

SIXTY-SECOND ORDINARY SESSION

***In re* ABDEL-RAHMAN, BOISROBERT
and MARTINEZ-HOLGADO**

Judgment 833

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the International Centre for Advanced Technical and Vocational Training (International Labour Organisation) by Mr. Mohamed Abdel-Rahman Abdel-Rahman, Mr. Daniel Boisrobert and Mr. José-Luis Martínez- Holgado on 16 April 1986, as corrected on 20 June, the Centre's replies of 5 September, the complainants' rejoinders of 14 October, the Centre's surrejoinders of 12 December 1986 and the telex of 23 April 1987 from the complainants' counsel to the President of the Tribunal about their claim to costs;

Considering Articles II, paragraph 1, and VII, paragraph 1, of the Statute of the Tribunal, Articles 5.2, 9.2 and 12.2 of the Staff Regulations of the Centre, the Centre's Circulars 1/85 of 19 February 1985 and 85/10 of 30 May 1985, and Articles 3(a), 48, 49(a) and (b), former 54(b) (in force from 1 January 1981 to 31 December 1984) and new 54(b) (in force since 1 January 1985) of the Regulations of the United Nations Joint Staff Pension Fund;

Having examined the written evidence and heard in public on 5 May 1987 submissions from Mr. Jean-Didier Sicault, counsel for the complainants, Mr. Dominick Devlin, agent of the World Health Organization, Mr. Francis Maupain, agent of the International Labour Organisation and Mr. Alfons Noll, agent of the International Telecommunication Union;

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

A. Staff of the defendant organisation, which belongs to the "common system" of the United Nations, have for some years had a pension scheme known as the United Nations Joint Staff Pension Fund ("the Fund"). A Joint Staff Pension Fund Board ("the Board"), set up by the General Assembly of the United Nations ("the Assembly"), runs the Fund and applies the Fund Regulations. The amount of the pension depends on three things. One is length of service by the staff member. Another is the percentage of his remuneration that he is to get for each year of service. And the third is "pensionable remuneration", which depends on each staff member's grade and his step within the grade and governs the amount of his pension contributions.

The connection between the rates of pensionable remuneration and of actual pay has changed from time to time. Pensionable remuneration was originally equivalent to net salary; in 1960 it was made equivalent to semi-gross salary and in 1965 to gross salary. Also in 1965, to keep it in line with total pay, which included - and includes - a post adjustment allowance calculated to give staff in the Professional category and above equivalent purchasing power at all duty stations, the Assembly made arrangements for adjusting pensionable remuneration by a percentage known as the "weighted average of post adjustment" at the main duty stations when the average rose or fell by 5 per cent or more.

An actuarial evaluation of the Fund made at 31 December 1980 revealed a serious decline in its finances, the Board made proposals for savings which meant lower benefits, and the Assembly approved the proposals in resolution 37/131 of 17 December 1982.

To make further savings the Assembly decided in resolution 39/246 of 10 December 1984 to adjust pensionable remuneration. It approved a new scale of pensionable remuneration as from 1 January 1985 and correspondingly amended Article 54(b) of the Fund Regulations to read: "In the case of participants in the Professional and higher categories, the pensionable remuneration effective 1 January 1985 shall be as appears in the appendix to these Regulations". According to the new scale, which determined pensionable remuneration for each grade and step in the Professional and higher categories, pensionable remuneration went up for grades P.1 and P.2 but fell for P.3 and above. The Assembly rejected proposals from the International Civil Service Commission for transitional

measures and asked the Board to put to it at its 40th Session proposals for interim or compensatory measures that would apply to staff on duty at 31 December 1984.

By Circular 1/85 of 19 February 1985 the staff of the Centre were told that, pending consideration of the matter by the Governing Body of the International Labour Office, the new scale would be applied to those who had joined the staff on or after 1 January 1985 and that the scale in force at 31 December 1984 would continue to apply to other staff. By Circular 85/10 of 30 May 1985 the staff were informed of a decision to apply the new scale as from 1 June 1985 to staff whose pensionable remuneration had been blocked as at 31 December 1984. For staff whose pensionable remuneration at that date had been higher than it was under the new scale the amounts corresponding to the difference between the rates of contribution under the two scales would be levied and put in a suspense account until the Assembly, at its 40th Session, decided whether to approve interim or compensatory measures. The staff would be paid back with interest any contributions not made over to the Fund on the Assembly's approving compensatory measures. Article 5.2.1 of the Staff Regulations of the Centre which defines pensionable remuneration, was amended accordingly.

The complainants are Professional category staff of the Centre. Their pay slips for June 1985 were made out in keeping with Circular 85/10 and they found that the new scale meant a reduction in their pension contributions and so also in the amount of their future pensions.

They lodged internal "complaints" with the Director under Article 12.2 of the Staff Regulations: Mr. Boisrobert on 14 November 1985, Mr. Martínez-Holgado on 15 November and Mr. Abdel-Rahman on 18 November. They challenged the decisions to apply to them as from 1 June 1985 the new scale for Professional and higher category staff as set out in Circular 85/10.

By letters of 17 January 1986 the Chief of Personnel informed them that the Director of the Centre rejected their appeals, and those are the final decisions they impugn.

B. The complainants are alleging breach of the Staff Regulations and of other texts and principles that govern the terms of their appointment. In their submission the decisions they challenge cause them injury, and the Tribunal is competent to hear their complaints under Article II(1) of its Statute.

They allege breach of their acquired rights. Two provisions of the Staff Regulations, which are patterned on those of the International Labour Office, are material: 9.2 and 5.2. The former says that "Except as otherwise provided in his terms of appointment an official shall be subject to the Regulations of the United Nations Joint Staff Pension Fund". Article 5.2 defines pensionable remuneration. Matters might have changed with the inclusion of a definition in the Fund Regulations as from 1 January 1981 and the Centre might have waived its competence in the matter, as have indeed other organisations. Instead it kept its own definition in 5.2 and so the reference to the Fund Regulations in 9.2 may not be read without regard to 5.2. Even supposing the Centre did not mean to give independent force to the definition in 5.2, 9.2 makes the provisions of the Fund Regulations on pensionable remuneration part and parcel of its own Staff Regulations, which may not be amended, insofar as they affect relations between the Centre and its staff, unless the staff's acquired rights are safeguarded.

By the lights of the Tribunal's case law and that of the World Bank Administrative Tribunal the pension scheme and the scale of pensionable remuneration are essential terms of an official's appointment, and he has an acquired right in the matter. What must be safeguarded is terms of appointment not just as at the time of recruitment but also as revised from time to time. It is wrong to say that officials not on the brink of retirement have no interest in having the old and more favourable scale still apply to them. At the least they should be given an option.

The complainants invite the Tribunal to quash the decisions to apply the new scale to them and order the application of the old scale or else award compensation for the injury they have sustained. They claim costs.

C. In its replies the Centre points out that, though Article II of the Tribunal's Statute allows review of the observance of provisions of the Staff Regulations on pension rights, and Article 9.2 does provide for membership of the Fund in accordance with the Fund Regulations, that is not what the complaints are really about. Moreover, Article 48 of the Fund Regulations says that it is for the United Nations Administrative Tribunal to hear complaints alleging non-observance of the Regulations.

As to the merits, the Centre contends that the only material rules are in the Fund Regulations, whatever other

provisions its own Staff Regulations may include on the subject. Article 5.2 merely reproduces the definition of pensionable remuneration in Article 54 of the Fund Regulations and does not give it independent force.

The complaints disclose no cause of action. The two scales were adopted in accordance with the provisions of the Fund Regulations, and the provision in Article 9.2 of the Staff Regulations that staff members shall be subject to the Fund Regulations is an essential term of their appointment. By virtue of 9.2 the Fund Regulations form part of the Centre's Staff Regulations: on that score the parties seemingly agree. But though they acknowledge that it is the Fund Regulations that govern pensionable remuneration the complainants do not address the material provisions. Such remuneration is defined in 54(b), which the Assembly may amend under the procedure prescribed in 49(a) but without prejudice to rights to benefits acquired before the date of amendment (49(b)). What is more, the Centre's main function is the levying of contributions, whereas the complainants' future benefits will depend on the amount of pensionable remuneration. The quashing of the decisions impugned would have no effect on the amount of pensionable remuneration: the only consequence for the Centre would be to require it to levy higher contributions.

As to their allegations of breach of acquired rights, the complainants fail to explain what are the acquired rights they believe to have been denied and what is the text that was amended. The only acquired right conceivably at issue is the right to a pension, that is, to the Fund membership prescribed in 9.2. But since the impugned decisions correctly applied 9.2 the material issue is whether bringing in the new scale was contrary to 49(b) of the Fund Regulations. It would be in breach of 49(b) to do away with the right to a pension but not to change the scale of pensionable remuneration, whether the effect is to raise or to lower the amount of future pension benefits.

From the Tribunal's recent case law, and particularly Judgment 726, the Centre infers that the application of the new scale to the complainants does not amount to breach of their acquired rights.

It invites the Tribunal to dismiss the complaints.

D. In their rejoinders the complainants develop their case and seek to refute the defendant's.

Their purpose is, they submit, both substantive and straightforward: to keep in force a particular pension scheme, including the rules that determine the amount of pensionable remuneration.

The duty the Centre owes its staff in the matter of pensions is not confined to the levying of contributions. The acquired right the complainants are relying on is the right to have a set of rules apply that provide for a scale of pensionable remuneration by grade and step. There is no question of breach of Article 49(b) of the Fund Regulations: what they allege is that the Centre failed to abide by the terms of their appointment, not that the Fund was in breach of its own Regulations. What the defendant is saying is that it would be unlawful to do away with the right to a pension altogether but that it is lawful to change the method of reckoning contributions. To carry that plea to its logical conclusion would be to strip the right of all safeguards by allowing drastic cuts in future pensions.

E. In its surrejoinders the Centre enlarges on its main pleas.

In its submission the complainants' rejoinders add no weight to their allegations of breach of acquired rights. By its very nature pensionable remuneration is a variable, because it is governed by outside factors, and cannot form part of the essential terms of appointment. Although constant cuts in pensionable remuneration might put the right to a pension under threat, that does not preclude reduction altogether in a constantly shifting economic context. What the Tribunal's case law requires in the matter of acquired rights is that the essential features and objectives of the pension system be safeguarded. Though the rejoinders seek to show that the introduction of the new scale of pensionable remuneration is just part of a downward drift, the complainants have failed to show any breach of acquired rights as so defined.

CONSIDERATIONS:

Pensionable remuneration

1. The United Nations General Assembly set up the United Nations Joint Staff Pension Fund to provide benefits for staff members of the United Nations and its specialised agencies in the event of their retirement, death or disability. The Regulations of the Fund came into force on 23 January 1949.

2. Although retirement pensions do bear a relation to the pay of staff members, it is "pensionable remuneration" (in

French it was known until 1981 as "traitement soumis à retenue pour pension" and then as "rémunération considérée aux fins de la pension") that serves in reckoning the amount of the pension. It has been adapted many times to changes in circumstances. It was originally equivalent to net salary, then to semi-gross salary, and from 1965 to gross salary, though account was also taken of the weighted average of post adjustment allowances paid at the main duty stations. A system was introduced that was based on two amounts, one reckoned in the United States dollar and the other in local currency, and the Assembly took a series of measures. In 1980 it decided to apply different methods of reckoning to contributions and to benefits. In 1982 it approved proposals for savings that brought about a reduction in benefits. In 1983 it raised the contribution rate and suspended adjustments of pensionable remuneration. On 10 December 1984 it adopted a new scale of pensionable remuneration to take effect on 1 January 1985 and an amendment to Article 54(b) of the Fund Regulations. On 18 December 1985 it approved transitional arrangements. Under the new scale pensionable remuneration was raised for staff in grades P.1 and P.2 but lowered for staff in higher grades.

The application of the new scale and the complainants' response

3. Circular 1/85 of 19 February 1985 informed the staff of the Centre that pending decisions by the Governing Body of the International Labour Office the new scale would apply to staff who had taken up duty on or after 1 January 1985 but that for others pensionable remuneration would be as at 31 December 1984.

Another circular, 85/10 of 30 May 1985, reported that the Board of the Centre had amended Article 5.2 of the Staff Regulations, that those whose pensionable remuneration had been frozen at the level reached on 31 December 1984 would therefore be subject to the new scale, and that the difference between the contributions due under the two scales would be paid into a "suspense account" to be used "for the purpose of interim or compensatory measures" or else paid back with interest.

4. Staff pay slips for June 1985 took account of Circular 85/10, and the complainants found that with the adoption of the new scale their pension contributions were lower and so too would be their pensions. They appealed to the Director alleging breach of an acquired right, and the Director rejected the appeals.

The complainants are asking the Tribunal to set aside the decision not to apply the old scale and order that that scale continue to apply to them or else make an award of damages.

Joinder

5. Complaints against a single organisation may be taken together provided the substance of the claims and the facts they rest on are the same.

The present complaints meet both requirements. They are all seeking the quashing of the decision to apply the new scale from 1 June 1985, and they are all relying on the same fact, namely the injury allegedly attributable to the change in scale. The complaints may therefore be joined.

The parties' submissions

6. The Centre has close links with the International Labour Organisation. Article 5.2 of its Staff Regulations corresponds to Article 3.1.1 of the ILO Staff Regulations and, as it acknowledges by implication, its position in law in this case is the same as the ILO's in the case the Tribunal rules on in Judgment 832.

In that judgment the Tribunal rejects the ILO's contentions that the Tribunal is not competent, that there is no cause of action and that Article 49(b) of the Fund Regulations applies, but it upholds the ILO's submission that there was no breach of acquired rights. Though some of the ILO's pleas fail, the Tribunal dismisses the complaints against the Organisation. The Centre and the ILO being in like case, the complaints against the Centre fail as well.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President,

and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1987.

(Signed)

André Grisel
Jacques Ducoux
Mohamed Suffian
A.B. Gardner

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