pressing his appeal.

In its report dated 30 August 2001, the Board noted that the Joint Advisory Panel on Professional Staff had agreed that "rotation is desirable" in the complainant's area. It recommended that the Director General uphold his decision not to extend the complainant's contract beyond 7 January 2003. In a letter of 7 September 2001, the Director General informed the complainant that the decision not to extend his contract had been upheld. That is the impugned decision.

B. The complainant argues that the decision not to extend his contract did not conform to the Staff Regulations as contained in Secretariat Notice SEC/NOT/1484 of 25 May 1993. That notice, clarifying the established policy on the tenure of appointment and contract extensions of Professional staff, states under paragraph 2 that a "normal" tour of service at the IAEA is five years. Under sub-paragraph 3(a) a staff member's contract may be extended for up to two more years for "programmatic or other compelling reasons", or under sub-paragraph 3(b) for an additional five years, subject to further renewals up to retirement age, if it is deemed necessary for the "continuity in essential functions or for other compelling reasons in the interest of the Agency". Paragraph 4 states that if a staff member has not been granted a five-year extension under sub-paragraph 3(b), then the "maximum" tour of service in the Agency is seven years. The complainant points out that his last contract extension brought his total service with the Agency to eight years. Therefore, he should have fallen under sub-paragraph 3(b) and been granted further contract extensions until retirement age since only staff members who are considered eligible for contracts until retirement age would be allowed to cross the seven-year barrier.

He contends that an extension of his contract until retirement age would have been consistent with the factors specified in paragraph 8 of the Secretariat notice. First of all, extending his contract would assure continuity of specific functions as well as that of institutional knowledge. The need for continuity was acknowledged by the Division Director and Deputy Director General for the Department when they proposed a five-year extension of his contract in 1998 and 1999. They had pointed out that his qualifications, conduct and performance were worthy of keeping him on staff. They had underlined that the Agency would benefit significantly by keeping him on until he reaches retirement age in 2006. He points out that because he is already close to retirement age, there would be no long-term commitment on the part of the IAEA.

The complainant argues that the Joint Appeals Board's consideration of certain facts was flawed, in particular its evaluation of the desirability of rotation in his Section. Out of a total of ten Professional staff in his Section, three were new and six were scheduled to leave in the next two years. This was one of the facts highlighted by his Director and the Deputy Director General as a reason for extending his contract. He submits that there has been selective application of the rotation policy which has led to unequal treatment.

He asks the Tribunal to quash the decision not to extend his contract beyond 7 January 2003 and to restore his right to a contract extension until he reaches the statutory retirement age.

C. The Agency replies that the complainant's pleas are based on "a serious misunderstanding of the nature of a fixed-term contract". He signed several contract extensions which stipulated that the "extension shall not be deemed to carry any expectation of or right to another extension, renewal or conversion to another type of appointment". The last one indicated that it would be "the final extension of [his] fixed-term appointment which will not be extended, renewed or converted to another type of appointment". Therefore, there can be no doubt that the complainant knew upon entering the service of the IAEA that he would have to leave at the end of his final fixed-term contract, irrespective of his age or employment prospects.

The Agency states that while it is true that the complainant's contract was exceptionally extended beyond the seven-year limit set out in SEC/NOT/1484, it was with the above-noted proviso. Therefore the complainant could have no reasonable expectation that he was either entitled, or even eligible, to stay on with the Agency beyond the duration of his final contract. To argue otherwise runs contrary to the language of the fixed-term contract and would deny the Administration the flexibility needed in certain situations. Lastly, to argue that anyone close to retirement age is entitled to remain at the IAEA until reaching that age would completely circumvent the Agency's policy on tenure of Professional staff as set out in the Secretariat notice and would have an adverse impact on the Agency's established rotation policy.

The IAEA asserts that the Director General's decision was taken within the proper exercise of his discretionary authority and therefore is open only to limited review. Having considered all programmatic reasons which may

have warranted a further extension of the complainant's contract, the Director General came to the conclusion that these did not so warrant.

It denies that the continuity of work will be jeopardised by a high turnover rate in the complainant's Section. The IAEA points out that the Joint Appeals Board had noted that there would be sufficient time for new staff members to be trained before the contracts of senior staff members came to an end. It also denies that there has been any unequal treatment.

D. The complainant rejoins that reading SEC/NOT/1484 sub-paragraph 3(b) in conjunction with paragraph 4 makes it clear that any extension of contract beyond the maximum tour of service of seven years gives rise to a long-term contract subject to further extensions until retirement age. The IAEA has repeatedly denied that his case was covered under sub-paragraphs 3(a) or (b). He asserts, as there has been no indication as to which provision was applicable, there exists "a lawless area". The Agency is using the standard non-renewal clause contained in all appointment letters and contract extensions to justify breach of the policy on rotation contained in the Secretariat notice.

He attaches the report of the staff issues working group dated August 2001 in which the group members expressed concern about the way the rotation policy is being implemented; the members felt that often decisions were "arbitrary and inconsistent" on when to apply rotation and when to award long-term contracts. He clarifies for the Agency that his "key issue" is not the nature of the fixed-term contract or the need for a rotation policy, but rather "the arbitrariness and a lack of transparency in its application".

He presses his claims and adds an alternative claim for compensation for material and moral injury in the event that he cannot be granted a contract extension.

E. In its surrejoinder the IAEA presses its pleas. It asserts that the complainant held a series of fixed-term contracts, the last of which was expressly final in nature. Neither continuity in the specific function assigned to him nor his particular qualifications or expertise required that an exception be made to the Agency's policy on tenure of Professional staff.

CONSIDERATIONS

1. The complainant was offered a one-year extension of his fixed-term contract - up to 7 January 2003 - by which time he will have served the IAEA for eight years. He was informed it would be a final extension. He appealed against that decision, and is now challenging a final decision not to renew his contract beyond that date. He cites Secretariat Notice SEC/NOT/1484 which, in paragraph 4, provides for a maximum tour of service of seven years, and he argues that only a staff member who is considered eligible for contract extensions until retirement would be allowed to cross that seven-year barrier. The complainant therefore wants the Agency to grant him contract extensions for almost four years which would bring him to the statutory retirement age of 62. He takes issue with some of the findings of the Joint Appeals Board, particularly because it found that SEC/NOT/1484 was not directly applicable to his case.

2. The IAEA argues that, in deciding not to extend the complainant's contract until retirement age, the Director General properly exercised his discretionary power. In its view, the complainant's arguments are based on a misunderstanding of the nature of a fixed-term contract. Such contracts cannot be deemed to carry any expectation of renewal. Besides which, the complainant knowingly signed the letters of extension notified to him in the past and thereby accepted the terms specified therein. It argues that if, in the interest of the Agency, a contract is exceptionally extended beyond the seven-year limit, that cannot create any expectation on the part of the staff member that he is "eligible" to stay with the Agency beyond the duration of that contract.

3. Paragraphs 3 and 4 of SEC/NOT/1484 state:

"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 [...] "

4. Paragraph 8 sets out the factors to be considered when reviewing proposals for long-term contracts.

5. The complainant holds a one-year fixed-term contract, yet he is asking for an extension until retirement age; but only long-term contracts are subject to such extensions under the terms of sub-paragraph 3(b) cited above. Likewise, while the complainant makes a persuasive case that he has satisfied each of the factors mentioned in paragraph 8 of SEC/NOT/1484, the text is quite clear that these factors are only to be considered when one is reviewing a proposal for a long-term contract, defined as five years. In the last proposal on his behalf, which was rejected in favour of a one-year final extension, the complainant requested a contract which falls more than one year short of a long-term contract, thus the factors did not, strictly speaking, apply to him.

6. Sub-paragraph 1(iv) of SEC/NOT/1484 clearly states that fixed-term contracts carry with them absolutely no expectation of extensions. Therefore, even if seven years is the stated maximum tour of service, for holders of fixed-term contracts, long-term contracts must be clearly designated as such by the Director General at the latter's discretion, taking into account the various listed factors. As a result, staff members who exceed the seven-year maximum tour of service do not, as the complainant argues, thereby automatically become entitled to long-term contracts.

7. In Judgment 2138, under 11, the Tribunal held that:

"[...] an IAEA staff member who exceeds seven years of service has no automatic entitlement to a long-term contract. A long-term contract is given at the sole discretion of the Director General after the latter has considered several factors outlined in paragraph 8 of the notice. [...]"

8. That finding is conclusive against the complainant.

9. Notwithstanding a certain sympathy for the complainant, who appears to be extremely well respected by his colleagues and his supervisors, many of whom have expressed their wish to see him continue on until his retirement, the Tribunal cannot do otherwise than find that his interpretation of SEC/NOT/1484 is faulty. The impugned decision by the Director General was purely within the latter's discretion and subject to only limited review.

10. There is no indication of any error of law or of fact of a nature to warrant intervention; nor is there any evidence of unfair or discriminatory treatment or of abuse of power. The complaint must fail.

11. In the final analysis, the complainant would have the Tribunal ignore the terms of the contract which he has himself freely entered into. That contract is and clearly so states that it is for a one-year term, that it is the last such contract, and that it carries no expectation of renewal. In effect, while enjoying the benefit of his contract, the complainant seeks at the same time to have the Tribunal repudiate it. It will not do so.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James

K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 13 February 2003.