

C. and S.

v.

FAO

123rd Session

Judgment No. 3741

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr C. C. and Mr M. S. against the Food and Agriculture Organization of the United Nations (FAO) on 24 September 2013 and corrected on 13 December 2013, the FAO's single reply of 5 May 2014, the complainants' rejoinder of 29 July and the FAO's surrejoinder of 11 November 2014;

Considering the applications to intervene filed between 21 and 22 May 2015 by:

[Names removed]

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 decision to cease treating the service differential as pensionable remuneration.

The complainants have worked in the General Service staff category of the FAO since 2000 and 1991 respectively. Between 2000 and 31 August 2010 Mr C. was assigned 30 regularly scheduled work hours per month in excess of the established work hours, and received a

pensionable service differential amounting to 20 per cent of his salary in compensation for this. Between 1996 and 31 August 2010 Mr S. was assigned 18-20 regularly scheduled work hours per month in excess of the established work hours, for which he received a pensionable service differential amounting to 12 per cent of his salary. For reasons relating to the requirements of the United Nations Joint Staff Pension Fund (UNJSPF), the FAO introduced an amendment to its Staff Rules and the complainants were informed in July 2010 that as of 1 September 2010 the service differential would no longer be treated as pensionable remuneration.

Each complainant filed a first appeal challenging the decision to exclude the service differential from their pensionable remuneration, as reflected in their September 2010 paysheets. The FAO offered a settlement whereby it would refund all pension contributions based on the service differential, with interest. The complainants did not accept the offer and each of them filed a second appeal challenging the decision to pay them a non-pensionable service differential at the normal hourly rate, instead of the overtime rate ($1\frac{1}{2} \times$ normal rate), again as reflected in their September 2010 paysheets. A second settlement offer was then made to one of the complainants, in view of his particular circumstances, but he declined it. Following an initial rejection of their appeals, each complainant pursued the matter before the Appeals Committee. The Appeals Committee recommended that the appeals be dismissed, but that the FAO should reimburse the pension contributions they had paid in respect of the service differential, essentially as proposed in the initial settlement offer. This recommendation was accepted by the Director-General in individual decisions of 10 September 2013 and the initial settlement offer was therefore re-opened, but the complainants rejected it and made a counter-offer. This counter-offer was rejected by the FAO and the complainants then filed their complaints before the Tribunal, impugning the decisions of 10 September 2013.

The complainants request that the Tribunal set aside the impugned decisions and draw all the legal consequences from their rescission, by ordering the FAO to restore the pensionability of their service differential as of 1 September 2010 or to take any other measure to restore the legality of their situation, such as the setting of a supplementary pension

at the expense of the Organization. Alternatively, they request that the FAO be ordered to pay their service differential at the overtime rate and to pay them moral damages in an amount to be determined by the Tribunal. They also ask for legal costs to be awarded.

The FAO requests the Tribunal to reject the complaints in their entirety.

CONSIDERATIONS

1. The two complainants challenge FAO's decision to amend Staff Rule 302.3.72 to make the payment of a service differential non-pensionable remuneration. In their common brief, they raise the same issues of fact and law and seek the same redress. Accordingly, their complaints are joined and will be the subject of a single judgment.

2. In 1960, the FAO introduced a service differential for General Service staff assigned to regularly-scheduled hours of work exceeding the hours of the established work week. Initially, the service differential was non-pensionable remuneration; however, in 1975 the Staff Rules were amended to make the service differential pensionable remuneration.

3. Prior to 1981, Article 1(p) of the UNJSPF's Regulations provided that "pensionable remuneration' shall mean the remuneration [...] of a participant which is pensionable under the terms of appointment". Thus, each organization participating in the United Nations common system set the level of the pensionable remuneration for its respective participants in the Fund. This changed in January 1981 with an amendment to the UNJSPF Regulations. Pursuant to the amendment, "pensionable remuneration" was defined in the new Article 55 of the Regulations as the sum of the participant's gross salary and any non-resident's allowance and/or language allowance payable to the participant. Subsequently, in 1993 the definition of pensionable remuneration in Article 54 of the Regulations was modified. This was the definition in force at the material time.

4. Article 54 relevantly states that for UNJSPF participants in the General Service category the pensionable remuneration shall be the sum of: (i) the participant's gross salary; (ii) any language allowance; and (iii) the non-resident's allowance for certain qualified participants. At this point, it is convenient to note that throughout the period from 1975 until August 2010, the FAO's Staff Rules provided that the service differential was pensionable remuneration. Although the specific dates of implementation are not in the record, two other Rome-based agencies also continued to treat the service differential as pensionable subsequent to the 1981 amendment to the definition of pensionable remuneration.

5. In an 18 November 2009 letter, the UNJSPF's Chief Executive Officer (CEO) informed the FAO's Staff Pension Committee Secretaries about a matter that had come to his attention through UNJSPF's normal internal controls. In particular, it was observed that there were "substantial differences between the pensionable remuneration rates reported by a Member Organization for one of its General Service category (GS) staff and those [...] used by the Fund in accordance with article 54(a) of the UNJSPF Regulations". The CEO noted that a preliminary examination revealed that the organization included an allowance that was not recognized as pensionable remuneration in the Regulations when calculating the reported pensionable remuneration rates. The CEO advised that in the circumstances and "in the interests of maintaining equality of treatment for all UNJSPF participants" a review would be conducted of the current practice of each Member Organization regarding each organization's establishment and reporting of General Service staff pensionable remuneration rates. He asked that a report on the FAO's practice and reporting in this regard be submitted to the UNJSPF Secretariat and upon receipt of the information from all the organizations, the Secretariat would determine whether any further action was required. Lastly, he stressed the need to conclude the review without delay.

6. This process ultimately led to a 4 May 2010 letter in which the UNJSPF's CEO instructed the FAO to comply with Article 54 and to cease the practice of including the service differential in pensionable remuneration on 1 June 2010. It was explained that this was "to ensure

compliance with the UNJSPF Regulations, which guarantee that all of the UNJSPF's participants are treated equally within the common system". As a result of further discussions between FAO and the UNJSPF Secretariat, the compliance date was extended to 1 September 2010.

7. On 22 July 2010, FAO advised the complainants and other recipients of the service differential that effective 1 September 2010 it would no longer be considered pensionable. However, contributions made to the UNJSPF prior to 1 September in relation to the service differential would still be considered as pensionable remuneration. On 24 August 2010, the FAO amended Staff Rule 302.3.72 to reflect this change.

8. Each complainant lodged two appeals. On 20 October 2010, they each lodged appeals against the decision to make the service differential non-pensionable remuneration applied to them for the first time in their September 2010 paysheets (the first appeal). The complainants lodged their second appeals on 20 December 2010 against the individual administrative decisions to pay their service differential at the non-pensionable service differential amount rather than at the overtime rate as also reflected in their September paysheets. As detailed above, one settlement offer was made to the first complainant and two offers were made to the second complainant all of which were rejected and the complainants pursued their appeals before the Appeals Committee.

9. The Appeals Committee made the following recommendations in relation to the first appeal:

- that the complainants' requests to set aside the impugned decision of 20 June 2011 and to restore the pensionability of the service differential or any other measures to restore the legality of the complainants' situation be dismissed;
- that the complainants' contributions to the UNJSPF with respect to the service differential be reimbursed with interest as provided for in the settlement offer of 17 December 2010;
- that the complainants be reimbursed their reasonable legal costs incurred for the appeal;

- that the parties pursue efforts to settle any remaining matters raised by the complainants and that the discussions should be initiated by the complainants with a proposal to FAO; and
- that all other claims be dismissed.

As to the second appeal, the Appeals Committee recommended:

- that the complainants’ requests to set aside the impugned decision of 20 June 2011 and to order the calculation of the payment of the service differential at the overtime rate or any other measures to restore the legality of the complainants’ situation be dismissed and reiterated the same recommendations made in the first appeal.

10. In individual decisions dated 10 September 2013, the Director-General accepted the Appeals Committee’s recommendations and the initial settlement offer was therefore re-opened. However, the complainants rejected it and made a counter-offer that was rejected by the FAO. The complainants filed their complaints with the Tribunal impugning the 10 September 2013 decisions.

11. The complainants claim that the impugned decisions are illegal as they are based on the reports of the Appeals Committee which contain errors of law. They argue that the Appeals Committee failed to recognise or acknowledge the FAO’s breach of a number of rules and principles in its adoption of the contested measure and advance those same arguments before the Tribunal. In particular, the complainants submit that FAO breached its obligation “to ascertain that the incorporation in its own legal order, of the decision of the CEO of the UNJSPF (to abolish the pensionability of service differential) did not entail any illegality and, in particular, did not deprive its staff members of their legal rights”. In fact, by taking the decision to make the service differential non-pensionable remuneration, the complainants contend that FAO breached acquired rights, contractual rights, the principle of mutual trust, and the principle of equal treatment. The complainants maintain that the fact the FAO “automatically” amended Staff Rule 302.3.72 shows that the FAO did not first ascertain before amending Staff Rule 302.3.72

that the amendment did not deprive its staff members of their legal rights. Moreover, the FAO adopted the changes in 2010 to comply with the UNJSPF's rules even though it knowingly had not complied with those rules for more than 25 years.

12. At this point, for the sake of clarity, it is noted that at various places in their brief the complainants refer to the UNJSPF's CEO "decision" and "interpretation". However, it is clear that the decision taken by the UN General Assembly in 1981 to amend the definition of pensionable remuneration which did not include the service differential allowance as pensionable remuneration is the decision that gave rise to the amendment of Staff Rule 302.3.72.

13. Returning to the complainants' submissions, it is well settled in the Tribunal's case law that an organization has a duty to verify the lawfulness of a decision of an external authority before incorporating that decision into its own legal order (see Judgment 2420, under 11, and the case cited therein). At this juncture, it is noted that the complainants do not claim that FAO breached its obligation to verify the lawfulness of Article 54 of the UNJSPF Regulations. Nor do they claim that the decision to amend the definition of "pensionable remuneration" was unlawful. Instead, they contend that FAO imported the decision amending the definition of pensionable remuneration without first verifying that this would not affect its staff members' rights. As noted above, this is based on the complainants' assertion that FAO "automatically" amended the Staff Rules on the basis of the 4 May 2010 letter. However, it is observed that the speed with which a decision is taken alone, in the absence of other known facts, does not support a reasonable inference that no regard was had to the rights of staff members. This is particularly so in this case where FAO knew from at least as early as November 2009 that the inclusion of an allowance such as the service differential that was not one of the recognized allowances in the UNJSPF Regulations as pensionable remuneration was under scrutiny. Additionally, under Article 3(a) of the UNJSPF Regulations FAO was obliged to comply with the Regulations and it risked having sanctions imposed or its membership in the UNJSPF terminated for

violation of the Regulations if it did not act in a timely manner. Without additional evidence, it cannot be concluded that FAO breached its duty to verify before incorporating the decision amending the definition of pensionable remuneration into its rules that it would not adversely affect its staff members' rights.

14. However, the question remains whether by amending Staff Rule 302.3.72 FAO breached the staff members' rights set out above. At this juncture it is observed that the Appeals Committee conducted a comprehensive review and analysis of the facts and the rules of FAO and the UNJSPF. After a careful review of the Appeals Committee's reports and consideration of the complainants' submissions in relation to the alleged errors of law in the reports, the Tribunal concludes that the reports are not tainted by error of law. The Tribunal also accepts the Appeals Committee's analysis and concludes that the complainants have failed to establish breaches of acquired rights, contractual rights, the principle of mutual trust, and the principle of equal treatment.

15. Accordingly the complaints will be dismissed.

DECISION

For the above reasons,

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

In witness of this judgment, adopted on 3 November 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ