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

SEVENTY-FIRST SESSION

In re LEHMANN-SCHURTER

Judgment 1125

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Maria Lehmann-Schurter against the Intergovernmental Organisation for International Carriage by Rail (OTIF) on 16 May 1990 and corrected on 19 June, OTIF's reply of 24 July, the complainant's rejoinder of 23 August and the Organisation's surrejoinder of 12 October 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 25 and 28 of the Staff Rules of 1956 and Appendix I to the Staff Regulations of 1980 of the Central Office for International Carriage by Rail, the secretariat of OTIF;

Having examined the written evidence;

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

A. The Intergovernmental Organisation for International Carriage by Rail has its headquarters in Berne. The Federal Council of Switzerland was in charge of it until 1956, when it became autonomous.

On 31 January 1947 the Council adopted rules applicable to the staff of OTIF and other international organisations under which the organisation was to pay the equivalent of 15 per cent of staff salaries into a savings fund. The sums were to be deposited in the Swiss National Bank until the official's death, whereupon they were to be made over to his heirs.

When OTIF adopted new Staff Rules on 17 April 1956 it carried over that entitlement. Article 25, which was about the fund, said (Registry's translation):

"1. Each year the Office shall enter in its budget a sum equivalent to 15 per cent of the basic salary of its serving permanent employees and the amounts of the insurance contributions set by the competent authority at the date of retirement of permanent employees. Those sums shall constitute and add to the insurance funds available for each employee. ...

2. With the exception of certificates for mandatory social insurance, the insurance funds so constituted shall be deposited in the Swiss National Bank in portfolios bearing the official's name. After his death they shall be paid out to his statutory heirs and legatees upon authentication of their status by the authorities of the official's home country. ..."

Those Rules were superseded by the Staff Regulations, which came into force on 1 January 1980. Appendix I applies transitional provisions to "officials recruited before 1 December 1966 who are not affiliated with the federal insurance fund",* and they include "Article 25 save clauses 7 and 9 to 15" and "Article 28 save clauses 2 and 3" of the 1956 rules. Article 28 reads (Registry's translation):

"The present regulations shall not affect the rights acquired under the former rules by permanent officials appointed before 1 March 1956. ..."

The complainant, a Swiss citizen, was on the staff of OTIF from 1 March 1949 until 31 December 1989, when she retired.

On 8 October 1989 she wrote to the Director-General asking, among other things, that the Organisation continue its payments to the savings fund under Article 25 after the date of retirement. The Director-General refused in a letter of 17 October and the matter went to the Administrative Committee.

In its report of 22 February 1990, which constitutes the impugned decision, the Committee recommended dismissing her claim and agreed with the Organisation that the fund had been set up to answer the need for social protection at a time when pay had been low and social insurance wanting. But it did acknowledge that the text did "not contain the express restriction that that interpretation implies". In the Committee's view neither the complainant's nor her heir's finances warranted any "further help" from the Organisation and "a teleological construction of the article must prevail over any strictly literal one".

B. The complainant submits that the decision she challenges was arbitrary. She has an acquired right to protection under Article 25 of the 1956 rules, and both Article 25 and Article 28, which safeguards that right, are still in force.

Whether the old scheme was too solicitous is no concern of hers. Her direct heirs, a son and three grandchildren, are not particularly well off and so her position is just what the draughtsman had in mind.

Whereas the new scheme, under which officials belong to the Swiss federal insurance fund, confines protection to the official's spouse and dependent children of any age the 1956 rules make no such restriction. Yet OTIF never gave notice of any change in her rights. Indeed she was led to believe she

would keep the rights she had acquired under a text that is quite plain and in no need of interpretation. To displace a literal with a teleological construction is a breach of good faith.

The impugned decision grossly offends against equal treatment. She names six officials in similar family circumstances who did benefit under the 1956 rules after retirement. As OTIF's last employee to be able to rely on those rules she regards its denial of her rights as especially offensive.

She asks the Tribunal to order production of the records on the six other cases and to order the Organisation to contribute at the rate of 15 per cent of her final yearly basic pay to the survivors' insurance fund in pursuance of Article 25 of the 1956 rules.

C. In its reply OTIF gives its own interpretation of Article 25.

In its submission the text is straightforward and distinguishes between two kinds of contributions: "a sum equivalent to 15 per cent of the basic salary" for serving officials and "the amounts of the insurance contributions set by the competent authority" - in this case the Administrative Committee - for retired officials. So the contributions do not necessarily continue after retirement, being dependent on what the Administrative Committee decides, and there is no question of any acquired right. What swayed the Committee was that protection was intended to meet cases where a retired official's death caused financial hardship and the financial position of the complainant and her descendants obviously precluded any such risk in this case. There was nothing arbitrary about the decision. To establish that her situation is indeed what the draughtsman had in mind she must offer evidence of her son's finances and legitimate expectations.

The construction the Organisation puts on the rule is in keeping with the draughtsman's intent and, as the papers show, has been asserted time and again over the years. A Committee paper of 30 September 1967, for example, states that the survivors' insurance fund is meant to serve the same purpose as the annuities Switzerland pays to widows and orphans. Yet the complainant's son is not a dependent child as an orphan is under Swiss social insurance law.

Besides, the Universal Postal Union had at the time a similar insurance scheme, and the Swiss Federal Council told it as long ago as 1965 not to pay further insurance contributions on behalf of any official with neither spouse nor dependent offspring. Unfortunately OTIF was not informed of that decision until 1978.

As for the payment of insurance contributions for the six officials named, OTIF produces several documents about them, and about a seventh official the complainant has not mentioned, and observes that in only four cases did it continue to contribute after their retirement.

D. In her rejoinder the complainant contends that OTIF's reply contains several errors and reveals bias in its disregard of earlier promises and of consistent practice. She points out that the three officials for whom the Organisation stopped contributing had no immediate heirs and that she is in just the same situation as the other four, whose cases bear out that the only condition is to have a spouse or lineal descendant. She maintains that the decision was arbitrary, in breach of her acquired rights and discriminatory.

She presses her earlier claims and adds a subsidiary claim that the Tribunal set the amounts of insurance contributions in keeping with the four precedents.

E. In its surrejoinder OTIF denies all the complainant's submissions in her rejoinder, observing that each of the cases she sees as evidence of the practice she relies on dated from before 1978, i.e. before the Universal Postal Union told it of the change the Union had made in its practice in 1965.

CONSIDERATIONS:

1. The complainant, who joined OTIF on 1 March 1949, retired on 1 January 1990.

Throughout her career she came under several sets of staff rules or regulations. At the date of her appointment the material rules were in a text dated 31 January 1947, which harked back to an even earlier one. Those rules came from the Federal Council of Switzerland, which at the time was in charge of OTIF and other international bodies. Besides a traditional pension scheme the rules provided for the protection of staff members' families, and for that purpose OTIF and the other international bodies were to pay contributions out of their own budgets to the Swiss National Bank in amounts depending on the pay of each staff member. The contributions were converted into lump sums and made up a savings fund for the benefit, not of the staff themselves, but of their heirs.

OTIF later became quite independent and the competent authorities of the Organisation adopted new Staff Rules on 17 April 1956. Those Rules continued to allow staff who had been subject to the 1947 rules to continue, provided that they so wished, to have contributions made to the fund for the benefit of their heirs.

The Staff Regulations in force at the date of the complainant's retirement had come in on 1 January 1980. Appendix I to those Regulations took over such provisions of the 1956 Rules as were still applicable and again affirmed the principle of acquired rights.

In 1956 the complainant chose to keep membership of the fund and so to confer on her heirs the lump-sum benefit it would yield at her death.

While she was in its employ OTIF contributed to the fund at the rate of 15 per cent of her salary in accordance with the successive sets of rules and regulations. Those sums, which the Swiss National Bank has charge of, will eventually go to her heirs, and that is not at issue.

What is at issue is whether the contributions are to continue after the date of her retirement: she objects to the decision which the Administrative Committee took on 22 February 1990 that the Organisation's contributions to the fund should cease at that date.

2. According to Article II, paragraph 5, of its Statute the Tribunal may "hear complaints alleging non-observance, in substance or in form, ... of provisions of the Staff Regulations".

Insurance protection is covered by Article 25 of Appendix I to the 1980 Staff Regulations, the ones that applied at the date of the complainant's retirement. Although she will not herself derive the benefit, which ordinarily goes only to heirs, her own lack of financial entitlement does not bar her from asking the Tribunal to enforce a provision of the material Regulations; else there would be no remedy in law since beneficiaries will have only such entitlements as she will have secured for them.

The Tribunal is therefore competent, and indeed the Organisation does not demur on that point.

The complaint is also otherwise receivable.

3. The complainant is relying on Article 25(1) of the 1956 Rules, which by virtue of Appendix I to the 1980 Staff Regulations is still in force and which reads (Registry's translation):

"Each year the Office shall enter in its budget a sum equivalent to 15 per cent of the basic salary of its serving permanent employees and the amounts of the insurance contribution set by the competent authority at the date of retirement of permanent employees. Those sums shall constitute and add to the insurance funds available for each employee. ..."

The complainant's case is that the article requires OTIF to go on contributing to the fund after her retirement.

The Organisation's answer is that retirement is a fundamental change of circumstances warranting review of the employee's status, and it points out that Article 25 distinguishes between serving and former staff. But in its submission the impugned decision is really based on broader considerations than that. The Swiss authorities' purpose in setting up the fund was, it says, to afford protection at a time when retirement schemes were still unreliable and did not give officials' families proper protection. But nowadays the pension scheme allows retired staff much the same standard of living as they had while on salary and enables them to look after their dependants as well. So it would run counter to equity and to wise management of the scheme to hold the Organisation to obligations that have lost their original purpose. Another outcome of the approach reflected in the impugned decision is to bring closer together the old scheme and the one which covers staff recruited after 1956, and which ordinarily protects only the spouse and dependent offspring, whether minors or not.

Though the Staff Regulations do speak of acquired rights it would be wrong - OTIF goes on - to apply the doctrine in this instance. If the complainant succeeded in her claim a quite proper form of social protection would become mere charity, which ill befits the international civil service.

The Organisation points out that the complainant's pension is 63,695 Swiss francs a year, that she lives alone and has no family dependants. Her only son, who is over 40, has three children and is working as a music teacher. Even if the impugned decision is upheld he will still be paid when she dies a sum which, though it will depend on when she does, would in 1990 have come to over 110,000 Swiss francs. In any event the complainant may if she likes - and she can well afford to - go on contributing to the fund in the Organisation's stead.

Lastly, in upholding the decision the Administrative Committee observed that Article 25 does not state the restriction OTIF reads into it, and there is no reason to infer wilful omission. It concluded its explanation of the decision with the more general comment that "a teleological construction of the article must prevail over any strictly literal one".

4. The text the complainant is relying on requires that the Organisation's budget include the amount of insurance contributions as determined by the competent authority at the date of the permanent employee's retirement. That means that even after the employee retires the Organisation must go on paying into the fund. Though Article 25 merely states the rule - the arrangements for applying it being immaterial in the context - the wording is quite explicit. While admitting that, the Organisation wants to disregard the literal construction on the grounds that the draughtsman's original purpose no longer holds good.

The plea fails. When the text is clear there is no call for any interpretation or, in particular, to take account of the draughtsman's purpose. Only where two provisions of the same text or two parallel texts are at variance will any attempt be made to reconcile them. There is no need for that here. The wording is clear, and Article 25 is based on another provision of the 1956 Staff Rules, which preserves rights acquired under the earlier rules by permanent employees recruited before 1 March 1956. When incontrovertible the literal meaning of a text prevails over the spirit of it, and the teleological approach is irrelevant in positive law.

5. There is a more telling plea in the Organisation's submissions.

The Staff Regulations lay down that whereas for serving officials the contribution shall be the equivalent of 15 per cent of gross salary, the Administrative Committee shall set the amount for retired officials; yet the rules say nothing of the criteria the Committee shall apply in doing so. That means that, short of acting arbitrarily, it has discretion in the matter and so was free to stop contributing altogether at the date of the complainant's retirement. Before so deciding it reviewed her and her heirs' financial and social circumstances and concluded that their livelihood was not at risk. The position of her natural heirs, as summed up in 3 above, shows that the Organisation took the material facts into account.

6. Where the rule is silent the competent authority - here the Administrative Committee - does have discretion to set the amount of the contribution to be paid from the date of retirement. But its decision will not be immune to review by the Tribunal, which will interfere if it finds some mistake of fact or of law, or abuse of authority, or if an essential fact was overlooked, or if a patently wrong conclusion was drawn from the facts.

7. The complainant pleads that she was never warned of any change in her rights and that six other employees fared

better.

In its reply the Organisation comments on the case of the six others, and of a seventh, who retired between 1956 and 1982. For four of them it did go on contributing after retirement at the rate of 15 per cent of gross salary, but the details it gives do not reveal their family circumstances at the date of retirement. In its surrejoinder it acknowledges that after 1956 it kept, to begin with, to the earlier percentage rate of contribution at least for employees with direct heirs at the date of retirement.

Actually it held to the old arrangements for a fairly long time. The four it mentions are Mr. Michalik, who left in 1956, Mr. Ruffy, who went in 1959, Mr. Haenni, who reached retirement age in 1970, and Mr. Wick, who retired in 1973. For each of them it continued to pay at the rate of 15 per cent of yearly basic salary "in keeping with Article 25 of the Staff Regulations", and it said that the purpose was to offset "the chronic decline in the purchasing power of survivors' lump-sum entitlements".

For the other three employees the Organisation stopped contributing at the date of retirement. All it says about them is that they have no direct heirs. They are Miss Guepfert, who retired in 1973, Mrs. Desmeules, who left in 1977, and Mrs. Was, who went in 1982.

The complainant is the last of OTIF's employees to be able to claim under the pre-1956 scheme.

8. It is at least doubtful whether OTIF has put on a par employees in the same position in law and in fact. A construction which an international organisation wilfully and consistently puts on a rule for years may become a binding element of personnel policy to be applied to everyone who is in the same position in law and in fact. That flows from the general principles that an organisation must show good faith and frame personnel policy in objective terms. Yet it may alter a construction it was not required to follow provided that it does not thereby offend against any of its written rules.

9. Apart from the individual cases cited above the only case record that abides by the interpretation in force up to 1956 is the one about Mr. Michalik, who retired in that year. The record says: "... The policy of the Swiss Federal Council has hitherto been to go on paying for retired employees, and it has done so for the staff not only of OTIF but also the International Bureaux of Berne, which it is in charge of as well". The Administrative Committee concurred.

The evidence shows that the Swiss Federal Council dropped the policy in 1966. Although OTIF did not hear of that until 1978, the Organisation's Administrative Committee apparently took the same line much earlier, as its letter of 7 December 1982 to Mrs. Was seems to suggest, at least for retired employees with no direct survivors.

There are no hard-and-fast conclusions to be drawn from all this. Though it is a pity that OTIF did not make its policy explicit until it took up the case of the last of the pre-1956 recruits, the complainant seems to be not quite on a par with the seven others. Though she had direct heirs when she retired they were not dependants. Moreover, even though OTIF went on contributing in the four cases the last of them goes back to 1973, over 16 years before the impugned decision was taken.

So the evidence does not suggest any breach of equal treatment. The Organisation's bad faith may not be presumed, and the Administrative Committee has wide discretion under Article 25 to take account of personal circumstances before reaching a decision in the general interest.

10. Yet in exercising its discretion it must keep within the bounds of the authority the Staff Regulations vest in it.

The material rule, Article 25 of the 1956 Rules, empowers the Committee to set the amount of contributions after the date of the employee's retirement. But it must apply the rule reasonably and in any event may not do away with the benefit altogether. The decision it took in this case was in breach of the rule and is therefore arbitrary. The conclusion is that the impugned decision is in breach of Article 25 and cannot stand. There is therefore no need to consider whether the Committee overlooked any essential element of the circumstances described above.

11. Nor is there any need for the further submissions and oral proceedings the complainant wants.

12. The Organisation shall pay the complainant 2,500 Swiss francs in costs.

DECISION:

For the above reasons,

1. The impugned decision is set aside.

2. The complainant is sent back to the Organisation for review of her claim.

3. The Organisation shall pay her 2,500 Swiss francs in costs.In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

(Signed)

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.