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

SEVENTY-THIRD SESSION

In re KHEIR, MUENSTER and TURCO

Judgment 1200

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Hag-Ahmed Kheir, Miss Elisa Carlota Münster and Mr. Vicenzo Turco against the International Training Centre (formerly known as the International Centre for Advanced Technical and Vocational Training) of the International Labour Organisation on 28 November 1990 and corrected on 28 February 1991, the Centre's reply of 8 November 1991, the complainants' rejoinder of 18 February 1992 and the Centre's surrejoinder of 24 April 1992;

Considering that the complaints raise the same issues of fact and law and should therefore be joined to form the subject of a single ruling;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 0.3, 5.2, 9.2, 10.2(a) and (d) and 12.2 of the Staff Regulations of the Centre;

Having examined the written evidence and disallowed the complainants' application for oral proceedings;

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

A. Judgment 833 of 5 June 1987 (in re Abdel-Rahman and others) explained, under A, how pensionable remuneration counts in reckoning pension benefits payable by the United Nations Joint Staff Pension Fund to the staff of the former International Centre for Advanced Technical and Vocational Training.

The Tribunal also ruled on the subject of pensionable remuneration in a series of judgments, and the most relevant of them are mentioned in Judgment 1199 (in re Aguiriano and others), also delivered on this day, under A.

Facts relevant to this case also appear in that judgment under A.

The complainants are on the staff of the International Training Centre of the ILO, which is in Turin.

Personnel Newsletter No. 7 of January 1990 informed staff at the Centre of new decisions by the General Assembly of the United Nations on the adjustment of pensionable remuneration.

The deputy chairman of the Staff Relations Committee sent its members an announcement dated 29 January 1990 of a meeting scheduled for 31 January to consider a proposed amendment to Article 5.2 of the Staff Regulations. The staff union representatives got the announcement on 30 January and told the chairman of the Committee that for want of full background information they could not comment on a matter of such importance to the staff. The deputy chairman answered that the meeting would be held but only so as to give Committee members information on the draft amendment.

After the meeting on 31 January the staff representatives on the Committee wrote the deputy chairman a note asking him to abide by point 4 of the Committee's standing orders, which said that a meeting must be announced and the agenda and background material notified to members at least three working days in advance.

Also on 31 January the deputy chairman said in a minute to the Director of the Centre that Committee members had that day been given an explanation of the technical points of the amendment to Article 5.2 but that for want of the quorum, the staff representatives having refused to attend, the scheduled meeting had not taken place.

By circular DIR-90/2 of 31 January 1990 the Director informed the staff that he had decided to amend the article as

from 1 February 1990. He had consulted the Officers of the Board and the Staff Relations Committee "within the short time available". The purpose was to apply the General Assembly's decision and bring the Centre into line with the ILO, which had amended the Staff Regulations of the International Labour Office so as to put that decision into effect and had brought in a new scale of pensionable remuneration from the same date. Paragraph (b) of Article 5.2 accordingly read:

"The scales of pensionable remuneration of the Professional category and above shall be those specified in Annex A. These scales shall be adjusted on the same date as the scales of net remuneration of the Professional category and above serving in New York are adjusted. Such adjustment shall be by a uniform percentage equal to the weighted average percentage variation in the net remuneration as determined by the ICSC, provided that the first adjustment due after 1 January 1990 under this paragraph shall be reduced by 2.8 percentage points."

In May 1990 the complainants and other officials submitted an Article 12.2 "complaint" to the Director alleging that it was unlawful to apply to them the new scale of pensionable remuneration. They said that their "complaints" related not only to February but also to any later month in which the Centre applied to them the scales based on the new text, which reduced by 2.8 per cent the first adjustment due after 1 January 1990 and did away with the multiplier of 1.22. By letters of 30 August 1990 the Deputy Director of the Centre told them that the Director had rejected their "complaints". It is the decision in those letters that they impugn.

B. The complainants submit that the impugned decision is unlawful because it is the outcome of a resolution the General Assembly adopted on recommendations from the Joint Staff Pension Board and the Commission which were in themselves unlawful.

They have five pleas.

The first is that by failing to consult the Staff Relations Committee the Director acted in breach of Articles 0.3 and 10.2(a) of the Staff Regulations, which lay on him a duty of consultation.* (*Article 0.3 provides: "Subject to the approval of the Board of the Centre, the Regulations may be amended, without prejudice to the acquired rights of officials, by the Director after consulting the Staff Relations Committee ...". Article 10.2(a) says: "There shall be established a Staff Relations Committee which shall be consulted: ... (2) on proposals for the amendment of the Regulations; ..."). Even though the Committee did not meet to examine the proposed amendment to Article 5.2 the Director made the amendment as from 1 February 1990. Not until the Committee met on 23 February 1990 did the Administration put the actual text to its members. The staff representatives then objected to the failure to consult the Committee before the amendment had come into force.

Secondly, they say, the decision is in breach of the rule against retroactivity. Had the earlier system held good, pensionable remuneration would, because of a rise in net pay at New York of 4.5 per cent, have gone up by 5.5 per cent (4.5 x 1.22). The actual increase was only 1.7 per cent. So there is a 3.8 per cent loss because the 1.22 multiplier has gone altogether and because it does not apply to the period in which there was the former method of reckoning, i.e. from 1 April 1987 to 31 December 1989.

The complainants' third plea is breach of acquired rights. Citing the case law on the doctrine, including the judgments mentioned in A above, they submit that the Centre can show no objective cause for the impugned decision. What it says about economic and tax trends in the United States is unconvincing. And even if the Tribunal accepted that explanation it would still properly quash the impugned decision because of the serious injury it has caused. Compounding as it does the cumulative injury caused by earlier decisions on pensionable remuneration which the Tribunal set aside in Judgment 986 (in re Ayoub No. 2 and others), it is in flagrant breach of acquired rights.

Fourthly, the Centre overlooked essential facts. The decision came, when there was no emergency to warrant it, in the middle of a comprehensive review of pensions in the United Nations. By going ahead before it knew the outcome the Centre failed to take account of all the material facts.

The fifth and last plea is that the Director drew wrong conclusions from the evidence. The reforms in the method of adjustment reflected only the changes in tax law in the United States; yet economic trends in several typical countries were also relevant.

The complainants seek the quashing of the Director's decision of 30 August 1990 and awards of 11,000 French

francs each in costs.

C. In its reply the Centre says that it is in a dilemma: it has obligations because it is affiliated to the Pension Fund and belongs to the common system of the United Nations; yet it also has obligations under the case law.

It submits that the complaints are irreceivable insofar as they rest on flaws in the General Assembly's decision-making process. For one thing, it cannot determine whether the Assembly's decision is lawful, let alone defend the reasons underlying it. For another, since under Article 9.2 of the Staff Regulations the complainants are "subject to the Regulations of the United Nations Joint Staff Pension Fund" they ought to have gone instead to the Board of the Fund and then to the Administrative Tribunal of the United Nations, before which similar cases were pending.

The Centre seeks to refute their five pleas on the merits.

The Centre denies breach of its duty of consultation. The Staff Relations Committee met on 31 January 1990 in keeping with Article 10.2(d) of the Staff Regulations and a representative of the Personnel Office of the Centre "fully explained to its members, who had met to comment on the amendment, the reasons for the General Assembly's decision and the effects of it". He provided papers that included the text of the proposed amendment and the new scale of pensionable remuneration. So the Committee's members were quite aware of the background content and consequences of the amendment. The only reason why the Committee could not take up the matter was that some members kept away and so there was not the quorum that the standing orders require. The Director of the Centre did hold prior consultation under Article 0.3 and the staff representatives' position was just a ploy to hold up approval of the amendment until the date at which the new scale was to take effect had gone by. By late January, the Centre concludes, it had become urgent to amend the Staff Regulations to give effect to the General Assembly's decisions by the appointed date and keep the Centre in line with the ILO.

The Centre denies breach of acquired rights. The clause that brought in the 1.22 multiplier which applied from 1987 to 1990 cannot in itself constitute an acquired right as defined in Judgment 832 and other rulings by the Tribunal. Besides, the complainants have taken the wording of Judgment 986 out of context: what was at issue in that judgment was the basis of determining actual pensions, namely pensionable remuneration, not the method of reckoning such remuneration, which as the Tribunal observed, has altered time and again. The nature, cause and effect of the measure under challenge are irrelevant to the issue ruled on in Judgment 986, the downward adjustment of the scale. Far from impairing any acquired right, that measure was needed to ward off the danger there might have been had the 1.22 multiplier held good. The complainants ignore the Noblemaire principle, a prominent issue in Judgment 986. Since there was compliance with the principle the changes in the method of adjustment did not go to fundamental terms of employment.

Nor was the Centre in breach of the rule against retroactivity. The case law does say that "an administrative decision may not retroactively impair a right or alter any state of fact". But the material amendment took effect only as to the future, even though its purpose - as is that of any adjustment - was to offset the effects of applying the 1.22 multiplier in the past.

The plea that the Centre overlooked essential facts is groundless. There was nothing unreasonable about the General Assembly's decision, which the circumstances at the time fully warranted. There was no telling in 1989 whether the comprehensive review would be over by 1990. Any delay in remedial action would have meant that for at least a year pensionable remuneration would have continued to show the already identified "excess" of 2.8 per cent, and future adjustment to pensionable remuneration would have made things even worse.

The Centre drew no mistaken conclusions from the evidence. Making United States income-tax rates a relevant factor in adjusting pensionable remuneration ensured that levels of income replacement in the United Nations remained on a par with levels in the "comparator" system.

D. In their rejoinder the complainants challenge the Centre's objections to receivability. For one thing, the soundness of the reasons for a decision is not a matter of receivability but goes to the merits. For another, to object to receivability on the grounds that the complainants may not plead flaws in the General Assembly's decision-making is to disregard the case law. Any organisation must comply with the law, and the rule that its administrative decisions must be lawful means that when its executive head follows a decision by some other body his action must still be lawful, or the Tribunal will set it aside.

The Centre's suggestion that the complainants ought to have gone to the United Nations Administrative Tribunal is no longer relevant: in Judgment 546 of 14 November 1991 (in re Christy and others) that Tribunal dismissed similar cases, and the complainants are therefore right to address the ILO Tribunal.

They press their plea of breach of the Centre's duty to consult the Staff Relations Committee.

They maintain their plea of breach of acquired rights. The Centre is ignoring the trend in the case law towards wider recognition of acquired rights, and the economic reasons it gives for the impugned decision are highly dubious.

The Centre's answer to the charge of breach of the rule against retroactivity rests on a false premise. The 1.22 multiplier brought the United Nations into line with the United States federal civil service in the matter of income replacement, as the logic of the system required, and so there was no need for any action to alter effects it might have had in the past.

As to the Centre's disregard of essential facts, it has not taken the point that it should have awaited the outcome of the comprehensive review scheduled for 1990 before going ahead.

As for their plea that mistaken conclusions were drawn from the evidence, the complainants maintain that the ILO's answer in no way weakens their argument.

E. In its surrejoinder the Centre enlarges on its pleas on receivability and on the merits. It maintains that its reading of the doctrine of acquired rights is in line with the case law.

As to the rule against retroactivity, it submits that in Judgment 546 the United Nations Administrative Tribunal held the measure under challenge to be justified. The pleas that essential facts were overlooked and that mistaken conclusions were drawn from the evidence are, it maintains, irreceivable; it presses its subsidiary arguments on the merits in its reply.

CONSIDERATIONS:

1. The complainants are on the staff of the International Training Centre of the International Labour Organisation. They are asking the Tribunal to set aside decisions to apply to each of them as from 1 February 1990 the "scales of pensionable remuneration of the Professional and higher categories of staff brought in the new text of Article 5.2 of the Staff Regulations of the Centre, as set out in circular DIR-90/2 of 31 January 1990, and not in the earlier text of that article, as set out in personnel circular 87/4 of 27 March 1987 and in the January 1989 edition of the Staff Regulations".

2. The complainants have a procedural objection to the lawfulness of the individual decisions they impugn.

Those decisions rest on the new text of Article 5.2, which is about pensionable remuneration, and in the complainants' submission the procedure prescribed for amending it was not complied with.

Article 10.2(a) of the Staff Regulations sets up a joint body known as the "Staff Relations Committee", which shall be consulted "... (2) on proposals for the amendment of the Regulations". Article O.3 empowers the Director of the Centre to amend the Regulations "after consulting the Staff Relations Committee".

What those articles plainly require is co-operation between staff and management. Though it is not to take the form of bargaining, there must be a real exchange of views, and if it is to work both sides must show good faith.

3. The sequence of events was as follows. On 29 January 1990 the deputy chairman of the Staff Relations Committee told its members that it was to meet on 31 January to look at a proposal for amending the Staff Regulations. He made no further comment. On 30 January the chairman of the Committee saw a staff representative, who warned him that for want of full background material the staff representatives on the Committee could not take up the item. The upshot was a decision to hold at the appointed hour the next day a preliminary meeting at which the Personnel Office might provide the relevant information and to hold the meeting proper afterwards.

The Centre acknowledges that, although it gave information at the preliminary meeting, the actual text of the

amendment and figures illustrating the effect it would have were not disclosed at that meeting. The staff representatives on the Committee sent a minute saying that they wanted three days in which to look at the papers.

That time limit is in point 4 of the Committee's standing orders: notice of a meeting, the agenda and the relevant papers must be circulated to members of the Committee three days beforehand.

The Director of the Centre pressed on without regard for the objections. Since the staff representatives refused to attend there was not the quorum and the Committee could not meet. On 31 January the Director amended the article as from 1 February 1990.

4. Why was the proper procedure not complied with, and what is the consequence?

The Centre argues, first, that the staff representatives were just seeking a pretext for putting off the date at which the amendment was to take effect; since the topic had already been mooted in the International Labour Office, with which the Centre has close links, they knew quite well what the purpose was. Secondly, the English version of the standing orders shows that there is nothing binding about the three days' time limit. And thirdly, the matter was urgent.

Although by late January 1990 things were indeed urgent, in that the United Nations Joint Staff Pension Fund required the Centre to amend its Regulations by 1 February, the Centre owns in its reply to having "just overlooked the need to bring the material article of its own Regulations into line with the Fund's". In other words, it is pleading its own mistakes or oversights.

It is again wrong to call the staff representatives' posture a pretext, since the Centre admits that it did not come forth in time with "the actual text of the amendment and figures illustrating the effect it would have". The subject was of some moment and the staff representatives had the right in law to convey their views to authority. Though the Director is not bound to agree with them, co-operation will, short of proper consultation, be nugatory. The English version of the standing orders does not belie that construction.

5. As precedent makes plain, the Committee's Staff Regulations are an independent set of rules and when the Centre wants to amend them it is making a decision of its own and must abide by the rules of its own making. Citing the rules of some other body does not relieve it of that obligation. Its failure to discharge it in this instance was unlawful and has the effect of avoiding the new text of Article 5.2. Although the staff representatives' attitude was unhelpful, the Centre itself was to blame for the disregard of the material rules.

Since the individual decisions under challenge rest on an improperly made amendment to the Staff Regulations they are unlawful. There being no need to entertain the complainants' other pleas, the complaints succeed.

6. The Centre shall pay each of the complainants 5,000 French francs in costs.

DECISION:

For the above reasons,

1. The impugned individual decisions are quashed.

2. The Centre shall pay each of the complainants 5,000 French francs in costs.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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

In re KHEIR,

MUENSTER and

TURCO

ORDER

The President of the Administrative Tribunal,

Considering the complaints filed by Mr. Hag-Ahmed Kheir, Miss Elisa Carlota Münster and Mr. Vicenzo Turco on 28 November 1990 against the International Training Centre of the International Labour Organisation, as corrected on 28 February 1991;

Considering the Centre's brief of 26 April 1991 applying to have the proceedings suspended so that the position of the United Nations Joint Staff Pension Fund on similar issues might be ascertained;

Considering the brief of 15 May 1991 from the complainants' counsel asking the Tribunal to dismiss that application on the grounds, among others, that the Staff Regulations of the International Training Centre were independent of those of any other body;

CONSIDERATIONS:

The President may at any time suspend proceedings on the application of the complainant or of the defendant.

In this case suspension may make for fuller consideration of the issues and will not seriously jeopardise the complainants' rightful interests since the period of suspension will be limited.

DECISION:

1. The Centre's application for suspension is granted.

2. If the Centre has not replied by 16 September 1991 the Registrar of the Tribunal shall, on application from the complainants' counsel, proceed forthwith.

(Signed)

Geneva, 30 May 1991

Jacques Ducoux, President

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