113th Session **Judgment No. 3122**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. K. against the World Trade Organization (WTO) on 15 June 2010, the WTO's reply of 30 July, the complainant's rejoinder of 15 September and the Organization's surrejoinder of 20 October 2010;

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. By a Notice to the Staff dated 4 August 2009, the WTO announced several amendments to the Regulations of the WTO Pension Plan. Among other things, with effect from 1 January 2010 the normal retirement age was raised from 62 to 65 for officials recruited on or after that date. In addition, staff members who were in service on that date and whose normal retirement age was 62 were permitted to request to remain in service beyond retirement.

The complainant, who was born in 1947 and has dual French and Swiss nationality, was due to retire at the end of November 2009. On

4 August 2009 he sent a memorandum to the Director-General to request that his contract be extended until 31 January 2010 so that he could benefit from the above-mentioned amendments. By a memorandum of 13 November 2009 he was informed that the Director-General had decided "on an exceptional basis" to grant him an extension until 31 July 2010 "on the understanding that said contract will not be renewed beyond that date". The complainant was asked to indicate to the Human Resources Division, in writing, whether he accepted that proposal.

In an e-mail dated 26 November 2009 to the acting Director of the Human Resources Division (Ms L.) the complainant replied that, while he accepted the extension, he requested that the Director-General reconsider the period of extension and allow him to serve until the age of 65, "in keeping with the Regulations of the WTO Pension Plan". Referring to "existing precedents", he asked that "the basic GATT/WTO principles of equal treatment and non-discrimination be applied". That same day Ms L. replied that, since his retirement date was 30 November 2009, any extension of his retirement age could only be made at the Director-General's discretion, based on the exigencies of the service. On 30 November 2009 the complainant signed a "letter of acceptance" indicating that he accepted the extension of his contract on the terms set out in the memorandum of 13 November 2009.

On 25 March 2010 he sent a memorandum to the Director-General asking him to reconsider the decision to extend his contract until 31 July 2010. He pointed out that other similarly situated officials had had their contracts extended even before the entry into force of the amendments to the Staff Regulations on 1 January 2010. The Director of the Human Resources Division, writing on behalf of the Director-General, informed him by memorandum of 30 March that his contract would not be extended beyond 31 July. She reiterated that the extension had been granted on an exceptional basis in appreciation of the complainant's loyal service to the Organization and in order to ensure a smooth handover. However, she emphasised that the extension had been granted on the understanding that his contract

would not be renewed beyond 31 July 2010 and that he had agreed to this condition by signing the letter of acceptance.

On 15 April 2010 the complainant lodged an appeal with the Joint Appeals Board challenging the Director-General's decision of 30 March 2010, and asking it to recommend that he be treated in the same way as other staff members whose contracts had been extended before the new rules had come into force. In its report of 21 May 2010 the Board found that the complainant's request for review of the decision to extend his contract only until 31 July 2010 had been rejected by the Administration on 26 November 2009, but that he had not lodged an appeal against that rejection within the 20-day period stipulated in Staff Rule 114.5. The Board concluded that his appeal of 15 April was therefore inadmissible and could not be reviewed, as the memorandum of 30 March 2010 could not be regarded as having given rise to a new time limit for appeal. The complainant then filed his complaint with the Tribunal.

B. The complainant contends that, by not treating him in the same way as other officials whose contracts were extended beyond retirement age prior to the entry into force of the amendments to the Regulations of the WTO Pension Plan, the Director-General acted in an arbitrary, unfair and discriminatory manner. He points out that he was originally due to retire only one month before the new rules took effect. Moreover, Staff Rule 115.2 allows the Director-General to make exceptions to the Staff Rules, provided that they are not prejudicial to the interests of any other staff member. In the complainant's view, by not granting him the same exception as was granted to his colleagues, the Director-General acted in a manner that was prejudicial to his interests.

He also argues that he was not provided with any justifiable reasons for the decision not to grant him a longer extension, and he states that his due process rights were violated because he was "coerced" to sign a "letter of acceptance" of the extension that was offered, failing which he would be required to separate from service on 30 November.

The complainant asks the Tribunal to award him material damages equivalent to what he would have earned from 1 August 2010 until 30 November 2012, including all allowances and benefits, had his contract been extended until the age of 65. He also claims moral damages in the amount of 100,000 Swiss francs.

C. In its reply the WTO contends that the complaint is irreceivable. The complainant did not file an internal appeal within the prescribed time limits and the response he received from the Administration in March 2010 did not reopen any right of appeal, as it was merely a confirmation of an earlier decision. Moreover, the Organization submits that there are no compelling reasons why the Joint Appeals Board should have reviewed the complainant's appeal in spite of its late submission. The complainant does not justify his delay on the ground, for example, that the alleged discriminatory, unequal, unfair or arbitrary treatment became apparent to him only months after the challenged decision was taken. On the contrary, he had already complained of unequal treatment in his e-mail of 26 November.

The WTO stresses that, while as of 1 January 2010 staff members may exercise the option to request an extension of their contracts beyond 62 subject to the interests of the Organization, staff members retiring before that date had no legal right to seek such an extension. At the time when the complainant was due to retire, the Director-General had a discretionary power to decide on an exceptional basis whether to grant an extension, and for how long, based on the interests of the Organization. The complainant therefore had no right to seek an extension of his contract as the new rules were not applicable to his case.

Alternatively, on the merits the Organization submits that the complainant has failed to demonstrate that he suffered discrimination or that his due process rights were violated. It argues that the Director-General provided clear reasons for his decision and that the complainant has not made a convincing case regarding his alleged indispensability that would justify a contract extension of several years. Moreover, as part of his discretionary power to grant contract

extensions beyond the retirement age, the Director-General is entitled to attach conditions such as a definitive separation on a specified date. Lastly, the complainant had produced no evidence that he was pressured or that he signed the letter of acceptance under duress.

D. In his rejoinder the complainant presses his pleas. He points out that in the response of 13 November 2009 no reasons were given as to why it was not in the interest of the Organization that he remain in service. In his view, the absence of objective and transparent criteria governing extensions beyond retirement age means that he was *ipso facto* discriminated against, as he was not given the same opportunity as other staff members whose contracts were extended even before the entry into force of the new rules.

The complainant reasserts that his complaint is receivable, given that the WTO failed to draw his attention to any applicable time limits, led him to believe that the decision was not final and coerced him into accepting the offer of extension.

E. In its surrejoinder the WTO maintains its position. Referring to the Tribunal's case law, it submits that the memorandum of 30 March 2010 was merely a confirmatory decision which did not set off a new time limit for appeal. It points out that the complainant appears to confuse his own situation with that of staff members who were due to retire after 1 January 2010. The new Regulations of the WTO Pension Plan being not yet in force the Director-General was not obliged to state the reasons for his refusal.

CONSIDERATIONS

1. The determinative issue is whether the complainant exhausted the internal means of redress as required by Article VII of the Statute of the Tribunal. In July 2009, shortly before the complainant reached his mandatory retirement age of 62, the WTO General Council adopted amendments to the Regulations of the WTO Pension Plan to raise the normal retirement age from 62 to 65. The

amendments came into force on 1 January 2010. The relevant amended regulation states that "'*Normal retirement age*' shall mean age 65, except that it shall mean age 62 for a participant whose participation commenced before 1 January 2010 and age 60 for a participant whose participation commenced before 1 January 1990".

2. In August 2009, the complainant wrote to the Director-General requesting that his contract, which was due to expire on 1 December 2009, be extended to 31 January 2010 to permit him to benefit from the pension plan amendments. By a memorandum of 13 November 2009 the acting Director of the Human Resources Division, Ms L., informed the complainant that "[i]n appreciation of [his] loyal service to the organization and in order to ensure a smooth handover" the Director-General had decided to grant him, "on an exceptional basis", an extension of his contract through 31 July 2010. The memorandum also stated: "Please note that this is on the understanding that said contract will not be renewed beyond [31 July 2010]. I would be grateful if you could indicate to the Human Resources Division, in writing, whether you accept the above-mentioned proposal."

3. In an e-mail of 26 November 2009 to Ms L. the complainant accepted the offer of an extension to 31 July 2010. However, he also requested that "the Director-General reconsider the period of extension" to permit him to work until he reaches the age of 65 "in keeping with the Regulations of the WTO Pension Plan". He also asked that "[i]n light of existing precedents […] the basic GATT/WTO principles of equal treatment and non discrimination be applied". Ms L. replied the same day stating that his retirement date was 30 November 2009 and that the new retirement age of 65 would not take effect until 1 January 2010. The complainant's current retirement age, she wrote, could only be extended "at the Director-General's discretion based on the exigencies of the service". The complainant states that he called Ms L. on the morning of 27 November 2009 to discuss his concerns and was told that if he did not accept the offer made on 13 November 2009 he would have to

leave his employment on 30 November 2009. He signed a letter formally accepting the offer on 30 November.

4. On 25 March 2010 the complainant asked the Director-General to reconsider the decision of 13 November 2009 granting him only an eight-month contract extension. He asserted that "other similarly situated staff members [were granted longer extensions] even before the amendment to the Staff Regulations went into force on 1 January 2010". The Director of the Human Resources Division responded to the complainant's request on 30 March 2010, informing him that having considered "the interest and the needs of the Organization" the Director-General had maintained the decision of 13 November 2009. The Director observed that the extension was "granted on the understanding that it [would] not be renewed beyond that date", and that by signing the letter of acceptance, the complainant had accepted that condition.

5. On 15 April 2010 the complainant appealed the Director-General's decision of 30 March 2010 to the Joint Appeals Board. In response, the WTO requested a preliminary ruling based on the assertion that as the proper decision to challenge was rendered in November 2009, the appeal was inadmissible as time-barred.

6. In its 21 May 2010 ruling the Joint Appeals Board found that the statutory 20 working-day time limit to initiate an appeal began on 26 November 2009, the date of Ms L.'s e-mail to the complainant. Since more than 20 working days had elapsed between that date and the date on which the complainant filed his appeal, the Board concluded that the appeal was inadmissible and the decision was not reviewable. The complainant impugns this decision before the Tribunal.

7. The complainant submits that the 20 working-day time limit to initiate an appeal started on 30 March 2010, the date on which he received the Director-General's reply to his request of 25 March 2010 for an extension of his contract beyond 31 July of that year. He argues

that as the memorandum of 13 November 2009 was an "open-ended" offer, it was not a "proper decision to challenge" under the WTO Staff Rules. He maintains that the communication of 13 November 2009 was qualitatively different from the memorandum of 30 March 2010, which conveyed a final decision. The complainant explains that until 30 March 2010 he always believed it was possible that his contract might be extended beyond 31 July 2010. He also points out that the communications of 13 and 26 November 2009 did not draw his attention to the applicable appeal time limits in keeping with the Organization's normal practice.

8. Under the relevant WTO Staff Rules, a staff member has 40 working days upon receipt of an administrative decision to seek the Director-General's review of that decision (WTO Staff Rule 114.3(a)). The Director-General's reply to the request for a review may be appealed within 20 working days of receipt of the reply or, if the Director-General does not reply within 20 working days, within a further time limit of 20 working days (WTO Staff Rule 114.5).

9. The first question is whether the memorandum of 13 November 2009 contains an appealable decision. A decision is "any action by an officer of the organisation which has a legal effect" (Judgment 533, under 3). Contrary to the complainant's assertion, the text of the memorandum of 13 November 2009 is not equivocal, conditional or "open-ended". The memorandum in response to his request for a particular extension states specifically that the Director-General decided to grant him, on an exceptional basis, an extension of his contract to 31 July 2010 and that the contract would not be extended beyond that date. It does not follow from the fact that it was open to the complainant either to accept or reject the extension that a decision in relation to the request was not taken. In accordance with the Staff Rules, upon the complainant's receipt of the decision of 13 November 2009 he had 20 working days within which to seek a review of that decision. The complainant sought that review by his e-mail of 26 November 2009 in which he stated that he was

"requesting that the Director-General reconsider the period of extension".

10. The complainant received a reply to his request on 26 November 2009. Although the e-mail of 26 November 2009 appears to be in response to the request for review, arguably, it is not a reply as contemplated in the Staff Rules. This interpretation is consistent with the reference in the memorandum of 30 March 2010 to the Director-General's decision of 13 November 2009. However, this does not assist the complainant as the same rule provides that if the Director-General does not respond to the request for the review within 20 working days, the staff member may appeal to the Joint Appeals Board within the following 20 working days. The complainant filed his appeal with the Board well beyond the statutory time limit.

11. The remaining question is whether the memorandum of 30 March 2010 constituted a new decision or simply confirmed the earlier decision. In Judgment 2011, consideration 18, the Tribunal observed:

> "According to the case law of the Tribunal, for a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) the following conditions are to be met. The 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 […]. It must not be a mere confirmation of the original decision […]. The fact that discussions take place after a final decision is reached does not mean that the Organization has taken a new and final decision. A decision made in different terms, but with the same meaning and purport as a previous one, does not constitute a new decision giving rise to new time limits […], nor does a reply to requests for reconsideration made after a final decision has been taken […]."

12. It is clear that the memorandum of 30 March 2010 did not alter the substance of the previous decision, relate to new issues or rely on new grounds. The only question is whether the statement in the memorandum that "[the complainant] agreed to the conditions of this extension by signing the letter of acceptance" provides a further

justification for the prior decision. Three reasons underpinned the prior decision: the complainant had served the Organization loyally; the Director-General wished to ensure a smooth handover; and extension decisions are "exceptional" in nature. Read in the context of the statement in the memorandum that "the Director-General maintains his decision communicated to you on 13 November 2009" the statement is simply an observation regarding the complainant's acceptance of the earlier decision and is not an additional justification.

13. The Tribunal concludes that the Joint Appeals Board did not err in finding that the appeal was irreceivable. It follows that as the complainant did not exhaust the internal means of redress as required by Article VII of the Statute of the Tribunal his complaint is irreceivable and must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2012, 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 July 2012.

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