**EIGHTIETH SESSION**

## *In re* GILL

**Judgment 1478**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Nirmal Gill against the International Atomic Energy Agency (IAEA) on 2 March 1994 and corrected on 14 February 1995, the Agency's reply of 31 May, the complainant's rejoinder of 12 July and

the IAEA's surrejoinder of 18 September 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, 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. Rule 4.06.6(B) of the IAEA's Provisional Staff Rules prescribes payment of an end-of-service allowance to an official with sufficient seniority who resigns, as provided in 4.06.6(A)(5) and (6), "after childbirth" or in order to "join another United Nations common system organization without break of service".

The complainant, a citizen of India who became an Austrian in May 1994, joined the Agency's staff at headquarters in Vienna in August 1983 under a six-month appointment as a clerk/ typist at grade G.5. She got four extensions of contract, the last until 31 January 1995.

In a memorandum dated 13 June 1991 to the Director of the Division of Personnel she tendered her resignation. The acting Director of the Division accepted it in a letter of 17 June and she stopped work at the Agency on 21 June, though her resignation did not take effect until 18 July 1991. She was not paid the end-of-service allowance.

By a letter of 29 November 1993 she asked the Director General of the Agency to review the decision not to pay her the allowance on the grounds that the Staff Rules "appear to contradict each other". Replying on the Director General's behalf, the Director of Personnel confirmed in a letter dated 2 December 1993 that she did not qualify for payment of the allowance.

In a letter dated 6 December 1993 to the Director General she objected to the reply and asked for leave to put her case directly to the Tribunal. The acting Deputy Director General informed her in a letter of 29 December 1993 that although her appeal was time-barred the Director General had agreed to waive her obligation to go to the Joint Appeals Board. She is impugning the letter of 2 December 1993.

B. The complainant submits that the Director General relied on an "unlawful" rule to deny her the end-of-service allowance. The reasons why she resigned have no bearing on her entitlement and there was nothing in the terms of her appointment to suggest that they might. But in 1987 the Agency changed the rules to link payment of the allowance to the reasons for resignation. That the Administration failed to explain the new rules shows how arbitrarily it had acted.

She seeks the quashing of the decision and payment of the allowance plus interest at the rate of 14 per cent a year from the date at which it fell due. She claims awards of 100,000 United States dollars in damages "for all forms of injury" and of 7,000 French francs in costs.

C. In its reply the IAEA contends that the complaint is irreceivable because her internal appeal was time-barred and she has therefore failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires. Having got notice by 17 June 1991 of the decision not to pay her the allowance, she had two months in which to ask the Director General to review it. So her request of 29 November 1993 for review was over two years late.

On the merits the Agency points out that the Tribunal held in Judgment 1086 (in re Grünzweig and others) that the

system it had brought in in 1987 was a "lawful and proper" response to a recommendation from the International Civil Service Commission. So the matter is res judicata and not open to challenge. Since she did not qualify for the allowance under the rules there was nothing arbitrary about refusing to pay it.

D. In her rejoinder the complainant maintains that her complaint is receivable: she appealed on 23 July 1991 against non-payment of her allowance but got no reply. What the Tribunal held in Judgment 1086 was that the new rule complied not with the Commission's recommendation, which required paying a lump-sum allowance on completion of service, but with the Fleming principle. (For an explanation of the principle, see Judgment 1086 under B and 1). She presses her claims.

E. In its surrejoinder the Agency presses its objections to receivability and observes that the Commission, though recommending alignment with the Fleming principle, did not call for unconditional payment of the allowance.

CONSIDERATIONS:

1. The complainant joined the Agency in 1983 as a clerk/ typist at grade G.5. On 13 June 1991 she submitted her resignation, which was to take effect at 18 July, and the Agency accepted it.

2. She supplies the text of a letter which she says she wrote on 23 July 1991 to the Director of the Division of Personnel in which she pointed out that her "reason for leaving the organization has no bearing whatsoever" on her entitlement to payment of an end-of-service allowance and that it was unfair of the Agency to withhold it. She further alleges that she sent reminders in the same terms on 14 August and 10 September 1991. The Agency states in its reply that it has no record of having received any of those three letters from her.

3. On 29 November 1993 she wrote to the Director General mentioning her earlier "repeated requests" and stating that at the time of her departure in 1991 the Agency had withheld the end-of-service allowance for reasons which she considered "unjustified and discriminatory". In his reply of 2 December 1993 the Director of Personnel told her that there was no trace of any written communications from her on the subject and he confirmed on the Director General's behalf that no end-of- service allowance was payable to her. That is the decision which she is impugning.

4. Since for the reasons set out below the complaint fails on the merits there is no need to entertain the Agency's objections to receivability.

5. It is common ground that until 1987 the Agency made a 3 per cent addition to the pay of its staff in the General Service category to reflect the value of the end-of-service allowance (Abfertigung) which was paid to local employees in Vienna under Austrian law. On a recommendation by the International Civil Service Commission the Agency introduced in 1987 a lump-sum end-of-service allowance for such staff so as to bring its own pay policy more closely into line with practice among local employers. In Judgment 1086 (in re Grünzweig and others) the Tribunal held that that new policy, which the Agency had embodied in Provisional Staff Rule 4.06.6, was in keeping with the Fleming principle, which requires that the pay of General Service staff be determined on the basis of the best prevailing conditions of service in the locality of their duty station.

6. Rule 4.06.6 reads:

(A) Staff members in the General Service category at Headquarters shall be eligible for an end-of-service allowance as set out below:

1) upon expiration of contract ...

2) upon retirement ...

3) upon termination of contract ...

4) upon death after three years or more of continuous service ...

5) upon resignation after childbirth, after five years or more of continuous service ...

6) upon resignation after three or more years of continuous service with the Agency to join another United Nations common system organization without break of service ...

(B) An end-of-service allowance is not payable in cases of i) summary dismissal, or ii) abandonment of post, or iii) resignation except for reasons specified in paragraphs A(5) and (6) above."

7. According to section 23, subsection 7, of the Employment Act of Austria (Angestelltergesetz), the end-of-service allowance is not due if the employee resigns or leaves without due cause before expiry of the contract of service or has been guilty of conduct warranting dismissal. Under the Act the allowance is payable on resignation only (i) where the male employee has reached the age of 65, or the female employee the age of 60, and has a record of at least ten years' unbroken service or (2) where the female employee has a record of at least five years' unbroken service and has resigned following childbirth.

8. The complainant argues that Rule 4.06.6(B) is unlawful on the grounds that the allowance was incorporated into pay scales for General Service staff and paid each month up to 1987 and entitlement to it used therefore to be based "on the mere fact of employment". She further contends that inasmuch as the Agency does not offer its staff the security of long-term employment it is acting unlawfully in applying a condition that is dependent on such security.

9. Both her arguments are unsound. As the Tribunal held in Judgment 1086, under 7:

"Replacing the system in force from 1972 with another one that was closer to the statutory scheme in Austria was not in breach of any acquired right."

Rule 4.06.6, which properly reflects the Fleming principle, has been in force since 1987 and its lawfulness is no longer open to challenge.

10. Since the complainant's resignation did not fall within Rule 4.06.6 she is not entitled to payment of the end-of-service allowance.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas
Mark Fernando
Julio Barberis
A.B. Gardner

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