

**SIXTY-SECOND ORDINARY SESSION**

***In re* ALVAREZ-SANTULLANO,  
COHEN, KANE and MUSSET**

**Judgment 835**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the International Telecommunication Union (ITU) by Mr. Guillermo Alvarez-Santullano, Mr. Franklin Cohen, Mr. David Kane and Miss Jacqueline Musset on 9 October 1985, as corrected on 20 December, the ITU's replies of 29 April 1986, the complainants' rejoinders of 6 August, the ITU's surrejoinders of 27 November 1986 and the telex of 23 April 1987 from the complainants' counsel to the President of the Tribunal about their claim to costs;

Considering the applications to intervene filed by:

R. Anderson  
G. Araman  
B. Arnold  
E. Augsburg  
J. Bacaly  
J. Balfroid  
R. Baillod  
J. Berenguer  
J. Berthet  
F. Bigi  
C. Bocard  
S. Brewer  
P. Bronzini  
R. Brun  
M. Bueno  
P. Capitaine  
H. de Groot  
A. Descalzi  
I. Dolezel  
R. Duder  
D. Duvernay  
H. Eckert  
J. Elotu  
X. Escofet  
J. Escudero  
J. Estero  
A. El Zanati  
D. Fabiani  
P. Favre  
P. Ferry  
A. Fleuret  
R. Fontaine  
M. Gascou  
M. Gautrey  
C. Habel  
R. Hess  
P. Hogendijk

E. Hummel  
A. Jennings  
P. Johner  
A. Jossierand  
W. Justrich  
P. Kalezic  
J. Kohli  
G. Kovacs  
F. Krum  
F. Lambert  
J. Lewis  
P. Lundborg  
B. Lutzky  
J. Marcuse  
W. Meyer  
H. Meyerhoff  
J. Meylan  
C. Moussac  
P. Natarajan  
P. Palmeter  
C. Perier  
S. Petter  
W. Pieper  
A. Pitt  
D. Plumley  
H. Pouliquen  
J. Ramos  
T. Ras-Work  
P. Raval  
G. Renn  
W. Richter  
S. Rossington  
C. Sanchez  
M. Sant  
H. Schellenberg  
V. Schwarb  
Y. Senuma  
G. Serlooten  
A. Sigrist  
L. Sonesson  
I. Syed  
Z. Tar  
P. Traub  
O. Valsoanei  
N. Venkatesh  
B. Verove  
B. Wilson  
W. Wohlleber  
F. Woolley  
R. Zbinden

and the ITU's observations of 16 and 28 April 1987 on those applications;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations 3.14, 3.15 and 6.1 of the ITU Staff Regulations, Rule 11.1.1.2(a) of the ITU Staff Rules, Service Orders Nos. 25 of 20 December 1984, 27 of 10 January 1985 and 34 of 1 April 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 defendant;

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 forty 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 Service Order No. 27 of 10 January 1985 the Secretary-General of the Union made known his decision to apply the new scale to those who had joined or would join the staff on or after 1 January 1985 and to continue to apply to other staff the scale in force at 31 December 1984 until the arrangements for applying the new scale had been worked out. By another service order, No. 34 of 1 April 1985, he announced his decision to apply the new scale as from 1 January 1985. For staff whose pensionable remuneration at 31 December 1984 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.

The complainants are Professional category staff of the Union. Their pay slips for April 1985 were made out in keeping with Service Order No. 34 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 appeals with the Secretary-General under Rule 11.1.1.2(a) of the Union Staff Rules: Mr. Kane and Miss Musset on 29 May 1985; Mr. Alvarez-Santullano on 30 May and Mr. Cohen on 4 June. They challenged the decisions to apply the new scale to them.

By letters of 11 July 1985 the Secretary-General rejected their appeals, and the letters are the final decisions now impugned.

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(5) of its Statute.

They allege breach of their acquired rights, which they define as any rights that they may in law expect to be observed notwithstanding any amendment to the rules. As a matter of fact the ITU Staff Regulations contain no definition of pensionable remuneration and merely refer, in Regulation 3.15, to the Fund Regulations. Although the insertion of a definition in the Fund Regulations as from 1 January 1981 led the Union to waive competence in the matter, the effect of 3.15 is to incorporate into the ITU Regulations the provisions in the Fund Regulations on pensionable remuneration. Those provisions may not be amended, insofar as they affect relations between the Union and its staff, unless the staff's acquired rights under the Union Staff Regulations 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.

The complainants' other plea is breach of the rule against retroactivity. Service Order No. 34 of 1 April 1985 brought in the new scale as from 1 January 1985, whereas Service Order No. 27 of 10 January 1985 implied that the old one held good. The application of the new scale was retroactive and therefore unlawful.

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 reduction in pension benefits. They claim costs.

C. In its replies the ITU 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 Regulation 6.1 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 Union contends that 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 Regulation 6.1 of the Staff Regulations that staff members shall be subject to the Fund Regulations is an essential term of their appointment. By virtue of 6.1 the Fund Regulations form part of ITU 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 ITU'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 Union 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 6.1. But since the impugned decisions correctly applied 6.1 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 Union infers that the application of the new scale to the complainants does not amount to breach of their acquired rights.

Nor was it retroactive. The new scale was to be automatically applied as from 1 January 1985 in keeping with the material provision of the Fund Regulations. Moreover,

the impugned decisions were to the complainants' immediate advantage since their pension contributions fell.

The Union 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 Union 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 ITU 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.

The complainants enlarge on their contention that there was breach of the rule against retroactivity.

E. In its surrejoinders the Union 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 and according to Article 3(a) the ITU joined the Fund on that date.

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. Service Order No. 25 of 20 December 1984 gave an account of the Assembly's resolutions on the service conditions of the staffs of the common system.

Service Order No. 27 of 10 January 1985 informed the ITU staff of the decision to apply the new scale to officials who had taken up duty on or after 1 January 1985 and to continue to apply to others the pensionable remuneration set out in Appendix 5 to the earlier Order.

Service Order No. 34 of 1 April 1985 declared (1) that anyone who had joined the staff on or after 1 January 1985

would be subject to the new scale; (2) that it would apply also to officials to whom it was more favourable than the old scale as at 31 December 1984; and (3) that for the rest of the staff contributions would still be reckoned as at 31 December 1984 but the difference between the contributions under the two scales would be put into a "suspense account" to be paid to the Fund or else paid back with interest.

4. Staff pay slips for April 1985 took account of Service Order 34, and the complainants found that with the adoption of the new scale their pension contributions were lower and that so too would be their pensions. They appealed to the Secretary-General alleging breach of an acquired right. The Secretary-General rejected the appeals and said they might go straight to the Tribunal.

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, failing that, to award them the difference between their pension entitlements under the two scales. They claim costs.

#### 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. The complainants are all seeking the quashing of the decision to apply the new scale and redress for the alleged injury, 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.

#### Receivability

6. Under Article II(5) of its Statute the Tribunal may hear complaints alleging the non-observance of the terms of appointment of officials and of provisions of the Staff Regulations. Its competence thus covers any allegation of breach of service conditions.

7. The complainants' case does not rest on breach of any term of their contracts or of any provision of the Staff Regulations. What they are saying is that the ITU Staff Regulations and Staff Rules were applied in breach of their acquired rights and the rule against retroactivity. Their complaints will therefore be receivable if the application of those regulations and rules does cause them injury.

The Tribunal concludes from the rules on the affiliation of ITU staff to the Fund that it does not.

Regulation 6.1 of the ITU Staff Regulations says that provision shall be made for the participation of staff members in the Fund in accordance with its Regulations, subject to the "special condition" prescribed for staff affiliated to the Union's own Funds before 1 January 1960. It is not the application of that provision that has brought about the reduction in pensionable remuneration, and plainly 6.1 cannot in itself cause the complainants injury.

Regulation 3.15 does say:

"Pensionable remuneration shall, without prejudice to the conditions of engagement of the staff member, consist of the amount calculated in accordance with the provisions of the Regulations of the United Nations Joint Staff Pension Fund".

But that provision has nothing to do with the issues the complainants raise and therefore cannot affect the Tribunal's ruling on the complaints.

The complainants' plea of breach of the rule against retroactivity suggests that the Union failed to apply correctly the provisions that authorise it, whether expressly or by implication, to carry out Assembly decisions on pensionable remuneration. But there is no need to rule on the plea: the complainants show no injury attributable to the alleged breach of the rule, and the Tribunal therefore will not entertain the plea.

The complaints fail insofar as they are challenging the application of the provisions mentioned above.

Since the complaints fail, so do the applications to intervene.

DECISION:

For the above reasons,

The complaints and the applications to intervene 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