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

104th Session **Judgment No. 2681**

The Administrative Tribunal,

Considering the complaints filed by Mrs R.M. C. S., Mrs M.-F. F., Mrs M. G. B. and Mr J.L. T. M. against the International Olive Oil Council (IOOC) on 12 June 2006 and corrected on 18 September, the IOOC's replies of 21 November 2006, the complainants' rejoinder of 26 February 2007 and the Council's surrejoinder of 23 March 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 none of the parties has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 18 November 2005 the IOOC adopted a decision (No. DEC-5/93-IV/2005) amending the Staff Regulations with the effect that the retirement age of the permanent staff members of the Executive Secretariat – which in November 2001 had been raised from 60 to 65 – was lowered to 60 as from 1 January 2007. On 17 or 18 January 2006 each complainant submitted an appeal to the Administrative and Financial Division, which was to be forwarded to the Joint Committee. In their appeals they challenged the above- mentioned decision and requested that the age of retirement in force on 18 November 2005 be applied to them, failing which they claimed the salary and benefits they would have received until they reached the age of 65 as well as compensation for the various financial losses that they would suffer on account of the shift in retirement age. Two of the complainants, Mrs F. and Mr T. M., also claimed compensation for moral injury. On 9 May 2006 the Administrative and Financial Division forwarded the appeals to the Joint Committee for consideration.

In a memorandum to the Executive Director dated 30 May the Joint Committee pointed out that, regarding the deadline for submission of the Executive Director's reply to the appeal, it had already drawn attention to a divergence between Article 64(2) of the Staff Regulations and section5(i) of the Procedure of the Joint Committee*. In this memorandum the Chairperson, acting on behalf of the Committee, requested the Executive Director's authorisation to convene the Committee and hear the appellants as soon as possible and, at the same time, she urged him to solve the matter of the divergence between the texts establishing the deadline for his reply. On 1 June the Chairperson of the Joint Committee summoned three of the complainants to attend a hearing on 7 June and the last complainant to attend a hearing on 8 June, in order that they might present their case orally to the Committee. In memoranda of 5 June the complainants announced that they would not attend the hearings because, in their opinion, the deadline given to the Executive Director for notifying his reply to their appeals had expired. On 12 June 2006 the complainants filed their complaints with the Tribunal, challenging the implied rejection of their appeals.

On 14 June the Executive Director sent the Joint Committee a Note to inform it that he had decided to amend section 5(i) of the Committee's Procedure*. In its reports of 6 July the Committee recommended that the Executive Director uphold the impugned decision. By letters of 15 September 2006 the Executive Director informed the complainants of his decision to reject their appeals.

B. The complainants assert, firstly that there has been a two-fold breach of the duty of consultation since, contrary to the provisions of Articles 49 and 50 of the Staff Regulations, neither the Staff Committee nor the Joint Committee were consulted before the adoption of the decision to lower the retirement age to 60. They point out that the Joint Committee itself noted that it was apparent from the minutes of the Staff Committee that the latter had not been consulted.

Secondly, referring to the criteria established by the Tribunal's case law – particularly in Judgment 832 – they submit that their acquired rights have been violated. With regard to the nature of the altered terms of appointment, they note that lowering of the retirement age involves an amendment of the Staff Regulations. Concerning the

reasons for the decision to lower the retirement age, they assert that these were budgetary, the obvious aim being to save the sums represented by the salary and benefits which would have been due to them until they reached the age of 65. Lastly, with respect to the consequences of the disputed measure, they observe that the old-age insurance arrangements at the IOOC consist in a mere provident scheme (called the "Provident Fund") and that the substitute income replacing their earned income (consisting in a capital sum which will be paid to them when they reach 60) is rather low when compared with the old-age insurance arrangements of many other international organisations. Thus, lowering the retirement age has a sizeable impact on their financial situation.

Thirdly, the complainants contend that the principle of legitimate expectations has been breached, particularly on account of the unstable, precarious nature of the old-age insurance scheme.

The complainants ask the Tribunal to set aside the impugned decision and to order the IOOC to apply to them the retirement age in force when the said decision was adopted. Failing that, they ask to be paid the salary and benefits they would have received until they reach the age of 65, as well as the insurance premiums and/or the contributions to "social security schemes" that they will have to pay until they reach the age of 65 in order to be covered by a social security scheme equivalent to that offered by the IOOC. In addition they want to be compensated for the loss incurred as a result of the fact that they would have to draw on their Provident Fund capital before reaching the age of 65. They also ask the Tribunal to award them compensation for the moral injury suffered and costs.

C. In its replies the IOOC requests the joinder of the complaints. It submits that they are irreceivable since the complainants, relying on the provisions of the first sentence of the third subparagraph of Article 64(2) of the Staff Regulations, as interpreted by them, and on those of section 5(i) of the Procedure of the Joint Committee (in the version in force at that time), "chose not to exhaust the means of recourse available to [them] under the Staff Regulations, as required by Article VII, paragraph 1, of the Statute of the Tribunal". Referring to Article VII, paragraph 3, of the Statute of the Tribunal and on the latter's case law in such matters, the IOOC argues that the complainants were wrong to rely on the above- mentioned provisions – which are, it admits, somewhat ambiguous – since according to consideration 2 of Judgment 786, "[a]rticle VII(3) of the Statute is the only rule that matters in determining whether to entertain a complaint against an implied decision". The IOOC submits that even if it were held that the transmission of the appeals to the Joint Committee had been unduly delayed and that the complainants, instead of "remaining silent", had done everything which could reasonably be expected of them to speed up that transmission, they could not "legitimately consider" that their appeals had been rejected when they filed their complaints. By then at least two decisions concerning their appeals – namely the forwarding of their appeals to the Joint Committee by the Administrative and Financial Division and the summons to hearings on 7 and 8 June 2006 – had been taken, and that ruled out any possibility of the complainants being able to rely on any implied decisions rejecting their appeals.

D. In their rejoinder the complainants deny that there is any divergence between the first sentence of the third subparagraph of Article 64(2) of the Staff Regulations and section 5(i) of the Procedure of the Joint Committee. In their opinion, the sentence in question can be interpreted in only one way: the Executive Director has two months to reply to a staff member who has lodged an appeal. They consider that they have exhausted the internal means of redress because the Staff Regulations establish a deadline for the Executive Director's reply to a staff member who has filed an appeal and stipulate that "[i]f, at the end of that period, no reply […] has been received, this shall be deemed to constitute an implied decision rejecting [the request]". They state that they cannot accept the IOOC's interpretation of the case law it cites in support of its position.

E. In its surrejoinder the IOOC submits that it merely stated the obvious with regard to the failure to exhaust internal means of redress: proceedings before the Joint Committee were under way when the complaints were filed; thus, the means of redress offered by the Staff Regulations had in fact been made available to the complainants, but they refused to exhaust them. In the opinion of the IOOC, the complainants' interpretation of the first sentence of the third subparagraph of Article 64(2) of the Staff Regulations would seriously jeopardise the efficiency of internal appeal proceedings – especially in the most difficult cases – by imposing a two- month time limit on all proceedings (from the filing of an appeal to the notification of the final decision).

CONSIDERATIONS

1. By a decision of 18 November 2005 the IOOC lowered the retirement age of the permanent staff members of its Executive Secretariat from 65 to 60 as from 1 January 2007 by amending Article 61 of the Staff Regulations

to that effect. This decision therefore reversed that adopted by the IOOC on 8 November 2001 whereby the retirement age, which had been set at 60 since 1961, had been raised to 65. It was accompanied by a transitional provision incorporated into the Staff Regulations as Article 69a, which stipulated that permanent staff members of the Executive Secretariat who had already reached the age of 60 on 1 January 2007 would retire on that date.

2. By appeals submitted to the Administrative and Financial Division on either 17 or 18 January 2006, the complainants challenged the lawfulness of the IOOC's above- mentioned decision of 18 November 2005 and requested that the retirement age of 65, which was in force when that decision was adopted, be applied to them or, failing that, that they be awarded compensation equivalent to the emoluments they would have received had they continued to serve until they reached that age, as well as compensation for various other related injuries.

These appeals, the purpose of which was to refer the matter to the Joint Committee for an opinion, were not, however, forwarded to the Chairperson of the Committee until 9 May 2006. Having received no reply to their appeals within two months, the complainants considered that they had met with an implied decision rejecting them, and they referred that decision to the Tribunal in four complaints filed on 12 June 2006.

After the Joint Committee had adopted a report on each of the appeals on 6 July, the Executive Director dismissed them by express decisions dated 15 September 2006, which the complainants also challenged before the Tribunal in four new complaints filed on 27 November 2006.

By this judgment the Tribunal will rule on the action which should be taken, in the legal context thus created, on the complaints initially filed in respect of the Executive Director's implied decisions rejecting the appeals.

3. The joinder of these four complaints is requested by the IOOC and accepted by the complainants. These complaints raise identical issues of fact and law and seek the same redress. The Tribunal will therefore join them so as to rule on them by a single judgment.

4. The IOOC challenges the receivability of the complaints on the grounds that, contrary to the complainants' submissions, the absence of a reply from the Executive Director within two months did not give rise to implied decisions rejecting their appeals.

In seeking to determine whether such implied decisions had arisen in the present case, the parties differ as to how the provisions of Article 64(2) of the Staff Regulations should be construed. At the material time that paragraph read as follows:

"[…]

Appeals shall be lodged with the Joint Committee within two months of the date on which the decision was notified to the recipient.

Within two months, the Executive Director shall, after receiving a reasoned majority opinion of the Joint Committee, reply to the member concerned. If, at the end of that period, no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it."

These provisions are indeed obscure, since they do not enable the reader to determine with certainty whether their author intended that the two-month period, which the Executive Director is allowed for taking a decision on the appeal, before an implied decision rejecting it can be inferred should run from the filing of the appeal or from receipt of the Joint Committee's opinion.

However, it should be borne in mind that, in any event, the receivability of the complaints filed with the Tribunal must be examined primarily in the light of the rules established by Article VII of its Statute. Under paragraph 3 of that article a complainant may have recourse to the Tribunal "[w]here the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it".

The Tribunal has consistently held, for example in Judgments 532, 533, 762 and 786, that these provisions are to be interpreted in the light of Article VII, paragraph 1, which stipulates that a complaint shall not be receivable unless the internal means of redress provided by the applicable Staff Regulations have been exhausted. Hence, where an organisation takes any decision "upon any claim of an official" – in the meaning of Article VII, paragraph 3 – within the sixty-day period thus stipulated, and particularly where it forwards the request to the competent advisory

appeal body before the expiry of that period, this step forestalls an implied rejection which could be referred to the Tribunal.

In the present case, however, the foregoing account of the facts shows that the appeals filed by the complainants on 17 or 18 January 2006, which were not actually forwarded to the Joint Committee until 9 May of that year, in other words well after the expiry of the sixty-day period running from their notification to the Administration, did not during that period form the subject of any decision which might have interrupted the said period. Consequently, an implied decision rejecting each complainant's appeal did arise at the end of that period, and inasmuch as no express decision was then taken until 12 June 2006, the date on which the complainants initiated proceedings before the Tribunal, their four initial complaints were receivable.

5. However, the fact that on 15 September 2006, after the filing of the complaints against these implied decisions, the Executive Director adopted four express and amply reasoned decisions rejecting the appeals has altered the material issues. Indeed, given that the complainants have challenged these new decisions before the Tribunal, decisions which have superseded the implied rejections they had initially challenged, in these circumstances their claims must now be considered as being directed against the express decisions. The four initial complaints must therefore be deemed no longer to show any cause of action and hence there is no longer any need to rule thereupon.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 15 November 2007, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

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* At the material time these two texts read as follows:

- Article 64(2):

"Except in the case provided for in article 55, the member concerned of the Executive Secretariat must appeal first to the Joint Committee.

Appeals shall be lodged with the Joint Committee within two months of the date on which the decision was notified to the recipient.

Within two months, the Executive Director shall, after receiving a reasoned majority opinion of the Joint Committee, reply to the member concerned. If, at the end of that period, no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it."

- Section 5(i) of the Procedure of the Joint Committee:

“The Executive Director shall take a decision on the case within the two months following the filing of the appeal and shall notify the Chairperson of the Joint Committee and the appellant thereof. If no reply is given to the appeal it shall mean that it has been rejected.”

* The new version of this provision reads as follows: “The Executive Director shall reply to the person concerned within two months of receiving the reasoned opinion of the Joint Committee and shall notify the Chairperson of the Joint Committee and the appellant thereof. If no reply is given to the appeal it shall mean that it has been rejected.”

Updated by SD. Approved by CC. Last update: 27 February 2008.