

TWENTY-SEVENTH ORDINARY SESSION

***In re* BARDON**

Judgment No. 186

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO) drawn up by Mr. David Joseph Bardon on 13 July 1970, the reply of the Organization dated 12 January 1971, the complainant's rejoinder of 5 March 1971 and the Organization's letter of 7 April 1971;

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. Bardon was appointed by FAO on 5 January 1952 as a technical assistance expert under 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 two years on 5 January 1953. As from 1 January 1954 the conditions of employment of technical assistance experts were amended and the complainant accepted the new conditions which were notified to him by a letter of 10 July 1953 signed on behalf of the Chief of the Personnel Branch; this letter again made no mention of enrolment in the Staff Pension Fund. On 5 January 1955 the complainant's appointment was extended to 31 December 1955, and it was again extended for two further years successively on 1 January 1956 and 1 January 1957.

B. In a letter addressed to the Technical Assistance Personnel Officer on 18 July 1953 Mr. Bardon wrote as follows: " ... I would like to know whether I am now in a position to subscribe to the Pension Fund or Provident Fund. This is a matter which has never been made clear and I would be obliged for a ruling on this point". The reply to this letter, dated 1 August 1953, stated that "a favourable reply is not possible".

C. By letter dated 23 January 1957 the acting Chief of the Personnel Branch informed Mr. Bardon that as from 1 February 1957, having been given a "programme appointment" (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), he would be eligible for admission, at his request, to the United Nations Joint Staff Pension Fund, the United Nations General Assembly having passed the necessary enabling legislation. The letter further specified that he was not entitled to validate his previous service. On 30 January 1957, in replying to the letter of the acting Chief of the Personnel Branch, the complainant stated that "nevertheless I trust that it will be possible for you to take into consideration the sixty-one months of service I have had with FAO and allow my pensionable service to be backdated to 1 July 1954, on payment by me of the appropriate amounts". This communication was referred to the Secretary of the FAO Staff Pension Committee, who informed Er. Bardon on 13 February 1957 that a participant in the Fund might not validate for Pension Fund purposes a period during which he was employed under a contract of employment which "specifically excluded his participation in the Pension Fund". Following this exchange of correspondence Mr. Bardon submitted an application for enrolment in the Joint Staff Pension Fund in March 1957, without requesting the validation of his previous service. It was only on 14 November 1961 that he asked for his pension rights to be backdated by three years or more. On 14 February 1962 the Secretary of the FAO Staff Pension Committee again informed him that his previous periods of service could not be validated.

D. In a memorandum to the FAO Staff Pension Committee dated 13 January 1967 the complainant formally requested the validation of his service from 5 January 1952 to 1 February 1957. This request having been refused by the Committee, first as time-barred and secondly as unfounded, and again on the same grounds by the Standing Committee of the United Nations Joint Staff Pension Board, to which the complainant had appealed, the

complainant then submitted an appeal to the Administrative Tribunal of the United Nations, which is competent to hear complaints concerning non-observance of the regulations of the Joint Staff Pension Board filed by staff members of the organisations participating in the Fund, including the FAO. In his appeal, however, the complainant not only impugned the decision concerning non-validation of his past service, but also claimed that the Organization ought to have enrolled him in the Joint Staff Pension Fund in accordance with his contracts of employment from the time of his first appointment. In its Judgment No. 127 the United Nations Administrative Tribunal stated that "it might be argued that the letter dated 30 January 1957 and received by FAO on 1 February 1957 was an application made within the time limit for validation of the applicant's prior service. Since, however, the Tribunal has held that the applicant cannot avail himself of Article III of the Pension Fund Regulations, on the ground that his prior service was neither on a contract basis for less than one year nor for a period of service of less than one year, the Tribunal does not deem it necessary to rule on the question of time limits". For the foregoing reasons the Tribunal dismissed the applicant's pleas impugning the decision of the Standing Committee of the United Nations Joint Staff Pension Board, and further stated that it was not competent to take cognizance of the applicant's contentions relating to the right of participation in respect of his service prior to 1957 because the point at issue was the interpretation of the successive contracts of employment of Mr. Bardon and of FAO Regulations, for which the Administrative Tribunal of the International Labour Organisation was the competent jurisdiction in accordance with Article XI of the FAO Staff Regulations.

E. Mr. Bardon then wrote to the Director-General of FAO on 13 June 1969 requesting him to take the necessary measures to backdate the complainant's membership of the Joint Staff Pension Fund to 5 January 1952. This request was rejected by the officer in charge of administration and finance, on behalf of the Director-General, in a communication dated 27 June 1969. The letter stated that the Organization could not accept the complainant's contention that his appeal to the Director-General had been submitted within the two weeks' time limit laid down by Staff Rule 303.131. The complainant had in fact contended that it was only on receiving Judgment No. 127 of the United Nations Administrative Tribunal on 31 May 1969, and through that judgment, that he had become aware that the correct procedure for submitting his appeal was the one laid down in Staff Rule 303.131, and that the time limit had therefore begun to run from that date. The letter further explained the difference between a request for validation of prior service and a request for enrolment in the Fund. The request submitted by the complainant in his memorandum of 13 January 1967 was a request for validation, and the Organization had therefore not misinformed him in stating that the correct procedure was that of appeal to the FAO Staff Pension Committee, then to the Standing Committee, and finally to the United Nations Administrative Tribunal. The complainant had not then applied for enrolment in the Fund, such application having been made for the first time to the United Nations Administrative Tribunal whereas to be receivable it ought to have been submitted several years earlier. Consequently his application of 13 June 1969 was time-barred. The letter added further that apart from the question of time limits, there could be no doubt that on the merits of the case neither the complainant nor any of his colleagues serving on the same terms in the FAO or in other organisations participating in EPTA had been entitled to enrolment in the Joint Staff Pension Fund before 1957.

F. The case was then submitted to the FAO Appeals Committee, which found in a majority opinion that Mr. Bardon's appeal had not been submitted within the time limit laid down by Staff Rule 303.131, and that consequently it was not receivable. On 20 April 1970 the Director-General accordingly informed the complainant that he accepted the majority recommendation of the Appeals Committee and rejected his appeal as time-barred; he also recalled the explanation previously given to the complainant to the effect that in any case he had not been entitled to enrolment in the Joint Staff Pension Fund before 1 February 1957.

G. In his complaint dated 13 July 1970 Mr. Bardon prays that the Tribunal may be pleased to validate his request, contrary to the decision of FAO dated 20 April 1970; to order the FAO to register him as a participant in the United Nations Joint Staff Pension Fund as from 5 January 1953 and to backdate his participation to 5 January 1952, to pay to the Fund such moneys as may be required to cover the cost of his participation from 5 January 1952 to 1 February 1957, less the 7 per cent of his pensionable salary for the same period with interest compounded at 2.5 per cent per annum, representing the complainant's normal contribution to the conversion of previously non-contributory service into contributory service; and finally, to order the FAO to pay the complainant a nominal sum of \$1 to indicate FAO's responsibility in having unjustly deprived him of his rights to registration as a participant in the United Nations Joint Staff Pension Fund in 1953.

H. On 17 November 1970 the Administrative Tribunal handed down its judgment in the cases of Vermaat and West versus the FAO. In their complaints Mr. Vermaat and Mr. West had also asked for retroactive enrolment in the Joint Staff Pension Fund in circumstances similar to those on which Mr. Bardon has based his complaint. By

Judgments No. 164 and No. 165 the Tribunal dismissed those two complaints, finding that the decision which the complainants ought to have impugned was that by which the Director-General had informed them that they would become members of the Joint Staff Pension Fund as from a specified date. That communication by the Director-General constituted confirmation and notification of the implicit decision he had taken earlier not to enrol the complainants in the Joint Staff Pension Fund, by appointing them on the basis of contracts which did not make provision for their enrolment in the Fund. As the complainants had not embarked on the internal appeals procedure laid down by Staff Rule 303.131 within the time limit set therein their right of appeal had lapsed and the Director-General's decision to dismiss their appeal was therefore not tainted by illegality.

I. In its reply to Mr. Bardon's complaint, dated later than the above-mentioned judgments, the Organization relies on the Tribunal's findings to contend that the complaint is not receivable. The Organization argues that the time limit within which the complainant ought to have filed his internal appeal started to run, at the latest, from the date on which he received the letter of 23 January 1957 informing him that henceforward he was entitled to enrolment in the Staff Pension Fund. The Organization specifically rejects the complainant's contention that his letter of 30 January 1957 constituted an appeal against a decision excluding him from participation. It maintains that a request for validation and a claim to participation are mutually exclusive. Consequently the procedure initiated to establish the claim to validation by the complainant's letter of 30 January 1957 did not have the effect of suspending the time limit within which an appeal against non-enrolment might have been submitted. On the merits of the case, the Organization repeats the arguments it presented to the United Nations Administrative Tribunal in connection with the cases of Bardon, Vermaat and West and to the present Tribunal in connection with the cases of Vermaat and West, to support its contention that the complainant was at no time entitled to enrolment before 1957. Even had such a right existed, it would in any case have lapsed by prescription. Consequently the Organization submits that the complaint is not receivable, and, subsidiarily, that it should be dismissed as unfounded.

J. In his rejoinder the complainant argues that if it took the Tribunal to identify the relevant decision, how could a field expert be expected to have recognised it? Even if it were accepted that the time limit began to run on 23 January 1957, however, he considers that, in view of the terms used and in particular the absence of the words "validation" or "right to enrolment", his letter of 30 January 1957 constituted an appeal within the meaning of Staff Rule 303.131. In the reply he received on 13 February 1957 he was not asked to specify whether he was claiming validation or enrolment and he had been misled by the statement that he had been appointed under a contract which "specifically excluded participation in the Fund". The same letter ought to have informed him of the correct procedure to follow, depending on what his intentions might be. Lastly, relying on Judgment No. 14, Tranter versus FAO, which states that "the judge ... can have recourse to equity only in the event of lack of clarity of the text or silence of the regulations", he contends that there is a lack of clarity, which is admitted by the Organization itself, in the FAO and United Nations Regulations concerning the pension rights of experts, and expresses the hope that the Tribunal will rule on the receivability and the merits of his complaint in equity.

K. In its letter of 7 April 1971 the Organization states that it maintains its contentions.

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. Bardon on 5 January 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.

Finally, even supposing that the letter sent on 30 January 1957 by Mr. Bardon constituted an appeal against the aforementioned letter of 23 January, although it was not addressed to the Director-General, the claim contained in the letter of 30 January 1957 was rejected by the letter addressed to him by the Secretary of the Pensions Committee on 13 February 1957 and by the letter of the Chief of Personnel of 12 March 1957. Mr. Bardon signed without qualification the statement of enrolment in the Fund and did not impugn the confirmatory decisions within the time limit.

The date of receipt of the letter of 12 March 1957 was accordingly, on any view, the latest date at which the period laid down in Staff Rule 303.131 began to run for the lodging by Mr. Bardon of an appeal against the Director-General's decision to appoint him to the staff of the Organization from 5 January 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 20 April 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 3 November 1971.

(Signed)

M. Letourneur
André Grisel
Devlin

Bernard Spy