Registry's translation, the French text alone being authoritative.

TWENTY-FIFTH ORDINARY SESSION

In re WEST

Judgment No. 165

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mr. Burnell West on 18 October 1969, and brought into conformity with the Rules of Court on 28 November 1969, the reply of the Organization dated 6 March 1970, the complainant's rejoinder dated 2 April 1970, and the Organization's reply thereto dated 20 May 1970;

Considering Article II, paragraph 5, of the Statute of the Tribunal and FAO Staff Rule 303.131;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

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

A. Mr. West entered the service of the FAO on 31 March 1952 and was assigned as an expert to carry out work in connection with the Organization's participation in the United Nations Expanded Programme of Technical Assistance (EPTA). His letter of appointment contained no reference to enrolment in the United Nations Joint Staff Pension Fund. His initial appointment for one year was renewed for a further year on 31 March 1953 and on 31 March 1954, and on 31 March 1955 for two years, i.e. until 30 March 1957.

B. By letter dated 23 January 1957 from the acting Chief of the Personnel Branch, the complainant was informed that he had been given a "programme appointment" (i.e. a type of appointment of indefinite duration given to a few selected experts who because of their versatility or the recurring need for the kind of services they rendered could be given the possibility of pursuing a career under EPTA) as from 1 February 1957 and he was accordingly enrolled in the United Nations Joint Staff Pension Fund, the United Nations General Assembly having adopted the regulations under which he was entitled to enrolment. The same letter specified that he was not entitled to validate his past service. Nevertheless, the complainant did apply for the validation of his service from 1952 to 1957. This application was dismissed by the Secretary of the FAO Staff Pension Committee on 30 September 1958, and the complainant did not contest the decision. In 1964, however, the complainant again applied for the validation of his past service. His application having been dismissed successively by the FAO Staff Pension Committee and by the Standing Committee of the United Nations Joint Staff Pension Board, the complainant appealed to the Administrative Tribunal of the United Nations, which is competent to hear complaints alleging non-observance of the regulations of the United Nations Joint Staff Pension Fund submitted by staff members of the organisations affiliated to the Fund, which include the FAO. In his submission to the Tribunal, however, the complainant did not confine himself to pursuing his claim to the validation of his past service, but also claimed that under the terms and conditions of his contracts of employment since his original appointment the Organization should have enrolled him in the Joint Staff Pension Fund. In its Judgment No. 119 the United Nations Administrative Tribunal dismissed the claim for validation on the grounds that Article III of the Pension Fund Regulations, as drafted at the time, established the right to validation only for those staff members who had been barred from enrolment in the Fund because their original appointment had been for a period of less than one year, which was not the case in respect of Mr. West. In respect of the complaint concerning enrolment in the Fund, the Tribunal ruled that it lay outside its jurisdiction, since it was a question of interpretation of the contract of appointment of FAO staff members, for which that Tribunal was not competent.

C. In these circumstances Mr. West wrote to the Director-General of the FAO on 20 November 1968 asking him "to take the necessary steps to rectify the adverse financial effect to me of the failure of the Administration of FAO to enrol me in the Pension Fund in 1952 when I became eligible". He was informed in reply, on 19 December 1968, that his request was considered to be time-barred. The Organization explained in the same letter that it had never been intended that EPTA experts employed by the FAO and the other organisations under contracts similar to that

originally held by the complainant should be affiliated to the Joint Staff Pension Fund, and that in fact they had never been entitled to membership of the Fund. When the case came before the FAO Joint Appeals Committee, the latter found by a majority decision that the appeal was receivable and recommended that the Director-General should take the necessary steps for the enrolment of Mr. West in the Pension Fund with retroactive effect to 30 March 1954, and with the right to validate his two years of service prior to that date. In a dissenting opinion one member of the Appeals Committee held that the appeal was time-barred (in particular, because Mr. West had not exercised his right of appeal in 1957 when he was admitted to membership of the Fund), and in any case must fail, because in view of the decisions taken by the Technical Assistance Board at the time the FAO was not able to enrol the complainant in the Pension Fund during the period 1952-1957. On 8 August 1969 the Director-General informed the complainant that he was unable to accept the majority finding of the Joint Appeals Committee to the effect that the appeal was not time-barred, and that consequently he could not accept the Committee's recommendations.

D. In his complaint to the present Tribunal attacking the Director-General's decision of 8 August 1969, Mr. West contends that when his contract was renewed for a further year in March 1953 Article II of the Regulations of the Joint Staff Pension Fund conferred the right to enrolment in the Fund on every full-time staff member holding an appointment for one year or more, provided that his participation is not excluded by his contract of employment, and that Manual provision 331.2 (Eligibility for participation) - a provision which was in force from 2 August 1951 to 20 September 1954 - endorsed that principle, but specified that experts appointed for less than two years and paid out of EPTA funds were not eligible for participation in the Joint Staff Pension Fund. Neither the complainant's letter of appointment nor the standard terms and conditions of employment for experts, nor again Administrative Memorandum No. 6 of 13 October 1952 mention the question of pensions. The possible exclusion envisaged by Article II of the Pension Fund Regulations not having been specified, it follows that the complainant ought to have been enrolled in the Fund on 31 Larch 1954 when he had completed two years of continuous service. As he was posted at Baghdad at that time the applicable regulations of the Pension Fund were not available to him and the Organization failed to communicate them to him. When in 1964 he ultimately learnt that he was entitled to appeal, the FAO had advised him wrongly to appeal to the United Nations Administrative Tribunal. The complainant considers it particularly unfair to regard his complaint as time-barred. Up to 1964 he believed the Organization's statement that he was not entitled to enrolment. As soon as he discovered that this was not true he had taken action within the prescribed time limit. He points out, in addition, that the United Nations Tribunal and the majority of the members of the FAO Appeals Committee had held that the appeal was not time-barred and that it was receivable. Furthermore, while it was true that from the middle of 1954 up to 1958 experts were barred from membership of the Fund under Manual provision 341.122, this was an unfair rule which was recognised as such in 1958, when it was amended; in any event, this did not exonerate the Organization of not having enrolled the complainant in the Fund in March 1954 in accordance with Manual section 331.2 which was then in force.

E. In its statements in reply, the Organization contends that the complaint is time-barred, and therefore irreceivable; it claims that the time limits for the submission of claims must be mandatory, since otherwise administrative situations might remain permanently indeterminate. The complainant, like other experts, was well aware that he was not a member of the UN Joint Staff Pension Fund and that he was not entitled to enrolment. This is proved by the fact that in his first appeal in 1958 he asked for the validation of his past service, basing his claim on the provisions of the Pension Fund Regulations which specified that only non-pensionable periods of service might be validated. No deduction was made from the complainant's pay on account of pensions contributions. If at that time he had considered that he ought to have been enrolled in the Fund, Mr. West ought to have lodged an appeal to that effect then. It was not incumbent on the Organization to provide him with a copy of the Pension Fund Regulations since he was not a member of the Fund, and in informing him that the United Nations Administrative Tribunal was the body competent to hear his appeal it had not misled the complainant since up to that time the question in dispute was the rejection of his claim for validation of his earlier service, a matter which was properly within the Jurisdiction of the United Nations Tribunal.

F. The right of an employee to assert a claim against his employer is normally extinguished after the lapse of periods ranging from six months to five years under national laws. Some of the international organisations, in particular the World Meteorological Organization and the International Labour Organisation, have specific rules on this point. The FAO regulations (provisions 302.3101 and 302.3102) are less specific but endorse the same principle. As eighteen years have elapsed since 1951, the Organization considers it reasonable to hold that even if any claim had existed at that time, it would have been extinguished by prescription.

G. On the merits of the case, the Organization points out that the complainant recognises that in the light of Manual

provision 341.122, which replaced Manual provision 331.2 as from 20 September 1954, EPTA experts were not eligible for enrolment in the Joint Staff Pension Fund unless they had previously been members, but claims that he himself ought to have been enrolled before that date under Manual provision 331.2 after completing two consecutive years' service. However, all that the provision in question did was to make it clear that EPTA experts appointed for less than two years were not entitled to enrolment, and it was by arguing a contrario that the complainant sought to interpret it as meaning that experts appointed for two years or more were entitled to enrolment. Such an interpretation a contrario was untenable, the Organization maintains, and even if it were to be accepted, the expression "appointed for two years or more" would mean an original appointment for two years or more and not an accumulation of two years or more of uninterrupted service on the basis of successive contracts of less than two years each. The Organization adds that Manual provision 331.2 should be interpreted in the light of the terms of employment of all EPTA experts. The Expanded Programme was established in 1949 by Resolution 222(IX) of the Economic and Social Council and Resolution 304(IV) of the United Nations General Assembly, and the implementation of certain technical aspects of the Programme was entrusted to the specialised agencies such as the FAO, funds being placed at their disposal for the recruitment of experts. The functions of the co-ordinating agency for EPTA, the Technical Assistance Board (TAB), included the establishment of uniform administrative procedures, particularly in respect of the terms of appointment of experts. Each of the participating organisations was required to implement the provisions laid down by TAB by itself issuing the necessary rules. The policy of TAB as laid down in consultation with the various organisations responsible for the implementation of EPTA, including FAO, was as follows. Regular staff members who had been enrolled in the Pension Fund and who were subsequently assigned to an EPTA post were entitled to continue their participation. As regards experts recruited specifically for service under EPTA from April 1950 until January 1952, the policy of TAB was to exclude experts appointed for less than two years, while the position of experts appointed for two years or more was left in abeyance pending further study. From January 1952 to April 1953, the policy was to exclude experts appointed on a "short-term" basis, i.e. those holding appointments for less than three years. Experts holding "long-term" appointments, i.e. for three years or more, were subject to the normal rules applied by the organisations participating in EPTA to their regular staff. This implied, inter alia, enrolment in the Pension Fund. From April 1953 onwards, until amendments were introduced in 1956 and 1958, only experts who occupied "continuing posts", i.e. posts established to carry out a function expected to continue for at least five years, were entitled to enrolment in the Pension Fund, as only they were subject to the normal rules applicable to regular staff. The Organization considers that Manual provision 331.2, which was applicable from 2 August 1951 to 20 September 1954, exactly reflected TAB policy in force at the time of its promulgation, namely that experts holding appointments of less than two years were expressly excluded and no rule was laid down to cover those holding appointments of two years or more. It follows that the complainant's argument a contrario is not acceptable. When the second edition of the TAB Manual came into force on 1 April 1953, i.e. just after the first renewal of the complainant's contract, it restricted enrolment in the Fund to experts appointed to "continuing posts", which was not the type of post held by the complainant. Moreover, even if experts appointed for two years or more had been entitled to enrolment, which was not the case, the complainant would still have been ineligible because at the eleventh meeting of TAB in May 1951 it was specifically decided that the accumulation of several successive short-term contracts was not equivalent to a long-term contract. Lastly, the Organization maintains that not only was the complainant ineligible for enrolment under the relevant FAO provisions and the TAB provisions applicable at the time, but he was also ineligible under the general FAO rules concerning the terms of employment of EPTA experts. Thus Administrative Memorandum 233, Supplement 15, which was applicable from 31 January 1951 to 13 October 1952, provided as follows under paragraph 20: "Pension Fund: employees, because of their short-term employment, cannot be included in the United Nations Joint Staff Pension Fund." It was stated in this Administrative Memorandum that its purpose was to give effect to TAB decisions (documents TAB-R/35 and TAB-R/66, Rev. No. 1). Administrative Memorandum No. 6 of 13 October 1952, which followed the above-mentioned Memorandum No. 233 and applied to experts appointed for periods of less than three years, contained no provisions concerning enrolment in the Joint Staff Pension Fund, although it included, in paragraph 11, a detailed clause concerning "social security" for experts. Lastly, section 370/371 concerning the employment of EPTA experts, which came into force on 1 January 1954, did not include any reference to enrolment in the Joint Staff Pension Fund. The Organization also dismisses the complainant's contention that exclusion as provided for in Article II of the Regulations of the United Nations Joint Staff Pension Fund operates only if such exclusion is specifically provided for in the contract of employment. It considers, on the contrary, that exclusion may result from the terms of appointment as a whole, including the applicable rules laid down by the Organization, even in default of a specific clause in the contract. No formal condition in respect of such exclusion is laid down in the aforementioned Article II of the Regulations.

H. The Organization consequently submits that the complaint is irreceivable and subsidiarily, that it should be

dismissed on its merits.

CONSIDERATIONS:

FAO Staff Rule 303.131 provides as follows: "A staff member who wishes to lodge an appeal shall state his case in a letter to the Director-General through the department head or division director. In the case of an appeal against an administrative decision or a disciplinary action, the letter shall be despatched to the Director-General within two weeks after receipt of the notification of the decision impugned. If the staff member wishes to make an appeal against the answer received from the Director-General, or if no reply has been received from the Director-General within two weeks of the date the letter was sent to him, the staff member may, within the two following weeks, submit his appeal in writing to the Chairman of the Appeals Committee, through the Secretary to the Committee."

In accordance with this provision the period within which an appeal must be submitted against any administrative decision affecting FAO officials starts to run from the date of notification of the decision to the persons concerned.

In appointing Mr. West on 31 March 1952 under a one-year contract which made no provision for his membership of the United Nations Joint Staff Pension Fund, the Director-General thereby took the decision not to enrol him as a Fund member.

Although that decision was not notified at the time, it was confirmed and notified by the letter of 23 January 1957 whereby the Director-General informed the complainant that he would become a member of the Joint Staff Pension Fund only from 1 February 1957.

The date of receipt of that letter was accordingly the date at which the period laid down in Staff Rule 303.131 began to run for the lodging by Mr. West of an appeal against the Director-General's decision to appoint him to the staff of the Organization from 31 March 1952 without Fund membership and against the decision of 23 January 1957 to enrol him as a member of the Fund only with effect from 1 February 1957. The Organization is therefore justified in contending that the complainant's right to appeal had lapsed and that the Director-General's decision of 8 August 1969 dismissing his appeal is not tainted with illegality.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this Judgment by Yr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., 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 17 November 1970.

(Signed)

M. Letourneur
André Grisel
Devlin
Bernard Spy

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