

The Administrative Tribunal,

Considering the complaint filed by Mr M. C. against the Food and Agriculture Organization of the United Nations (FAO) on 17 August 2006 and corrected on 14 September, the FAO's reply of 22 December 2006, the complainant's rejoinder of 21 February 2007 and the Organization's surrejoinder of 22 May 2007;

Considering Articles II, paragraph 5, and VII 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, an Italian national born in November 1942, worked for the FAO under authors' contracts or special services agreements from 1979 to 1989. On 2 October 1989 he was granted a short-term contract of 11 months as a draftsman at grade G-5, which was followed by another special services agreement. As from 4 February 1991 he held a series of short-term contracts in the Fishery Industries Division. On 1 January 1992 he was granted a fixed-term contract and was transferred to the Fishing Technology Service (FIIT). His appointment was converted to a continuing one as from 4 February 1997.

By a memorandum of 23 July 2004 the Chief of FIIT requested that the Deputy Director-General authorise the extension of the complainant's contract beyond mandatory retirement age. This request was turned down on 3 November and the complainant retired on 30 November 2004, having reached the statutory retirement age of 62.

On 4 February 2005 the complainant wrote to the Director-General to appeal against the decision not to extend his contract. He pointed out that between 1971 and 1991 he had been excluded from participation in the United Nations Joint Staff Pension Fund (UNJSPF) because he had been employed under a series of "non-staff member contracts". In his view, he should not have been employed under that type of contract to perform work of a continuous nature. He alleged that the Administration's mistake had caused him considerable financial losses. He sought compensation by asking for a two-year extension of his appointment, which, he said, would enable him to obtain a "decent" pension.

The Director-General dismissed the appeal and the complainant referred the matter to the Appeals Committee on 1 June 2005. In its report of 21 December 2005 the Committee considered that the Director-General's decision had been taken in accordance with the Staff Regulations and Rules. It noted that he had based his decision on the information then available and that there was no "impropriety" in the exercise of his discretionary authority. The Committee also held that the complainant's claim concerning the improper use of "non-staff contract[s]" for several years was time-barred. It recommended that the appeal be rejected as unfounded, but stated that the Administration could consider recruiting the complainant as a retired expert in the future. By a letter of 16 May 2006 the complainant was informed that the Director-General had decided to reject his appeal in accordance with the Committee's recommendation. That is the impugned decision.

B. The complainant contends that he has suffered a loss in pension because he was not entitled to join the UNJSPF between 1979 and 1991, when he was employed under "non-staff member contracts". He argues that the Administration made an error in recruiting him under such contracts since he performed work of a "regular" nature. Indeed, according to paragraph 319.2.21 of the FAO Manual, special services agreements are to be used "only with respect to individuals when it is not possible or advisable to obtain [their] services [...] on a regular employment basis". According to him, it was possible and advisable to obtain his services on a regular employment basis because the work was of a technical nature and he had the required skills.

The complainant submits that the Director-General has the authority to waive the mandatory retirement age when it is in the Organization's interest to do so or on the grounds of "humanitarian needs". He indicates that after he had retired the Director of the Fishery Industries Division requested the authorisation to recruit him because he had "a profound knowledge of FIIT"; it was consequently in the Organization's interests to extend his appointment.

Moreover, an extension would have enabled him to obtain a more “liveable” pension. He also contends that he has been treated less favourably than other staff members whose appointments were extended beyond mandatory retirement age so that they could complete the minimum number of years of contribution to be entitled to draw a pension under the UNJSPF scheme. He further asserts that the Organization did not provide reasons for refusing to extend his appointment.

The complainant asks the Tribunal to order the “retroactive conversion of the contracts from 1979” into fixed-term contracts and to affiliate him to the UNJSPF as from that year. He also claims damages for the misuse of “no[n]-staff member contracts” for a prolonged period of time and moral damages for failure to treat him in a “humanitarian way” and for failure to employ him as a retiree.

C. In its reply the FAO argues that the claim for retroactive conversion of the contracts entered into between the Organization and the complainant as from 1979 until 1989 is time-barred. On the merits it submits that the complaint is unfounded. It recalls that, according to Staff Regulation 301.9.5, staff members may not remain in active service beyond the age of 62, unless the Director-General, in the interests of the Organization, decides to extend this age limit in exceptional cases. The defendant asserts that the Director-General did not abuse his discretion in refusing to extend the complainant’s appointment beyond retirement age and that he did follow the established procedures. Citing the Tribunal’s case law, it points out that since the determination of an organisation’s interest lies within the Director-General’s discretion, the Tribunal has a limited power of review and may interfere with such a decision only if it is taken without authority. In that respect it indicates that, contrary to the complainant’s assertion, the Assistant Director-General explained in a memorandum of 19 January 2005 that some staff members’ appointments were exceptionally extended beyond retirement age to allow them to reach the requisite number of years of service to obtain pension benefits from the UNJSPF; the complainant, who was already entitled to a pension, was in a different situation, and there were no particular reasons to extend his contract.

In view of the nature of the work performed by the complainant before 1989 the Organization asserts that it was appropriate to recruit him under authors’ contracts and special services agreements. It explains that there are a number of functions of a permanent nature that are performed by independent contractors and points out that editorial work of the same nature as that performed by the complainant has always been done, to a significant extent, by such contractors.

The FAO denies having any “moral obligation” to compensate the complainant for the fact that he was not entitled to join the UNJSPF prior to 1989. It underlines that, at that time, it could not recruit the complainant as a staff member because he did not meet the language requirements for a post in his area of expertise. It stresses that it later redefined the linguistic requirements of the post to allow the complainant’s recruitment. It also contends that the complainant’s claim for damages is unfounded because he had agreed to his terms of appointment.

D. In his rejoinder the complainant reiterates his pleas. He adds that the Organization has recruited staff members who did not fulfil the basic language requirements. He asserts that the decision not to recruit him under the Retired Experts Programme, as requested by the Director of the Fishery Industries Division on 28 June 2005, was taken in retaliation for his having filed an internal appeal.

E. In its surrejoinder the FAO maintains its position. It notes that the complainant seems to have abandoned in his rejoinder his claim for retroactive conversion of the contracts he entered into with the Organization between 1979 and 1989 into fixed-term contracts. It denies that the decision not to allow the complainant’s appointment under the Retired Experts Programme was an act of retaliation. It points out that the complainant’s claim in this respect relates to a period during which he was not employed by the Organization and that, consequently, the Tribunal has no jurisdiction to deal with that claim.

## CONSIDERATIONS

1. The complainant asks the Tribunal to order the retroactive conversion of the authors’ contracts and special services agreements he entered into with the FAO between 1979 and 1989 into fixed-term appointments with entry into the UNJSPF for that period and all entitlements. He also seeks damages for the misuse of “no[n]-staff member contracts” over a protracted period of time despite requests to the FAO to have his situation regularised.

2. The FAO submits that these claims for relief are irreceivable being time-barred.
3. The complainant is, in effect, challenging contracts he entered into for a period starting some 28 years ago. Prior to his appeal to the Appeals Committee concerning the refusal to extend his services beyond the mandatory retirement age, the complainant did not take any actions to advance either of these claims.
4. In these circumstances the complaint in relation to these claims is clearly irreceivable under Article VII of the Statute of the Tribunal. As the Tribunal recalled in Judgment 2116, under 7(b), “in the interests of stable administration a decision which has taken effect unchallenged may not as a rule be challenged at some later date”.
5. With regard to the refusal to extend his contract beyond the mandatory retirement age, the complainant submits that the Director-General can waive the mandatory retirement age in the interests of the Organization and for “humanitarian” reasons, in particular, to permit a staff member to accumulate additional service time for the purposes of medical coverage and pension entitlement. The complainant argues that the Director-General erred in refusing his request since he met both requirements.
6. The complainant also contends that the FAO has a moral obligation to compensate him for the extended use of “no[n]-staff member contracts” resulting in his UNJSPF entitlements being lower than they would have otherwise been if he had been employed as a staff member. In his view, this moral obligation should have been taken into account by the Director-General in reaching his decision. The failure to consider this critical factor undermines the Director-General’s decision.
7. The Director- General’s authority to extend a staff member’s service beyond the retirement age is found in Staff Regulation 301.9.5. It reads:

“Staff members may not be retained in active service beyond the age of 62 years, unless the Director- General, in the interests of the Organization, extends this age limit in exceptional cases. Normally, such extension will be one year at a time. Staff members, except those whose participation in the United Nations Joint Staff Pension Fund commences or recommences on or after 1 January 1990, may, however, elect to retire at the age of 60 years.”
8. This provision makes it clear that a decision to grant an extension of a staff member’s contract is within the discretionary authority of the Director-General. It is well established in the case law that the Tribunal will only intervene in these circumstances if it can be shown that the executive head of the organisation acted without authority, breached a rule of form or procedure, or that the decision was based on a mistake of fact or law, or overlooked an essential fact, or that clearly mistaken conclusions were drawn from the facts.
9. The complainant argues that other staff members have been granted extensions in similar situations and that he deserved the same compassionate treatment others have received. The Tribunal observes that the complainant is not similarly situated with those whose extensions have been granted. On the evidence presented, it appears that in prior cases the extensions were granted to permit a staff member to acquire sufficient service to meet the minimum requirements for entitlement to pension and medical benefits. In contrast the complainant sought an extension to increase his pension entitlements. The Tribunal also observes that the argument that extensions have been given to other staff members is irrelevant (see Judgment 2377).
10. As to the complainant’s argument that the Director-General failed to have regard to the Organization’s moral obligation the complainant is, in fact, indirectly seeking compensation for the years he worked under “non-staff service contracts”.
11. The complainant also alleges that he was never given reasons for the refusal to extend his contract beyond the mandatory retirement age. This allegation is unfounded. It is evident from the complainant’s submissions to the Appeals Committee that he was fully aware of the reasons for the refusal. The Tribunal notes that in the memorandum of 19 January 2005 to the General Secretary of the Union of General Service Staff the reasons were clearly spelled out.
12. Lastly, in his rejoinder, the complainant states that after he launched his appeal, his division placed a request for his services under the Organization’s Retired Experts Programme, which would allow the Organization to benefit from his skills at a reduced cost. He claims that this request was refused and that the work remains incomplete and alleges that the refusal was in retaliation for having launched his appeal.

13. In addition to denying the allegation, the Organization submits that it is not receivable. In Judgment 2364 the Tribunal considered grounds of complaint based on facts arising subsequent to the impugned decision. The complainant argued that any fact that arose after the decision at issue up until the final decision could be taken into account as part of his complaint. He also put forward an additional claim which was not in his internal appeal. The Tribunal held that the claims were not receivable under Article VII(1) of the Statute of the Tribunal. For the same reasons, the Tribunal rejects this last claim.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2007, Mr Seydou Ba, 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 6 February 2008.

Seydou Ba

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet