

The Administrative Tribunal,

Considering the complaint filed by Ms G. A. H. against the Food and Agriculture Organization of the United Nations (FAO) on 21 February 2003 and corrected on 3 April, the FAO's reply of 23 June, the complainant's rejoinder of 4 August and the Organization's surrejoinder of 13 October 2003;

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, who is a British national and was born in 1955, joined the FAO in 1981 at grade G.3. In 1983 she was promoted to G.4 and transferred to the World Food Programme (WFP), an autonomous joint subsidiary programme of the United Nations and the FAO. In September 1991 her appointment was converted to a continuing one, and in September 1996 she was promoted from grade G.5 to G.6.

In late 1998 the Programme initiated a comprehensive review of its personnel policies. Pending the results of the review, all new recruits in the Professional category were to be appointed on one-year, fixed-term contracts. By a memorandum of 3 September 1999 the complainant was offered - and accepted - a post in the Professional category, at grade P.1, on a fixed-term contract for one year. The memorandum indicated that any extensions were subject to availability of resources and satisfactory performance and "should not exceed a maximum total of four consecutive years".

With effect from 1 January 2001 the Programme established a standard type of appointment for all international professional staff, termed the indefinite appointment. By a letter of 27 December 2000 the complainant was offered an indefinite appointment, as a Finance Officer at grade P.2, with effect from 1 January 2001. According to an Information Guide dated November 2000 that was attached, such appointments were open-ended, with no precise date of expiry; although contracts could be terminated under certain conditions, staff could normally have an expectation of employment as long as performance was satisfactory, funds were available and functions had to be performed. The complainant took up the post but did not immediately sign the contract. Wishing to retain her continuing appointment status, the complainant sent an e-mail to the Acting Director of the Human Resources Division on 24 January 2001 seeking clarification of her contractual status. He replied that if she accepted the indefinite appointment she would have to renounce her return rights to a General Service position as well as the related continuing appointment status.

The complainant, along with four others, took the matter up in a memorandum of 3 April 2001 to the same Director and received a detailed reply of 19 April informing her that she had continuing status in the General Service category but not in the Professional category. On 17 April the complainant had lodged an appeal with the Executive Director of the Programme. It was rejected on 21 May and on 19 July 2001 the complainant appealed to the FAO Appeals Committee.

The Committee issued its report on 7 August 2002. By a majority it concluded that the continuing status that the complainant had in the General Service category could not be carried forward under the terms and conditions of the indefinite appointment in the Professional category; that status had nonetheless been safeguarded as she still had the possibility "to choose between her previous terms of appointment and the new ones". A dissenting opinion was put forward by two members of the Committee. The Committee recommended that the appeal be dismissed as unfounded. By a decision of 25 November 2002 the Director-General of the FAO concurred with that recommendation and rejected the complainant's appeal. That is the impugned decision.

B. The complainant is contesting the decision to remove her 'continuing' status, as notified to her in the letter of 27 December 2000. In her view, the decision constitutes an infringement of her acquired right to continuing status and represents inequality of treatment in that other staff who moved from the General Service to the Professional category in 1999 were allowed to retain their continuing appointment status. It also caused her injury, resulting in lack of job security and career perspectives.

She submits that it was unlawful on several grounds. She was led to believe that she would retain her continuing status. She cites the covering memorandum attached to the contract dated 3 September 1999 in which it was said: "This will not affect your contractual status as a 'continuing' staff member." Referring to an Information Note of 18 October 1999 she says it was clear that upon the introduction of indefinite appointments staff holding continuing appointments would retain such appointments. Also, notifications of personnel action received on 8 November 1999, 7 August 2000 and 3 May 2001 all referred to the type of her appointment as "continuing".

She seeks a ruling that she is to retain her continuing status as a Professional staff member.

C. In its reply the Organization submits that the complainant failed to lodge her appeal of 17 April 2001 to the Executive Director within the statutory time limit and her complaint to the Tribunal is therefore time-barred and irreceivable. It argues that the alleged withdrawal of the complainant's continuing status came into effect when the decision was made to offer her a fixed-term appointment in the Professional category in September 1999, and that is the decision the complainant should have challenged, but she took no action at the time. Her appeal of 17 April 2001 was still filed out of time insofar as it challenged the decision contained in the letter of 27 December 2000. Moreover, there is no evidence that that letter only reached her on 19 January 2001, as claimed by the complainant in her internal appeal.

The Organization describes the procedures it followed in adopting the indefinite appointment as a standard type of appointment. On the merits, it argues that the complaint is unfounded. It rebuts the allegation of unequal treatment and asserts that as the complainant has never held a continuing appointment in the Professional category she cannot claim breach of acquired rights. When she changed from the General Service to the Professional category she became subject to different rules governing her contractual conditions of employment. It was only in the context of a General Service appointment that her continuing status was unaffected. This becomes clear when the extract cited by the complainant from the memorandum of 3 September 1999 is seen in its entirety, for the full text of the segment reads: "This will not affect your contractual status as a 'continuing' staff member. You will be granted return rights to the General Service category at the G.6 level." Additionally, the Terms of Employment that she signed in September 1999 were unequivocal in stating that her contract was for a fixed term. In no way was she led to believe that she could expect a continuing appointment in the Professional category.

The offer of an indefinite appointment was moreover in conformity with the applicable legal provisions. The complainant quotes certain texts to support her argument that staff with 'continuing' status could retain said status, but she has cited texts that refer to continuing appointments held in the Professional category. With regard to the information given in the notifications of personnel action referred to by the complainant, as staff were aware, the problem arose from the phasing out of a computerised personnel management system. Over a certain period the notifications sent to staff could not reflect the changes in appointment status that had come about. However those forms did not create obligations for the Programme or create rights for staff members.

In subsidiary argument the Organization states that since the regime of the indefinite appointment is not substantially different from that of the continuing appointment there was no significant change affecting her security of tenure, and her allegations on that score are unfounded.

D. In her rejoinder the complainant asserts that there was no reason for her to lodge an appeal in 1999 because at that time she believed she still had continuing appointment status. She reiterates that she only received the notification of 27 December 2000 on 19 January 2001, maintaining that it is clear from the wording of her e-mail of 24 January that she had received the letter of 27 December only a few days earlier. Therefore, she considers her appeal of 17 April 2001 was filed within the 90-day time limit and that consequently her complaint to the Tribunal is receivable.

On the merits, she submits that there were changes in her conditions of employment when she moved from the General Service to the Professional category, but her continuing appointment status remained unaffected. In her opinion continuing status was not a category-dependent entitlement, and her terms of employment did not say that

her continuing status was only in the General Service category.

E. In its surrejoinder the defendant Organization maintains its plea of irreceivability.

On the merits, it acknowledges that in the past the relevant provisions on conversion of appointments from fixed-term to continuing did not make a distinction between staff in the General Service and staff in the Professional categories; but it points out that the scope of those provisions was amended in respect of Professional staff of the Programme as a result

CONSIDERATIONS

1. From 1981 to 1999, the complainant worked first in the FAO and subsequently in the WFP within the General Service category.

With effect from 1 August 1999, she was appointed as a Budget Officer in the Professional category, at grade P.1, on a one-year fixed-term project contract. The appointment occurred at a time when the WFP was proposing to implement new personnel practices involving indefinite appointments in the Professional category. As an interim measure, it had been decided, in September 1998, that all fixed-term contracts issued for international professional staff would be non-core project contracts, under the terms of section 391 of the WFP's Human Resources Manual. That section specified that such contracts should be for a term of one year but might be renewed for subsequent periods of one year provided that the total period should not exceed four years.

2. The complainant was offered the contract as Budget Officer by a memorandum dated 3 September 1999. Her attention was drawn to the provisions of Manual section 391. The memorandum contained the following statement:

"The change in category from General Service to Professional will take effect on the date you transfer to your new post. [...] During your professional assignment [...] you will be subject to Manual Section 391 [...]. This will not affect your contractual status as a 'continuing' staff member. You will be granted return rights to the General Service category at the G-6 level."

The contract which the complainant subsequently signed contained no provision relating to her continuing status or return rights to the General Service category.

3. A notification of personnel action dated 8 November 1999, which reflected the new appointment, gave the complainant's "appointment type" as 'continuing' and specified that she had received a "promotion to P-1 as per reassignment exercise approved by [the Director of the Human Resources Division] on 13/8/99". The notification also identified her new appointment as a "[o]ne year assignment with general return right to GS 6 level".

4. On 18 October 1999 an Information Note was issued, informing staff that a working group had proposed that "[f]uture International Professional Staff [...] be engaged under a United Nations category of indefinite appointment, instead of fixed[-term] appointments". It continued:

"Indefinite appointments are appointments that do not carry a specific date of expiry. When introducing the new appointment type, WFP would take into account the legal principle that it cannot change unilaterally fundamental terms of outstanding contracts. Thus, staff holding continuing appointments would retain their appointments. Staff under fixed-term appointments with a definite expectation of conversion of their contracts to continuing would retain their rights. Other [international professional staff] under fixed-term appointments would have their contracts converted to indefinite, subject to on-going needs of the Programme."

5. In November 1999 the Council of the FAO approved amendment of the Staff Regulations to provide for indefinite appointments. It was noted by the Council that:

"The indefinite appointment would be introduced in WFP with respect to staff in the Professional and Higher categories, from grades P-1 to D-1. When introducing the new appointment type, the acquired rights of serving staff would be respected."

6. In March 2000 the Executive Director of the Programme submitted Special Staff Rules, relating to indefinite

appointments, to the Secretary-General of the United Nations and the Director-General of the FAO. It was relevantly stated in paragraph 1.111 of those Rules that:

"An indefinite appointment shall be offered to international staff in the professional and higher categories appointed as from the date to be determined by the Executive Director [...]"

7. On 7 August 2000 the complainant received a notification of personnel action informing her of the extension of her assignment in which her appointment type was again specified as "continuing".

8. New provisions with respect to indefinite appointments came into force on 1 January 2001. They were set out in the "WFP Human Resources Policy Document on Administrative Procedures for International Professional Staff [...]". Paragraph 4.1.2 provided:

"Staff members holding continuing appointments on the date on which the policies and procedures contained in this document enter into force, shall retain such appointments."

9. At about the same time that the new provisions came into force, the complainant was offered an indefinite appointment effective from 1 January 2001. With the letter of offer the complainant was sent a contract for signature, the new policies and administrative procedures relating to indefinite appointments, and two information guides. The letter also stated:

"As a consequence of technical limitations with the present payroll system [the Human Resources Division] is unable to reflect the Indefinite Appointment. Therefore please consider this communication as the legal and official confirmation of your Indefinite Appointment status, provided you sign the attached contract and return it to your [Human Resources] Officer."

10. On 24 January 2001 the complainant enquired of the Acting Director of the Human Resources Division whether, if she signed the new contract, she would lose her 'continuing' appointment status and return rights to the General Service category. She received an e-mail that same day informing her that she would indeed lose her continuing status and return rights. It was also said in the e-mail that the change in status that would come about if she signed the new contract was "based on the personnel manual which considers the move from [General Service] to [Professional] as a change in category and not as a promotion". The complainant was also informed that she would have to decide between either accepting the indefinite appointment or requesting a "return to a [General Service] position".

11. There was later correspondence on the question as to whether the complainant and certain other staff members in the same position were entitled to continuing status in the Professional category, with the Administration asserting that the decision to offer indefinite appointments was legally correct and that a request for the appointments to be changed to 'continuing' could not be entertained. In the meantime, on 28 March 2001, the complainant received a letter stating that she had been promoted from P.1 to P.2 with effect from 1 January of that year. The notification of personnel action dated 3 May 2001, which reflected that promotion, also specified the complainant's appointment type as 'continuing'.

12. On 17 April 2001 the complainant filed an appeal with the Executive Director of the Programme against the decision not to accept her continuing status in the Professional category. The appeal was rejected as unfounded on 21 May, it also being said in the letter rejecting her appeal that it had been submitted out of time and was, thus, time-barred. On 19 July 2001 the complainant filed an appeal with the FAO Appeals Committee. The Committee reported to the Director-General of the FAO on 7 August 2002 recommending, with two dissenting opinions, that the appeal be dismissed as unfounded. The Director-General endorsed that recommendation and, on 25 November, informed the complainant of the decision to reject her appeal.

13. It should be noted that on 19 September 2002 the complainant was informed that her fixed-term contract had expired and that, if she did not sign the indefinite appointment contract by 1 October 2002, it would be necessary to consider "reinstatement to GS status". On 1 October she signed the contract with the notation that it was "without prejudice to the outcome of the ongoing appeals process". A notification of personnel action, dated 18 September 2002, specified that her appointment had been converted from continuing to fixed-term as a result of her changing from the General Service to the Professional category with effect from 1 August 1999. The notification stated that, due to an oversight, no action had been taken in the computerised personnel management system.

14. In her complaint, the complainant challenges the decision of the Director-General of 25 November 2002 rejecting her appeal as recommended by the Appeals Committee. She states in her complaint that she wishes "to retain [her] continuing status with the Organization as a Professional staff member". The impugned decision is challenged on two distinct bases. First, the complainant contends that she had continuing status as a staff member in the Professional category on 1 January 2001 when the new provisions came into force, and that, in accordance with the above-mentioned paragraph 4.1.2, she is entitled to retain that status. She also contends that to deprive her of her continuing appointment would infringe her acquired right to continuing status. In support of her arguments, she points out that other staff members moved from the General Service to the Professional category without losing their continuing status.

15. The FAO contends that the complaint is irreceivable as time-barred. There are two separate arguments. One is that the complainant did not lodge her appeal with the Executive Director of the Programme within 90 days of the decision to offer her an indefinite appointment. The other is that the real matter of which she complains is the failure to accord her continuing status in the Professional category when she moved from the General Service category in 1999 and that that issue should have been the subject of an appeal within 90 days of that decision, a period which has long since passed.

16. The FAO also contends that the complaint is unfounded. It argues that the complainant had continuing status only in the General Service category and, thus, she is not entitled to rely on paragraph 4.1.2 which applies only to staff holding a continuing appointment in the Professional category. For substantially the same reason, it holds that the complainant had no acquired right to continuing status in the Professional category. As a subsidiary argument relating to the complainant's claim of acquired right, the Organization contends that an indefinite appointment is not significantly different from a continuing appointment. Further, the FAO asserts that the staff members who retained their continuing contract status when they moved from the General Service to the Professional category were in a different position from that of the complainant.

17. The arguments of the FAO with respect to receivability are without merit. First, although the letter offering the complainant an indefinite appointment is dated 27 December 2000, there was annexed to that letter a form of contract bearing the signature of the relevant official and dated 18 January 2001. Accordingly, it must be accepted that, as claimed by the complainant, she was notified of the offer on 19 January 2001. The appeal to the Executive Director of the Programme was lodged on 17 April 2001 and was, thus, within time.

18. The other argument with respect to receivability fails because the complainant was not notified that she did not have continuing status within the Professional category until 24 January 2001 and her appeal to the Executive Director of the Programme was lodged on 17 April 2001 within the required time limit. In this regard, it is simply not possible to read the memorandum of 3 September 1999, which contained the statement that "[t]his will not affect your contractual status as a 'continuing' staff member", as confined to continuing status in the General Service category. Certainly, there is no suggestion in the reference to return rights to the General Service category, that the complainant's continuing status was confined to that category. The above-mentioned statement is explicable on the basis that the appointment or "assignment", as it is described in the memorandum, was for a fixed term. Moreover, it would have been a simple matter to specify that the complainant's continuing status was confined to the General Service category if that was intended. Indeed, in a context in which the complainant's promotion resulted from a reassignment exercise and it was contemplated that new rules would introduce indefinite appointments, ordinary notions of good faith and fair dealing would have required it to be clearly stated if it were intended to confine her continuing status to the General Service category. That is particularly so if, as is not disputed, the rules governing continuing status were then the same for both the General Service and the Professional categories.

19. The question whether the complainant has continuing status in the Professional category is to be determined by reference to the contract established by her acceptance of the offer contained in the memorandum of 3 September 1999. That offer was accepted by the signing of the fixed-term contract attached to the memorandum. Once it was accepted, the FAO became bound by the terms of its offer even though not all of those terms were included in the contract form tendered for signature. More precisely, the signed contract contained only part of the agreement reached between the Organization and the complainant and, thus, cannot displace the terms of the agreement reached by acceptance of the offer contained in the memorandum. And that offer expressly stated that the change in category would not affect the complainant's 'continuing' status.

20. As already explained, the statement as to the complainant's continuing status in the memorandum of

3 September cannot be read as confined to continuing status in the General Service category. Indeed, it is clear from subsequent personnel notifications that it was not interpreted in that way by the FAO until 24 January 2001 when the Organization sought to deny her that status on the basis of the signed contract. However, the signed contract did not displace the terms offered in the memorandum of 3 September 1999 and subsequently accepted by the complainant when she signed the contract form. Accordingly, the complainant obtained continuing status in the Professional category when she transferred to the post of Budget Officer. At least that is so unless there was some provision in the relevant rules that prevented that course.

21. The FAO points to no rule which expressly prevented an employee from maintaining his or her continuing status after transfer to the Professional category or, if there be a difference, from gaining that status by virtue of long-term employment in the General Service category. At best, the Organization points to a Manual provision treating a move to the Professional category as a change in category, not a promotion. That falls far short of a prohibition of the kind indicated. Moreover, the fact that other staff members who moved from the General Service to the Professional category maintained or were granted continuing status indicates that there was no such prohibition. And that is so whether or not they were in a different position from the complainant.

22. It follows that the complainant obtained continuing status in the Professional category on her appointment to the post of Budget Officer in 1999. Thus, she had continuing status when the new provisions came into force on 1 January 2001 and, in accordance with the above-mentioned paragraph 4.1.2, she automatically retains that status. The decision to offer the complainant an indefinite appointment and, later, to reject her appeal was premised on the assumption that she did not have continuing status in the Professional category. That resulted from the failure to appreciate the true effect of the contract that came into existence on the complainant's acceptance of the offer of 3 September 1999. That was an error of law and, accordingly, the Director-General's decision of 25 November 2002 must be set aside.

DECISION

For the above reasons,

1. The Director-General's decision of 25 November 2002 is set aside.
2. The FAO is ordered to take all steps necessary to recognise the complainant's continuing appointment status with the WFP.

In witness of this judgment, adopted on 7 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet