

**106th Session**

**Judgment No. 2774**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. P. against the World Health Organization (WHO) on 29 January 2007 and corrected on 1 March, the Organization's reply of 24 May 2007, the complainant's rejoinder of 28 January 2008 and WHO's surrejoinder of 27 March 2008;

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, a Peruvian national born in 1943, worked for WHO under a series of temporary appointments as from May 2000. In December 2005 he was informed that his contract as messenger, which was due to expire on 31 December of that year, would not be renewed as he had reached the statutory retirement age of 62. On 21 December a representative of the Staff Association wrote on his behalf to the Director of Human Resources Services drawing attention to the complainant's special circumstances and requesting that his appointment be extended beyond 31 December "as originally promised to him". By a letter of 23 December the complainant was

notified that his appointment would exceptionally be extended for three months until 31 March 2006, but that his “separation from service [would] take effect on that date in accordance with the provisions of Staff Rule 1040”. On 9 March 2006 a representative of the Staff Association requested that the complainant’s contract be further extended until July 2006 in order for him to complete, before his retirement, the maximum duration of service under temporary appointments, i.e. 44 months out of 48. She argued in particular that the Retirement Policy set out in Cluster Note 99/3 of 8 January 1999 was applicable to fixed-term staff only and that there was no clear policy concerning the re-employment of temporary staff once they had reached retirement age. Having received no response from the Administration, the representative of the Staff Association wrote to the Director-General on 30 March 2006 asking that, in the event that the Retirement Policy applied to temporary staff, a waiver be granted to the complainant.

The complainant’s contract was not extended when it expired on 31 March 2006 and, by a memorandum of 5 April the Director of Human Resources Services rejected his request explaining that “[f]ollowing a review [...] of the financial resources of the unit and of the human resources requirements, [...] the Department is not in a position to offer [the complainant] a new contract”. The complainant filed a notice of intention to appeal with the Headquarters Board of Appeal on 11 April 2006, challenging the decision not to renew his contract. On 25 August the Board recommended dismissing his appeal on the grounds that it was time-barred because the memorandum of 5 April 2006 simply reiterated the final decision of which he had been notified on 23 December 2005. The Acting Director-General informed the complainant on 31 October 2006 that he had decided to accept this recommendation and to dismiss the appeal. That is the impugned decision.

B. The complainant submits that WHO did not give him valid reasons for the decision not to extend his contract. Insofar as the decision was based on his age, the three-month notice given by the letter of 23 December 2005 is invalid, since there is no rule by which

temporary staff cannot work beyond the statutory retirement age of 62. The complainant notes in this respect that, after he turned 62, the Administration offered him three more contracts. Further, the memorandum of 5 April 2006 falsely alleged financial reasons although his colleagues received contract extensions and the Organization hired new staff for the position of messenger.

The complainant seeks payment of the salary corresponding to the period during which his colleagues received contract extensions. He asks to be given another three-month period of notice based on valid reasons and to be allowed to continue working for the Organization “in order to benefit [from] a minimum of five years of pension”. He claims material and moral damages as well as costs.

C. In its reply WHO contends that the complainant’s claim is devoid of merit. He had no contractual right to an extension of his temporary appointment, and the contract extension until 31 March 2006 was granted on a discretionary and exceptional basis. The Organization’s obligation under Staff Rule 1040 to give three months’ notice only concerns fixed-term appointments. Thus, the letter of 23 December 2005 merely notified the complainant of the decision not to extend his appointment “on the basis of good human resources practice”.

The defendant also contends that the complainant is subject to WHO’s statutory retirement age reflected in Staff Rule 1020.1, WHO Manual paragraph II.9.60 and Cluster Note 99/3. The complainant’s colleagues who received contract extensions had not reached retirement age. Moreover, the memorandum of 5 April 2006 did not contradict the decision contained in the letter of 23 December but merely informed him that, at that time, the relevant department was not in a position financially to offer him a further exceptional extension of his contract beyond retirement age.

D. In his rejoinder the complainant presses his pleas. He adds that he was never informed that the same retirement age applied to both temporary staff and fixed-term staff and he asserts that two colleagues were granted contract extensions beyond the 44 months maximum

duration of service. He asks the Tribunal to consider his personal situation.

E. In its surrejoinder WHO maintains its position.

## CONSIDERATIONS

1. The complainant impugns the decision of the then Acting Director-General of WHO dismissing as irreceivable his appeal against the decision not to extend his contract beyond 31 March 2006. The complainant reached the Organization's statutory retirement age of 62 in September 2005 but his fixed-term contract, which was to expire later that same month, was extended until 16 October and then further extended to 31 December 2005. He was informed on 21 December that his contract would not be renewed because of his age. A representative of the Staff Association sent a memorandum to the Director of Human Resources Services that same day challenging the decision not to renew the complainant's contract and requesting a three-month notice period. The complainant was notified by a letter dated 23 December 2005 that his contract would be exceptionally extended until 31 March 2006 but not beyond, in accordance with the provisions of Staff Rule 1040 as it then stood, which relevantly provided:

"In the absence of any offer and acceptance of extension, fixed-term and temporary appointments shall terminate automatically on the completion of the agreed period of service. Where it has been decided not to offer an extension of appointment to a staff member holding a fixed-term appointment, the staff member shall be notified thereof no less than three months before the expiry of the appointment."

2. On behalf of the complainant, a representative of the Staff Association sent a memorandum, dated 9 March 2006, to the Director of Human Resources Services asking that the complainant's contract be extended to allow him to meet the 44-month maximum period of service. The memorandum went unanswered and the representative of the Staff Association wrote to the Director-General on 30 March 2006, stating that if, as she believed, the Retirement Policy contained

in Cluster Note 99/3 was applicable to the complainant, she would request a waiver of that policy, under Staff Rule 050, to allow him to complete his 44 months of service.

3. The Director of Human Resources Services responded in a memorandum dated 5 April 2006, that:

“Following a review by management of the financial resources of the unit and of the human resource[s] requirements, I have been informed that the Department is not in a position to offer a new contract to [the complainant]. This decision has been made independent of any issues related to the retirement policy or the 44-month limit for the employment of temporary staff members. I note in this connection that [the complainant] received notice of his separation from the Organization by letter dated 23 December 2005; the situation has not changed.”

4. The complainant appealed the non-renewal of his contract, claiming it was based on false reasons. In a letter of 31 October 2006 the Acting Director-General informed the complainant that he was accepting the conclusions and recommendation of the Headquarters Board of Appeal which considered the letter of 23 December 2005 to be a final administrative decision and the memorandum of 5 April 2006 a reiteration of the same decision. His appeal was therefore being dismissed as time-barred and so irreceivable.

5. However, the Tribunal finds that the memorandum of 5 April 2006 indeed constituted the final administrative decision stating, as it did, that the decision for the non-renewal of the complainant’s contract was based on financial reasons. It was not a mere confirmation of the decision contained in the letter of 23 December 2005, which was supported only by reference to Staff Rule 1040 as quoted above. Also, considering the fact that the complainant, through the representative of the Staff Association, had requested a waiver to allow the renewal of his contract, the memorandum is clearly a separate, final decision. As the Tribunal held in Judgment 2011, under 18:

“for a decision, taken after an initial decision has been made, to be considered as a new decision [...] [t]he new decision must alter the previous decision and not be identical in substance, or at least must provide further

justification, and must relate to different issues from the previous one or be based on new grounds.”

Consequently, the complainant’s appeal was not time-barred.

6. The Tribunal recognises that the decision to renew or not renew a term-limited contract is at the discretion of the executive head of an organisation and that an employee has no right to the renewal of such a contract. However, the decision must not be arbitrary and therefore it “must be based on clear and coherent reasons” (see Judgment 2125, under 6). The complainant was told in December 2005 that his contract would not be renewed because he had passed retirement age, but in fact, his contract had already been extended twice after he had reached the age of 62. On 23 December 2005 he was exceptionally offered a further extension of three months with an expiry date of 31 March 2006. He was then advised that the decision not to extend his contract further was based on financial reasons, and yet the complainant’s contention that the Organization had hired a replacement for him remains uncontested. Therefore, the reasons given by the Organization are baseless and cannot stand.

7. It follows that the impugned decision must be set aside. The complainant being no longer a staff member of WHO and the reason given for the impugned decision being contradicted by the hiring of a replacement for him, it is appropriate that the Tribunal deal with the complaint on its merits, rather than remit the matter to the Organization for a further decision. The same reasons require that the complainant be notionally reinstated for the period 1 April to 1 July 2006 (the period of time which would have allowed him to complete his 44 months of service) because actual reinstatement is not possible. Accordingly, the Organization shall pay him the salary and other benefits he would have received if actually reinstated, and shall pay all contributions it would otherwise have paid so that his rights for the period are fully restored, including contributions to his pension.

8. Since his claim succeeds, the complainant is entitled to an award of costs that the Tribunal sets at 800 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Organization shall pay the complainant all salary and other benefits he would have received for the period 1 April to 1 July 2006 as if he had actually been reinstated on 1 April 2006, and shall pay all contributions it would otherwise have paid so that his rights for the period are fully restored, including pension contributions.
3. The Organization shall also pay the complainant 800 Swiss francs in costs.

In witness of this judgment, adopted on 7 November 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet