

The Administrative Tribunal,

Considering the complaint filed by Mr A.H.Q. against the Food and Agriculture Organization of the United Nations (FAO) on 29 July 2004 and corrected on 7 September, the Organization's reply of 28 December 2004, the complainant's rejoinder of 9 February 2005 and the FAO's surrejoinder of 22 April 2005;

Considering Article II, paragraph 5, 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 was born in 1966 and is a national of Bangladesh. On 26 September 2000 he joined the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – under a one-year fixed-term contract as a Programme Officer, at grade P-2, based in Asmara (Eritrea). His appointment was subject to a probationary period of twelve months.

In November 2000 the Programme issued an Information Guide summarising the new policies and procedures which, as from 1 January 2001, would govern the reassignment, recruitment, probationary period and promotion of international professional staff at grades P-1 to D-1. The guide referred, *inter alia*, to the introduction of a single contract type – the “indefinite appointment” or IA – for all international professional staff.

The complainant's first Probationary Performance Appraisal Report (PPAR), dated 15 December 2000, indicated that his performance was deemed satisfactory. By a letter of 28 December 2000 the Human Resources Division informed him that the decision as to whether to offer him an indefinite appointment was “postponed to the satisfactory completion of [his] probationary period”. In his second PPAR, dated 30 June 2001, his performance was again rated satisfactory, but in his final PPAR, dated 6 September 2001, it was described as “marginal”, which, as indicated on the appraisal form, meant that he “fail[ed] to meet some major job requirements”. Consequently, his probationary period was extended by six months, until 25 March 2002.

On 21 September 2001 the complainant suffered a heart attack. After a period of sick leave, he returned to work in December 2001. With effect from 1 January 2002 he was transferred to Decamhare (Eritrea).

Upon completion of his extended probationary period, the complainant's appointment was confirmed and he was offered a two-year fixed-term contract, commencing on 26 March 2002, which he accepted. He was stationed in Decamhare on “permanent mission status”. The complainant applied to be reassigned to another duty station.

In April 2002, following a budget revision exercise, the Country Office Director proposed a reduction in the number of international staff in Eritrea. By an e-mail of 11 April 2002 he informed various members of the Human Resources Division that he had already frozen one post and that he now proposed to freeze the complainant's.

On 29 April 2002 the complainant received an e-mail from a human resources officer at Headquarters indicating that his transfer to Kampala (Uganda) had been approved, “subject to all clearances and receipt of information required”. He accepted this reassignment on 29 June and was informed by the Human Resources Division on 19 August that it was confirmed. However, the post in Kampala was subsequently abolished for lack of funds.

On 10 September 2002 the Director of Human Resources informed the complainant by e-mail that he was reassigned to Arbil (Iraq). The Director explained that the Reassignment Committee had not been able to accommodate the expressed wishes of all candidates for reassignment, and that some candidates had therefore been assigned to positions for which they had not applied, due to exigencies of service.

By an e-mail of 12 October the complainant requested that the Reassignment Committee reconsider the decision to transfer him to Iraq. He pointed out that he had applied for reassignment primarily because of his medical

condition, and that in his view a transfer to Iraq might be “medically hazardous” for him because of the lack of medical facilities in that country. He added that he was still interested in a transfer to Uganda. On 15 October he received an e-mail from the Human Resources Division stating that the FAO’s Medical Service had reviewed his medical records and that he was considered fit to work in Arbil.

On 31 October 2002 that same Division informed the complainant that his appointment would be terminated for lack of funding, and that it had not been possible to identify a suitable alternative post for him. The complainant immediately replied that, since he was deemed fit to serve in Arbil, and if the Committee was unable to find an alternative assignment for him, then he was ready to go to Iraq. He emphasised that his earlier message regarding the reassignment to Iraq had contained “just suggestions and not a refusal to be transferred to Iraq”. He confirmed his willingness to go to Iraq in an e-mail of 4 November, to which the Human Resources Division replied, the following day, that “an alternate decision” had been taken regarding that post.

The Programme’s decision to terminate the complainant’s fixed-term contract with effect from 13 December 2002 was officially communicated to him in a letter dated 5 November 2002 from the Director of the Human Resources Division. The letter stated that he would be paid three months’ termination indemnity.

On 2 December 2002 the complainant appealed against the decision to terminate his contract to the Executive Director of the Programme, who rejected the appeal on 28 January 2003. He then lodged an appeal with the Appeals Committee on 3 March 2003. In its report dated 25 February 2004 the Appeals Committee observed that there might have been a lack of communication between the Programme’s Administration and the complainant regarding the reassignment to Iraq. It noted, however, that the Programme had made efforts to find a suitable post for the complainant, though it was under no obligation to do so in view of his contractual status, and found that the complainant’s appointment had been terminated in accordance with the relevant rules and regulations. Consequently, the Committee recommended that his appeal be rejected as unfounded. By a letter of 13 May 2004 the Director-General of the FAO informed the complainant that he had decided to accept the Appeals Committee’s recommendation. That is the impugned decision.

B. The complainant contends that his probationary period was wrongly extended. He points out that his first and second PPARs were satisfactory and that no reasons were given for the extension, which was proposed by the Country Director, Eritrea, shortly before the end of his probationary period.

He considers that on completion of his probationary period, he ought to have been granted an indefinite appointment rather than a fixed-term appointment. In this respect he refers, in particular, to the Information Guide published by the Human Resources Division in November 2000. He submits that that Division promised him an indefinite appointment in its letter of 28 December 2000, provided that he satisfied certain requirements pertaining to language skills, and that in an e-mail of 19 March 2002 it indicated that the contract offered to him on confirmation was “fixed-term to be converted to IA”.

The complainant criticises the Programme for failing to inform him that the post in Kampala had been abolished, thereby preventing him from applying for other posts while he was awaiting a decision on his reassignment to Uganda.

According to the complainant, the Programme had a moral and legal duty to inform him that the post in Arbil was the only option available to him and that failure to accept it would result in the loss of his job. Instead of treating his request for reconsideration of that reassignment as a refusal, the Programme ought to have asked him for a final decision on the post in Iraq before offering it to another staff member.

Lastly, he submits that the decision to terminate his appointment should at least have been stayed until 31 December 2002, to allow additional time for consideration of his application for a vacant post in Kenya, since funding for his post was available until that date.

The complainant asks the Tribunal to set aside the impugned decision and to order the Programme to reinstate him retroactively with an indefinite appointment. Subsidiarily, he claims financial compensation “commensurate with the mental, physical and psychological suffering [he has] undergone for more than a year and a half and the irreparable damage and loss [he has] suffered in [his] career”.

C. In its reply the Organization explains that, as a fixed-term contract holder, the complainant was merely

eligible to be considered for an indefinite appointment; he had no right to be granted such an appointment automatically upon expiry of his initial fixed-term contract. However, it points out that the complainant did not contest the decision to grant him another fixed-term appointment within the applicable deadlines and that, consequently, his claims regarding the type of appointment he held are now time-barred.

The Organization submits that in terminating the complainant's appointment, the Programme acted in full conformity with the applicable rules. It recalls that under Staff Regulations 301.9.1 and 301.9.12 a fixed-term appointment can be terminated prior to its expiration date if the necessities of the service require the abolition of the post in question. In this case, a reduction of available budget resources made it necessary to abolish the complainant's post, and in accordance with Staff Rule 302.9.33 he was given more than 30 days' notice of the termination of his appointment.

The Organization emphasises that the Programme made "substantial efforts, in good faith", to reassign the complainant, even though it was not obliged to do so, since he did not hold an indefinite appointment. Referring to the complainant's allegation that he was not informed of the abolition of the post in Kampala, it asserts that the notification, on 10 September 2002, of his selection for the post in Iraq clearly implied that the decision regarding the post in Uganda had been reversed. Moreover, it considers that the decision to assign another staff member to the post in Arbil was entirely justified, since the complainant's e-mail of 12 October 2002 left no doubt that he was unwilling to serve in Iraq.

D. In his rejoinder the complainant presses his pleas. He maintains that he never refused to serve in Iraq, and that the Programme's silence regarding the post in Uganda deprived him of the opportunity to apply for other posts.

E. In its surrejoinder the Organization reiterates its position, noting that the complainant's rejoinder, like his complaint, offers no grounds as to why the impugned decision was unlawful.

## CONSIDERATIONS

1. The complainant joined the WFP on a one-year fixed-term contract in September 2000. His contract was subject to a probationary period of twelve months which was subsequently extended for a further six months. Thereafter, in March 2002, the complainant accepted a two-year fixed-term appointment as Logistics Officer, grade P-2, stationed at Decamhare (Eritrea). However, his position was frozen the following month and abolished in December 2002.

2. At or about the same time as his position was frozen, the complainant was offered a transfer to Kampala (Uganda). He accepted that offer in June 2002 and in August he was informed that all arrangements had been completed for the transfer to take effect. Having accepted the offer of a transfer to Kampala, the complainant did not pursue the possibility of other postings. However, the Kampala post was also abolished and no transfer occurred.

3. Sometime in August or early September, the complainant was informed that his transfer to Kampala was on hold, but he was not directly informed that the post in question had been abolished. Instead, on 10 September 2002, he was informed that he had been assigned to Arbil (Iraq). The reassignment notice stated that a number of staff had been approved for positions for which they had not applied, "due to exigencies of service". By an e-mail of 12 October the complainant sought reconsideration of the transfer to Arbil by the Reassignment Committee on the ground that a posting in Arbil would be "medically hazardous" for him. He requested a transfer to a duty station with better health facilities and stated that he was still interested in a transfer to Uganda. On 15 October he was informed that a review of his medical records indicated that he was fit to work in Arbil. The communication did not indicate that the transfer had been reconsidered by the Reassignment Committee, and the complainant spoke to the Chief of Human Resources on 31 October and again requested that the transfer be reconsidered by the Committee. He was then informed that it had been decided to terminate his contract.

4. On the same day that the complainant spoke to the Chief of Human Resources (31 October 2002), he sent an e-mail to a human resources officer stating that he was prepared to accept a transfer to Arbil and that his earlier e-mail seeking reconsideration of the transfer was not a refusal of that transfer. He confirmed his preparedness to accept the transfer by another e-mail on 4 November but the following day, 5 November, he was informed that "an alternate decision ha[d] been taken by the Reassignment Committee". By letter of the same date, the complainant

was informed that it had been decided to abolish his post and that his fixed-term contract would be terminated on 13 December 2002.

5. The complainant appealed, unsuccessfully, to the Executive Director of the WFP with respect to the decision to terminate his appointment, and then to the Appeals Committee. The Committee recommended that the appeal be rejected and its recommendation was accepted by the Director-General of the FAO on 13 May 2004. That decision is the subject of the complaint, by which the complainant seeks reinstatement with an indefinite appointment or, in the alternative, financial compensation.

6. It is not in issue that, as the complainant had accepted a fixed-term appointment, his contract could be terminated on 30 days' notice in accordance with Staff Regulations 302.9.33 and 301.9.12 "if the necessities of the service require[d] abolition of [his] post". The complainant does not contest the necessity to abolish his post. Instead, he contends that he should have had an indefinite appointment rather than a fixed-term appointment. In this regard, he claims, as he did before the Appeals Committee, that his probationary period should not have been extended and that he should have been offered an indefinite appointment at the expiry of his initial probationary period. Alternatively, he contends that he should have been offered an indefinite appointment at the end of his extended probationary period, rather than a fixed-term appointment. Had he received an indefinite appointment, he would have had priority in respect of reassignment over persons holding fixed-term appointments.

7. The Appeals Committee correctly held that it could not entertain the complainant's claims with respect to the extension of his probationary period or the failure to offer him an indefinite appointment, no appeal having been instituted with respect to those decisions within the time limit stipulated in the Staff Regulations. For the same reason, those claims cannot be entertained by this Tribunal. However, the complaint is not limited to those matters.

8. The complainant contends, as he did before the Appeals Committee, that he should have been informed that the Kampala post had been abolished and, also, that if he did not accept the transfer to Arbil, his appointment would be terminated. On this issue, the Appeals Committee noted that "there might have been a lack of communication [...] for it was never made sufficiently clear [...] that a prompt reply [...] was needed following the clearance by the Programme's Medical Service or that [...] the offer of reassignment to Iraq was the only possibility". Further, the complainant argues that, as funding was available until 31 December 2002, the decision to terminate his appointment should have been stayed until that date, which would have allowed him to pursue applications for other vacancies in the interim.

9. The FAO submits that the Programme was under no duty to reassign the complainant but that, nevertheless, it made "substantial efforts, in good faith", to do so. It asserts that the notice of reassignment to Arbil "clearly implied" that the decision to reassign the complainant to Kampala had been reversed. Moreover, it says, the complainant's request for reconsideration of his reassignment to Arbil "left no doubt that [he] was unwilling to serve [there]".

10. Neither the Staff Regulations nor its Policies and Administrative Procedures for International Professional Staff imposed an obligation on the WFP to reassign the complainant to another post when his was abolished. However, because it was terminating a fixed-term appointment before its expiry on other than disciplinary grounds, the Programme was under a duty to "scrupulously observe due process and the safeguards that an appointment with an international organisation affords" (see Judgment 1350, under 10). One of those safeguards is the duty to act in good faith – a duty which encompasses ordinary notions of fair dealing. Another safeguard is the duty of care which relevantly requires that an employee be informed in a timely manner of developments that may adversely affect his or her employment.

11. In a context in which the complainant had been told that his transfer to the Kampala post was "on hold", the notice of his reassignment to Arbil cannot be construed as "clearly impl[ying]" that the post had been abolished. More to the point, it was clear from the complainant's request for reconsideration that he still considered that he could be reassigned to Kampala. In these circumstances, it was incumbent on the WFP to inform the complainant immediately on receipt of his request for reconsideration that it was no longer possible for him to be posted to Kampala and to advise him that Arbil was the only alternative. The Appeals Committee erred in law in failing to do so. And because the Director-General's decision was based on the Committee's report and recommendation, that decision also involves an error of law and must be quashed.

12. Although the WFP was under an obligation to inform the complainant that the Kampala post was no longer available and that Arbil was the only alternative, the complainant was not entitled to stand idly by for the period between 15 October, when he was advised that he was considered medically fit to be posted to Arbil, and 31 October, when he again asked that the matter be reconsidered by the Reassignment Committee and was informed, by way of reply, that his appointment was to be terminated. He also had a duty to act in good faith and, given that the reassignment notice indicated that some staff members were being assigned to positions for which they had not applied because of the exigencies of the service, that duty obliged him to indicate promptly after he was advised that he was considered medically fit, whether or not he was prepared to be posted to Arbil. Further, and contrary to the complainant's contention, there was no obligation on the Organization to stay the decision to terminate his appointment until 31 December 2002, particularly if, as seems clear, there were then no posts to which he could be reassigned.

13. Although the complainant should have acted promptly after being advised that he was considered fit to serve in Arbil, the failure of the WFP to inform him, in accordance with its duty of care and its duty to act in good faith, that the Kampala post had been abolished and that Arbil was the only post available was a substantial contributing cause to the complainant's loss of a valuable opportunity to accept the Arbil posting in a timely manner. The complainant should be compensated for that failure by an award of damages in the sum of 20,000 United States dollars. Additionally, he should be awarded 1,000 dollars by way of costs.

## DECISION

For the above reasons,

1. The Director-General's decision of 13 May 2004 is quashed.
2. The FAO shall pay the complainant damages in the sum of 20,000 United States dollars.
3. It shall also pay him costs in the sum of 1,000 dollars.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 3 November 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet