Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M.

v.

WHO

124th Session **Judgment No. 3874**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. M. against the World Health Organization (WHO) on 10 August 2015 and corrected on 7 September 2015, WHO's reply of 8 January 2016, the complainant's rejoinder of 25 February and WHO's surrejoinder of 21 June 2016;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant claims that he has been deprived of his pension rights.

The complainant joined WHO in 2000 under a temporary appointment and was granted several other temporary appointments over a twelve-year period. On 10 June 2011 he was offered a temporary appointment for the period 16 May 2011 to 15 November 2011, which he accepted. In November his appointment was extended until 31 March 2012 to coincide with the last day of the month during which he would reach the mandatory retirement age of 62 years.

Following a query raised by the complainant concerning the within-grade step shown in his letter of appointment of 10 June 2011, he received a new letter of appointment showing the requested step increase. That letter, which was dated 15 February 2012 and which he signed on 23 February, provided that the appointment cancelled and

superseded that of 10 June 2011; however, it remained a temporary appointment for the period 16 May 2011 to 15 November 2011.

On 16 January 2012 the complainant wrote to the Director of the Human Resources Department (HRD) requesting an exceptional extension of his appointment for six months beyond the retirement age in order for him to be able to reach the minimum five years of contributory service required to draw a retirement pension from the United Nations Joint Staff Pension Fund (UNJSPF). On 26 January his request was denied on the ground that there were no exceptional circumstances to justify an extension. In February the complainant met with the Executive Director, Office of the Director-General, to discuss the possibility of an arrangement whereby he could continue to contribute to the UNJSPF while on leave without pay (LWOP). On 24 February the Executive Director informed the complainant that she had brought his personal situation to the attention of the Administration, as she had promised to do during their meeting, but that she had then learned that he held a temporary appointment and not a fixed-term appointment, as she believed. She explained that the fact that he held a temporary appointment made his situation "less positive". On 8 March 2012 the complainant's request to be granted LWOP was rejected.

On 14 March 2012 the complainant submitted three separate notices of intention to appeal to the Headquarters Board of Appeal (HBA), seeking inter alia the annulment of the decisions of 26 January and 8 March 2012 and the letter of appointment dated 15 February 2012. After having heard the parties, the HBA issued its report on 18 March 2015, recommending that the Director-General dismiss the three appeals. By a letter of 11 May 2015, the complainant was informed of the Director-General's decision to adopt the HBA's recommendations. That is the impugned decision.

The complainant considers that the decision not to extend his appointment and the decision not to grant him LWOP should be set aside. He requests the Tribunal to order retroactive extension of his appointment until such time as he would become entitled to a UNJSPF pension and to grant him damages for all financial losses he may suffer as a result of WHO's failure to make his position "permanent" and as a

result of the non-extension of his temporary appointment beyond 31 March 2012, including damages representing loss of salary and loss of pension rights. He also seeks moral damages and costs.

WHO asks the Tribunal to dismiss the complaint in its entirety as devoid of merit.

CONSIDERATIONS

1. By the impugned decision of 11 May 2015, the Director-General endorsed the recommendations contained in the 18 March 2015 report of the HBA concerning the complainant's three internal appeals (cases numbers 882, 883 and 884) by which he challenged the decisions of 26 January and 8 March 2012, together with the letter of appointment dated 15 February 2012.

2. The first appeal (No. 882) was filed against the decision of 26 January 2012 not to grant the complainant an extension of his appointment beyond the mandatory retirement age of 62. The second appeal (No. 883) was filed against the decision of 8 March 2012, which would have not allowed him to continue contributing to the Pension Fund until 30 November 2012 (i.e. the date by which he would have completed five years of contributory service). The third appeal (No. 884) was filed against the letter of appointment of 15 February 2012 by which he was granted a temporary appointment and not a "permanent" one. In its report, the HBA concluded as follows:

> "(a) Appeal No. 884 was found to be time-barred and thus irreceivable.
>
> (b) Appeals Nos. 882 and 883 were found to be receivable.
>
> (c) The decision to reject the [complainant]'s request for an extension of the retirement age pursuant to Staff Rule 1020.1 was in line with the WHO Staff Regulations and Staff Rules and WHO policies. It was not tainted by a failure to observe or apply correctly the WHO Staff Regulations or Staff Rules, or the terms of his [appointment] (Staff Rule 1230.1.3); personal prejudice on the part of a supervisor or of any other responsible official (Staff Rule 1230.1.1); incomplete consideration of the facts (Staff Rule 1230.1.2); or improper application of the WHO post classification standards (Staff Rule 1230.1.4).

(d) The decision not to extend the [complainant]'s appointment beyond the mandatory retirement age had not discriminated [against] the [complainant] on the basis of age.

(e) The [complainant] was not eligible to be granted a LWOP with a view to being able to continue participating in the UNJSPF in order to reach [five] years of contributory service. The decision to reject his request was not tainted by any grounds of appeal as stipulated in S[taff] R[ule] 1230.1.

(f) There was no evidence of *détournement de pouvoir*."

In accordance with those conclusions, the HBA recommended that the Director-General dismiss appeal No. 884 as irreceivable, and that she dismiss appeals Nos. 882 and 883 as unfounded, as well as the related claims for redress.

3. The complainant bases his complaint on the grounds that he was wrongfully treated as a temporary employee, that he was discriminated against on the basis of his age, that WHO relied on irrelevant considerations, that the impugned decision was taken for improper purposes amounting to an abuse of power, that WHO violated a promise made to him, and that he was unjustly prevented from reaching five years of contributory service which would have entitled him to a UNJSPF pension.

4. The complainant requests oral proceedings. He does not include a list of witnesses and in fact does not substantiate his request. Considering that the abundant written submissions are clear and detailed, the Tribunal is satisfied that the complaint can be fairly and appropriately determined by reference to the written material filed by the parties. Accordingly, no order is made for oral proceedings.

5. The Tribunal finds that the HBA and the Director-General correctly considered appeal No. 884 as time-barred and thus irreceivable. The complainant contested the letter of appointment of 15 February 2012 insofar as he was thereby offered a temporary appointment and not a "permanent" one. The temporary appointment was offered for the period 16 May 2011 to 15 November 2011. The letter of appointment of 15 February 2012, which cancelled and superseded the initial appointment

of 10 June 2011, merely changed, with retroactive effect, the within-grade step as requested by the complainant. It did not change any other terms of the appointment, which the complainant had accepted and signed earlier on. The Tribunal finds it useful to note that, in any case, the Staff Rules and Staff Regulations provide for a mandatory retirement age irrespective of the nature of the appointment (temporary, fixed-term or continuing).

6. The decision not to extend the complainant's appointment beyond the mandatory retirement age of 62 was taken on the basis of Staff Regulation 9.5 and Staff Rule 1020.1.

Staff Regulation 9.5 regarding separation from service provides as follows:

> "Normally, staff members shall not be retained in active service beyond the age specified in the Pension Fund regulations as the age of retirement. The Director-General may, in the interests of the Organization, extend this age limit in exceptional cases."

Staff Rule 1020.1 regarding retirement provides as follows:

> "Staff members shall retire on the last day of the month in which they reach the age of 60. However, staff members who have become participants in the United Nations Joint Staff Pension Fund on or after 1 January 1990 shall retire on the last day of the month in which they reach the age of 62. In exceptional circumstances the Director-General may, in the interests of the Organization, extend the retirement age, provided that not more than a one-year extension shall be granted at a time and that in no case shall any extension be granted beyond the staff member's sixty-fifth birthday."

7. The complainant has been employed at WHO on several temporary appointments which amounted to nearly four and a half years of service over a twelve-year period. There is no basis for the argument that he should have been treated as a "permanent" employee with all the protections that such status would have entailed. It is clear from the wording of the above quoted Staff Regulation 9.5 and Staff Rule 1020.1 that the complainant was not entitled to an extension of his appointment beyond the mandatory retirement age of 62.

8. The complainant contends that WHO ought to extend an appointment beyond the mandatory retirement age when there are exceptional circumstances and it is in the interests of the Organization

to do so. The complainant argues that the HBA and the Director-General applied a different standard as they considered only whether there were "exceptional circumstances, [that were] in the interests of the Organization". He believes this was an error of law. The complainant cites the following "exceptional circumstances" which should have led WHO to extend his appointment:

(a) He only had six and a half months left until his pension rights would become vested;

(b) WHO had promised to find a solution, which would allow him to reach the five years of contributory service needed to benefit from a pension;

(c) He was fit for service and his function was a "permanent one" which was still needed;

(d) He would suffer severe financial hardship without the pension;

(e) The length of extension of LWOP would only be six and a half months.

9. The HBA found that the exceptional circumstances mentioned by the complainant served only his own interest and that he had failed to indicate how they might serve the Organization's interests. It thus concluded, and the Director-General accepted this, that it was not in the interests of the Organization to extend his appointment. Although it concerned another organization, the Tribunal's observations in Judgment 3765, consideration 2, are relevant:

> "Staff Regulation [...] allows the Director-General to defer the retirement of a staff member if he or she considers it to be in the interest of the Organization. According to well-settled case law, a decision to extend an appointment beyond the statutory retirement age is an exceptional measure over which the executive head of an organisation exercises a wide power of discretion. This measure is therefore subject to only limited review by the Tribunal. The latter will interfere with such a decision only if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 1143, under 3, and 3285, under 10)."

10. In the present case, the complainant has not proven that any of the above-mentioned flaws exists. WHO was not required to extend his appointment based on his "fitness to perform the job" or the continuation of the duties of the post that he occupied. His argument that it was in the Organization's interests to extend his appointment and allow his pension rights to become vested rather than to appoint another staff member to replace him is untenable. As pointed out in the Organization's submissions, WHO would incur an indirect cost by extending his appointment, so not only would the extension of his appointment not be in the interests of the Organization, but it could reasonably be against its interests. The complainant's reliance on Judgment 2634 regarding the unlawful abolition of a post when evidence showed that the functions of that post were still required, is irrelevant to the complainant's situation. The abolition of a post necessarily implies the elimination of that post, whereas retirement of a staff member does not necessarily mean the abolition of the post occupied by the retiring staff member.

11. The complainant's arguments that when deciding whether to extend his appointment or grant him LWOP, the Organization relied on irrelevant considerations, that the impugned decision was taken for improper purposes amounting to an abuse of power, and that WHO had promised to find a solution to his situation, namely by extending his appointment or granting him LWOP, are unfounded. Having reviewed the documents submitted by the parties and the relevant rules, it is clear that what occurred cannot be construed as a promise which would bind the Organization to extend the complainant's appointment or grant him LWOP. Instead, the Tribunal finds that the Executive Director had acted appropriately, with respect to the Organization's duty of care, in promising to bring "[the complainant's] personal situation to the attention of the Director [of] HRD", which she did. Unfortunately, at that time she was unaware that the complainant held a temporary appointment and not a fixed-term one, and once she became aware of that fact (two days later), she notified him that the outcome of their inquiries was unlikely to be positive. In any case, she referred to conferring with HRD "to ensure [that they] were adhering to current

practices and rules". It is important to point out that even if the complainant had been on fixed-term appointments, he would still not have been eligible for LWOP as he did not have the service history required by Staff Rule 655.3, according to which "[t]he Director-General may authorize leave without pay for pension purposes for staff who are within two years of reaching age 55 and 25 years of contributory service, or who are over that age and within two years of reaching 25 years of contributory service."

12. The Director-General's decision was taken on the basis of e-Manual section III.6.25, paragraph 150, according to which "[s]taff members holding temporary appointments [...] are not eligible for [LWOP] for pension purposes". As the complainant was not eligible to be granted LWOP, there is no flaw in the decision not to grant it. In fact, to have granted it would have amounted to fraud against the UNJSPF. Additionally, it is not reasonable for the complainant to assert that financial aspects are "irrelevant factors" for deciding whether or not something is "in the interests of the Organization". Clearly, financial responsibility is a core requirement of the proper functioning of an international organization.

13. The argument that the complainant has been discriminated against on the basis of his age is unfounded. As stated in Judgment 2979, consideration 4, in relevant part:

> "[...] The principle of non-discrimination requires the adoption and implementation of impartial, reasonable and objective rules which provide the same juridical treatment for similar cases. What it forbids is any arbitrary and/or unjustified distinction between individuals or groups in similar or identical positions, not the differentiated or gradated treatment of situations which are intrinsically and objectively different. It is clear that set standards and rules are an administrative necessity in order to ensure the most fair and balanced practice towards all employees while maintaining the efficient operation of the organisation. [The Organization] Staff Regulation 4.05 is an example of a set standard which differentiates according to age, but cannot be considered as an arbitrary or unjustified distinction. Considering the present-day general health standards and longevity, it is not unreasonable to set a retirement age at 62 years – which already constitutes an increase in the years of service, given that 60 years is the retirement age for those

> appointed prior to 1990 – in order to support the broadest range of capability in retirement-age employees and maintain the continued proper functioning of the organisation. The complainant's suggestion, that all employees be treated individually with regard to their retirement, would be ideal but is not a practical option due to the unreasonably heavy administrative burden that it would place on the organisation. Determining retirement age on an individual basis would require supervisors to determine regularly an employee's 'fitness' and its probable duration."

14. The plea that the complainant was unjustly prevented from reaching five years of contributory service, which would have entitled him to a UNJSPF pension, is unfounded. As noted above, the series of temporary appointments, which the complainant had accepted, amounted to nearly four and a half years of service over a twelve-year period. He had not reached the minimum years of contributory service for his pension rights to become vested, not because WHO had "prevented him", but simply because he had not contributed to the UNJSPF for five years of service. As noted above, WHO was under no obligation to extend his appointment beyond the mandatory retirement age.

15. In light of the above considerations, the complaint is unfounded in its entirety and must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ