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

TWENTY-FIFTH ORDINARY SESSION

In re VERMAAT

Judgment No. 164

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mr. Jan George Vermaat on 29 April 1970 and the reply of the Organization dated 28 July 1970;

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

Having heard in oral proceedings on 9 November 1970 Mr. Jacques Mercier, counsel for the complainant and Mr. Roche, agent of the Organization;

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

A. Mr. Vermaat entered the service of the FAO on 1 May 1951 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, and specified that no deduction would be made from his salary for any purpose. His initial appointment for one year was renewed on 1 May 1952 for two years, then again on 1 May 1954, 1 July 1955, 1 November 1955, 1 November 1956 and 1 November 1957, and was similarly extended in subsequent years.

B. By letter dated 20 November 1957 from the Chief of the Personnel Branch, Mr. Vermaat was informed that as from 1 January 1958 he would be enrolled in the United Nations Joint Staff Pension Fund. On a pension application form returned to the FAO pension authorities on 19 August 1958 he requested the validation of his past service from 1 January 1954 to 31 December 1957. This request was rejected on 30 September 1958 by the Secretary of the FAO Staff Pension Committee on the ground that such validation was not permitted by Article III.4 of the Joint Staff Pension Fund Regulations. In 1964 the complainant repeated his application for validation, but on that occasion for the whole period of his service prior to enrolment in the United Nations Joint Staff Pension Fund, i.e. from 1 May 1951 to 31 December 1957. 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 then appealed to the United Nations Administrative Tribunal, 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 organisations affiliated to the Fund, which include the FAO. In his submissions to that 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 ought to have enrolled him in the Joint Staff Pension Fund. In its Judgment No. 118, the United Nations Administrative Tribunal dismissed the application for validation on the grounds that Article III of the Pension Fund Regulations, as drafted at the time, established the right to validation only of 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. Vermaat. In regard to the claim for enrolment in the Fund, the Tribunal ruled that this lay outside its jurisdiction since it was a question of interpretation of the contracts of employment of FAO staff members for which that Tribunal was not competent.

C. In these circumstances Mr. Vermaat wrote to the Director-General of the FAO on 15 November 1968 asking him "to make the necessary arrangements in order to enable me to validate my service with the Organization prior to 1 January 1958 for pension purposes". In reply he was informed on 19 December 1968 that he could not be enrolled retroactively in the United Nations Joint Staff Pension Fund as from 1 May 1951, in particular because his request was time-barred. The Organization explained in the same letter that it had never been intended that EPTA experts employed by the FAO and other organisations under contracts similar to those held by the complainant should be enrolled in the Joint Staff Pension Fund, and that in fact they had never been entitled to membership of the Fund. The case as referred to the FAO Joint Appeals Committee, which found in its report that the appeal was

against an administrative action taken when the appellant was appointed in 1951 and subsequently reaffirmed at the time of each of the several renewals of appointment from 1952 onwards; that the appellant had become a full participant in the Fund on 1 January 1958, and that in August 1958 he had been clearly made aware by the Secretary of the FAO Staff Pension Committee of his previous pension fund status; that subsequently there had been a six-year gap (between August 1958 and July 1964) before he had had recourse to the FAO Staff Pension Committee, and that his appeal must consequently be regarded as time-barred. On 2 February 1970 the Director-General informed Mr. Vermaat that he accepted the Joint Appeals Committee's recommendation.

D. In his complaint to the present Tribunal Mr. Vermaat points out that his first contract of employment did not expressly exclude enrolment in the Joint Staff Pension Fund and that at that time he had thought that the question of pensions was in abeyance and in default of a specific statement of exclusion, he had accordingly not been unduly concerned at the fact that no deduction was made from his pay. The Organization could not argue that he ought to have protested against his non-enrolment in the Fund at the outset of his appointment in accordance with Staff Rule 303.131 which lays down that any appeal against an administrative decision must be notified to the Director-General within two weeks after notification of the decision impugned. In fact no administrative decision was notified to the complainant; the Organization merely omitted to enrol the complainant in the United Nations Joint Staff Pension Fund (wrongly, according to Mr. Vermaat, since the rules in force at the time did not exclude EPTA experts). This omission was not an administrative decision notified to the person concerned and therefore the time limit did not begin at that date. The complainant maintains that an administrative decision must be a clear, specific, and positive act. Nor could the fact that no deduction from his salary was made on account of contributions to the Joint Staff Pension Fund be regarded as refusal of enrolment in the Fund. The complainant relies on Judgment No. 118 of the Administrative Tribunal of the United Nations, which states that "in the file before the Tribunal there is nothing to indicate that the legal problems which have been raised by the applicant in the present case and which concern his contractual situation before 1958 either received administrative consideration or have been the subject of any decision open to appeal". United Nations General Assembly Resolution No. 48 (III) of 23 January 1949 lays down that every full-time member of the staff of each organisation who enters employment under a contract of one year or more and who is under 60 years of age at the time of entering such employment is entitled to a pension. In deciding to participate in the Fund the FAO accepted the above rule, which allows only of specific exceptions. The first relevant regulation issued by the FAO after the complainant's appointment is Administrative Memorandum No. 233, Supplement 15, of 30 January 1951, which provided that short-term employees should not be eligible for enrolment in the Fund, the expression "short-term" employees signifying those engaged for periods of six months or less. It follows that FAO ought to have enrolled the complainant in the Fund at that time. Subsequently, on 2 August 1951, Manual provision 331.2 was introduced and had the effect of excluding EPTA experts engaged for less than two years from enrolment. On 1 May 1952, however, the complainant's contract had been renewed for a period of two years. These provisions remained unchanged until the adoption of provision 370.34 enabling EPTA experts to participate normally in the Joint Staff Pension Fund. The complainant contends, further, that the Organization cannot claim that his successive contracts were independent of one another. In fact, it was always the same contract which was renewed on the same terms, and the Organisation cannot rely on the argument that each of the contracts was of brief duration to deny the complainant a benefit to which employees holding longer-term contracts were entitled.

E. In its statements in reply, the Organization contends that the complaint is time-barred and therefore irreceivable; it argues that the time limits for the submission of claims must be mandatory, since otherwise administrative situations might remain permanently indeterminate. The complainant was well aware that he was not a member of the Joint Staff Pension Fund and that he was not entitled to enrolment in the Fund. This is proved by the fact that his first claim, on 19 August 1958, was for the validation of his past service on the basis of certain provisions of the Joint Staff Pension Fund Regulations; those provisions specified, however, that only non-pensionable periods of past service might be validated. The complainant's initial contract specified that no salary deduction would be made for any purpose. He could not describe this as an omission since in contractual matters the rights arising out of an agreement concluded between the parties must be specified in that agreement and it cannot be argued that certain rights arise because they are not expressly excluded.

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 the time, which it denies, it would have been extinguished by prescription.

G. On the merits of the case, the Organization points out that the Expanded Programme of Technical Assistance was established in 1949 by Resolution 222 (IX) of the Economic and Social Council and Resolution 304 (IV) of the General Assembly of the United Nations, the implementation of certain technical aspects of the Programme being entrusted to the specialised agencies such as the FAO and 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. Article II of the Joint Staff Pension Fund Regulations, in the form in which it was applicable from 1949 to 1958, laid down that every full-time member of the staff of the United Nations should become a participant in the Fund if he entered employment under a contract for one year or more, provided that his participation was not excluded by his contract of employment. The Organization accordingly considers that the initial conditions of employment of the complainant should be examined, having regard to the principles and procedures laid down by TAB, the FAO Rules governing the employment of EPTA experts at that time, and the FAO Rules concerning the participation of EPTA experts in the Joint Staff Pension Fund. When the complainant was appointed, his conditions of employment were governed by Administrative Memorandum No. 233, Supplement 15, concerning the conditions of service of EPTA experts, paragraph 20 of which was in the following terms: "Pension Fund: employees, because of their short-term employment, cannot be included in the United Nations Joint Staff Pension Fund". The expression "short-term" must be interpreted in the light of the explanation provided by paragraph 27 of document TAB/R.35, which specified that experts appointed for less than two years were not eligible for enrolment in the Fund, and also in the light of the expression "for at least one year" in Article II of the Pension Fund Regulations. As from 13 October 1952, the above-mentioned Memorandum No. 233, Supplement 15, was superseded by Memoranda No. 6 (Terms and Conditions of Employment for EPTA Experts) and No. 16, which remained in force until 17 June 1953 and 1 January 1954 respectively. These provisions were applicable only to EPTA experts appointed for a period of less than three years. They were adopted by FAO to implement amendments made by TAB in its regulations relating to the conditions of employment of EPTA experts, which appear in document TAB/R.143/Add.1 of 1 January 1952. Paragraph 14 (conditions of appointment) of that document laid down that experts appointed under short-term contracts, i.e. contracts for a period of less than three years, were not entitled to any allowances not specifically provided for in the provisions concerning them, and those provisions made no reference to participation in the Fund. On 1 January 1954 FAO Manual sections 370/371 concerning conditions of employment and remuneration of technical assistance experts came into force. They contained no provision relating to the possibility of participation in the Pension Fund of EPTA experts. However, on 1 December 1956, provision 370.347 was incorporated in the Manual laying down that holders of Programme appointments would become eligible for participation in the Fund from the effective date of their appointment, without retroactivity. As from 1 January 1958 the above provision was confirmed as a result of a revision of the Manual section concerned and became provision 370.338, which reads as follows: "Holders of Programme appointments are eligible for participation in the UN Joint Staff Pension Fund from the effective date of such appointments without retroactivity". A further provision, No. 370.94 (Pension Fund), was then incorporated in the Manual specifying that experts in short-term appointment status should not be eligible for participation in the Fund unless such eligibility was explicitly provided for in their letter of appointment. It was further provided that experts in long-term status should be full participants in the Fund. Consequently the complainant, who at that time held an appointment for five years, became a member of the Fund. In addition to the above provisions relating to the general terms and conditions of employment of experts, the FAO Manual also included in section 331 provisions concerning the participation in the Joint Staff Pension Fund of various categories of FAO staff. At the end of provision 331.2 (eligibility for participation), which had been in force since 2 August 1951, it was specified that experts paid from EPTA project funds appointed for periods of less than two years would not be eligible for participation in the Fund (this sentence did not appear in the earlier text dated 12 July 1950). On 20 September 1954 section 331 was superseded by section 341, in which provision 341.21 was included. That provision specifically excepted technical assistance experts from the definition of "every full-time member of the staff" who were eligible for participation in the Fund under Article II of its Regulations, and on 11 April 1957 the above provisions were amended and provision 341.211 of the new text specified, unlike the earlier text, that the term "every full-time member of the staff" was to be construed as excluding all technical assistance experts other than those serving under a "Programme appointment" (i.e. an appointment of indefinite duration given to 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). The Organization considers that there is no doubt that section 341, which came into force on 20 September 1954, excluded EPTA experts unless they had already become members of the Fund. The complainant, however, maintains that he ought to have been a member of the Fund at that date because Manual provision 331.2, referred to above, which excluded only experts appointed for less than

two years, was applicable from 2 August 1951 to 20 September 1954 and it so happened that he had received a contract for two years on 1 May 1952. The Organization contests this interpretation of the rules. In the first place, while Manual provision 331.2 specifies that experts holding an appointment for less than two years are not eligible for membership, it does not state that those holding an appointment for a longer period are eligible. As the rule is silent on the subject, the Organization contends that it must be interpreted in the light of TAB policy. The Organization points out that in the early stages of the Technical Assistance Programme it was by no means certain that the Programme would continue, and it was impossible at that time to foresee the extent of its future development and to anticipate that a considerable number of experts would in fact be employed on it for long periods. It was not until 1 January 1952, after lengthy discussion with the various specialised agencies, that TAB issued a Manual containing the rules applicable to EPTA experts, in which it was stated that such experts would be eligible for membership of the Joint Staff Pension Fund only if they held long-term appointments, i.e. appointments for at least three years. The amendments made to the provisions of the TAB Manual on 1 April 1953 and 1 January 1954 in no way altered the position, and at its Sixteenth Session in 1955 the Consultative Committee for Administrative and Budgetary Questions, which is the co-ordinating body for the specialised agencies of the United Nations, expressed the view that "experts generally should continue to be excluded from membership of the Pension Fund"; it was only in 1956 that experts holding Programme appointments acquired the right to participate in the Fund, and in 1958 that experts with at least five years of service acquired the right to become full members of the Fund. Lastly, the Organization contends that in the absence of specific provisions to that effect, it cannot be held that the accumulation of several successive short-term contracts is equivalent to a long-term contact, even if the conditions of appointment are unchanged. The Organization also dismisses the complainant's argument that the possibility of exclusion provided for in Article II of the Regulations of the Fund can exist only if such exclusion is specifically stipulated in the contract of employment. The Organization considers 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. Vermaat on 1 May 1951 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 20 November 1957 whereby the Director-General informed the complainant that he would become a member of the Joint Staff Pension Fund only from 1 January 1958.

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. Vermaat of an appeal against the Director-General's decision to appoint him to the staff of the Organization from 1 May 1951 without Fund membership and against the decision of 20 November 1957 to enrol him as a member of the Fund only with effect from 1 January 1958. The Organization is therefore justified in contending that the complainant's right to appeal had lapsed and that the Director-General's decision of 2 February 1970 dismissing his appeal is not tainted with illegality.

DECISION:

For the above reasons,

The complaint is 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, 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.