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

SEVENTY-SIXTH SESSION

In re BANGASSER, DUNAND, MARGUET-CUSACK and SHEERAN (No. 2)

Judgment 1330

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Paul Bangasser, Mr. Michel Eugène Dunand and Mrs. Ita Marguet-Cusack and the second complaint filed by Miss Lynette Merrilyn Sheeran against the International Labour Organisation (ILO) on 23 January 1992 and corrected on 29 April, the ILO's single reply of 3 September 1992, the complainants' rejoinder of 26 February 1993 and the Organisation's surrejoinder of 16 July 1993;

Considering the applications to intervene by:

A. Ahlborn

P. Allen

C. Antony

Y. Barras

R. Beattie

H. Bennett

J. Berset

E. Blet

J. Bonjour

A. Bonnin

F. Busson de Cortes

A. Carrizo

L. Caruso

S. Cerutti

V. Cervantes

J. Charavay

H. Chu

D. Claret

A. Clarke

H. Clément

D. Clementi

H. Cognard

R.-M. Cucchi

S. Deleuze

M. Dia

B. Diot

J.-L. Dugourd

F. Durand

R. Fairley

G. Fraize

W. Frederic

M. Ganescu

P. Garnier

M. Gautrey

R. Geiger

J.-P. Gentet

A. Gogarty

J. Gorka

C. Haeberli

J. Haeuw

S. Italici

M. Jüttner

K. Koppitz

M.-C. Laforest-Schär

C. Lagnel

M. Lastella

R. Laverriere

M. Le Prado

M. Leroy

E. Leuenberger

A. Lloyd

B. Lochon

J.-P. Lupo

C. Mannaert

M. Markwalder

G. Médecin

P. Molière

M. Molliard

A. Moranges

J.-P. Mossière

K. Narasimhan

J. Neeser

S. Peters

S. Pfenniger

J. Piccoli

B. Pillonel-Alvarez

C. Pinto de Magalhaes

L. Pond

N. van Rijn

M. Rochat

F. Roche

F. Rojas-Duran

R. Sánchez-Ventura

M. Serrano

C. Smith

M. Soff

E. Sommaro

M. Stagoll

B. Stam

J. Suaton

E. Taha

H. Thomas

A. Trebilcock

C. Wilhelm

L. Wirth-Dominicé

E. Zénié

Considering Article II, paragraph 1, of the Statute of the Tribunal, Article 3.1.1, as in force up to 26 February 1991 and as amended at that date, and Articles 13.2 and 14.7 of the Staff Regulations of the International Labour Office, and Article 49 of the Regulations of the United Nations Joint Staff Pension Fund;

Having examined the written submissions;

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

A. From 1981 Article 3.1.1 of the ILO Staff Regulations contained a definition of "pensionable remuneration"*(*For an explanation of the term see for example Judgment 832 under A and 2.) that was independent of the one in the Regulations of the United Nations Joint Staff Pension Fund, in which ILO staff are participants. In recent years the Tribunal has ruled on several disputes arising under Article 3.1.1 in Judgments 832 (in re Ayoub and others), 862 (in re Picard and Weder), 986 (in re Ayoub No. 2 and others), 990 (in re Cuvillier No. 3) and 1199 (in re Aguiriano and others).

As in force until this dispute arose Article 3.1.1 used to read:

"1. For officials in the General Service category, pensionable remuneration shall be the rounded aggregate of the following:

(a) gross salary, exclusive of any allowances;

(b) the net amount of such allowances as may be pensionable under these Regulations;

(c) these scales of pensionable remuneration of the General Service category in Geneva shall be as specified [elsewhere in the Regulations].

2. The scales of pensionable remuneration of the Professional category and above shall be those specified [elsewhere in the Regulations]. 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 [International Civil Service Commission], provided that the first adjustment due after 1 January 1990 under this paragraph shall be reduced by 2.8 percentage points."

By circular 461, series 6, of 14 March 1991 the ILO told its staff that the Governing Body of the International Labour Office had amended 3.1.1 with immediate effect to read:

"Pensionable remuneration shall be determined directly by the Regulations of the United Nations Joint Staff Pension Fund."

The circular also said that the Governing Body had decided "to establish a Voluntary Thrift Benefit Fund for ILO officials".

Mr. Bangasser and Miss Sheeran belong to the Professional category and Mr. Dunand and Mrs. Marguet-Cusack to the General Service category of the ILO staff. They addressed internal "complaints" to the Director-General, within the time limit in Article 13.2 of the Staff Regulations, challenging the lawfulness of the amendment to 3.1.1 on grounds of breach of acquired rights.

On the Director-General's behalf the Director of the Personnel Department rejected their "complaints" in letters of

1 November 1991, the decisions now impugned.

B. The complainants explain why in their view the independent definition of pensionable remuneration was put in the ILO Staff Regulations. In their submission the reason was that the Organisation wanted to assume independent obligations towards its staff instead of being bound by decisions of the Fund. They give the background to the circular of 14 March 1991.

They submit that their complaints are receivable in that they are challenging what are unquestionably decisions that caused them injury. The injury is immediate in that they have forfeited an essential safeguard in law, and they will suffer further injury in the form of financial loss they cannot yet ascertain.

On the merits they have only one plea: breach of their acquired rights. That the plea is sustainable they infer, first, from the Tribunal's case law on the acquired right of ILO officials to a particular system of pensionable remuneration and, secondly, from its more general rulings on the doctrine.

First, they argue that the Tribunal's recognition of the staff's acquired right to a particular system of pensionable remuneration depends on there being in the ILO Staff Regulations - as there was in 3.1.1 - a definition of pensionable remuneration that is independent of the one in the Regulations of the Fund. So the article was the source both of the Tribunal's competence in the matter and of the acquired rights relied upon, and those rights imply an acquired right to retention in the Staff Regulations of some, albeit not a particular, independent definition of pensionable remuneration.

Secondly, citing the Tribunal's more general rulings on acquired rights, the complainants further seek to show that the decisions under challenge offend against their acquired rights on account of the nature, causes and effects of the change in the terms of their employment.

In their submission there can still be breach of their acquired rights even though that change was due to amendment of the Staff Regulations.

Though never officially imparted to the staff, the reasons for amending 3.1.1 may be gathered readily enough from the papers which have been put since 1990 to the Governing Body and its Programme, Financial and Administrative Committee, and which show that the purpose of the amendment was to avoid the consequences of independent definition.

Lastly, the complainants submit that the amendment would have far-reaching effects if the Tribunal declined to acknowledge the staff's acquired right.

First, it would deny them access to the Tribunal. In line with its case law the Tribunal will decline to affirm its own competence and will hold a complaint irreceivable if the staff regulations and rules of the defendant organisation just refer to the Fund Regulations for the definition of pensionable remuneration. So they would forfeit a basic safeguard in law, the means of redress open to ILO staff being much narrower. They reject the ILO's contention in the Governing Body committee that ILO officials would not lose all protection since the Fund Regulations vest competence in the United Nations Administrative Tribunal to hear complaints about decisions by the Board of the Fund. The Fund Regulations may - says Article 49 - be amended "without prejudice to rights to benefits acquired through contributory service prior to that date". So they protect only such rights to benefits as were acquired by payment of contributions before the date of any amendment.

The United Nations Administrative Tribunal construes strictly Article 49 of the Fund Regulations and the sort of protection its case law affords lies mainly in enforcing the rule against retroactivity. But this Tribunal's case law is not so restricted because there is nothing in the provisions about acquired rights in the ILO Staff Regulations to narrow the safeguarding of such rights to mere compliance with the rule against retroactivity. It is therefore essential for ILO staff to keep their right of appeal to this Tribunal in any dispute over pensionable remuneration.

Secondly, it is quite beside the point for the ILO to plead - as it did in the internal proceedings - that the complainants suffer no immediate material injury. It is immaterial whether setting up the Voluntary Thrift Benefit Fund is, as the Organisation makes out, an "undeniable advantage": the case at issue is about keeping the staff's right of access to the Tribunal should they in future suffer further loss in pensionable remuneration. The Staff Union never agreed that setting up the thrift fund should hinge on waiver of the right to appeal against amendment of 3.1.1.

The complainants ask the Tribunal to quash the impugned decisions and award each of them 25,000 French francs in costs.

C. In its reply the ILO gives its own account of the facts. It explains how the "independent" definition in 3.1.1 came to be put in the Staff Regulations in 1981 and describes in detail how it came to be amended. It submits that after Judgment 990 (in re Cuvillier No. 3) in particular, which at once had far-reaching financial and practical effects, the Governing Body was resolutely minded to amend 3.1.1. The only trouble was squaring the demands of the Staff Union for a supplementary pension scheme - if 3.1.1 was to go - with those of the Government members of the Governing Body, mostly hostile as they were to any policy that went beyond the ambit of the United Nations common system. Then there came the idea of a thrift fund with endowment by the Organisation. Although at first it aroused stout opposition from the Governing Body and objections from the Pension Fund and the International Civil Service Commission, in the end everyone came round, including the Staff Union, which helped in setting up the thrift fund and hailed it as a victory for the staff.

The Organisation presses the objections to receivability it raised in the internal proceedings: that there is no injury for the time being and that future injury is speculative.

Turning to the merits, it challenges the complainants' contention that they may "infer from the case law" the unlawfulness of amending 3.1.1. In its submission there are two distinct issues of law: the independence the ILO derived from 3.1.1, and the pensionable remuneration defined therein which, because the definition was an independent one, was subject to review by the Tribunal against the doctrine of acquired rights. The Tribunal's competence to declare whether a change in pensionable remuneration impaired an acquired right was attributable to the independence of 3.1.1 itself.

It was for objective reasons to do with financial and administrative difficulties that 3.1.1 was changed. The complainants' subjective view of the matter does not fit the precedents and betrays failure to grasp the meaning of the facts and principles at issue.

As for the effects of the amendment, the defendant submits that even in itself it wrought no fundamental changes in terms of employment; besides, the concomitant benefits from the thrift fund have more than made up for them.

On the first point the ILO contends that 3.1.1 has but little effect since amending it caused the complainants no immediate injury and the future injury they plead is speculative. Secondly, despite the amendment there is still judicial review, albeit different in scope, of decisions on pensionable remuneration. Since the United Nations Administrative Tribunal makes such review, the shift of jurisdiction that the amendment brings about means no foreseeable narrowing in the scope of review.

Taking up the second issue, the Organisation submits that since the new thrift fund came in with the amendment of 3.1.1 the exercise must be seen as a whole. The new fund offers tangible advantages: thanks to the Organisation's contributions and small deductions from monthly pay staff can build up a goodly lump sum that will be exempt from tax upon encashment.

D. In their rejoinder the complainants maintain that in 1981 the Organisation wanted its own obligations to remain independent by means of an independent definition of pensionable remuneration which had been in its Staff Regulations since 1961.

On its own admission what set off the process of amendment of 3.1.1 was its realising the financial impact of Judgment 990. That admission shows that this dispute arose because the Organisation wanted release from obligations that were proving expensive.

Amending 3.1.1 and setting up the thrift fund were unilateral decisions by the Governing Body: there was no agreement with the staff. Nor is there any written evidence to suggest that the waiver of staff rights under the old text of 3.1.1 was to be the consideration for getting the new fund.

On receivability the complainants maintain that they did suffer immediate material injury. All that a cause of action requires is that the impugned decision affect the complainant adversely; there need not be actual injury. As for the contention that future loss is speculative, it no longer holds water: since 1 January 1992 the pensionable remuneration of some of the complainants has, owing to a change in the reckoning of it, gone down.

They again submit on the merits that the impugned decisions infringed their acquired rights. The only reason why they are asserting an acquired right to an independent definition of pensionable remuneration in the Staff Regulations is that it affords the basis for the Tribunal's competence. There is a straightforward and clear distinction to be drawn between the purpose of the earlier complaints, which were about the level of pensionable remuneration, and that of their own, which are about keeping a crucial legal safeguard, namely review by the Tribunal.

The complainants press their pleas about the case law on acquired rights. As to the reasons for the amendment they point out that though the Organisation speaks of the financial and administrative difficulties of having an independent definition of pensionable remuneration, it offers no figures to bear out that it could not afford one.

As for the effects of the amendment, they submit that ILO staff rightly want to keep the possibility of review by a tribunal that knows the Organisation well, since pensionable remuneration is an essential feature of the terms of their employment.

E. In its surrejoinder the Organisation points again to the three criteria the case law uses to determine whether there is breach of acquired rights: the nature of the employment conditions that have changed and of the acquired right being claimed; the reasons for the change; and the effect of recognising or not recognising the acquired right.

On the first criterion it contends that there is no inferring from precedent an acquired right to an independent definition of pensionable remuneration. Even though the one in 3.1.1 was what vested competence in the Tribunal that did not make it an acquired right.

On the second criterion the ILO argues that the complainants belittle the financial reasons for the amendment and that their pleas on the issue are contrived and inconsistent. The Organisation was not trying to save money. What was troubling it was the financial consequences of having to cope with the differences in pensionable remuneration and the fortuitous delays that were likely to occur because it had to amend the Staff Regulations every time there was a change. Being part of the United Nations common system, the ILO sees keeping the old text of 3.1.1 in the same light as the Tribunal saw, in Judgment 1239 (in re Baeumer, Claus and Hansson), the continuance of former Article 3.1 bis of the Staff Regulations of the World Intellectual Property Organization.

On the third criterion the ILO again affirms that there was no immediate material injury and that future losses are hypothetical. Some officials may be unhappy with the changes that review of the present basis of pensionable remuneration may bring, but the amendment of 3.1.1 did not, for all that, rob them of means of redress. The complainants are not, it seems, denying that the case law of the United Nations Tribunal is much akin to this Tribunal's. So the sole purpose of the complaint is to keep the right to go to two different tribunals.

As for the reasons for setting up of the thrift fund, insofar as the amendment made no fundamental changes in the conditions of service, there was no strict need in law to "offset" it. Although there was no negotiation in the context of the Staff Regulations about the new fund or any legal agreement to set it up, it was something without precedent in the annals of an international organisation in that for the first time the governing body of such an organisation was directly involved in discussion and told the Director-General how far he might go. The Director-General reminded the government representatives that they could not in all fairness refuse an endowment in exchange for loss of the independent definition in 3.1.1. So the thrift fund was indeed seen as a sort of quid pro quo for the amendment.

CONSIDERATIONS:

1. The United Nations Joint Staff Pension Fund provides benefits in the event of retirement, death or disability for the staff of the United Nations and the other organisations admitted to membership. Pension entitlements are determined by reference to an amount that is defined in the Regulations of the Fund as "pensionable remuneration". The staff regulations of all the organisations refer to the definition in the Fund Regulations, but only recently has such reference appeared in the Staff Regulations of the International Labour Office. On 26 February 1991 the Governing Body of the Office amended Article 3.1.1 of the Staff Regulations, which is about the pension entitlements of staff in the several categories, to read:

"Pensionable remuneration shall be determined directly by the Regulations of the United Nations Joint Staff Pension Fund."

2. The ILO announced the new wording to the staff by a circular of 14 March 1991. It superseded forthwith the earlier text. By reproducing the provisions of the Fund Regulations without express reference thereto, that text had reflected the ILO's view that it was not bound in law by the amendments the Fund decided upon and its wish to keep a degree of independence within the system. By amending Article 3.1.1 it surrendered that independence. Members of staff in the various categories, including the complainants, saw the amendment as offending against their acquired rights and they filed internal "complaints" against the application to them of the new text. The Director of the Personnel Department rejected their "complaints" on behalf of the Director-General by decisions dated 1 November 1991, and they want the quashing of those decisions.

Receivability

3. In the ILO's submission the complaints are irreceivable. For one thing - it argues - since the old text of 3.1.1 used to import the scales in force under the Fund Regulations the amendment did not make any new scale of pensionable remuneration applicable to the complainants. For another, though the amendment divests the Tribunal of competence to hear disputes on the subject, it does not impair any legal safeguard they enjoy under the express terms of their appointment and cannot therefore cause them any actionable injury. Thirdly, they have failed to show that the new method of setting pensionable remuneration is bound in future to cause them such injury: the future losses they fear are merely speculative.

4. The ILO's objections fail. According to the Tribunal's case law receivability does not depend on proving actual and certain injury. All that a complainant need show is that the decision under challenge may impair the rights and safeguards that an international civil servant claims under staff regulations or contract of employment. In this case - and whatever the ruling on the merits may be - the amendment the complainants are objecting to obviously affects the way of reckoning the contributions to be docked from their monthly pay, their pension entitlements and the remedies at their disposal for ensuring observance of their acquired rights in the matter. It is something that may cause them injury and it is indisputably actionable even if, as the defendant says, the actual injury due to the amendment is not yet ascertainable.

The merits

5. The complainants explain at length how the ILO authorities came, though somewhat loath, to give up their independent power to determine pensionable remuneration. They then contend that the amendment of Article 3.1.1 impaired the acquired rights that the Tribunal has always sought to safeguard, for example by Judgments 832 of 5 June 1987 (in re Ayoub and others) and 986 of 23 November 1989 (in re Ayoub and others No. 2).

6. The case law sets forth the principles the Tribunal will abide by in ruling on this case and indeed both sides acknowledge them. The "acquired rights" of ILO staff are inviolate according to Article 14.7 of the Staff Regulations and the general principles which the Tribunal has affirmed and enforced. But it is neither the purpose nor the effect of safeguarding acquired rights to arrest every staff member's position in all aspects of relations with the employing organisation up to the date of expiry of appointment, nor to "freeze" the text of the Staff Regulations. Such a freeze would anyway be at odds with the fast-evolving trends that international organisations have to cope with nowadays. Though contracts do ordinarily engender acquired rights - as was held in Judgments 832 and 986, to cite but two - the staff may not plead that amending the material provisions of Staff Regulations and Staff Rules amounts to breach of such rights unless the amendment bears on some fundamental and essential term of appointment. Precedent also has it that in entertaining a plea of that kind the Tribunal must look into the causes and effects of the challenged amendment to the Staff Regulations to see whether it does amount to breach of acquired rights.

7. What then were the reasons for the amendment challenged here? The complainants' case is that there is no objective cause and justification for it. In their submission the ILO just wanted to evade the consequences of having in 1981 asserted a degree of autonomy and of having failed to foresee properly how far the Tribunal's rulings, among other things, would take it. There was discussion about how to amend the old text of 3.1.1 and the records show that the reasons for forgoing an independent definition of pensionable remuneration were objective, not a wish to impair the staff's interests and rights. It was hard to carry on having a joint body that links all the United Nations agencies administer pensions and another body altogether set the rates of contribution and amounts of benefits. One approach is to have close links with the common system by means of decisions of the ILO authorities that merely take over automatically any amendments approved by the Fund. That is how things were

done up to the date of the challenged amendment, but the ILO ran a risk of delay or error that it might in the end find harmful to its own interests. The alternative is for it to free itself altogether from the Fund scales. But of course that it must do at its own expense, the Fund being under no duty to pay benefits - possibly not fully funded - that would make for disparity between different groups of participants. Since ILO member States seem never to have countenanced the second alternative and the whole idea of supplementary pension schemes is at variance with the concepts underlying the Fund, the conclusion is that there was nothing improper about the reasons for the amendment of 3.1.1.

8. The complainants' second plea is that the effects of that amendment upset essential terms of their appointment. For the time being the scale of pensionable remuneration has not altered on account of the amendment. And as to the future there is every reason to suppose - considering the financial difficulties that the ILO would face if it pursued a wilful policy of discarding the Fund's own scales - that the Organisation will as in the past be applying the same rates as do other international organisations. One of the main effects of the amendment is to narrow access to the Tribunal, which has declined competence to hear complaints about the pension entitlements of the staff of organisations whose rules merely refer to the Fund Regulations for the definition of pensionable remuneration. The Tribunal appreciates the confidence its rulings arouse in complainants who see them as especially protective of acquired rights. But it cannot treat an amendment to the rules on competence as "loss of an essential legal safeguard". After all, with the new text competence goes to an independent and impartial international administrative tribunal. And - to make one further point the defendant brings out in its surrejoinder - appeals about staff pay still lie to this Tribunal.

9. Last comes the complainants' contention that any amendment of a text that in itself confers an acquired right by safeguarding an independent definition of pensionable remuneration is bound to amount to impairment of that right. That is a nice point but it is mistaken. No provision of the Staff Regulations is in itself inviolate. Indeed the complainants acknowledge as much. Only when an amendment to earlier provisions has altered some essential and fundamental term of appointment will there be breach of an acquired right. But here, as was said above, neither the reasons for the amendment nor the effects of it warrant treating it as such breach. Although international civil servants are entitled to have the conditions for setting pensions decided in line with the relevant general principles, they may not demand that the rules about who is competent to determine pensionable remuneration remain the same forever.

10. The conclusion is that amending 3.1.1 did not impair the complainants' acquired rights. Besides, any disadvantages there may be in applying the standards of the common system to ILO staff are offset on the best possible terms by the establishment of a thrift fund with a big capital endowment. Though the creation of the thrift fund was distinct in law from the amendment, it was approved at the same time and is an earnest of the ILO's good faith and wish to play fair.

11. The written submissions having shed full light on the material issues, there is no need for hearings.

12. Since the complaints fail on the grounds set out above, so too do the applications to intervene.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda
P. Pescatore
Michel Gentot
A.B. Gardner

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