The Administrative Tribunal,

Considering the complaint filed by Ms K. G. against the International Atomic Energy Agency (IAEA) on 13 March 2007 and corrected on 30 May, the IAEA's reply of 10 September, the complainant's rejoinder of 14 November 2007, the Agency's surrejoinder of 25 February 2008, the complainant's additional submissions of 7 April, and the IAEA's final comments thereon of 24 April 2008;

Considering Articles II, paragraph 5, and VII 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, an Austrian national born in 1944, is a former official of the IAEA who was recruited in 1972 as a Programmer/Analyst Trainee. During her long career with the Agency, she was employed under successive fixed-term appointments, each of which was extended several times. Between 1 February 1972 and 31 May 1984 she worked full-time, progressing from grade G-5 to grade G-8. She was granted a special post allowance at the P-2 level from 1 January to 31 December 1983 and at the P-3 level from 1 January to 31 May 1984. Further to her request to be employed on a part-time basis following maternity leave, the complainant was offered a new appointment with effect from 1 June 1984, still at grade G-8, which cancelled and superseded the previous one. Thus, from 1 June 1984 to 30 June 2002 she held a part-time post, although from September 1997 onwards she periodically accepted full-time temporary assistance contracts, each of which stipulated that upon its expiry the complainant would revert to her part-time appointment. Following a renumbering of the grades in the General Service category, her G-8 grade became G-7 with effect from 1 October 1996. As from 1 July 2002 the complainant held a full-time appointment at grade G-7 under a new contract which was scheduled to expire on 31 October 2004, when she would reach the statutory retirement age. This appointment was subsequently extended three times. In September 2003 she was temporarily assigned to perform the duties of a P-2 post, for which she received a special post allowance at that level as from 1 December 2003. Following the reclassification of that post, she received a special post allowance at the P-3 level as from 1 April 2005.

At the time when the complainant joined the Agency, staff in the General Service category holding an appointment of less than three years were excluded from participation in the United Nations Joint Staff Pension Fund (UNJSPF). Consequently, she remained affiliated to the Austrian Pension Insurance Scheme (APIS) during her initial six-month appointment and the first two-year extension thereof. In March 1974, however, when she was offered a five-year extension of her appointment, she was notified that, if she decided to accept it, she would become a participant in the UNJSPF as from the date of that extension and that the Agency would then cease to pay contributions to the APIS. She was also provided with information as to what measures she could take with respect to her contributions to the Austrian scheme. She accepted the offer by letter of 27 March, stating that she had taken note of the fact that she would become a member of the UNJSPF as from 1 August 1974 and that she would inform the Division of Personnel of her decision regarding her contributions to the APIS at a later date. On 28 March she signed the letter of extension.

By a memorandum of 9 August 1974 the complainant informed the Acting Director of the Division of Personnel that, following her discussion with Mr U., an IAEA officer responsible for pension matters, she had decided to avail herself of the option of being excluded from the UNJSPF until she had accumulated a total of 180 insurance months in the APIS. Accordingly, the complainant signed a new letter of extension on 9 September 1974, which cancelled and superseded that of 28 March and which explicitly excluded her from the UNJSPF but provided for her participation in the APIS. In a letter of 11 June 1975 addressed to the complainant and to Mr U., the APIS indicated that by the end of December 1974 she had accumulated a total of 91 insurance months in the Austrian scheme.

In April 1982 Mr U. informed the Division of Personnel that by 31 May 1982 the complainant would have accumulated 15 insurance years in the APIS; he accordingly requested that she be affiliated to the UNJSPF as from

1 June 1982. By a letter of 29 July 1982, however, the APIS informed the complainant that by the end of May 1982 she had accumulated 203 insurance months.

In April 2004 the Director General approved a six-month extension of the complainant's appointment beyond retirement age. Subsequently, she was granted two further extensions of five and three months respectively, the latter expiring on 31 December 2005. In early December 2005 she was informed that her contract would not be extended beyond its expiry date. In a letter of 20 December 2005 to the Director General, she requested a review of that decision and a further extension through October 2006. She added that, because of Mr U.'s "bad advice" to remain in the APIS, she would receive a pension significantly lower than that which she would have received had she participated in the UNJSPF when she first became eligible. She requested that the Agency pay her compensation in the amount of 102,090.34 euros. In addition, she requested the payment of an end-of-service allowance (EOSA) equivalent to six months' net base salary, instead of four and a half months as indicated in a clearance certificate sent to her by the Division of Personnel. In his reply of 20 February 2006 the Director General rejected the complainant's requests. In the meantime, on 16 February 2006, the complainant had filed an appeal with the Joint Appeals Board. In its report of September 2006, the Board recommended that the Director General uphold his decision not to extend the complainant's contract and not to pay her compensation. Nevertheless, it also recommended that the Director of the Division of Personnel review the fairness of including the special post allowance when determining staff deductions, while excluding it when determining pension entitlements or the EOSA. By a letter of 19 December 2006 the Director General informed the complainant of his decision to endorse the Board's recommendations. That is the impugned decision.

B. The complainant contends that the IAEA breached its duty to act in good faith and to safeguard her pension entitlements by interfering with her right to participate in a retirement scheme of her own choosing, and specifically advising her to withdraw from participation in the UNJSPF and to continue in the APIS. She submits that in March 1974 she had already opted for the UNJSPF and that she had subsequently changed her original decision solely on the basis of the advice of Mr U.; as a result of that interference she now suffers a significant loss in pension benefits. She considers that the Agency has shown a lack of due care in that it has not accounted for the period she should have been enrolled in the UNJSPF, namely from 1 August to 9 September 1974.

She argues that the Agency acted negligently and in breach of its contractual obligations in that it failed to enrol her in the UNJSPF when she had accumulated 180 insurance months in the APIS, that is on 1 July 1980. In her view, it was not her responsibility to monitor her insurance months or to ensure that the Agency complied with its own rules. She submits that she would be receiving considerably higher pension benefits had she been enrolled in the UNJSPF as of 1 July 1980.

The complainant also contends that, by reducing her EOSA because of her part-time service, the Agency violated the Flemming principle, which requires that the pay of staff in the General Service category should be aligned with the best prevailing conditions at each duty station. She argues that the IAEA's rules in Appendix E to the Staff Regulations and Staff Rules which reduce the EOSA of part-time employees by 50 per cent are inconsistent with Staff Rule 4.06.7(C) and the relevant recommendations of the International Civil Service Commission. In addition, she considers it unfair that the Agency did not include in the calculation of her EOSA the special post allowances she received. She asserts that under the Austrian legislation in force since January 2003, which the Agency has failed to implement, she is entitled to receive a higher EOSA.

The complainant claims that she was entitled to a further contract extension up until 31 October 2006. According to her, she was led to believe that she would be granted such an extension and she was not given reasonable notice of the decision not to extend her appointment. She accuses the Agency of having discriminated against her because of her gender and of having breached the principle of equal pay for equal work. For instance, when she requested part- time work in order to care for her child, she was "downgraded" as she was offered a post at a lower grade, even though her duties remained the same. Similarly, despite repeated requests, she was only allowed to return to full- time employment in 2002.

The complainant seeks the quashing of the impugned decision and an award of 97,168.01 euros in material damages for loss of pension benefits due to the Agency's interference with her right to participate in the UNJSPF. Alternatively, she asks for 66,252.41 euros in material damages for breach of contract due to the Agency's failure to enrol her in the UNJSPF upon becoming eligible. In addition, she requests 115,918.95 euros in material damages for failure to extend her contract for another year, plus compound interest at the rate of 8 per cent per annum calculated every month from 1 January 2006. She also seeks an award of material damages for unpaid EOSA,

compound interest at the rate of 8 per cent per annum on material damages, appropriate damages for gender discrimination, moral damages and costs.

C. In its reply the IAEA objects to the receivability of the complainant's claims concerning breach of contract for failing to enrol her in the UNJSPF, non-implementation of the Austrian legislation, breach of the obligation to provide a reasonable period of notice regarding the non-extension of her contract, and gender discrimination as well as breach of the principle of equal pay for equal work, on the grounds that she has failed to exhaust the internal means of redress and to obtain a final administrative decision, as required under Article VII of the Statute of the Tribunal.

On the merits the defendant submits that the complainant's present pension status is the result of her own decisions, taken of her own free will and that, for its part, it acted according to her specific instructions. It holds that the complainant has failed to establish that the advice of Mr U. was "bad" at the time, or that it was given in bad faith, especially since she did not raise any issue as to its adequacy for more than 30 years. It considers that it was justified in relying on the information provided by the APIS for determining the date of the complainant's enrolment in the UNJSPF and argues that the complainant was in a better position to assess the accuracy of that information, since she was informed of her status in July 1982. It denies that it showed lack of due care, especially in view of the fact that the complainant took no action to address the issue for nearly 24 years.

Relying on the case law of the Tribunal, the IAEA asserts that its policy of reducing the amount of the EOSA payable by the ratio that part-time service bears to full- time service, and excluding from its calculation any special post allowance, is not in breach of the Flemming principle. It argues that this principle does not require direct application of Austrian law, and that the complainant has not established that the EOSA paid by the Agency is manifestly inadequate compared to that paid in Austria. In addition, even if the Agency's rules were amended to reflect the 2003 changes in the Austrian legislation, the complainant would not be entitled to compensation, given that her EOSA has been correctly calculated.

The defendant observes that the complainant had no entitlement to a contract extension beyond 31 October 2004, and that the one month's notice she was given was reasonable in the context of her appointment, namely a three month contract extension beyond retirement age. It dismisses the allegations of gender discrimination and non-compliance with the principle of equal pay for equal work, noting that the complainant was moved to a part-time post at her own request and that she was not "downgrad[ed]" but rather transferred to a post at the same grade, which, unlike her former post, did not involve higher-level duties.

D. In her rejoinder the complainant asserts that her claims are receivable in their entirety. She argues that the defendant has "blurred the lines drawn by the Tribunal between claims and pleas when it comes to deciding whether a complaint is receivable", and emphasises that, according to the case law, a complainant may raise new pleas in support of claims during the internal appeal proceedings or before the Tribunal. She reiterates her pleasand introduces a new plea in support of her claim for a higher amount of EOSA, namely that, based on a plain reading of the relevant Staff Rules, she is entitled to an EOSA equivalent to six months' net base salary plus language and non-resident's allowance. She also alleges breach of due process during the internal appeal proceedings.

E. In its surrejoinder the Agency maintains its objections to receivability. It argues that the complainant's arguments are not "pleas in support of her claims", but rather claims, which should have been submitted to the Director General for review and subsequently to the Joint Appeals Board, in order to form the subject of a final administrative decision within the meaning of Article VII of the Statute of the Tribunal. On the same grounds, it rejects as irreceivable the complainant's new argument that a reading of the relevant Staff Rules leads to the conclusion that she is entitled to a higher EOSA. It denies that there has been any breach of due process. It otherwise maintains its position.

F. In her additional submissions the complainant asserts that the IAEA is effectively asking the Tribunal to adopt a new rule on receivability, according to which an argument as to why a claim should succeed is waived if it is not made in the request for review to the Director General. She claims that the proposed new rule is inconsistent with the case law and wrong as a matter of law.

G. In its final comments the IAEA denies that it is seeking to introduce a "new rule on receivability". It maintains that what the complainant refers to as "argument[s] as to why a claim should succeed", are new claims, which were not the subject of a final administrative decision and are thus irreceivable.

CONSIDERATIONS

1. The complainant was employed by the IAEA from 1 February 1972 until 31 December 2005. She was initially employed full-time but worked part-time for various periods following maternity leave and unpaid leave from 14 July 1982 to 28 August 1983 and, again, from 18 January 1985 until 12 March 1986. Her employment was extended beyond retirement age, first from 1 November 2004 until 30 April 2005, then from 1 May until 30 September 2005 and, finally, from 1 October until 31 December 2005. On 2 December 2005 the complainant was informed that her appointment would not be further extended.

2. On 20 December 2005 the complainant asked the Director General to review his decision not to extend her contract and requested that she be granted a further extension beyond retirement age until October 2006. She also asked that the IAEA pay her "a sum sufficient to ensure the financial security of [her] retirement", claiming that her retirement benefits had been reduced by 102,090.34 euros as a result of advice provided to her by an IAEA officer, Mr U. She also asked for payment of an EOSA "equivalent to 6 months of net base salary" on the basis that the IAEA calculation breached the Flemming principle. Not having received a reply, on 16 February 2006 she requested that the Joint Appeals Board review the matter. Later, on 20 February, the Director General replied to her, maintaining his earlier decision not to extend her appointment and rejecting her other two claims.

3. So far as concerns the complainant's claims, the Joint Appeals Board recommended in September 2006 that the Director General maintain his decision of 20 February 2006 not to further extend the complainant's contract and that her claims for compensation be rejected. By a letter of 19 December 2006 the Director General informed the complainant that he accepted the recommendations of the Joint Appeals Board and that, accordingly, her appeal was dismissed. That is the impugned decision.

4. The complainant seeks the following relief:

(a) the setting aside of the impugned decision;

(b) material damages in the sum of 97,168.01 euros for loss of pension benefits as a result of interference in her option to participate in the UNJSPF;

(c) alternatively, material damages in the sum of 66,252.41 euros as a result of the failure of the IAEA to enroll her in the UNJSPF when she became eligible;

(d) material damages for unpaid EOSA;

(e) material damages in the sum of 115,918.95 euros for failure to extend her contract for another year from 1 January 2006, plus compound interest at the rate of 8 per cent per annum from that date;

(f) damages for gender discrimination; and

(g) moral damages, compound interest at the rate of 8 per cent per annum on material damages and costs.

5. The IAEA submits that parts of the complaint are irreceivable. With respect to the claim relating to the UNJSPF, the IAEA contends that only part of the claim, namely that relating to alleged interference is properly before the Tribunal. It points out that the issue with respect to eligibility for enrolment surfaced for the first time in oral hearings before the Joint Appeals Board. Because it was not raised in her letter of 20 December 2005, according to the argument, the claim was not receivable by the Board and, thus, is not receivable by the Tribunal.

6. As previously noted, the precise claim made by the complainant in her letter of 20 December 2005 was for "a sum sufficient to secure the financial security of [her] retirement", which she quantified at 102,090.34 euros on the basis that, but for the advice of Mr U., she would have joined the UNJSPF in 1974. She put her claim on the same basis in her appeal to the Joint Appeals Board. As pointed out in Judgment 1519, "receivability depends on the making of prior claims, not of prior pleas" (see also Judgments 429, 595, 960, 1019 and 1590). The complainant's alternative claim for 66,252.41 euros is within the scope of her original claim. However, a further issue arises with respect to the receivability of this part of the claim; it will be dealt with later.

7. The claim with respect to the EOSA is properly before the Tribunal. The claim for payment of six months'

net base salary by way of an EOSA, rather than four and a half months, has not changed. All that has happened is that in her complaint and, again, in her rejoinder, the complainant has advanced different arguments or pleas in support of the claim.

8. The IAEA also contends that a subsidiary claim based on inadequate notice of the non-extension of the complainant's contract is irreceivable, it having been made for the first time in the complaint. That must be rejected. The complainant's general claim that her contract should have been extended is apt to include a claim that it should have been extended to allow for a proper period of notice. However, her original claim was for extension until October 2006 and, accordingly, her present claim must be restricted to that period.

9. Different considerations apply to the complainant's claim for damages for gender discrimination as a result of her taking maternity leave and electing to work part-time for some time after her return to work, and for failure to observe the principle of equal pay for work of equal value. The precise claim made in the complaint is for financial damages for having worked at a lower grade for several years following her first period of maternity leave even though the duties were the same as those previously undertaken, for having worked part-time instead of full-time for substantial periods between 1994 and 2002 despite her requests for full-time work and for consequential diminution in pension benefits. The claim for damages on this basis was made for the first time in oral proceedings before the Joint Appeals Board. The Board neither ruled on its receivability nor made any recommendation with respect to it, although, it seems, the Chairman informed the complainant that he had raised the issue with the Focal Point for Gender Concerns. The complainant contends that this part of her complaint is supported by an "accumulation of events over time", as referred to in Judgment 2067, and that, as the Board did not rule on its receivabilty, the Tribunal should now decide the matter. She also contends that the issue is bound up with her pension claim.

10. The fact that the complainant's pension entitlements would have been greater if she had worked full-time and/or in a higher position does not make her claim with respect to gender discrimination and failure to observe the principle of equal pay for equal work part of her claim with respect to the UNJSPF. It is a separate claim made by reference to the consequences of several administrative decisions taken between 1983 and 2002. The complainant's reliance on Judgment 2067 is misplaced. That was a case concerning harassment which is often evidenced by an accumulation of acts and events. The complainant's case is one of discrimination or unequal treatment manifest in the individual decisions which resulted in her working part-time and at a lower grade. Those decisions were not timely challenged. Moreover, no claim was made with respect to gender discrimination or breach of the principle of equal pay prior to the oral proceedings before the Joint Appeals Board. For these reasons, the Board should have ruled that the claim was not receivable. For the same reasons, the claim is not receivable by the Tribunal.

11. It is not disputed that when the complainant joined the IAEA in February 1972 she was required by Staff Rule 8.01.3 to participate in the APIS. On 8 March 1974 the complainant was offered a five-year extension of her appointment with effect from 1 August of that year and was informed that, if she accepted, she would have to join the UNJSPF. In late March the complainant accepted the offered extension and noted that she would be joining the UNJSPF with effect from 1 August 1974. At that time, the relevant Staff Rules required that she then join the UNJSPF. However, the rules were changed with effect from 1 July of that year and staff members were advised in the Notice to the Staff of 28 June 1974 that:

"Under the provisions of revised Staff Rule 8.01.3 (A) (2), General Service staff members who are nationals of Austria […] and who remain participants in [the APIS] after 30 June 1974, will be permitted, on request, to remain in that scheme until they have accumulated a total period of 180 insurance months in the scheme. On completion of this period, they will be transferred to the [UNJSPF]. Hitherto, such staff members could only participate in [the APIS] for a maximum period of three years."

As pointed out in Judgment 1769, this change resulted from the combined effect of the Headquarters Agreement between the IAEA and the Austrian Government and a more specific agreement concerning social security which had come into effect on 1 July 1974 which allowed persons in the position of the complainant to stay in the APIS until they had accumulated the minimum requirement for the vesting of pension rights under that scheme.

12. In August 1974, after the above changes had come into effect, the complainant spoke to Mr U., who advised her that "it would be to her advantage to withdraw from the UNJSPF and instead participate in APIS". The complainant says that his arguments were "very persuasive" and, in consequence, she informed the Division of Personnel in writing that she would like to be excluded from the UNJSPF until she had a "total of 180 insurance

months" in the APIS. As a result, a new letter of extension was prepared and signed by the complainant providing that she was excluded from the UNJSPF but would, instead, be a full member of the APIS.

13. The complainant contends that because of Mr U.'s advice to remain with the APIS the Agency interfered with "her right to participate in a retirement scheme of her own choosing". She also suggests that the advice was negligent or given in bad faith, although she contends that these issues are irrelevant. In support of her argument, it is put that she "had initially freely exercised her right to participate in the UNJSPF in March 1974, when she was offered and accepted the [five]-year […] extension". That is not correct. She had no choice in March 1974. She was only able to make a choice after 1 July 1974. Additionally, she contends that Mr U. was "in a position of influence" and should not have offered advice as to which was the better scheme. It is not clear whether the complainant sought advice or it was offered gratuitously. Whatever the situation in that regard, there is no evidence that the complainant was in a vulnerable or other situation that made her prone to being influenced against her better judgement. Moreover, she clearly had a choice after 1 July 1974 and in order to make that choice it was relevant for her to know that, by remaining in the APIS until she had 180 insurance months, her pension rights would vest. It would have been a breach of its duty of care had the IAEA not drawn that matter and the fact that she had a choice to her attention. In the absence of any evidence as to the nature of the advice offered, how it came to be offered, the basis on which it was proffered, the factors that were then important to the complainant and the factors taken into account by her, it is impossible to conclude that there was any interference in her right to choose the fund to which she would belong from 1 August 1974.

14. The complainant's argument is advanced by referring to Judgment 1245 in which the Tribunal said "it would not have made sense for [the complainant in that case] to agree to continued exclusion from the [UNJSPF] when her pension from [that fund] was likely to be better than her pension from the Austrian scheme". That statement was made in relation to the question whether the complainant in that case had been consulted as to whether she wished to be in the APIS or the UNJSPF. In the present case, the complainant was consulted and agreed to remain in the APIS until she had accumulated 180 insurance months in that scheme. Further, there is nothing in the material to indicate that the advice given to the complainant in August 1974 was given negligently or in bad faith. Accordingly, the complainant's argument based on the giving of that advice must be rejected.

15. It was said in Judgment 1245, by reference to the IAEA Staff Rules that are not materially different from those applicable immediately after 1 July 1974, that there is a duty on the Agency "to ensure that a staff member who qualifies should be made a participant in the [UNJSPF]". Perhaps, more accurately for this case, there is a duty to ensure that the relevant Staff Rules are respected. Staff Rule 8.01.3(A)(2) as applicable on 1 July 1974 provided that "[staff members in the General Service category] shall participate in the [UNJSPF] after having accumulated 15 years in [APIS]". Moreover, the Notice to the Staff of 28 June 1974 clearly stated that they would then be transferred to the UNJSPF. The first question that arises in relation to this aspect of the claim is whether the complainant had accumulated 15 insurance years or 180 insurance months prior to her enrolment in the UNJSPF from 1 June 1982.

16. By a letter dated 11 June 1975 the APIS informed the IAEA that the complainant had accumulated 91 insurance months at the end of 1974. Someone – it is not clear who – noted at the bottom of that letter that she would accumulate 180 insurance months on 31 May 1982. That calculation was clearly made on the basis that the complainant would accumulate one insurance month for every month worked. It is not suggested that the calculation was wrong. And presumably on the basis of that letter and calculation, the IAEA arranged for the complainant to participate in the UNJSPF from 1 June 1982. Thereafter, by a letter of 29 July 1982, the APIS informed the complainant that she had accumulated 203 insurance months by and inclusive of May 1982. On this basis, the complainant calculates that she should have been enrolled in the UNJSPF from 1 July 1980. It is not suggested that this calculation is wrong.

17. The complainant suggests that the difference between the two statements as to the insurance months calculated by the APIS in 1975 and 1982 is explicable on the basis of changes in the APIS rules. However, the information before the Joint Appeals Board was that the "system of insurance months accumulation" had not changed in the relevant period. Accordingly, the Tribunal must proceed on the basis that either the letter of June 1975 or that of July 1982 was wrong. As the complainant has produced the latter letter and the IAEA has not offered any material to suggest that the information in it was wrong, it is appropriate to proceed on the basis that the complainant should have been enrolled in the UNJSPF from 1 July 1980.

18. As earlier indicated, the complainant became aware in July 1982 that she had accumulated 203 insurance

months in the APIS by the end of May 1982 and she must then have known, or ought reasonably to have known, that she should have been enrolled in the UNJSPF from 1 July 1980. She claims in her rejoinder that she immediately contacted Mr U. but was told that there was nothing that could be done to correct the error. There is nothing to support that assertion and the IAEA argues that it should be rejected. The complainant also contends that she had no duty to take the matter further as she could not predict what effect the matter would have on her pension entitlements. The latter argument must be rejected. At the very least, the complainant must be taken to have been aware in July 1982 that the IAEA was in breach of her employment agreement, as reflected in her memorandum of 9 August 1974 and the subsequent letter of extension of appointment in September 1974 that replaced the earlier one of March of that year, and of its duty to ensure that she was enrolled in the UNJSPF as soon as she accumulated 180 insurance months in the APIS. She should thus have availed herself of internal remedies by asking the IAEA to take steps to ensure her enrolment in the UNJSPF with retroactive effect, including, if possible, by buying back the sums paid to the APIS and, if not, by meeting the costs of her retroactive enrolment. In the event that that request was refused, she should have availed herself of the internal appeal remedies and if necessary proceeded to the Tribunal. She did not do so. The time within which she could do so has long since passed. Accordingly, this aspect of the complainant's claim is time-barred and irreceivable.

19. The first question that arises in relation to the complainant's claim with respect to the EOSA is whether the allowance in the amount of four and a half months' net base salary was calculated in accordance with the Staff Rules. The complainant contends that it was not. Staff Rule 4.06.7(C) relevantly requires that "[t]he end-of-service allowance shall be calculated on the basis of completed years of continuous service at Headquarters after 1 October 1987 […]". It is not in dispute that, had her actual years of service been taken into account, the complainant would have been entitled to six months' net base salary, instead of four and a half months. Her entitlement was calculated by reference to paragraph 28 of Appendix E which relevantly provided at the material time that:

"For the purpose of payment of [EOSA], periods of service in part-time employment shall be counted as 50% or 80% of the period in full-time employment […]."

20. The complainant contends that paragraph 28 of Appendix E as applicable at the time was inconsistent with Staff Rule 4.06.7(C) and was, thus, invalid. This argument must be rejected. Staff Rule 3.03.1(E)(3) provides:

"Salaries, allowances, and other entitlements for staff members working part-time shall be reduced in accordance with the ratio part-time employment bears to full-time employment. Specific provisions for part-time service are set forth in Appendix E to these Rules."

Given the terms of Staff Rule 3.03.1(E)(3), paragraph 28 as applicable then was not inconsistent with Staff Rule 4.06.7(C). Together, Staff Rule 3.03.1(E)(3) and paragraph 28 of Appendix E operated as a special modification or qualification to Staff Rule 4.06.7 with respect to part-time employment. That did not make paragraph 28 invalid.

21. The argument that the Staff Rules regarding the calculation of the EOSA infringe the Flemming principle is made on the basis of three points of divergence between the Agency's relevant rules and Austrian law that provides for payment of an EOSA to employees in the private sector. Before turning to those points of divergence, it is convenient to note that the Flemming principle requires that international organisations within the United Nations common system offer staff in the General Service category salary and other basic components of pay that are "among the best in the locality without being the absolute best" (see Judgments 1086, 1519, 1713 and 2303). For many years, General Service employees in Austria were paid a salary that incorporated an adjustment for the payment made on retirement under Austrian law. However, following the recommendations of the International Civil Service Commission in 1987, the IAEA and other Vienna-based organisations replaced the salary adjustment with an EOSA similar to that paid under Austrian law.

22. Neither the Flemming principle nor any other consideration requires that the IAEA replicate Austrian law. However, once the salary adjustment ceased, the Flemming principle required that, in its overall application, the EOSA be at least on a par with the Austrian provisions. The complainant points to three areas in which she contends it is not. The first relates to the reduction in the calculation of years of service by reference to part-time employment, the second relates to the calculation of salary on which the EOSA is paid and the third concerns changes to the Austrian system that came into effect on 1 January 2003. It is unnecessary to deal with the last two matters which are, in any event, under review by the IAEA. So far as concerns the EOSA as paid by the Agency, the Staff Regulations and Staff Rules appear to give effect to the substance of the Austrian law save in the three respects identified by the complainant. There is nothing to suggest that, if the EOSA paid by the IAEA is less

advantageous in any of these respects, it is compensated for by aspects that are more advantageous.

23. It is not in issue that under Austrian law, the EOSA is calculated by reference to the actual years of continuous service and no reduction is allowed for periods worked part-time. The IAEA points out that, under Austrian law, persons working part-time at the time of their retirement will have their EOSA calculated on the basis of their part- time salary. However, this is also true of IAEA staff members. Thus, it is not correct, as the Agency suggests, that its EOSA may be more advantageous for staff members who are employed part-time in their last month of service. As there is nothing to suggest that the IAEA system is different from Austrian law in respects that make it on a par with it overall, it must be concluded that paragraph 28 of Appendix E in the version applicable at the time infringed the Flemming principle insofar as it reduced the actual number of years of service by reference to a period or periods of part-time employment. That being so, the complainant is entitled to the difference between six months' net base salary and that actually paid by way of an EOSA.

24. As already noted, the complainant's contract had been extended three times after she reached compulsory retirement age. Staff Regulation 4.05 provides:

"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."

The complainant's last extension was preceded by a request for extension to 31 December 2005 on the basis that the person who had been selected to fill her position would not be able to report for duty until 1 December of that year. There was no subsequent request.

25. Given the terms of Staff Regulation 4.05, the basis on which the last extension was granted and the absence of any evidence as to arbitrariness, improper motive or any other matter that might justify the setting aside of the decision not to extend the complainant's contract beyond 31 December 2005, that decision cannot be disturbed. However, a question arises as to whether the complainant was given reasonable notice.

26. There is nothing to suggest that the complainant was informed at the time of her last extension that that would be her last – a course that might appropriately have been taken in light of the basis on which it was then extended. Moreover, it is not disputed that, as set out in her memorandum of 7 December 2005 to the Special Assistant to the Deputy Director General for Management, the complainant was only informed of the decision on 2 December 2005. Nor is it disputed that she had reason to believe that it would be extended in that she had been given a workplan for the coming year only a few days earlier. Further, at her meeting with the Special Assistant, she was told that the matter would be looked into but received no further communication before her contract expired.

27. Although Staff Regulation 4.02 provides that no notice is necessary in the case of expiry at the due date of a fixed-term or short-term appointment, the duty of an organisation to act in good faith and to respect the dignity of staff members requires that reasonable notice be given, "particularly so that they may exercise their right to appeal and take whatever action may be necessary" (see Judgments 2104 and 2531). In view of the complainant's long service with the IAEA and the fact that it must have been known when her last extension was granted that it was likely to be her last, a period of three months' notice is reasonable. Accordingly, the IAEA must pay compensation equivalent to the salary and allowances, including special post allowance, that the complainant would have received if her contract had been extended to 31 March 2006.

28. As the complainant has had a measure of success, there should be an order for costs in the sum of 2,500 euros.

DECISION

For the above reasons,

1. The decision of 19 December 2006 is set aside.

2. The IAEA shall pay the complainant compensation by way of an EOSA in a sum equal to one and a half months' net base salary together with interest at the rate of 8 per cent per annum from 31 December 2005 until the

date of payment.

3. It shall also pay her compensation in lieu of notice in an amount equal to salary and allowances, including special post allowance, that she would have received if her contract had been extended to 31 March 2006, together with interest at the rate of 8 per cent per annum from 31 December 2005 until the date of payment.

4. The IAEA shall pay the complainant 2,500 euros for her costs.

5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 16 May 2008, Ms Mary G. Gaudron, Vice-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 9 July 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.