

order has been amended or rescinded in any manner or that any application has been made or is pending.

VII. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

R. VENKATARAMAN
President

CROOK
Vice-President

Z. ROSSIDES
Member

Jean HARDY
Executive Secretary

Geneva, 13 May 1969.

Judgement No. 127

(Original: English)

Case No. 127:
Burdon

Against: The United Nations
Joint Staff Pension Board

Request by a staff member of FAO for validation by the Joint Staff Pension Fund of service completed before his participation in the Fund.

Request for the rescission of the decision taken by the Joint Staff Pension Board refusing to validate the Applicant's prior service.—Grounds of the original decision of the FAO Staff Pension Committee and of the contested decision.—Article II and article III, paragraph 1, of the Pension Fund Regulations.—The Applicant was in neither of the situations covered by the latter and could not avail himself of the benefits provided therein.

Contention that FAO should have enrolled the Applicant in the Pension Fund earlier than it did.—In order to decide whether the Applicant was entitled at an earlier date to participate in the Pension Fund, it would be necessary to examine the Applicant's contract and the relevant legal provisions of FAO.—The judicial precedents of Judgements Nos. 118 and 119 relating to the competence of the ILO Administrative Tribunal.—Question whether the request for validation was submitted within the prescribed time-limit.—It is not necessary for the Tribunal to rule on this question.

The request for rescission of the contested decision is rejected.—The Tribunal is not competent to take cognizance of the Applicant's contentions relating to his participation in the Pension Fund.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; the Lord Crook, Vice-President; Mr. Zenon Rossides;

Whereas, on 13 August 1968, David Joseph Burdon, a staff member of the Food and Agriculture Organization of the United Nations, hereinafter called FAO, filed an application against a decision of the United Nations Joint Staff Pension Board;

Whereas the pleas of the application to the Tribunal request:

“1. An order for the rescission of the decision taken by the United Nations Joint Staff Pension Board at its 121st meeting on 21 May 1968 excluding the Applicant from validating for Pension Fund participation his years of service with FAO as an EPTA [Expanded Technical Assistance Programme] Expert from 5 January 1952 to 1 February 1957, based on the fact that by refusing the Applicant's request for such validation the Respondents [the United Nations Joint Staff Pension Board and FAO] infringed the Applicant's rights under his contract and conditions of employment with FAO, and through FAO with the Joint Pension Fund.

“2. An order to the Joint Respondents to take the necessary steps to enable the Applicant to validate for Pension Fund purposes his time of service with FAO from 5 January 1952 to 1 February 1957.

“3. An order against FAO to pay to the United Nations Joint Staff Pension Board such monies as may be required by the Board to cover the full cost of such validation, less the 7 per cent of the Applicant's pensionable salary with interest compounded at 2.5 per cent per annum, which will be the Applicant's contribution to the cost of such validation.

“4. An order against FAO to pay to the Applicant a nominal sum (say \$1) to acknowledge FAO's responsibility in having unjustly deprived the Applicant of his rights with regard to entry into participation in the United Nations Joint Staff Pension Fund.”

Whereas, on 19 August 1968, the application was communicated to the Director-General of FAO under article 7, paragraph 11, of the Rules of the Tribunal, it being understood that this did not prejudice in any way the question of the competence of the Tribunal in relation to FAO;

Whereas the Respondent filed his answer on 13 November 1968;

Whereas, on 9 December 1968, the Director-General of FAO filed a statement setting forth the views of FAO with respect to the application and noting, *inter alia*, that “appeals relating to terms and conditions of service [of FAO staff members] ultimately fall within the competence of the Administrative Tribunal of the International Labour Organisation”;

Whereas in that Statement the Director-General of FAO concluded that:

- “(i) The issue before the Tribunal is the validity of the Respondent's decision that the Applicant was not entitled under the Pension Fund Regulations to validate his period of service with the Organization between 5 January 1952 and 1 February 1957;
- “(ii) The only aspect of the Applicant's appeal which may be entertained by the Tribunal is the question of validation as only this question has been the subject of the appeals procedure laid down in the Administrative Rules of the Pension Fund;
- “(iii) The Applicant is not entitled to validate his service between 5 January 1952 and 1 February 1957 because he did not observe the time limits for electing to validate such service contained in article III of the Pension Fund Regulations and further because he was in any case precluded from validating these services by the very provisions of article III of the Pension Fund Regulations.”

Whereas the facts in the case are as follows:

The Applicant entered the service of FAO on 5 January 1952 under a one-year appointment as a technical assistance expert; the letter of appointment contained no provision concerning participation in the United Nations Joint Staff Pension Fund. On 5 January 1953 the appointment was extended for two years. Effective on 1 January 1954 the conditions of service for technical assistance experts were revised and the Applicant accepted the revised conditions, which had been stated to him in a letter of 10 July 1953 sent on behalf of the Chief of the Personnel Branch; participation in the Pension Fund was not mentioned in that letter. On 5 January 1955 the Applicant's appointment was extended to 31 December 1955. On 1 January 1956 the appointment was extended further for one year and, on 1 January 1957, it was again extended for one year. On 1 February 1957, however, the fixed-term appointment was converted into a programme appointment. On 1 March 1967, the Applicant was transferred to the FAO headquarters and his appointment converted into a permanent appointment.

When the Applicant received his initial appointment, the employment of technical assistance experts was governed by Administrative Memorandum No. 233 (Suppl. 15) dated 30 January 1951, paragraph 20 of which read: "*Pension Fund*. Employees, because of their short-term employment, cannot be included in the U.N. Joint Staff Pension Fund." This Administrative Memorandum was superseded by Administrative Memoranda Nos. 6 and 16 dated 13 and 3 October 1952 respectively, which contained no provision relating to the Pension Fund. As of 1 January 1954 Administrative Memoranda Nos. 6 and 16 were superseded by Manual Sections 370 and 371, which again contained no provisions concerning the Pension Fund. Effective 1 December 1956, however, the following provision was inserted into these sections:

"370.347 Subject to action by the General Assembly on amendment of the Regulations of the United Nations Joint Staff Pension Fund and to T.A.B. approval, it is contemplated that holders of Program Appointments will become eligible for participation in the United Nations Joint Staff Pension Fund from the effective date of the Program Appointments, without retroactivity."

The enabling legislation referred to in that provision was passed shortly thereafter; accordingly, when the Applicant received his programme appointment on 1 February 1957, he became eligible for participation in the Pension Fund.

While the regulations outlined above defined the general terms of employment of technical assistance experts, regulations dealing specifically with the Pension Fund were issued from time to time, as explained by the Tribunal in Judgments Nos. 118 and 119.

The fact that he would be eligible for participation in the Pension Fund effective from the date of his programme appointment had been brought to the Applicant's knowledge by a letter of 23 January 1957 signed on behalf of the Chief of the Personnel Branch. By the same letter, the Applicant had been informed that "Under revised Pension Fund Regulations which [became] effective 7 December 1956, you are excluded from validating for Pension Fund purposes your previous service as an EPTA expert." This statement apparently referred to the following amended text of article III of the Pension Fund Regulations adopted by the General Assembly in resolution 1073 (XI) of 7 December 1956:

"ARTICLE III (amended text)

"1. A participant who has been in the employment of a member organization as a full-time staff member and whose participation in the Pension Fund was at that time excluded by article II of these regulations because he had entered employment under a contract for less than one year, or had completed less than one year of service, may, subject to paragraph 4 of this regulation, elect within one year of the commencement of his participation to have the period of such prior employment included in his contributory service to the extent to which he pays into the Pension Fund, in accordance with the administrative rules established for this purpose by the Joint Staff Pension Board, a sum or sums equal to the contributions which he would have paid had he been subject to these regulations throughout this period, with compound interest at 2½ per cent per annum, and provided that there has been continuity of employment. For the purposes of this article, intervals of not more than thirty calendar days in the period of employment shall not be considered as breaking the continuity of employment. The time covered by these intervals shall not be included in the period of contributory service.

"2. Payment into the Pension Fund of amounts equal to twice the amount of the payment so made by the participant shall be made by the member organization designated for that purpose in accordance with arrangements concluded by the member organizations.

"3. The earliest date from which employment with the United Nations can be validated is the first day of February 1946.

"4. Notwithstanding the provisions of paragraph 1 of this article, a participant may not make pensionable a period during which he was employed under a contract of employment which specifically excluded his participation in the Pension Fund."

In a letter of 30 January 1957 addressed to the Acting Chief of the Personnel Branch, the Applicant stated that while he was aware of the last words of Manual Section 370.347, he nevertheless trusted that it would be possible to allow his pensionable service to be back-dated to 1 July 1954 on payment by him of the appropriate amounts. That letter was answered on 13 February 1957 by the Secretary of the FAO Staff Pension Committee who, after referring to paragraph 4 of the above-mentioned article III of the Pension Fund Regulations, informed the Applicant that his request could not be granted since experts had been specifically excluded from participation in the Pension Fund by the terms of their appointment. When completing his Participant's Declaration Form in March 1957, the Applicant made no application for validation of non-pensionable service. On 14 November 1961 the Applicant requested that his pension rights be put back by three or more years and, on 14 February 1962, the Secretary of the FAO Staff Pension Committee again advised him that his prior period of service could not be validated. On 13 January 1967, in a memorandum in which he stressed the basic equity of his case, the Applicant formally applied for validation of his period of service from 5 January 1952 to 1 February 1957. On 1 March 1967 the Secretary of the FAO Staff Pension Committee informed him as follows:

"...

"The Staff Pension Committee at its meeting held on 21 February 1967 considered your application. The Committee felt that it had to base its decision on the provisions of the Pension Fund Regulations and could not

review the matter solely on considerations of equity. It noted that the time limit provided by Article III for validation had not been observed by you as your first formal request had been made only on 14 November 1961, that is four years after you became a full participant in the Fund. The Committee further noted that the participation of EPTA experts in the Pension Fund had been specifically excluded, under certain conditions, by the provisions of the FAO Manual during the years in question.

“On these grounds the Committee arrived unanimously at the decision that you are not entitled to validate your past non-pensionable service.

“ . . . ”

On 22 September 1967 the Applicant submitted an appeal to the Joint Staff Pension Board under Administrative Rule G.7. On 28 May 1968, the Secretary of the Pension Board informed him that the Standing Committee of the Board had rejected his appeal at its 121st meeting, on 21 May 1968, because he “had not observed the time limit provided in article III [of the Pension Fund Regulations] for the election to validate”; the Secretary added:

“The Standing Committee noted that, even if you had applied within one year after 1 February 1957, i.e. within the time limit laid down in article III for electing to have a period of service included in your contributory service, the application could not have been accepted because article III, paragraph 1, at the relevant time provided for the inclusion, as contributory service, only of periods of less than a year during which the staff member did not become eligible for participation because his contract of employment was for less than a year or because he had completed less than a year of service. The service you performed between 5 January 1952 and 1 February 1957 was, therefore, not service to which article III.1 referred.”

On 13 August 1968, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant has suffered a wrong under his terms of contract (5 January 1952-1 February 1957) with FAO and with the Staff Pension Fund in virtue of its agreements with FAO in the fact:

(a) That on two occasions he was not enrolled by FAO in the Fund when he became eligible for participation;

(b) That his rights with regard to the Fund were improperly or incompletely explained to him in 1953;

(c) That his attempts to validate past services in 1957 were not dealt with in the proper way and that he was not informed of his right and procedures of appeal;

(d) That his attempts to validate past services in 1961 were dealt with in a very limited manner and not according to the spirit of his appeal; and

(e) That the contested decision of 21 May 1968 was incorrect and should be rescinded, in that the full facts of the case may not have been brought to the attention of the Pension Board.

2. Even if his legal grounds for seeking redress of the wrong inflicted by his exclusion from participation in the Staff Pension Fund are considered invalid, the Applicant is in equity entitled to seek redress of this wrong.

Whereas the Respondent's principal contentions are:

1. The arguments put forward in the application are primarily directed, not to the question of validation of non-pensionable service after the Applicant had in fact become a participant, but rather to the contention that his employing organization had an obligation to secure his admission as a participant on an earlier date. Such a claim can only be addressed to the Applicant's employing organization.

2. In so far as the appeal impugns the decision taken by the Respondent, it should be rejected on the ground that this decision only concerned the application of article III of the Pension Fund Regulations and that this decision complied fully with the Pension Fund Regulations.

3. Since the Applicant did not satisfy the prerequisites for validation set out in paragraph 1 of article III of the Pension Fund Regulations and for this reason alone could not qualify under the article, it was unnecessary to consider whether the Applicant's previous contracts of employment had "specifically excluded" his participation in the Fund for the purposes of paragraph 4 of the same article.

4. The issues before the Tribunal in this case are the same as those on which the Tribunal ruled in Judgements Nos. 118 and 119.

The Tribunal, having deliberated from 6 to 19 May 1969, now pronounces the following judgement:

I. The Applicant requests the Tribunal to rescind the decision taken by the Standing Committee of the Joint Staff Pension Board, and notified to him on 28 May 1968, refusing to validate the Applicant's service as an expert of the Expanded Programme of Technical Assistance from 5 January 1952 to 1 February 1957. The Applicant also maintains, as part of his case, that he was eligible to participate in the Joint Staff Pension Fund from 5 January 1952 and that the FAO Administration was negligent in its responsibilities and disregarded his terms of employment when it failed to enrol him in the Pension Fund as soon as he became eligible.

II. The FAO Staff Pension Committee rejected the Applicant's claim for validation of his service from 5 January 1952 to 1 February 1957 on the ground that the time-limit provided by article III of the Pension Fund Regulations had not been observed since a formal request for validation had been made only on 14 November 1961, that is, four years after the Applicant had become a full participant in the Fund. The Committee further noted that the participation of experts of the Expanded Technical Assistance Programme in the Pension Fund had been specifically excluded under certain conditions by the provisions of the FAO Manual during the years in question.

The Standing Committee of the Joint Staff Pension Board, at its 121st meeting held on 21 May 1968, rejected the appeal filed by the Applicant against the decision of the FAO Staff Pension Committee on the ground that the Applicant had not observed the time-limit provided in article III of the Pension Fund Regulations for election to validate past service. The Standing Committee further noted that even if the Applicant had applied within the time-limit laid down in article III, the application could not have been accepted because article III, paragraph 1, as it stood at the relevant time, provided for the inclusion, as contributory service, only of periods of less than one year during which the staff member did

not become eligible for participation because his contract of employment was for less than a year or because he had completed less than a year of service.

III. Article II of the Pension Fund Regulations in force at the relevant time provided that

“every full-time member of the staff of each member organization shall become a participant in the United Nations Joint Staff Pension Fund if he enters employment under a contract for one year or more, or when he has completed one year of employment, provided that he is under sixty years of age at the time of entering such employment and that his participation is not excluded by his contract of employment.”

On the other hand, article III of the Pension Fund Regulations provided that

“a participant who has been in the employment of a member organization as a full-time staff member and whose participation in the Pension Fund was at that time excluded by article II of these regulations because he had entered employment under a contract for less than one year, or had completed less than one year of service, may, subject to paragraph 4 of this regulation, elect within one year of the commencement of his participation to have the period of such prior employment included in his contributory service. . . .”

The Applicant is invoking the provisions of article III of the Pension Fund Regulations to validate his prior service. Since his prior service, however, was neither on a contract basis for less than one year nor for a period of less than one year, it follows that the Applicant could not avail himself of article III concerning validation of his prior service at the time of his enrolment in the Fund on 1 February 1957 when he received a programme appointment.

IV. The Applicant argues that, when his contract was extended for two years commencing 5 January 1953, he was entitled to enrolment in the Joint Staff Pension Fund under the FAO Manual and to validation of his prior service under article III of the Pension Fund Regulations, and that FAO, by failing to ensure this enrolment, had infringed the Applicant's rights under his contract and conditions of employment with FAO. The Respondent maintains that this question concerns FAO and the interpretation given by that organization to the Applicant's contract, that in any event the Respondent has no direct responsibility in this respect and that this issue is not properly before the Tribunal.

In the statement presented to the Tribunal by FAO, that organization pointed out that the question whether the Applicant was entitled prior to 1 February 1957 to be enrolled in the Pension Fund was unrelated to the contested decision, and that the only point for decision by the Tribunal was the validity of the action taken by the Respondent in rejecting the Applicant's claim for inclusion in his contributory service of the prior period between 5 January 1952 and 1 February 1957. FAO further pointed out that if the Applicant was aggrieved by his non-enrolment in the Pension Fund, he should have resorted to the internal appeal procedures of the organization, which provided for ultimate recourse to the Administrative Tribunal of the International Labour Organisation.

V. Thus, in order to decide whether the Applicant was entitled before 1957 to participate in the Joint Staff Pension Fund, it would be necessary to examine

the contract of the staff member and the relevant legal provisions in force in the organization concerned. There is nothing in the file to indicate that this question has been the subject of any administrative decision open to appeal. Moreover, if there had been a decision subject to appeal, the question would arise as to what jurisdiction would be competent.

The Tribunal has stated in Judgements Nos. 118 (Vermaat) and 119 (West):

“When, in a case involving participation of a FAO staff member in the Fund, the dispute relates mainly to the interpretation of his contract and of the FAO regulations and rules applicable to him, it would appear from article XI of the Staff Regulations of FAO that the International Labour Organisation Administrative Tribunal would be the competent jurisdiction.”

VI. The Respondent contends that as FAO, the employing organization, had enrolled the Applicant as a participant in the Pension Fund only from 1 February 1957 and as that action had not been challenged according to appropriate procedures, the Applicant's right to elect to have the period of prior employment included in his contributory service should have been exercised within one year of his becoming a participant, namely, 1 February 1957, and that the application for validation of past service was made on 14 November 1961, long after the time-limit prescribed by article III, paragraph 1, of the Pension Fund Regulations.

The Tribunal observes, however, that in a letter dated 30 January 1957 and addressed to FAO, the Applicant stated: “. . . nevertheless I trust that it will be possible for you to take into consideration the 61 months of service I have had with the FAO and allow my pensionable service to be back-dated to 1 July 1954 on payment by me of the appropriate amounts”. The letter was transmitted to the FAO Staff Pension Committee and a reply denying the request was given by the Secretary of the Committee on 13 February 1957.

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-limits 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.

VII. For the foregoing reasons, the Tribunal rejects the pleas of the application relating to the decision of the Standing Committee of the Joint Staff Pension Board notified to the Applicant on 28 May 1968, and further decides that it is not competent to take cognizance of the contentions relating to the right of participation claimed by the Applicant in respect of the service prior to 1957.

(Signatures)

R. VENKATARAMAN
President

CROOK
Vice-President

Z. ROSSIDES
Member

Jean HARDY
Executive Secretary

Geneva, 19 May 1969