Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

A.

v.

BIPM

130th Session **Judgment No. 4277**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms E. F. A. against the International Bureau of Weights and Measures (BIPM) on 4 May 2018 and corrected on 18 May, the BIPM's reply of 20 June, the complainant's rejoinder of 5 November, the BIPM's surrejoinder of 13 December 2018, the complainant's further submissions of 2 April 2019 and the BIPM's final comments of 26 April 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant, who was recruited by the BIPM in November 1999, has been receiving a retirement pension from the BIPM Pension and Provident Fund since 1 December 2017. She impugns her "pay slip" for January 2018, issued by the Pension Fund, which showed that her pension had not been revalued on 1 January 2018 following the adoption by the International Committee for Weights and Measures (CIPM) – the body responsible for administering the Pension Fund – of decisions to introduce a new unit for calculating pensions (the "pension point") into the Pension Fund's Rules and not to adjust that point for the period 2018-2019.

At its 105th session, held in October 2016, the CIPM adopted decision CIPM/105-05, which, in order to ensure the long-term sustainability of the Pension Fund, provided, in particular, for a gradual, stepped increase in the contributions of staff members recruited before 31 December 2016. The CIPM also adopted decision CIPM/105-06, which read as follows:

> "The CIPM decided to amend the Rules of the BIPM Pension Fund to implement changes consistent with the proposals of the [actuarial] report of 29 September 2016 and requested the Director of the BIPM to send the proposals to the CCE [Commission for Conditions of Employment] for their advisory opinion."

At the end of the amendment process, in Note No. 34 of 14 December 2016, the Director of the BIPM notified staff of the revised version of the Regulations and Rules of the Pension and Provident Fund which was to enter into force on 1 January 2017 and provided details of the increase in contribution rates.

At its 106th session, held in October 2017, the CIPM adopted decisions CIPM/106-06 and CIPM/106-07, which read as follows:

> "**Decision CIPM/106-06**
>
> The CIPM decided unanimously to modify the Rules of the BIPM Pension and Provident Fund to state that the unit used to calculate pensions shall henceforth be the *Pension Point* and that the CIPM may, if the need to ensure long-term financial sustainability warrants so, phase in the adjustment of the *Pension Point* value, apply it in part, suspend it or defer it. [...]
>
> **Decision CIPM/106-07**
>
> Following review of the actuarial modelling carried out by the actuaries [...] and Decision CIPM/105-06 by which the CIPM:
>
> – increased the annual contributions by the BIPM to the Pension Fund by 400 k€ in 2017 and 150 k€ in every year thereafter, and
>
> – implemented increases in the contribution rate for active staff,
>
> The CIPM decided unanimously that the *Pension Point* will not be adjusted for the period 2018–2019."

The content of both decisions was brought to the attention of serving and retired staff members by a note dated 26 October 2017.

Note No. 3 from the Director of BIPM, dated 5 January 2018, informed all serving and retired staff members of the amended version of the Regulations, Rules and Instructions applicable to staff members,

together with the changes to the Regulations and Rules of the Pension Fund. Note No. 4 of the same date provided notification of the value of the pension point for 2018 (1.1449) and confirmed that pensions would be frozen. On 7 February 2018, the complainant received her pay slip for January 2018, which showed that her pension had been calculated using the value of the pension point indicated in Note No. 4. That is the impugned decision.

The complainant requests the Tribunal to set aside her pay slip for January 2018, as well as the notes of 14 December 2016 and 26 October 2017, decisions CIPM/105-05, CIPM/105-06, CIPM/106-06 and CIPM/106-07 and those communicated by Notes Nos. 3 and 4 of 5 January 2018, and, more generally, "any decision of general application that forms the basis for those decisions", to order the BIPM to consult the Pension Fund Advisory Board – the body responsible for advising the CIPM on the Pension Fund's long-term sustainability – concerning the introduction of the pension point and the pension freeze for 2018 and 2019, and to award her 5,000 euros in moral damages and 10,000 euros in costs.

The BIPM requests the Tribunal to join this complaint with a similar complaint filed by a former staff member of the Organisation who also receives a retirement pension. It submits that the claims directed against decisions CIPM/105-05 and CIPM/105-06 are irreceivable on the grounds, among others, that they are not decisions that alter the legal framework. It further requests the Tribunal to consider whether the complainant should have challenged decisions CIPM/106-06 and CIPM/106-07 at the time they were adopted, when she was still a serving staff member. As, in its view, the complainant's pleas are either irreceivable or unfounded, it asks the Tribunal to dismiss the complaint in its entirety. In its surrejoinder, the BIPM adds that the complainant has no cause of action since she has not shown that she has suffered any financial loss.

CONSIDERATIONS

1. The BIPM seeks the joinder of this complaint with that filed by a former staff member of the BIPM who also receives a retirement pension. The complainants are in different legal situations. The decisions

they challenge are not all the same and the complaints raise partly different questions of law. Accordingly, the complaints shall not be joined.

2. The complainant, who retired on 1 December 2017, requests that the Tribunal:

– set aside decisions CIPM/105-05 and CIPM/105-06 taken by the CIPM at its 105th session in October 2016 concerning staff contributions to the BIPM Pension and Provident Fund, and Note No. 34 of 14 December 2016 relating thereto;
– set aside the pay slip relating to her pension for January 2018 as well as two pension-related decisions taken by the CIPM at its 106th session, namely decision CIPM/106-06 establishing a "pension point" and decision CIPM/106-07 freezing pensions for 2018 and 2019. These decisions were brought to the attention of serving and retired staff members by a note dated 26 October 2017. She also seeks the setting aside of Note No. 3 of 5 January 2018 providing notification of the revision of the Regulations and Rules of the Pension Fund and Note No. 4 of the same date setting the value of the pension point for 2018;
– "more generally, set aside any decision of general application that forms the basis for those decisions" [*].

3. Decisions CIPM/105-05 and CIPM/105-06 taken at the 105th session of the CIPM in October 2016 were not final as they were submitted for consultation to the Commission for Conditions of Employment (CCE) and a new decision was taken and notified to staff in Note No. 34 dated 14 December 2016. However, only final decisions can be impugned before the Tribunal (see Judgments 3512, under 3, 3958, under 15, and 4131, under 4).

Moreover, the complainant may not directly challenge general decisions such as these. As the Tribunal recalled in Judgment 3736, under 3, "according to the case law, a general decision that requires individual implementation cannot be impugned; it is only the individual implementing decisions which may be challenged" (see Judgments 3628, under 4, and the case law cited therein, 4008, under 3, and 4119, under 4).

[*] Registry's translation.

Accordingly, the lawfulness of the general decision may only be challenged in the context of a challenge to the individual decisions.

The complainant has not challenged any individual decisions implementing decisions CIPM/105-05 and CIPM/105-06 or the decision communicated in Note No. 34. The complaint is hence irreceivable in this respect.

4. As regards the claim for the setting aside "more generally" of any other "decision of general application forming the basis" of the impugned decisions, the Tribunal considers that this claim has not been formulated in sufficient detail to allow the challenged decision (or decisions) to be identified.

5. The complaint is, however, receivable insofar as it is directed against the pay slip for January 2018, which is an individual decision implementing the general decisions establishing a "pension point", freezing pensions and setting the value of the point. In support of her claims related to that pay slip, the complainant may therefore plead that the general decisions on which it partly rests are unlawful (see Judgment 3931, under 3).

6. The complainant challenges the lawfulness of the general decisions CIPM/106-06 and CIPM/106-07, arguing that the principle of *tu patere legem quam ipse fecisti* was breached because the Pension Fund Advisory Board (PFAB) was not consulted about either the pension freeze or the establishment of a pension point.

7. The Regulations and Rules of the BIPM Pension and Provident Fund, in the version applicable on 1 January 2017, provide in Article 4.4 on the PFAB's tasks:

> "The Advisory Board advises the CIPM on the long term sustainability of the Fund, and submits advisory opinions to the CIPM, in particular on:
>
> - the investment policy of the Fund;
> - the Fund's financial statements;
> - the actuarial studies;
> - the Fund's resources;
> - the review and modification of rules and regulations within the remit of the CIPM that are related to the Fund; and
> - any other appropriate task as decided by the CIPM.

> For this purpose, the Advisory Board formulates recommendations to the CIPM when provided for by applicable provisions, upon request by the CIPM or when the Board considers it necessary.
>
> In addition, the BIPM Director informs the Advisory Board of any development of importance related to the Fund.
>
> [...]"

Article 3 of the text entitled "Working methods of the Pension Fund Advisory Board" provides that its chair is "responsible for drafting recommendations and other communications to the CIPM, for consideration by the PFAB".

8. The Director forwarded the actuarial report dated 29 September 2016 to the PFAB. Scenarios 3 and 4 of that report proposed a "BIPM point revalorization used for pension increase" with a five-year pension freeze starting on 1 January 2018.

The assumptions made by the actuary were examined at the PFAB's third meeting on 4 October 2016.

The PFAB's fourth meeting on 28 February 2017 mainly focused on the proposal from the CCE to establish four "pillars", the last of which was "participation of retired staff". This was eventually implemented by decision CIPM/106-05 taken by the CIPM at its 106th session. Tables relating to the CCE's proposal, which clearly show the pension freeze for a fixed period from 1 January 2018, are included in the documents appended to the minutes of the meeting. Moreover, the proposal to ensure pensioners' representation on the PFAB can only be explained by the fact that measures affecting their pensions were under consideration. That was why a pensioners' representative was invited to the meeting held by the PFAB before decision CIPM/106-05 had even been adopted.

During the PFAB's fifth meeting on 15 September 2017, the chair of the PFAB and the Director confirmed that the four pillars would be considered by the CIPM, which would meet in October and discuss a possible pension freeze for a defined period. The pensioners' representative said that he was not opposed to the pension freeze if the savings made were "injected" into the pension fund. He added that the pension freeze should be reviewed on a regular basis and reconsidered if the situation improved. The staff representative stated that any new decision affecting pensioners and future pensioners should not come in addition to the decision already taken to change the contribution rate for active staff members, who should not incur a "double penalty".

However, he was not opposed to the pension freeze as long as it was temporary, which was indeed the case. The Director confirmed that this would be taken into consideration by the CIPM.

The Appeals Committee, to which the same issue was referred by serving staff members, heard several participants at the fifth meeting of the PFAB as witnesses. All of them confirmed that the freeze had been discussed.

9. The establishment of a pension point that was different from the point applicable to the salaries of serving staff members was a logical consequence of the pension freeze.

As the Appeals Committee noted, the actuarial report of 2016 drew an explicit link between the establishment of a separate pension point and the measures proposed for freezing pensions, and that link was never called into question by the PFAB. The PFAB did not consider any other measure which, assuming one existed, could have achieved the same result. It must therefore be held that the PFAB supported that approach.

10. In summary, the PFAB was duly informed of current plans and discussed the proposed solutions. No member of the PFAB opposed the pension freeze or the introduction of a specific pension point.

Nevertheless, in breach of Article 4.4 of the Regulations of the Pension Fund and Article 3 of the PFAB's Working Methods, the PFAB did not formalise its position in an opinion or recommendation. It was particularly important to do so since the minutes of the PFAB's meetings do not explicitly indicate its stance.

However, in the particular circumstances of this case, the Tribunal will not censure that irregularity, which does not have a significant bearing here. The chair of the PFAB listed the solutions that had been discussed and implicitly accepted by the PFAB in the annual report which he presented to the 106th session of the CIPM. Although that annual report – which, according to Article 13 of the PFAB's Working Methods, is supposed to concern the PFAB's activities and their general trends – cannot, as a rule, replace a formal recommendation, in this case it had the effect of correctly informing the CIPM before it took a decision.

In these circumstances, the plea must be rejected.

11. The complainant alleges that the Organisation did not take account of the CCE's opinion concerning the establishment of a pension point.

12. Article 21.2.1 of the Regulations applicable to staff members of the BIPM provides that:

> "The CCE [...] delivers advisory opinions to the Director on any rule or any proposed rule which would change the conditions of employment of staff members, on the development of emoluments and on health and safety matters [...]. It shall also submit to him any proposals aimed at improving the conditions of employment. Finally, it shall organize the election of Staff Representatives, the annual staff meeting and the circulation of information. [...]"

13. By e-mail of 27 September 2017, the Director requested the CCE's opinion as to whether to introduce a pension point. In an e-mail dated 29 September 2017, the CCE replied that this subject was very sensitive and was linked to the sustainability of the Pension Fund. Therefore, the CCE recommended that this modification should not be made without having been thoroughly discussed by the "modified" PFAB, which, according to the CCE, underlined the need for the PFAB to be quickly reformed as a "parity" structure. This appears to be a reference to the establishment of a joint executive committee, which was the first pillar of the CCE's proposals.

The Organisation sought and received the CCE's opinion. It is true that in this case the Organisation did not formally act on the CCE's recommendation, but at the 106th session of the CIPM, the chair of the PFAB presented its annual report, which took a position on the matter. The CIPM adopted its decision only after hearing that report.

In any event, a competent authority is not bound to follow the recommendations of an advisory body which is internal to the organisation, except where a text requires that the advisory body give its assent (see Judgment 4008, under 7).

The complainant further takes issue with the BIPM for having requested the CCE to give its opinion within two weeks, which she argues is much too short and unjustified. However, the Tribunal considers that two weeks was sufficient. It further notes that the CCE responded two days after the request for its opinion and did not ask for the time limit to be extended.

It follows that the plea is unfounded.

14. The complainant argues that her acquired rights have been infringed, first, by the increase in pension contributions deducted from her salary before 1 December 2017 – the date on which she retired – and, second, by the specific measures relating to pensions, namely decision CIPM/106-06 establishing a "pension point" and decision CIPM/106-07 providing that the point would not be adjusted in 2018 and 2019.

15. As regards the decisions relating to contributions paid by serving staff members, the Tribunal observes that, although it has accepted that, when seeking to establish that her or his acquired rights have been infringed, a complainant is entitled to rely on decisions taken prior to the impugned decisions, she or he may do so only to the extent that those earlier decisions concern the same subject (see Judgment 986, consideration 16 *in fine*). However, that is not the case here: the increases in pension contributions concerned the complainant's salary, which was thus reduced, but did not affect the amount of her pension.

16. With regard to the decisions concerning pensions, the Tribunal points out that the staff members of international organisations are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered during or after an employment relationship as a result of amendments to those provisions (see Judgment 3876, consideration 7).

Of course, the position is different if, having regard to the nature and importance of the provision in question, a complainant has an acquired right to its continued application. However, according to the case law established in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on. In order for there to be a breach of an acquired right, the amendment to the applicable text must therefore relate to a fundamental and essential

term of employment within the meaning of Judgment 832 (in this connection see also Judgments 2089, 2682, 2986 or 3135).

The challenged decisions concern the introduction of a "pension point" and the non-adjustment of that point for the period 2018-2019.

According to the BIPM, the challenged decisions had the effect, in 2018, of not increasing the pension of 4,149.50 euros paid to the complainant by 33 euros per month. The complainant estimates the loss incurred from February 2018 to February 2019 at 647.56 euros.

Whichever amount is taken into account, any change in that amount cannot be regarded as a fundamental and essential change affecting a fundamental condition of employment in consideration of which the complainant accepted her appointment or which subsequently induced her to stay on, especially given that the decision not to adjust the pension point was temporary.

The plea must be rejected.

17. The complainant alleges a breach of the principle, upheld in the Tribunal's case law, that the methodology chosen by an organisation to set salary adjustments for its staff must ensure "stable, foreseeable and clearly understood" results. That principle applies both to the remuneration of international civil servants and their retirement pensions (see Judgments 1821, under 7, and the judgments cited therein, and 2793, under 20). In support of this plea, she submits that there were four successive reforms in a period of only eight years, that the Organisation exercises its discretion without adequate safeguards and that the actuarial report contains blatant errors.

18. As the Tribunal recalled in Judgment 4134 (under 26), the requirement that the results must be stable, foreseeable and clearly understood or transparent does not mean a salary regime is fixed once and for all and is incapable of change (see Judgment 1912, under 14), or that this requirement excludes reasonable variations in the results yielded (see Judgment 3676, under 6). Moreover "a methodology cannot be applied without a degree of flexibility and without leaving some room for interpretation by the competent authority, which [is] entitled to take into account the imbalances generated by past applications of the adopted methodology in order to try to attenuate the effects thereof" (see Judgment 2420, under 15).

It should be noted that the reforms referred to by the complainant rather concerned adjustments which did not undermine the fundamental principles of the established system. The fact that several adjustments were made does not inherently imply that those measures, taken individually or as a whole, led to results that were neither stable, foreseeable or transparent. The graphs in the actuarial report clearly indicate the outcome of the latest reform, so there can be no question of a breach of the principle that results must be stable, foreseeable and transparent.

Moreover, the majority of the changes to which the complainant refers applied to serving staff members and she did not bring an appeal against them. In that regard, the complainant points out that the contribution rates for serving staff in other international organisations are much lower than at the BIPM, but that observation concerns decisions which the complainant is time-barred from challenging and does not concern the only decisions which she is entitled to challenge, namely those concerning the amount of the pensions paid to retired officials.

The complainant's submissions do not establish that the requirements of stability, foreseeability and transparency have been breached.

19. The complainant puts forward a second argument, submitting that those requirements were not met since the circumscription of the Administration's decision-making power by reference to concepts as broad and subjective as "circumstances [...] warranting [an adjustment of the point]" * and "the Organisation's interest"* is not a real safeguard against the Administration's whims and in fact amounts to allowing it to do as it pleases.

In this connection, it should be observed that Article 10.2.1 of the Regulations applicable to staff members allows the CIPM to phase in the adjustment to the value of the salary point, apply it in part, suspend it or defer it only in exceptional or unforeseen circumstances and on the condition that the BIPM cannot, without one of these measures, meet both its financial obligations and essential operating requirements. The value of the pension point is adjusted using the same mechanism as to calculate the value of the point used for salaries, and the same measures may be taken if the need to ensure the Pension Fund's long-term financial sustainability so warrants. The PFAB was established with the aim of keeping that sustainability under review, and it is responsible for

* Registry's translation.

advising the CIPM in that regard. Lastly, the decisions were taken on the basis of a report by an international, professional firm of actuaries.

It is therefore incorrect to allege that the Organisation's discretion is not sufficiently circumscribed and that it can act as it wishes.

The complainant's argument must hence be dismissed.

20. Moreover, the complainant criticises the actuarial report, which she alleges is based on blatantly erroneous considerations. First, the actuary decided to dispense with the mortality tables for international civil servants established by the "Co-ordinated Organisations"[*] in favour of French mortality tables. Second, in 2016 the actuary estimated that the rate of return would be 1.75 per cent while in 2015 he still estimated that it would be 4 per cent. According to the complainant, these two changes are not warranted and "are contrary to common sense", "without even requiring a thorough technical understanding of actuarial calculations"[**]. At the very least, the reasons for changing mortality tables should have been explained and justified for the sake of transparency.

As a rule, the Tribunal will not substitute its own assessment for that of an expert such as an actuary (see Judgments 3360, under 4 and 5, 3538, under 11 to 15, and 4134, under 26). However, since the complainant alleges blatant errors, the Tribunal will examine her objections.

With regard to the choice of mortality tables, the question was raised at the 102nd session of the CIPM in 2013 and the decision was taken on the following basis:

> "The use of mortality tables based on staff working in international organizations gives a higher rate of mortality because these tables take into account staff working in countries where life expectancy is relatively lower than in France. It was recommended that the BIPM returns to using French

[*] This term refers to several international organisations that have a common pay and pension system and are members of the Co-ordination System, which includes the Council of Europe (CoE), the European Centre for Medium-Range Weather Forecasts (ECMWF), the European Space Agency (ESA), the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT), the North Atlantic Treaty Organization (NATO), the Organisation for Economic Cooperation and Development (OECD) and the Western European Union (WEU) (a now defunct former member of the Co-ordinated Organisations).

[**] Registry's translation.

> mortality tables, with the result that staff will be estimated to live longer, requiring pensions over a longer period and a correspondingly higher budget. This is a more conservative and a more realistic scenario."

That choice is a precautionary measure intended to ensure the sustainability of pensions. It is not blatantly wrong or unreasonable to use French mortality tables, since a significant number of staff members are nationals of France or another country offering the same standard of living, and will live there after their service. As for nationals of other countries where life expectancy is lower and who will return there on reaching retirement age, they still have a higher life expectancy than their compatriots because, first, they are not among the economically disadvantaged citizens of those countries and, second, for a more or less extensive period of their life, they have worked in France and enjoyed the same living conditions and healthcare as French nationals.

As regards the decrease in the estimated return between 2015 and 2016, it is common knowledge that interest rates dropped sharply at that time, and the evidence does not show that the actuary committed a blatant error by revising the rate downwards.

As the Tribunal recalled in Judgment 3538 (under 15), the power clearly vested in the competent authority to alter the pension scheme can be exercised lawfully if it represents a *bona fide* attempt to secure the pension scheme into the future and is based on what appears to be properly reasoned actuarial advice.

In conclusion, the plea is unfounded.

21. Finally, the complainant lists a number of respects in which, in her view, the principle of equality has been breached, namely: the change in the retirement age (Article 3.2 of the Rules of the Pension Fund); the reduced early pension (Article 6.2 of the Rules); the cumulation of pension entitlements; and the annual increase in the contribution rate from 2017.

The complainant seems to be mainly referring to changes made in 2010.

Be this as it may, she fails to state how the alleged unequal treatment relates to the general decisions challenged here and how her own situation is affected, given that the examples provided seem to concern categories of staff members to which she does not belong.

Furthermore, the complainant submits that the freezing of the pension point breaches the principle of equality by creating inequality between retired and serving staff members. Reference must be made to the Tribunal's consistent precedent that the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example Judgments 1990, under 7, 2194, under 6(a), 2313, under 5, or 3029, under 14, 3787, under 3, and 3900, under 12). Retired staff members are not in the same position as serving staff members, and the difference in their treatment relates to this difference in situation. The Tribunal is therefore satisfied that the principle of equality has not been breached here.

In these circumstances, the plea must be dismissed.

22. It follows from the foregoing that the complaint must be dismissed, without there being any need to consider the objections to receivability raised by the BIPM.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 22 June 2020, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ