Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

M. and P.

v.

BIPM

135th Session **Judgment No. 4580**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Ms C. M. and Mr G. P. against the International Bureau of Weights and Measures (BIPM) on 7 October 2021 and corrected on 12 November, the BIPM's reply of 31 January 2022, the complainants' rejoinder of 9 April 2022 and the BIPM's surrejoinder of 13 May 2022;

Considering the applications to intervene filed by Mr F. B., Mr M. N. and Mr P. M. on 19 August 2022 and the BIPM's comments thereon of 15 September 2022;

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

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

The complainants challenge the increase in their contributions to the Pension and Provident Fund such as it appears on their payslips for January 2021.

When they joined the BIPM in the 1990s, the rate of contributions to the Pension and Provident Fund applicable to the complainants was nine per cent of their salary. On 1 January 2010 new rules adopted by the International Committee for Weights and Measures (CIPM) – the body responsible for administering the Fund – came into force, setting

the contribution rate at 10 per cent and raising the retirement age, previously 60 years in normal circumstances, to 63 years. These new rules also created a "post-2010" scheme which set a different contribution rate and a retirement age of 65 years for staff members recruited from January 2010 onwards.

On 1 January 2017 a revised version of the Regulations and Rules of the Pension and Provident Fund entered into force. The Rules set out separate schemes for the "pre-2010", "post-2010" and "post-2017" sections respectively. Regarding the "pre-2010" section, to which the complainants belonged, the amendments introduced, among other measures, a rise in contributions of 1.5 percentage points in 2017, followed by an annual rise of one percentage point until 2025, then a rise of 0.3 percentage points in 2026, eventually reaching a rate of 19.8 per cent. A capped rate of 15 per cent was to apply to staff members recruited after 1 January 2017 (the "post-2017" section).

The complainants challenged the increase in contributions before the Appeals Committee in 2018. After their internal appeals were rejected by decisions of the Director dated 1 June and 11 July 2018, they decided not to refer the matter to the Tribunal, in contrast to two of their retired former colleagues, whose complaints were considered in Judgments 4277 and 4278, delivered in public on 24 July 2020.

In October 2020 the CIPM decided to offer BIPM staff members who were covered by the scheme for the "pre-2010" section the opportunity to join the scheme for the "post-2017" section from 1 January 2021. The complainants did not request a change of scheme.

On 24 March 2021 the complainants individually challenged their payslips for January 2021, which reflected the application of a new contribution rate of 15.5 per cent. By letters of 1 April 2021, the Director rejected their ex-gratia requests for rescission on the basis of the *res judicata* principle among other grounds. According to him, the Appeals Committee could not be requested to give an opinion again on that question, which had already been raised in 2018 and settled by the Tribunal in Judgments 4277 and 4278.

On 29 April 2021 the complainants referred their cases to the Appeals Committee, which heard the parties on 8 June. In its opinion dated 10 June 2021, the Committee found that the increased contribution rate did not breach acquired rights but that this question had to be settled by the Tribunal. It further recommended that a dialogue between the parties should be initiated with a view to, in particular, putting in place non-financial compensatory measures. In letters of 9 July 2021, the Director rejected the complainants' appeals on the grounds that they were irreceivable and unfounded. Those are the impugned decisions.

The complainants request that the Tribunal set aside the Director's decisions of 9 July 2021, the contested decisions of 1 April 2021 and the payslips for January 2021. They ask to be fully compensated for the injury they consider they have suffered, and to be awarded back pay with interest at the rate of 5 per cent per annum, as well as 10,000 euros in moral damages, and costs.

The BIPM asks the Tribunal to declare the complaints irreceivable or, subsidiarily, to dismiss them entirely as unfounded.

CONSIDERATIONS

1. Both complainants impugn the decisions of 9 July 2021 by which the Director of the BIPM rejected their internal appeals directed against the individual decisions reflected in their payslips raising the rate of monthly contributions to the Pension and Provident Fund deducted from their salaries from 14.5 to 15.5 per cent as of 1 January 2021. That increase in their contributions to the pension scheme resulted from the implementation of a revision to the Regulations of the Fund that was adopted by the CIPM on 14 December 2016 and entered into force on 1 January 2017. In particular, for staff members recruited before 2010 (like the complainants), the revision introduced stepped annual increases in that contribution rate until 2026, raising it from 10 per cent to 19.8 per cent.

2. Three applications to intervene have been submitted by other staff members employed by the organisation whose contributions to the Fund were increased in the same circumstances.

3. The complaints, for which the same submissions were filed, seek the same redress and are based on the same arguments. They may therefore be joined to form the subject of a single judgment.

4. In support of their claims, the complainants first submit that their right to an effective internal appeal was breached in that the Appeals Committee's opinion of 10 June 2021 did not properly address their plea alleging unlawful infringement of their acquired rights, the central element of their appeal submissions. They criticise the Committee for not stating why it rejected that plea and simply leaving it to the Tribunal to rule on its merits. However, although it is true that the Appeals Committee stated in its report that "this question must be settled by the [Tribunal]" – with the apparent intention of making clear that only the Tribunal could provide a conclusive reply – it also stated that it "[was] of the view that [...] the combined measures leading to the retirement contribution rate rising from 14.5 per cent to 15.5 per cent [did] not breach acquired rights", having justified that finding by reference, in particular, to the Tribunal's case law setting out the applicable legal tests. The complainants are therefore wrong to argue that the Appeals Committee did not properly address the plea in question.

5. Next, the complainants criticise the Director for having considered in his decisions of 9 July 2021 that their appeals were irreceivable because they were in his view time-barred. They submit that the decisions involved an error of law on that point.

It is true that this particular reason for rejecting the complainants' claims – namely, that the disputed increase in contributions was simply part of the ongoing implementation of the aforementioned CIPM decision of 14 December 2016, and the decision in 2018 dismissing the complainants' appeals against a previous increase in contributions resulting from the same reform was final – is debatable. However, the Tribunal notes that the decisions of 9 July 2021 were also based on the

Director's finding that the complainants' appeals were unfounded. That second reason for dismissal plainly suffices of itself, and the possible flaw tainting the first reason therefore has no bearing on the lawfulness of those decisions in any event (see, for example, Judgment 4507, consideration 7). The complainants' plea is therefore irrelevant.

In this regard, the complainants add that, if the Tribunal were to find that the objection to receivability invoked in the impugned decisions differed from that relied on by the BIPM before the Appeals Committee – which was likewise based on different reasoning than that adopted in those decisions – this would imply a breach of the adversarial nature of the internal appeal procedure. However, the Tribunal considers that the objection to receivability stated in the decisions is essentially the reason that the BIPM had already put forward in its brief to the Appeals Committee, a copy of which the complainants duly received at the time. Not only is this plea irrelevant for the same reason as that identified above in respect of the alleged error of law, it is also unfounded.

6. The complainants challenge the lawfulness of the CIPM decision of 14 December 2016 that introduced the disputed increases in contributions on the grounds that it was adopted by an improperly constituted body. They contend that the twenty-fifth General Conference on Weights and Measures (the BIPM's supreme authority), held in November 2014, elected all 18 members of the CIPM, whereas Articles 7 and 8 of the Regulations annexed to the Metre Convention – the BIPM's founding convention signed in 1875 – provide that "half" of that committee should be renewed at each General Conference. The complainants argue that it can be inferred that, when it adopted the decision of 14 December 2016, the CIPM, whose membership at the time had been established by that election, was not constituted in accordance with the Regulations. According to the complainants, the same defect taints the CIPM's decision of 16 October 2015 establishing the Pension Fund Advisory Board, which had been consulted regarding the 2016 reform, with the result that the decision of 14 December 2016 was, moreover, adopted following a flawed consultation procedure.

7. The file shows that, following criticism by delegates from a number of contracting States at the twenty-fourth General Conference in October 2011 in respect of the manner in which CIPM members were elected, the twenty-fifth General Conference passed a resolution requiring the committee to be completely renewed at each General Conference from then on. The General Conference then immediately carried out the first renewal of this kind, given that all serving members of the CIPM had previously resigned in anticipation of such an election. Plainly, an amendment to the Regulations annexed to the Metre Convention would ordinarily have been required in order to modify the rule concerning the renewal of half the CIPM laid down in aforementioned Articles 7 and 8 of the Regulations, and, given that Article 22 of the Regulations provides that they have "the same force and value" as the Convention itself, that amendment should have been submitted for ratification by the contracting States, as had already been done, in particular, when the Regulations were last amended in 1921.

However, the Tribunal observes that under Article 3 of the Metre Convention, the General Conference on Weights and Measures consists of "the delegates of all the contracting Governments". While it is true that the adoption by the General Conference of a resolution cannot formally equate to the ratification of an amendment to the aforementioned Regulations by the States parties to the Convention, it nevertheless expresses their shared intention in respect of the substance of the matters dealt with. Moreover, it should be borne in mind that, under Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties, for the purposes of interpreting – and hence applying – a treaty, account should be taken of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". The shared intention of the States parties to the Metre Convention to dispense with the rule concerning the renewal of half the CIPM might thus allow the new practice adopted by the General Conference to be recognised as lawful, even though it breaches the letter of certain provisions of the Regulations.

8. It is true that, in the present case, the resolution approved by the twenty-fifth General Conference does not reflect the completely unanimous will of the contracting States, as the Tribunal observes in view of the report of that conference that the delegate representing one of them – namely the Czech Republic – voted against it. However, although the conditions under which the CIPM was renewed were indisputably irregular, the Tribunal considers, in the light of the foregoing observations, that it does not follow that this irregularity constitutes a substantial defect warranting a declaration by the Tribunal that the decisions subsequently issued by it are unlawful. This is so particularly in view of the fact that the irregularity in question does not affect the rights of the Organisation's staff, since the manner in which the CIPM is renewed has no bearing on the safeguards provided to them.

Moreover, it should be emphasised that since, as noted earlier, the outgoing members of the CIPM had all resigned before the twenty-fifth General Conference, the General Conference had no option but to renew the committee entirely, irrespective of the reason for that situation.

The complainants' challenge to the lawfulness of the decisions of 14 December 2016 and 16 October 2015 will therefore be dismissed.

9. The complainants contend that the increase in contributions resulting from the contested decisions unlawfully infringes their acquired rights, the main part of their submissions being devoted to this point.

At the outset, it is important to note that, contrary to what the complainants submit, the disputed increases in the contribution rate, which have the effect of reducing their net salary, do not influence the amount of the pension they will ultimately receive and affect them only as serving staff members, not future retirees. As the Tribunal observed when ruling on the complaint filed by a former BIPM staff member also directed against measures resulting from the 2016 reform of the Pension and Provident Fund, decisions concerning deductions from employment income made with a view to the acquisition of pension entitlements have a different purpose than those affecting the amount of a pension (see Judgment 4277, consideration 15). A breach of acquired rights

owing to the effect of a new decision can only be determined by reference to the situation resulting from previous decisions with the same purpose (see Judgment 986, consideration 16 *in fine*). The complainants cannot therefore seek to rely, as they attempt to do, on a breach of the acquired rights they will have as future retirees.

10. The complainants point out that successive increases in the contribution rate since their recruitment have had the effect of substantially eroding their pay given that, according to their calculations, one of them now receives 11.05 per cent less pay and the other 7.14 per cent less than they normally should in 2021.

The increases in question are indeed large, and the Tribunal observes that although in themselves the decisions impugned in these proceedings only involve a transition from a contribution rate of 14.5 per cent to 15.5 per cent, they form part, as has been stated, of the implementation of a general decision raising that rate, still 10 per cent in 2016, to 19.8 per cent in 2026. However, the Tribunal considers that, even when these increases are considered together, they do not establish a breach of the complainants' acquired rights.

11. It is recalled that the staff members of international organisations are not entitled to have all the conditions of employment 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. Most of those conditions can be altered during an employment relationship as a result of amendments to those provisions (see, for example, Judgments 4465, consideration 8, 3876, consideration 7, and 3074, consideration 15). 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, under the Tribunal's case law, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only where such an amendment adversely affects the balance of contractual obligations or alters fundamental and essential terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on. For

there to be a breach of an acquired right, it is therefore necessary for the amendment to affect a term of employment that is fundamental and essential (see, for example, Judgments 4398, consideration 11, 4381, considerations 13 and 14, and aforementioned 3074, consideration 16, and the case law cited in these judgments).

12. In the present case, the Tribunal considers that the disputed increases in contributions, though significant, do not substantially alter the balance of the complainants' contractual obligations, and that, contrary to what the complainants submit, they did not adversely affect a fundamental term of employment in consideration of which they accepted their appointment with the BIPM or which subsequently induced them to stay on. This finding can be compared with the conclusion reached by the Tribunal in consideration 18 of aforementioned Judgment 4277 and consideration 14 of Judgment 4278 – delivered on the complaint of another former BIPM staff member – that the various measures taken as a consequence of the reform of the BIPM retirement scheme "rather concerned adjustments which did not undermine the fundamental principles of the established system".

13. In respect of the application of the principle of acquired rights to increases in pension contributions, a long line of precedent establishes that "whereas the right to a pension is no doubt inviolable, a pension contribution is by its very nature subject to variation [...]. Far from infringing any acquired right a rise in contribution that is warranted for sound actuarial reasons [...] actually affords the best safeguard against the threat that lack of foresight may pose to the future value of pension benefits" (see Judgments 3538, consideration 10, 2633, consideration 7, or 1392, consideration 34). It follows that, where a decision to alter a pension scheme is taken on grounds of financial necessity, such as the need to address the rising cost of pensions, the Tribunal cannot consider it to be invalid for the sole reason that it leads to a situation less favourable to staff members (see aforementioned Judgment 2633, consideration 7).

14. The file shows that the increases in the contribution rates prescribed by the decision of 14 December 2016 – including the increase that came into force on 1 January 2021 specifically challenged in these proceedings – were intended to mitigate the risk of structural financial instability to which the Pension and Provident Fund was exposed in the long term. These rises in contributions, together with other measures relating to the pension scheme adopted at the same time, were based on the results of an actuarial study performed by a specialist firm at the CIPM's request in 2016, the main findings of which were subsequently confirmed by another study of the same kind carried out in 2019. There is therefore no doubt that the disputed increases in contributions were fully warranted by the Fund's financial situation.

15. The complainants perceive a breach of their acquired rights in the fact that in 2009 a provision of the Fund's Regulations and Rules was repealed, which until then had provided for the payment of "subsidies allocated by the [CIPM] from the [BIPM] budget to maintain the [F]und's financial stability". They submit that this amendment, which led to the removal of a safeguard of the Fund's financial stability provided at the BIPM's expense, indirectly caused the contribution increases in question.

However, this plea is unfounded. Besides the fact that the alleged breach does not result from the impugned decisions themselves or the general decision of 14 December 2016 which is their sole legal basis, the Tribunal has already ruled that a provision concerning an organisation's contributions to a staff pension scheme affects staff members' interests too indirectly to give rise to an acquired right (see Judgment 429, consideration 9). The same is bound to apply to a provision providing for the payment of such subsidies by the organisation concerned. Moreover, it should be borne in mind that Article 3.1 of the Regulations of the Fund provides that "[a]ny pensions [...] shall be charged to the budget of the BIPM", and Article 3.2 adds that "[t]he Member States of the BIPM shall jointly guarantee the payment of the pensions", which represents the fundamental safeguards that, as the Tribunal has already observed in its case law, may be afforded to staff members in this area (see also, on this point, aforementioned Judgment 429, consideration 9).

Finally, it should be pointed out that Article 3.3 still provides that the Fund's resources also comprise, in addition to contributions from staff members, not only "contributions from the BIPM" but also "voluntary cash injections made by the BIPM upon decision of the CIPM", in other words subsidies, and it is apparent from the file that such subsidies have in practice been regularly paid to the Fund from 2017 to help redress its financial situation.

16. The complainants contend that there is "no legitimate cause or compelling reason" for the rise in staff members' contribution rate. They at once argue that the actuarial deficit of the Pension and Provident Fund results from its poor management by the BIPM, that the increase will have a limited effect on the deficit in question, and that the actuarial studies on the basis of which the increase was decided display a "flimsiness" that casts doubt on their validity.

17. In the first place, it is true that the evidence in the file shows that the BIPM's past management of the Fund was not beyond reproach. The Appeals Committee stated in its opinion that "serving staff members pay, and will continue to pay, a heavy price for decades of inaction in respect of the Pension Fund's finances". However, the Tribunal observes that the mismanagement in question owes in large part – and certainly more than to the failure properly to determine the Fund's investment policy, which the complainants criticise – to the prolonged lack of structural measures, precisely such as an increase in staff contributions, which undoubtedly should have been adopted earlier. The BIPM cannot therefore be faulted for having eventually decided to remedy this shortcoming. Moreover, the fact that the Fund's difficult financial situation may be considered partly attributable to shortcomings in its management by the Organisation is not, in itself, such as to render unlawful the decisions taken to improve it. Indeed, the opposite view would be tantamount to rendering the restoration of this situation legally impossible, which plainly makes little sense (see Judgment 2793, consideration 16 *in fine*).

18. In the second place, it is apparent from the actuarial studies performed in 2016 and 2019 that, even if, as the complainants argue, the disputed increase in contributions should only have the effect of delaying the onset of the Fund's financial instability for several years, that increase is still an appropriate measure to contribute towards improving the pension scheme's structural situation as part of the reform under implementation. Once again, the BIPM cannot be faulted for endeavouring to remedy that situation to the best of its abilities, and the complainants' argument that the Fund's financial stability also depends on other factors such as the staff replacement policy does not invalidate that conclusion.

19. In the third place, the Tribunal reiterates, in respect of the supposed "flimsiness" of the actuarial studies at issue, that it is not its role to substitute its assessment for that of an expert such as an actuary unless that assessment is affected by a blatant error (see aforementioned Judgments 4278 and 4277, considerations 16 and 20 respectively, and the case law cited therein). The complainants' line of argument regarding these studies, which consists in drawing attention to the hypothetical nature of particular data used therein – which the very nature of such studies makes inevitable – does not establish the existence of such a blatant error. In that regard, the complainants specifically challenge the future rate of return on investments used in the 2016 study, but it should be noted that this argument was dismissed in aforementioned Judgments 4277 and 4278. The Tribunal finds no persuasive reason in the file to review that finding nor to allow the complainants' plea that the BIPM ought to have shown greater caution when taking that figure into consideration.

20. These various criticisms must therefore be dismissed. As the Tribunal held in aforementioned Judgment 3538, consideration 15, and repeated in Judgment 4422, consideration 14, and aforementioned Judgments 4277 and 4278, "the power clearly vested in [an organisation's 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". The CIPM decision of 14 December 2016 satisfies these criteria.

21. The complainants further submit that the pension contribution rate at the BIPM is now higher than the rates applied at other international organisations. However, as the complainants' observation that the BIPM has thereby become less attractive further illustrates, this is in any event an argument based on policy, not law. From a legal perspective, the principle of equal treatment requires only that staff members be subject to the same rules if they are in identical or similar situations (see, for example, aforementioned Judgment 4277, consideration 21, and Judgments 3029, consideration 14, or 1990, consideration 7). This is plainly not the case for the staff members of different organisations who by definition are not governed by the same staff rules.

22. Lastly, in their rejoinder the complainants submit that the BIPM breached its duty to act in good faith towards them as it did not inform them at the time of their recruitment or during their employment that their contributions to the pension scheme were liable to increase significantly over time. However, the complainants could not be unaware of the risk that contributions would increase in line with financial necessity, which characterises all social insurance schemes to a greater or lesser extent. Moreover, bad faith cannot be presumed (see, for example, Judgment 4345, consideration 6, and the case law cited therein). Although the Organisation did have to alter substantially the terms on which the Pension and Provident Fund was financed on account of the successive actuarial studies that it commissioned, there is nothing in the file to suggest that it deliberately concealed from its staff members exact information on this matter which it already possessed before those studies were performed. This plea will therefore be dismissed.

23. It follows from the foregoing that the complaints must be dismissed in their entirety, without there being any need for the Tribunal to consider the BIPM's various objections to the receivability of all or some of the submissions.

24. In consequence, the applications to intervene must also be dismissed.

DECISION

For the above reasons,

The complaints are dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 16 November 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ