

THIRTY-SECOND ORDINARY SESSION

In re STRACEY

Judgment No. 230

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mr. Russel St. Clair Ballantyne Stracey on 27 May 1973 and brought into conformity with the Rules of Court on 14 June 1973, the Organization's reply of 8 August 1973, the complainant's rejoinder of 3 September 1973 and the Organization's surrejoinder of 22 October 1973;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Rule 303.131, FAO Manual section 331.311, Articles II.1, IIbis.1 and IIbis.3 of the 1963 Regulations of the United Nations Joint Staff Pension Fund and Article II of the 1967 Regulations of the Fund;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

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

A. The complainant joined the staff of the FAO (World Food Programme) on 10 May 1964 shortly before his fifty-sixth birthday and received a one-year appointment at grade P.4, step 1. He was sent to Guyana, then British Guiana. At the time he became an associate participant in the Joint Staff Pension Fund. His appointment was successively extended to June 1966, June 1967 and 31 December 1968. In May 1967 it was decided to transfer him to the United Arab Republic on assignment to projects of which some were to end in 1970 and others in 1972. War broke out between that country and Israel in 1967 and prevented his transfer. He was posted to Uganda until the end of February 1969, then transferred to Tanzania and then to Malta. Finally he was offered a post at headquarters but, being unable for family reasons to accept it, resigned on 1 September 1972.

B. The complainant reached the age of sixty in May 1968. In June 1968 he discovered from his pay slip that he was no longer an associate participant in the Joint Staff Pension Fund. Under the Fund Regulations a staff member appointed for less than five years is an associate participant; to qualify as a full participant he must fulfil certain conditions and, in particular, be under the age of sixty. If he does not fulfil those conditions he ceases to be an associate participant from the age of sixty and can no longer qualify for full participation if on the date of his birthday he does not hold an appointment which brings his total period of continuous service to at least five years. Since his appointment to the United Arab Republic, which might reasonably have been expected to last for the period required to fulfil the above conditions, was cancelled and replaced by an assignment to Uganda which ended on 31 December 1968, on the date of his sixtieth birthday the complainant did not fulfil the prescribed conditions since he had joined the staff of the FAO on 10 May 1964. His contract would have had to run until 10 May 1969 for him to complete five years' continuous service and so qualify as a full participant. Through the combined effect of the Pension Fund Regulations and the circumstances of the case the complainant was and still is deprived of a pension to which he believed himself to be entitled.

C. The complainant drew the Organization's attention to the anomaly immediately, in July 1968, and was, he alleges, given to understand that steps would be taken to correct it. But his position remained unchanged, and he again urged the Organization to act. In 1970 it sought to have the complainant admitted as a full participant in the Fund by retroactively extending the period of his appointment so as to fulfil the condition of five years' continuous service. The secretary of the Joint Staff Pension Fund told the FAO, however, that such an expedient was not acceptable, and the complainant was so informed in August 1970.

D. The complainant believed that the Organization had been negligent since by acting in time it could have corrected the anomaly, and he appealed to the FAO Appeals Committee. The Committee unanimously held that the Organization had clearly intended to give the appellant pensionable status, but unfortunately had not taken the right

action in time, and despite its subsequent efforts the complainant found himself without a pension. Since the complainant had been the victim of oversights on the part of the Organization, the Committee unanimously recommended the Director-General to consider as soon as possible ways of fulfilling the Organization's intention of providing a pension for the complainant. The Committee added that, not being conversant with the Pension Fund Regulations, it could not make precise recommendations. It did recommend, however, that should the complainant find it necessary to appeal to the FAO Staff Pension Committee or to the United Nations Joint Staff Pension Board, the Organization should join him in his appeal or, failing that, take any further measures required to rectify the complainant's anomalous position.

E. By letter of 20 March 1973 the Director-General informed the complainant that he could not endorse the Appeals Committee's recommendations and dismissed his appeal. The complainant is appealing against that decision of 20 March 1973.

F. In his claims for relief the complainant asks the Tribunal to order his reinstatement in the United Nations Joint Staff Pension Fund, or, if that is no longer technically feasible, to order the *ex gratia* payment to him by the Organization of a sum sufficient to buy an annuity equivalent to the full pension to which he would ordinarily have been entitled.

G. In its reply the Organization maintains that the complaint is irreceivable inasmuch as it is based on administrative decisions taken in 1967 or 1968 concerning the duration of the complainant's appointment and the complainant did not appeal against them to the Director-General within the time limits laid down by FAO Staff Rule 303.131. It was not under any legal obligation or commitment to grant the complainant an appointment of such duration as would have entitled him to full participation in the Fund, and in omitting to do so it committed no breach of the terms of his appointment and was guilty of no "administrative negligence". Finally, not being responsible for managing the United Nations Joint Staff Pension Fund or applying its Regulations, it cannot be held liable for its lack of success in securing the complainant's participation through retroactive amendment of the duration of the appointment he received on 1 July 1967. The Organization therefore prays that the complaint be dismissed.

CONSIDERATIONS:

As to the receivability of the complaint :

The Organization maintains that the complaint is irreceivable in so far as it is based on alleged irregularities in the decisions taken in 1967 and 1968. It is true that the complainant did not impugn within the time limits laid down in Staff Rule 303.131 the decision to extend his appointment from 1 July 1967 to 31 December 1968. In July 1968, however, immediately after he discovered that he was no longer an associate participant in the Joint Staff Pension Fund, he pointed out this fact to the Organization. The Organization then sought to give him the status of a full participant. In 1970 it accordingly replaced the contract concluded for the period from 1 July 1967 to 31 December 1968 with a new contract starting on the same date but expiring on 30 June 1970. There is no need to consider whether in law it was bound to alter the earlier arrangements. Nor need the Tribunal decide whether the authorities of the Joint Staff Pension Fund were right, notwithstanding the new contract, in refusing to admit the complainant as a full participant. Nevertheless having replaced one contract with another the Organization is implicitly estopped from arguing that the original contract was not contested in time. Hence, insofar as that contract is relevant, the Organization cannot properly rely on the non-observance of the rules on internal means of redress.

As to the merits:

1. The decision to extend the complainant's appointment from 1 July 1967 to 31 December 1968 was taken in the exercise of discretion. The Tribunal can therefore interfere with it only if it was taken without authority, is irregular in form or tainted by procedural irregularities or by illegality, or is based on incorrect facts, or if essential facts have not been taken into consideration, or, again, if it is tainted with misuse of authority, or if conclusions which are clearly false have been drawn from the documents in the dossier.

2. The decision is tainted with an irregularity of which the Tribunal may take cognizance, namely the failure to take into consideration an essential fact.

When the complainant was reappointed merely for the period from 1 July 1967 to 31 December 1968, the officials

of the Organization did not realise that they were depriving him of the chance of becoming a full participant in the Joint Staff Pension Fund. In all likelihood, had they realised the consequence of their decision, they would have extended the period of the contract until at least 10 May 1969, without regard to the date of expiry of the project and so enabled the complainant to become a full participant. The proof of this lies in the fact that in 1970 they replaced the original contract with a contract expiring on 30 June 1970 in an attempt to give him such status. In the circumstances of the case under consideration the omission to take account of the complainant's situation in respect of membership of the Pension Fund constituted a fact which must be described as essential. The Organization had in the first place offered the complainant an appointment under which he would have been employed for several years in the United Arab Republic and would have been entitled to full participation in the Joint Staff Pension Fund, and only the outbreak of the Israeli-Arab war of 1967 had prevented that appointment from materialising. In these circumstances the Organization was not entitled to ignore the complainant's right to a pension, and particularly in that he was about to reach the normal age of retirement.

The complainant also accuses the Organization of dilatoriness in referring the matter to the authorities of the Joint Staff Pension Fund. No decision need be taken on the validity of that charge. It does not appear from the dossier that the Organization would have obtained satisfaction by acting more promptly.

3. Whereas the Organization failed to take an essential fact into consideration, the complainant himself was remiss. In 1967, when his contract was extended, he was already 59 years old, an age at which a staff member who is careful of his own interests is concerned about his possible pension rights. Even if he was unaware of the regulations of the Joint Staff Pension Fund, he could have obtained information on his position as a Fund participant on the conclusion of the new contract. In failing to clarify the matter in time he contributed to the loss of his rights.

4. It appears from the foregoing that the complainant was deprived of full participation both by his own negligence and by an omission on the part of the Organization. It is therefore proper to meet the complainant's claims in part by ordering the Organization to pay the complainant from the date of his retirement half the amount of the pension to which he would have been entitled as a full participant in the Joint Staff Pension Fund.

DECISION:

For the above reasons,

1. The Organization is ordered to pay the complainant from the date of his retirement half the amount of the pension to which he would have been entitled as a full participant in the United Nations Joint Staff Pension Fund.
2. The rest of the complainant's claims are dismissed.

In witness of this judgment by Mr. 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, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 6 May 1974.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet