

SIXTY-THIRD SESSION

In re QUAYYUM

Judgment 844

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Syed Abdul Quayyum against the International Atomic Energy Agency on 27 March 1987, the Agency's reply of 30 April, the complainant's rejoinder of 9 June and the Agency's surrejoinder of 20 July 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Agency Staff Regulation 3.01 and 3.03 and Agency Staff Rule 3.03.2;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a Bangladeshi, is a chartered accountant. The Agency advertised a grade G.7 vacancy in Vienna for a safeguards inspection assistant and he was appointed to it on 22 September 1984 for a two-year term. He was assigned to Group OC 1/2 in the Division of Operations, Department of Safeguards. He was given two months' training. A "first semester appraisal" made on 10 July 1985 by the acting leader of the Group said that his technical knowledge was poor and he needed close watching. He was sent on inspections. One inspector reported in a minute of 26 August 1985 that, though good at accountancy and eager to do well, he had needed a great deal of support. Another inspector, in a minute of 24 October, advised giving him scientific training or else moving him to an accountant's job. He was taken off the inspection roster. On 8 April the Deputy Director of the Division of Personnel wrote warning him that his supervisor was not proposing extension of his contract as an inspection assistant beyond the date of its expiry, 30 September 1986, but suggesting he might "care to apply for other positions" for which the requirements would be "more commensurate with your professional experience and qualifications". On 7 May 1986 he appealed to the Director-

General, who on 22 May answered that non-renewal was not a challengeable decision under the Staff Regulations. He was given an extension to 31 December so that he could look for other work, and a final one to 31 March 1987, when he left. By a letter dated 19 January 1987 he had asked the Director-

General to reconsider, but on 11 February the Director-General confirmed his earlier decision and his view that the complainant was not fit for the post of inspection assistant. That is the decision impugned.

B. The complainant points out that the notice of vacancy said that preference would be given to accountants, and so he had no reason to fear he would be thrust into work he was not fit for. The United Nations Development Programme (UNDP), who were employing him as an accountant under a project in Botswana, were loth to let him go, and the loss of his job in Vienna cost him the one in Botswana as well. He was not allowed nearly enough time to learn his new job and was not given proper training. The group leader was nevertheless satisfied with him and a report dated 17 January 1986 praised his "accounting skills" and "desire to learn". His performance ought to have been reviewed. His supervisors appreciated his knowledge of accountancy and never warned him they thought him unfit for inspection work. His group leader assured him several times orally that his contract would be renewed. He was not given a chance to answer adverse comments on his performance in a text entitled "Note to the file" and dated 17 March 1986 by the head of his section. He was given tasks that fell outside the scope of his job description. His attempts to find other employment within the Agency were thwarted by the head of his section, who was determined to see him go, and the impugned decision causes him serious hardship.

He seeks the quashing of the decision of 11 February 1987; a three-year appointment with the Agency or equivalent redress; damages amounting to the 12 1/2 years' pay he would have earned had he kept his job in Botswana; pension entitlements; damages amounting to six months' salary for "loss of face and reputation"; the same amount for harassment; "nonresident allowance at Austrian schillings 26,000 per year"; and costs.

C. In its reply the Agency observes that according to Staff Regulation 3.03 and Staff Rule 3.03.2 a fixed-term appointment carries no guarantee of renewal or extension. In declining to extend the complainant's the Director-General exercised his discretion correctly, after consideration of all the relevant facts. The complainant's assertions that his supervisors were pleased with his work are, for reasons the Agency goes into in detail, either mistaken or unsubstantiated and the Agency cites several texts that state their dissatisfaction. The report of 17 January 1986 by his group leader was not a formal appraisal of his performance and does not count. Although he should indeed have been given a chance to answer criticisms in the minute of 17 March 1986, again it was not a formal appraisal but just a report on a talk with him about matters he knew of already. Oral assurances by supervisors cannot commit the Agency, and besides he offers no evidence of any. His pleas that he failed to get other employment and that the decision causes him hardship are immaterial: a contract will be renewed only if service is satisfactory, and the crux of the matter is that his was not.

The Agency invites the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant again goes over the facts of his case, enlarges on his original arguments and seeks to refute the Agency's reply. Had he known that the Agency would judge him on his knowledge of scientific matters and not on his accounting skills he would never have accepted its offer of employment. It misled him.

E. In its surrejoinder the Agency develops its main contention that there was no flaw in its discretionary decision not to renew the complainant's appointment. It submits, in particular, that no essential fact was overlooked; that the charge of animosity levelled against the head of the section is not borne out by any evidence and is in any case irrelevant to the complainant's failure to get another post since the section head had no say in the matter; that his work was "closely monitored" by his supervisors throughout; and that the Director-General drew no mistaken conclusions from the evidence before him.

CONSIDERATIONS:

1. The complainant was appointed to a fixed-term appointment for two years expiring at the end of September 1986. He was notified by a letter of 8 April 1986 that his contract would not be renewed. On appeal the Director-General, having granted him two extensions of three months each without conferring any right of renewal, ultimately confirmed the decision not to grant a renewal by a letter of 11 February 1987. It is against this decision that the appeal is brought.

2. In the vacancy notice advertising the job the type of appointment was stated to be "Fixed Term, Duration - Two years (with possibility of extension)". The job description was generally to provide assistance to professional inspectors at duty stations and during world-wide inspections of facilities. It was stated that the two main areas were, first, giving technical support involving surveillance equipment, non-

destructive measurement, sampling of materials and use of plant processing equipment, and, secondly, checking of accounting records, calculation of book inventories and related activities.

3. As for the qualifications, it was specified that general education up to university entrance level was essential and that preference would be given to candidates with either relevant technical experience in material measurement and sampling techniques and familiarity with process equipment or practical experience in material or financial accounting and familiarity with electronic data processing equipment. The vacancy notice stated that the incumbent of the post would be offered training in the activities mentioned.

4. The complainant's qualifications were solely in the accounting field. At the time of his appointment he held two concurrent appointments, one with the Botswana Government and the other with the UNDP under a project financed by the United Nations Volunteers. The Resident Representative of the UNDP in Botswana wrote to the Executive Co-ordinator of the United Nations Volunteers in Geneva saying that they were reluctant to lose the services of the complainant but felt that in the interests of his long-term career prospects they should not stand in his way.

5. No assessment of his technical and scientific aptitudes having been carried out by the Agency, the complainant took up duty and completed an introductory course on Agency safeguards (ICAS) of about three months and a safeguards training course of about one week in February 1985, and was sent to the Soviet Union for training in non-destructive analysis (NDA) lasting some fifteen days in May 1985. He was sent to Alkem as a trainee with an

inspector, Mr. Griggs, in May 1985 and with another inspector, Mr. Bevaart, in October 1985.

6. In May 1985 the complainant was excluded by the Director of Operations from the list of those certified as having given satisfactory service for the purpose of receiving a salary increment. A memorandum of 20 May said that he still had to be evaluated and that the Division of Personnel would be informed at a later date of the result. The complainant was ultimately paid a salary increment.

7. In October 1985 Mr. Bevaart was asked to provide a detailed evaluation of the complainant's workload because his man-day totals were rather low in comparison with divisional statistics and because of several oral appraisals made by named employees.

8. Mr. Bevaart made a confidential report on the complainant as a first semester appraisal dated 10 July 1985, to which was added a note on 26 August 1985 from Mr. Griggs on the complainant's performance and a further note from Mr. Bevaart on 24 October 1985.

9. These reports indicated that his technical knowledge, which had been low on his joining the Agency, had not noticeably improved. His knowledge of accountancy methods used in the agency was not sufficient. Mr. Bevaart reported that he needed close supervision and did not make decisions. His attitude to work was satisfactory. It seems he was anxious

to learn but failed to do so. This indeed is a common factor in each report: every person who reported on him confirmed that he was eager to learn. Mr. Griggs recommended giving him further NDA training and further inspections as a trainee before assigning him to inspections on his own. In his second report Mr. Bevaart commented that the complainant's main problem was lack of scientific background and said that he would have to be given either extra training in NDA, basic mathematics and physics or else a job in accountancy.

10. In a performance appraisal covering the period from 22 September 1984 to 31 January 1986 Mr. Craig, the complainant's supervisor, in the section dealing with the skills which contributed most to the complainant's performance, specified his accounting skills and desire to learn. He advised further training and inspections.

11. At a meeting of special group leaders held on 6 February 1986 a decision was taken that the complainant would no longer be assigned to inspection activities because he lacked the ability to perform tasks during an inspection without constant direct supervision. Inspection assistants were sometimes left during an inspection without direct supervision for periods of up to four hours. As a result of this decision the complainant was no longer assigned to work at Alkem.

12. Mr. Mousalli, the head of the section to which Group OC 1/2 belonged, reported on 17 March 1986 following an interview with the complainant that his work was still not satisfactory. While his good motivation and personal attitude were recognised, his weakness was a poor technical background. Mr. Mousalli said that in spite of close supervision by his superiors he was unable to cope without taking twice the time normally allowed.

13. By letter dated 8 April 1986 the complainant was informed that his contract would not be renewed, and he appealed to the Director-General.

14. On 22 May 1986 the Director-General wrote to the complainant and stated that completion of the ICAS course did not necessarily indicate satisfactory service, that he did not show that he retained the information communicated, that this was due to insufficient technical background and that according to the evaluation of his superiors he could not adequately perform the duties and responsibilities of his post.

15. After further representations by the complainant, and two extensions of appointment of three months each, the Director-General wrote to him on 11 February 1987 referring to his letter of 22 May 1986 and saying that the position had not changed and that the Department of Safeguards still maintained that he was not suited for an inspection post.

16. The case made out by the complainant is that he must have been up to standard as he received his salary increment and Mr. Craig, his supervisor, was satisfied. He was told after his two sessions as trainee that his reports were good. The decision of 6 February 1986 discriminated against him because other inspectors and an assistant were not sent to work on their own. Anyway he was misinformed that he would be helped to get a job in accounts-related work, and he was thwarted by the head of his section in his attempts to find other employment with the

Agency.

17. Staff Rule 3.03.2(D) provides that a fixed term-

appointment does not carry any expectation of renewal or of conversion to any other type of appointment. The Director-

General is given discretion under Regulation 3.03(C) to extend or renew a fixed-term appointment, and under Regulation 3.01 it is provided that the paramount consideration in the recruitment, employment and promotion of staff is to secure employees of the highest standard of efficiency, technical competence and integrity.

18. In order to impugn the decision of the Director-

General the complainant would have to show that the decision was flawed in some way: that it was made without authority, or in breach of a rule or that it involved a basic error of law or that an essential fact was overlooked or that a clearly mistaken conclusion was drawn from the facts or that it constituted an abuse of authority. The Director-General must reach an informed and unprejudiced decision.

19. The Tribunal is satisfied that the complainant was given every help and assistance, including special supervision, in his training and his allegation of discrimination is not substantiated. This is unfortunately a case where the complainant proved to be one of those persons who though possessing accounting skills and experience did not have the type of mind which could easily absorb and retain technical and scientific data.

20. While in his original brief the complainant concentrates on making out that he was suited for the job, he does state in his rejoinder that if he had been informed when he was in Botswana that his performance would be judged on the basis of his knowledge of physics and chemistry he would not have accepted the Agency's offer. It is true that the vacancy notice, which required either technical experience in a specialised field or accounting experience, did not spell out the degree of scientific knowledge which a successful candidate with accounting skills would be expected to acquire.

21. The Agency's reply to this point is that technical background has not been considered a necessary qualification for inspection assistants since the required basic training in technical subjects is given by the Agency itself, and that general inspection assistants at present employed have accounting or other non-technical backgrounds.

22. The Agency states that the complainant proved not to have the abilities necessary to benefit from the organisation's training or to translate his accounting skills into practical work and further that no mistake was made in recruiting him since he had on paper the qualifications required for the post as mentioned in the vacancy notice. The Agency does not deny his allegation that the extent of the skills which would be required was not made clear to him.

23. In recruiting an employee who would be expected to acquire skills which were not necessarily an extension of skills he already possessed but required a different discipline altogether, the Agency should have made it quite clear to the applicant exactly what was involved so that he could judge whether or not he possessed the ability to acquire, retain and apply the new skills and knowledge.

24. To judge from its submissions, the Agency does not accept any degree of responsibility for the lack of initial information to the complainant. While the complainant, in joining the Agency, took the risk that his appointment would not be renewed (see Staff Rule 3.03.2(D)), he was entitled to expect that he had all the relevant information to enable him to make an important decision concerning his future.

25. The complainant's charge of discrimination is not substantiated. His interpretation of the decision of the meeting held on 6 February 1986 was that a general rule was formulated which was not observed in the case of the other assistants. But what he considered to be a general rule was not. The assistants were never sent on their own and do not perform routine inspection without the supervision of an inspector present on the site, though not necessarily in the same facility. The decision to remove the complainant's name from the schedule was based on his performance and could not be considered discriminatory.

26. The failure of the complainant to find another position within the Agency cannot form the basis of a claim since Staff Rule 3.03.2(D) provides that a fixed-term appointment does not carry any expectation of renewal or of

conversion to any other type of appointment. There is nothing to substantiate his allegation that his attempts to find other employment within the Agency were thwarted by the head of his section.

27. In reaching his decision of 11 February 1987 the Director-General failed to take an essential fact into consideration, namely the degree of the Agency's own responsibility for the lack of information supplied initially to the complainant. While the paramount consideration in making or renewing appointments is to secure employees of the highest standard, it is not the only one. The principle of good faith requires that employees be treated with due regard for their rights. If the Director-General had considered the application in the light of the organisation's own responsibility for the complainant's difficulties when his contract was not renewed, he might have reached a different decision. It is not suggested that he should have renewed the complainant's contract to carry out work he was not competent to perform, but it might have been possible to use the complainant's accounting skills for another limited period. It had already been possible to grant two extensions of three months each to allow him time to find another position. This, however, was not sufficient recompense for the situation in which the complainant found himself through no fault of his own. He is entitled for the injury so sustained to compensation equivalent to six months' net salary and allowances.

DECISION:

For the above reasons,

1. The complainant is awarded damages equivalent to six months' net salary and allowances.
2. The complainant is awarded 1,500 United States dollars towards costs.
3. All his other claims are disallowed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner