

FORTY-FIFTH ORDINARY SESSION

***In re* RODESCU**

Judgment No. 431

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Atomic Energy Agency by Mr. Teodor Rosescu on 17 May 1979, the Agency's reply of 10 July, the complainant's rejoinder of 30 August and the Agency's surrejoinder of 2 October 1979;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article VII of the Statute of the Agency and Staff Regulations 3.03(C), 12.01.1(D)(1) and 12.02.1(B);

Having heard in oral proceedings on 18 November 1980 Mr. Rosescu, complainant, and Mr. Dominique de Leusse, counsel for the complainant, and Messrs. Herron and Camcigil, agents of the Agency;

Considering that the material facts of the case are as follows:

A. The complainant, a Romanian citizen, joined the staff of the International Atomic Energy Agency on 15 January 1975 as a "safeguards inspector" at grade P.4. His contract of appointment, which was for two years, expired in January 1977. The Romanian authorities asked the Agency to extend his contract by five years, but the appointment was extended by only two, up to January 1979. On 26 June 1978 the Director of the Division of Personnel wrote to the Permanent Representative of Romania in Vienna asking whether the Romanian authorities would agree to another extension, this time for five years. On 12 July 1978 they answered that they could not. For some months things remained uncertain, but on 4 December 1978 the Agency decided to extend the complainant's appointment by eight months, i.e. up to 13 September 1979. On 12 December 1978 the complainant asked the Director General to reconsider that decision. Having received no reply, he sought permission to appeal directly to the Tribunal and on 22 February 1979 the Director General upheld the decision to extend his appointment by eight months and authorised him to appeal to the Tribunal. For the purpose of drafting his memorandum the complainant asked for copies of three items of evidence, namely the reply from the Permanent Mission of Romania to the letter of 26 June 1978, a memorandum dated 16 November 1978 from the Deputy Director General, Department of Safeguards, to the Director General and a memorandum dated 26 July 1978 from the Director of the Legal Division of the Agency to the Deputy Director General, Department of Administration. The complainant's request was refused on the grounds that the three documents contained advice which had guided the Director General in reaching his decision and were therefore confidential.

B. The complainant puts forward two arguments. The first is that the Director General failed to honour commitments towards him. He received a copy of the letter sent on 26 June 1978 to the Romanian authorities, which explicitly stated the Agency's intention of extending his appointment by five years. Since such extensions are common and normal administrative practice, the complainant believes that the copy given to him constituted a firm commitment. His second argument is that the impugned decision is unlawful because it was in breach of Article VII F of the Statute of the Agency, which states that in the performance of their duties the Director General and the staff shall not seek or receive instructions from any source external to the Agency. That, in the complainant's view, is a general principle of law of the international civil service, and one that is embodied in the rules of many organisations and has been consistently upheld by the Tribunal. The letter dated 26 June 1978 plainly solicits instructions from the Romanian authorities and the decision to extend his appointment by only eight months instead of five years shows compliance with those instructions. Thus the Director General abused his discretionary authority. The complainant also objects to the decision not to let him have the three documents mentioned above, which are essential to his case.

C. In his claims for relief the complainant asks the Tribunal to order the Agency to disclose the three documents, quash the Director General's decision of 22 February 1979 and, failing reinstatement or extension of his appointment by five years, award him compensation equivalent to not less than the amount of remuneration which

he would have received had he remained with the Agency up to 13 January 1984, including assignment, education and other allowances, plus 15,000 French francs as costs.

D. In its reply the Agency states that it was the President of the State Committee for Nuclear Energy of Romania who in May 1973 proposed that the Agency should employ the complainant, an expert in reactor physics. When his appointment was first extended by two years in 1976 the Romanian authorities objected on the grounds that the Agency had not complied with the procedure agreed upon between them for appointments and extension of appointments of Romanian citizens, the extension being for only two years instead of the five requested. The consent of the Romanian authorities had been secured later. The reason why the Agency refuses to disclose the three documents is that the letter dated 12 June 1978 from the Permanent Representative of Romania is a privileged diplomatic communication which may be released only with the consent of the Romanian authorities. The other two documents were advice which was given in confidence to the Director General to help him in taking his decision and, like any other communication from an adviser, are privileged. The Agency maintains that it entered into no commitment towards the complainant. No commitment may be inferred from the letter dated 26 June 1978, in which it merely said that it "wishes to offer" the complainant a five-year extension of his appointment. Moreover, Staff Regulation 3.03(C) expressly states that a fixed-term appointment carries no expectation of or right to extension, renewal or conversion. The defendant organisation did nothing to create any such expectation. The words "wishes to offer" in the letter dated 26 June 1978 denote a mere statement of intent. It is true that inspectors are "normally" offered an extension of their appointment, but they cannot hold the Agency to that. In reply to the allegation that the decision was unlawful, the Agency argues that because of the need for geographical distribution of posts it has to consult member States before making appointments and such consultations are long-established practice. It may recruit Romanian citizens only through or with the consent of the Romanian Government since all citizens who are qualified for a professional post in the Agency are government employees and have to be released from a government department before they can take up employment in the Agency. The complainant was highly qualified, being the general inspector and head of the national safeguards system in the State Committee for Nuclear Energy of Romania. The Romanian Government could not be expected to forgo his services indefinitely, as the complainant well knew. Because of the nature of the duties of Agency inspectors, they must be acceptable to all member States. It is clear from the facts that on two occasions the Agency twice did not meet the wishes of the Romanian Government: first, when it extended the complainant's appointment by two years instead of the five which the Government had asked for, and again, when it extended the complainant's appointment by eight months after the Government had asked that he should have no extension at all. In other words, the Agency did act independently: it may consult governments, but it does not accept instructions from them. The Agency therefore contests all the complainant's allegations and invites the Tribunal to dismiss the complaint.

E. In his rejoinder the complainant argues that although it is understandable for the Director General to consult a member State before appointing one of its senior civil servants, it is quite wrong for the organisation to go on doing so after the appointment, since by then he has become an international official and his independent status is unanimously recognised. It is clear from the evidence that the Agency itself is not sure that its practice is lawful under Article VII of its Statute. It is clear too, that the Department of Safeguards Inspectors, though anxious to keep such an efficient and well-qualified official as the complainant, expressed the view that the Romanian authorities had to be handled carefully. That attitude is at variance with the requirement of independence in Article VII. As for the Agency's commitments towards him, the complainant does not agree that the letter dated 26 June 1978 was just a "statement of intent": the Joint Committee which considers extensions of appointment had approved a five-year extension of his contract; the Director General had shown his concurrence by sending the letter and letting the complainant have a copy; and the complainant had been asked whether he would accept the extension. He therefore had a legitimate expectation of extension. Lastly, he appends to his rejoinder the three documents which he failed to obtain from the Agency, and therefore withdraws his application to the Tribunal to order the Agency to disclose them.

F. In its surrejoinder the Agency objects to the filing of the three documents, of which it says it was unlawful for the complainant to get copies. It formally asks the Tribunal to have the documents expunged from the dossier. As for the complainant's two arguments, it repeats that it entered into no commitment towards him and that all that may be inferred was an intention to extend his appointment after consulting the Romanian authorities in the usual way. After consulting those authorities, it changed its mind and gave him an eight-month extension - a decision taken for many different reasons, of which the attitude of the Romanian authorities was only one. The Director General therefore made free exercise of his discretionary authority. The complainant has suffered no prejudice and there is no proof that he will suffer any by reason of the refusal to extend his appointment on his return to his own country

or on any other account.

CONSIDERATIONS:

The removal of documents

1. The complainant asks the Tribunal to order the Agency to disclose three documents: a letter from the Director of the Department of Safeguards to the Director General, a letter from the Legal Adviser to the Deputy Director General and a letter dated 12 July 1978 from the Permanent Representative of Romania to the Agency. In its reply the Agency refuses on the grounds that the first two documents are internal documents and that disclosure of the third requires the consent of the Romanian Government. The complainant appends copies of the three documents to his rejoinder and agrees not to press his request for the originals provided that the authenticity of the copies goes unchallenged. In its surrejoinder the Agency accuses him of procuring the copies in breach of the rules and of common practice and asks that they be expunged.

2. In hearing the complaint the Tribunal need not take account of the three documents which the Agency wishes to have withdrawn. First, the two minutes written by Agency officials relate either to questions of law which the Tribunal will settle *proprio motu* and on which the opinions expressed carry no greater weight than arguments put forward by the parties, or else to questions of fact which the Tribunal will settle on the strength of other written evidence. Secondly, at the hearings on 18 November 1980 counsel for the Agency acknowledged that by a letter dated 12 July 1978 the Romanian authorities stated, without giving reasons, their opposition to extension of the appointment. Counsel thereby admitted the accuracy of the copy of the letter.

In the light of the written evidence and what was said at the hearings the Tribunal will therefore leave the three documents out of account. It thus gives material satisfaction to the Agency, but without detriment to the complainant's interests, and need not decide on the Agency's application for removal of the documents.

The complainant's waiver of his claim

3. The Agency argues that on 11 December 1978, when the complainant signed the form extending his appointment by eight months to 13 September 1979, he gave his unqualified consent to the decision he is now impugning. Be that as it may, his signature may not be construed as waiver of any claim against the Agency.

It is true that an official may have a good reason for waiving his rights. But the Tribunal will not consider such waiver to be established unless it may be clearly inferred from all the circumstances of the case. It may not be inferred merely from statements which the official may have made on one particular day: it must be evident from his general attitude over a longer period of time.

On 11 December 1978 the complainant did indeed sign the form extending his appointment, but the next day he wrote two letters to the Director General. In one of them he expressed surprise at the decision and said that he had no choice but to acquiesce, but stated his intention of taking steps to secure a further appointment, for five years. In the other letter he asked the Director General to review his decision. The form signed on 11 December 1978 must be taken, not in isolation, but together with the letters he wrote immediately afterwards.

Read with those letters, it did not constitute any waiver which precludes his claiming relief from the Tribunal.

Alleged right to extension of the appointment

4. The complainant argues that by sending him a copy of the letter which it wrote to the Romanian authorities on 26 June 1978 the Agency entered into a commitment to extend his appointment for the five-year period. The Agency retorts that the letter contained a mere declaration of intent which was in no way binding. That is indeed how the Tribunal construes the letter.

The complainant also relies on a practice which the Director General notified to an Agency body on 26 September 1968 whereby inspectors who had given satisfactory service for two years would normally have their appointments renewed for five-year periods. That is only a general practice, however, not a binding rule. In other words, it neither laid any obligation on the Director General in this case nor conferred any right on the complainant.

Misuse of authority

5. Although a decision on the extension of an appointment is a discretionary one, it does not fall entirely outside the scope of review by the Tribunal. The Tribunal will set it aside if it is tainted with some such flaw as lack of authority, breach of formal or procedural rules, mistake of fact or of law, disregard of essential facts, misuse of authority or the drawing of clearly mistaken conclusions from the facts.

The Tribunal will accordingly consider the complainant's contention that there was misuse of authority.

6. There will be such misuse when, though the decision is formally *intra vires*, authority is exercised for some improper purpose. The way on which the rule will apply to relations between an organisation and its staff calls for some explanation.

The executive head of an organisation is bound at all times to safeguard its interests and, where necessary, give them priority over others. One area in which the rule applies is staff recruitment. If a director-general intends to appoint to the staff someone who is a government official in a member State he will normally consult the member State, which may wish to keep the official in its service. Similarly, if such a government official's appointment is to be extended, it is reasonable that the organisation should again consult the member State, which may have good reason to re-employ him. This does not mean that a director-general must bow unquestioningly to the wishes of the government he consults. He will be right to accede where sound reasons for opposition are expressed or implied. But he may not forgo taking a decision in the organisation's interests for the sole purpose of satisfying a member State. The organisation has an interest in being on good terms with all member States, but that is no valid ground for a director-general to fall in with the wishes of every one of them.

7. On 26 June 1978 the Director of the Division of Personnel wrote on the Director General's behalf to the Permanent Representative of Romania saying that the Director General wished to extend the complainant's appointment by five years and expressing the hope that the complainant's services might be made available for that period. The letter is clear evidence of the Administration's belief that the five-year extension was in the Agency's interests. There was no reason for the Director General at the end of 1978 to disavow a belief held several months earlier by the Director of the Division of Personnel. The only reason which the Director General could have had for not carrying out the intention stated on 26 June 1978 was, at least to a large extent, a desire to defer to the will of the Romanian authorities, even though they gave neither express nor implied reasons for their opposition.

Had the Romanian authorities originally consented to the complainant's appointment for only a limited period, extension of the appointment up to the end of that period would arguably have been agreed to between the Agency and the member State. There is not a shred of evidence, however, to suggest that they did. In 1976 they actually proposed extending the appointment by five years, to 13 January 1982. In other words, it was not their intention then that the total period of the appointment should be limited to four years and eight months and terminate on 13 September 1979, that being the result of the impugned decision.

It is also true that, if the Romanian authorities had explained that they were opposed to the five-year extension because they wanted to have the complainant back again, this might have been a sound reason. But had that been what they wanted they would have needed his consent. Yet if they ever sought it, he certainly did not give it since he has shown a firm determination not to go back to Romania.

It appears from the foregoing that in taking the impugned decision the Director General, for no valid reason, let the interests of a member State prevail over the Agency's. He thereby committed a misuse of authority which taints his decision.

The independence of the Agency

8. Having found misuse of authority, the Tribunal need not consider whether the impugned decision is further tainted with any error of law, that is, whether it constituted a breach of Article VII F of the Statute of the Agency, the first sentence of which reads: "In the performance of their duties, the Director General and the staff shall not seek or receive instructions from any source external to the Agency."

The amount of damages

9. There being misuse of authority, the Tribunal allows the complaint. Reinstatement being inadvisable, the Tribunal will award compensation as provided for in Article VIII of its Statute.

Under this head the complainant claims "compensation equivalent to not less than the amount of remuneration which he would have received if he had remained with the Agency up to 13 January 1984, including expatriation, education and other allowances". He explains that because of a disagreement with the Romanian tax authorities he is unwilling to go back to his own country and that the duties he was performing at the Agency were such that it is difficult for him to find other employment.

These are not adequate reasons for allowing his claim in full. Where a decision not to extend an appointment is improper the Tribunal generally awards compensation less than the amount of remuneration which the complainant would have received up to the end of a further appointment. The Tribunal sees no reason to make an exception here. The complainant is not necessarily deprived of all means of livelihood; moreover, he himself attributes his difficulty in finding other employment in part to a disagreement with the Romanian authorities, and that is something for which the Agency is not liable.

The Tribunal will therefore award him *ex aequo et bono* compensation amounting to 50,000 United States dollars.

Costs

10. The complainant claims 15,000 French francs in costs. The case being a complex one, the claim is warranted.

DECISION:

For the above reasons,

1. The Agency shall pay the complainant compensation amounting to 50,000 United States dollars.
2. The complainant is awarded 15,000 French francs in costs.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 11 December 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy