

## TENTH ORDINARY SESSION

**In re LINDSEY**

**Judgment No. 61**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Telecommunication Union, drawn up by Mr. Robert V. Lindsey on 3 February 1961, the Organisation's reply of 29 June 1961, complainant's rejoinder of 30 December 1961 and the Organisation's further reply of 27 February 1962;

Considering Article II, VI and VIII of the Statute of the Tribunal;

Considering the Staff Regulations of the Union, 1950-1959, especially Articles 19, 35 and 57 of 1950, which became Articles 25, 41 and 72 in the latest version of the said Regulations, as well as the Regulations for the Staff Superannuation and Benevolent Funds of the International Telecommunication Union, 1950-1959, especially Section II, relating to the Pension Fund and the provisions to be found in the latest version in Articles 18, 22, 37 and 38;

Considering Resolutions Nos. 7 and 8 of the Conference of Plenipotentiaries of the Union held in Geneva in 1959;

Considering the Staff Regulations and Staff Rules of the Union, 1960, especially Regulations 3.12, 6.1 and 9.6 f); the Regulations for the Staff Superannuation and Benevolent Funds of the Union, 1960, especially Article 6 and Section II, relating to the Reserve and Complement Fund, particularly Articles 20, 21, 23, 41 and 49 of the said Section, and the Regulations of the United Nations Joint Staff Pension Fund of 1 January 1958, especially Articles IV, X, XV, XVI, XXII and XXXVII of the said Regulations;

Considering the applications to intervene that were lodged by Messrs. Gabriel Corbaz Arnold Matthey and Jean Millot, acting on behalf of the Staff Association of the International Telecommunication Union in as far as required and pertaining to complainant's claims with regard to termination benefits and family allowances;

Having heard Mr. Jean-Flavien Lalive, Counsel for complainant, assisted by Messrs Georges Bonar and J.F. Heyman, and Mr. A.H. Zarb, Agent of the Organisation, assisted by Professor Prosper Weil and Mr. François Brunschwig, in public sittings on 26 and 27 April 1962;

Considering that the pertinent facts at issue are the following:

A. By a letter of appointment dated 23 December 1949, complainant was given a permanent appointment to the staff of the International Telecommunication Union as from 1 January 1950. The letter of appointment stated that his duties and rights were set out in the Staff Regulations and the Regulations of the Staff Superannuation and Benevolent Funds.

B. By a general service order dated 22 December 1959, the Acting Secretary-General of the Union informed the staff that the Plenipotentiary Conference of 1959 had decided that their conditions of service should be assimilated to those of the staff of the United Nations. Appended to the order was a summary of the action that would be taken to this end. However, it was stated in the said service order that each official would be informed in due course and before the plan was implemented of his or her situation with regard to over-all conditions of service.

C. By a letter of 1 March 1960 the Secretary-General informed complainant of his classification in the new salary scales, effective 1 January 1960, and stated that complainant was entitled to lodge a request, not later than 15 March 1964 for a review of his classification. On 7 March 1960 complainant requested a review of his classification, without prejudice to his other conditions of employment.

D. On 24 May 1960, the Secretary-General issued the Staff Regulations and Rules laying down the new conditions

of employment applicable to the staff of the Union as a result of the assimilation decided on by the Plenipotentiary Conference with effect as from 1 January 1960. At its 15th Session (May/July 1960), the Administrative Council approved the Staff Regulations and Rules, with amendments to certain provisions not relevant to the present case.

E. By a letter dated 20 June 1960, complainant asked the Secretary-General to give him a formal assurance that his rights proceeding from the provisions of the Staff Regulations in force on the date of his appointment with regard to the termination allowance, family allowances and the pension scheme would be fully respected, and that the provisions of Article 25, paragraph 3 a), Article 41, paragraphs 4 and 5, and Article 72 of the Staff Regulations of the Union, 1959, would be fully observed in as far as they applied or might apply to complainant. This letter remained unanswered.

F. On a date not precisely known but in the course of the month of September 1960, the Secretary-General published the Regulations for the Staff Superannuation and Benevolent Funds of the Union, effective 1 January 1960, which laid down the rules governing membership of the United Nations Joint Staff Pension Fund for officials belonging to the ITU Pension Fund on 31 December 1959, and the right which such officials retained by virtue of their participation in the old Pension Fund of the Union.

C. On 30 September 1960 complainant lodged with the Appeal Board of the Union an appeal against the decision to reject his request of 20 June, this decision being implicit in the prolonged silence of the Administration.

H. On 31 October 1960 the Appeal Board submitted to the Secretary-General a report stating that complainant's appeal could be regarded as receivable in spite of its tardy transmission, in view of the fact that by the prescribed date not all the necessary information, including the new Regulations for the Staff Superannuation and Benevolent Funds, had yet been made available to the staff of the Union by the Secretary-General. However, the appeal raised a complex legal problem. The Board did not consider that it could itself deal with this problem, which it regarded as being a matter for decision by an international administrative Tribunal. The prejudice alleged to have been suffered by complainant had arisen out of decisions taken by the Plenipotentiary Conference or the Administrative Council and it was not for the Appeal Board to pass judgment on such decisions. In conclusion the Appeal Board stated that it was not competent to deliver an opinion on the questions of substance raised by Mr. Lindsey's appeal regarding certain changes made in the Staff Regulations and the Regulations for the Staff Superannuation and Benevolent Funds. By a letter dated 7 November 1960 the Secretary-General transmitted the Appeal Board's report to complainant and stated that the conclusions of the report did not call for comment on his part.

I. In the conclusions set out in his complaint drawn up on 3 February 1951 complainant requested that it might please the Tribunal principally to quash Regulations 9.6 f), 3.12 and 6.1 of the Staff Regulations and Staff Rules of the Union of 1 January 1960 (conclusions 1, 2 and 3); to declare that the safeguards provided for in Article 25 paragraph 3 a), Article 41, paragraphs 4 and 5, and Article 72 of the Staff Regulations, 1959, constitute an integral part of complainant's terms of appointment (conclusion 4), and the said provisions capable of modification only with his consent (conclusion 5); the abolition of the Pension Fund of the Unions with regard to permanent officials appointed before 1 January 1960; contrary to the obligations entered into by the Union when such officials were appointed (conclusion 6); to order that the said Fund should continue in existence (conclusion 7); to rescind the transfer of complainant to the United Nations Joint Staff Pension Fund (conclusion 8); to order reimbursement to complainant, with 5 per cent interest, all sums wrongfully collected, since 1 January 1960, as his contributions to the said Fund (conclusion 9); to award him costs (conclusion 10); and subsidiarily, to grant to him compensation for the damage he has suffered.

J. The conclusions of the Organisation were that the Tribunal be pleased, in relation to both the principal and the subsidiary conclusions of complainant, (1) to declare itself not competent, (2) to declare the conclusions not receivable, and (3) to dismiss the complaint as not well founded; and in relation to costs, (4) to rule that complainant should meet all the costs he had himself incurred, and (5) to order complainant to meet all or part of the legal costs of the Organisation.

## IN LAW

With regard to the Competence of the Tribunal:

1. With regard to conclusions Nos. 1, 2 and 3, requesting the Tribunal to declare Regulations 9.6 f), 3.12 and 6.1 of the Staff Regulations and Staff Rules of the Union of 1 January 1960 to be null and void:

There is no provision in the Statute of the Tribunal empowering the latter to entertain conclusions praying for the quashing of regulations.

2. With regard to conclusion No. 7, requesting that the former Pensions Fund of the Union should continue in existence in the form in which it existed on 31 December 1959:

It is not for the Tribunal to issue injunctions to the Union, save in regard to the execution of any obligations towards an official which the Tribunal finds to have been violated.

3. With regard to conclusions Nos. 4, 5, 6, 8 and 9, concerning the application to Mr. Lindsey of the amendments in the Staff Regulations and Rules on termination benefits, family allowances and pension rights:

The complaint under these five heads is really directed against the letter of the Secretary-General of the Union dated 7 November 1960 and confirming his decision of 1 March 1960; the said letter whatever its intent, constitutes an individual decision in respect of which non-observance of the terms of complainant's appointment as laid down in his contract and in relevant regulations is alleged; hence the Tribunal is competent, under Article II, paragraph 5 of its Statute, to proceed to review it.

On the Receivability of the Complaint:

4. Contrary to the submission of the Union, by concurring in his letter of 7 November 1960 in the opinion of the Appeal Board, the Secretary-General of the Union rejected a claim by complainant and thus took a decision against which redress could be sought before the Tribunal.

5. Mr. Lindsey has an interest in impugning the said decision before the Administrative Tribunal since the decision alters, allegedly to his detriment, the terms of his appointment to the staff of the Union.

6. It is established that complainant submitted his claim to the Appeal Board on 30 September 1960 and that the Board in fact rendered its opinion on 31 October 1960. Consequently the Union is not justified in maintaining that when his complaint was filed with the Tribunal, complainant had not exhausted all internal remedies and that the complaint is therefore not receivable.

7. While complainant's claim was submitted to the Appeal Board after expiry of the prescribed time limit, the Board exercised its power under Staff Rule 11.1.1, paragraph 2 (c), and expressly discharged complainant from his failure to present his claim within the time limit prescribed. On this point as on the others, the Secretary-General confined himself to accepting the Appeal Board's opinion. The Union is therefore in any case not justified in relying on prescription.

8. Consequently, the complaint, which is directed against a final decision and which was filed within 90 days after the notification of the decision impugned, is receivable.

On the Receivability of the Interventions:

9. With regard to the applications to intervene that were made by Messrs. Corbaz, Matthey and Millot acting on behalf of the Staff Association of the Union "in as far as required" and with the authorisation of the competent bodies of the said Association these applications are not receivable since the Staff Association has no cause to intervene in the present proceedings.

10. In as far as the intervenors Matthey and Millot acted on their own behalf, they have rights which may be affected by this judgment, and their intervention is receivable in as far as the Administrative Tribunal is competent to pass judgment on the complaint itself.

11. On the other hand, the intervenor Corbaz, who was a member of the old Pensions Fund of the Union and who opted, under the choice offered by Resolution No. 8 of the Conference of Plenipotentiaries, held in Geneva in 1959, for acceptance of the entire new system of salaries, allowances and pensions in preference to the maintenance of the conditions of service applicable to him on 31 December 1959, is not in the same legal position as complainant, and his application to intervene is therefore not receivable.

On the Validity of the Decisions complained of:

12. The terms of appointment of international civil servants and, in particular, those of the officials of the Union, derive both from the stipulations of a strictly individual character in their contract of appointment and from Staff Regulations and Rules, which the contract of employment by reference incorporates. Owing, inter alia, to their increasing complexity, the conditions of service mainly appear not amongst the stipulations specifically set out in the contract of appointment but in the provisions of the above-mentioned Staff Regulations and Rules. The Staff Regulations and Rules contain in effect two types of provisions, the nature of which differs according to the object, to which they are directed. It is necessary to distinguish, on the one hand provisions which appertain to the structure and functioning of the international civil service and the benefits of an impersonal nature and subject to variation, and, on the other hand, provisions which appertain to the individual terms and conditions of an official, in consideration of which he accepted appointment. Provisions of the first type are statutory in character and may be modified at any time in the interest of the service, subject, nevertheless, to the principle of non-retroactivity and to such limitations as the competent authority itself may place upon its powers to modify them. Conversely, provisions of the second type should to a large extent be assimilated to contractual stipulations. Hence, if the efficient functioning of the organisation in the general interest of the international community requires that the latter type of provisions should not be frozen at the date of appointment and continue so for its entire duration, such provisions may be modified in respect of a serving official and without his consent but only in so far as modification does not adversely affect the balance of contractual obligations or infringe the essential terms in consideration of which the official accepted appointment.

13. It follows that as regards their terms and conditions of appointment, international civil servants are not exclusively governed by statutory rules, such as apply to the great majority of national civil servants, which are of a different nature and afford similar guarantees by different means. Furthermore, even where the provisions of the Staff Regulations and Rules are alone applicable, the power to modify them vested in the international organisation is governed by different legal rules according to whether the provisions concerned fall within the first or the second of the two types of provisions referred to and distinguished above.

14. In altering the pensions scheme, the family allowances provisions and the termination benefits in case of abolition of post, the Union modified provisions falling within the first and the second of the above-mentioned categories. While the Union was, in principle, empowered to do so, it falls to be considered whether it thereby altered the balance of contractual obligations or infringed the essential terms of appointment in consideration of which the complainant Lindsey agreed to accept service with the Union.

15. However, there are two preliminary arguments of a general nature which have been adduced by the organisation and which require to be answered before the aforesaid questions are considered. The Organisation submits, first, that in adopting the Staff Regulations and Staff Rules the Administrative Council of the Union was merely exercising powers that had been expressly bestowed upon it by the Plenipotentiary Conference in Resolution No. 7; and secondly, that the reforms introduced on 1 January 1960 should be reviewed as a whole and that the substantial improvements secured by the staff as a result of these reforms more than outweigh the few losses which the reforms may involve.

16. With regard to the first point, while the Plenipotentiary Conference gave the Administrative Council extensive powers to take any action that would ensure that the conditions of service of the staff of the Union would be brought into line with those of the staff of the United Nations, it cannot be deduced, either from a specific provision of Resolution No. 7 or even from the provisions of the resolution taken as a whole, that this delegation of powers was so extensive as to give the Council the right, in exercising these powers, to take action that would adversely affect the terms of appointment of officials of the Union. Therefore, the arguments adduced with regard to this point are in any case not well founded.

17. With regard to the second point, it is to no purpose that the Organisation contends that any increases of salary which have accrued to complainant did so as part of a "package deal" stemming from the decision to affiliate the staff of the Union to the United Nations Joint Staff Pension Fund. Such salary increases resulted from the equating of complainant's salary to that of officials of the United Nations with similar duties and responsibilities, and such salary increases cannot be set off against any loss which complainant can be shown to have suffered as the result of the application to him of the new conditions of service.

With regard to the Pension Scheme:

18. After being a member of the Pension Fund of the Union until 31 December 1959, complainant was affiliated on

that date to the United Nations Joint Staff Pension Fund. Since then his rights as an insured person are determined no longer by organs of the Union but by the Joint Staff Pension Board and by the General Assembly of the United Nations. Moreover while the contributions payable by him since 1 January 1980 have been barely higher than those for which he was previously liable, the contribution of the Union to the Joint Fund are markedly lower than those which the Union used to make to its own Fund. In addition, under the old scheme the maximum amount of complainant's pension corresponded to 60 per cent. of his insured earnings, whereas under the new scheme it corresponds to only 54,5 per cent. Actually, it is doubtful whether, taken in isolation, these various changes seriously impaired a right that could have induced complainant to enter the service of the Union, but taken in conjunction the changes did have this effect. Therefore by making the changes applicable to complainant the Union infringed the terms of his appointment.

19. When it altered the pension scheme for its staff the Union admittedly adopted transitional provisions which grant certain safeguards to officials transferred from one fund to another. For instance, under Article 40, paragraph 3 of the Regulations for the Staff Superannuation and Benevolent Funds which came into force on 1 January 1960, every such official may require his pension to be calculated on the basis of the salary class to which he belonged on 31 December 1959, and of the step within that class which he would normally have reached at the time when he qualified for a pension. However, contrary to the contention of the Organisation, the guarantees introduced do not eliminate the infringement of the terms of appointment. It is obvious that owing to the general rise in the cost of living the salaries of the staff of the Union would have been increased to some extent, if not to existing levels, even if there had been no review of the pension scheme. Therefore, if complainant had remained a member of the old fund of the Union he could have laid claim to a pension based on a salary rate higher than that provided for in the transitional provisions. His rights have therefore been impaired.

20. As stated above, the fact that the changes made coincided with a considerable rise in salaries is immaterial. It is also immaterial that until 31 December 1959 complainant was not entitled to retire before reaching the age of 65, whereas now he may do so between the ages of 60 and 65. Any benefit that may result will not markedly reduce the seriousness of the infringements of the terms of appointment, which has already been noted.

21. However, while the adoption of the new pension scheme seriously impaired complainant's rights, it is impossible to assess the full extent of the impairment at this stage. In particular the Tribunal does not know at what age complainant will retire and what provisions will then be in force. Therefore the Tribunal cannot now order the Union to pay compensation to complainant or to guarantee him a particular benefit. The only decision the Tribunal can take is to recognise complainant's rights when he qualifies for his insured benefits, to receive those to which he would have been entitled under the old pension scheme. Complainant may if need be apply once more to the Tribunal to have the extent of his rights determined and to ensure that they are respected.

With regard to Termination in the Event of Abolition:

22. Under Article 25, paragraph 3 al of the Staff Regulations in force until 31 December 1959 - which, apart from a few amendments of form, was identical with Article 35, paragraph 3 of the Regulations in force when Mr. Lindsey was appointed -

"a permanent official shall be retired. In such case, his retirement pension shall be imputed to the ordinary budget of the Union until the retired person is entitled to a pension under the terms of the Staff Superannuation and Benevolent Funds. In addition, he shall receive a termination allowance of three months' salary for each year of service with the Union, provided that such an allowance does not exceed the total salary he received during his three last years of service".

23. Under Staff Regulation 9.6 f) of the Staff Regulations and Rules applicable as from 1 January 1960 -

"... the case of a permanent staff member appointed before 31 December 1959 and whose appointment is terminated shall, as regards termination benefits, be referred to the Administrative Council for such action as they may decide, after taking all relevant factors into account".

24. A comparison of these two provisions reveals that in the event of termination owing to the abolition of the official's post the new regulations abolish all immediate right to a pension and substitute for an allowance of a stated amount guaranteed under the former Article 25, paragraph 3 a), a benefit of an amount to be decided by the Administrative Council at its absolute discretion; these two changes constitute a serious infringement of the terms

of appointment of Mr. Lindsey.

25. Complainant is therefore justified in maintaining that the Secretary-General was not entitled to take the action he did in his decision of 1 March 1960, confirmed by that of 7 November 1960, by which he declared Regulation 9.6 f) of the Staff Regulations and Rules of 1960 to be applicable to the terms of appointment of Mr. Lindsey. The intervention of Messrs. Matthey and Millot under this head are also justified.

With regard to Family Allowances:

26. Article 41, paragraphs 4 and 5, of the Staff Regulations in force until 31 December 1959, which, apart from a few amendments of form, was identical with Article 19, paragraphs 3 and 4 of the Regulations in force when Mr. Lindsey was appointed, provided that a family allowance should continue to be granted to an official who was entitled to a retirement or invalidity pension, to the widow of an official who died while in the service of the Union and, in certain cases, to the orphans of an official; whereas Regulation 3.12 of the new Regulations contains no provision concerning the continued payment of family allowances in the three cases mentioned above.

27. While the payment of family allowances in these three cases have been abolished, entitlement to such allowances has simultaneously been extended to the spouse, and even in certain cases to the parents and certain brothers and sisters of an official, and the rates have been increased. Therefore the Administrative Council, far from infringing Mr. Lindsey's rights, merely altered the conditions for the grant of family allowances within the framework of a family welfare policy which it is entitled to establish. Moreover the changes are in general favourable to the interests of those concerned. The complaint is therefore not justified in this respect, and the interventions of Messrs Matthey and Millot under this head are also unjustified.

With regard to Complainant's subsidiary Conclusions in respect of Compensation:

28. With regard to the pension scheme and the system of termination allowances in the event of abolition of post:

The acceptance, within the limits stated above, of the principal conclusions under these two heads renders the subsidiary conclusions purposeless.

29. With regard to the family allowances scheme:

The subsidiary conclusions are to be rejected as a consequence of the rejection of the principal conclusions under this head.

#### DECISION:

1. The Administrative Tribunal is not competent to deal with Mr. Lindsey's conclusions praying -

- (a) that Regulations 9.6 f), 3.12 and 6.1 of the Staff Regulations and Rules of 1 January 1960 be quashed;
- (b) that the old Pension Fund of the International Telecommunication Union be re-established in the form in which it existed on 31 December 1959.

2. The decisions of the Secretary-General of the Union dated 1 March and 7 November 1960 are quashed in as far as they declare Regulation 9.6 f) of the Staff Regulations and Staff Rules of 1 January 1960 to be applicable to the terms of appointment of Mr. Lindsey.

3. The decisions of the Secretary-General of the Union dated 1 March and 7 November 1960 are also quashed in so far as they constitute a refusal to pay to Mr. Lindsey the benefits to which he would have been entitled under the old pension scheme.

4. No ruling is called for on complainant's subsidiary conclusions in as far as they relate to the pension scheme and the scheme of termination allowances.

5. The intervenors Matthey and Millot shall be entitled to rely on the rights recognised to complainant under this judgment with regard to termination allowances.

6. The intervention of Mr. Corbaz is dismissed as being not receivable.

7. The costs incurred by complainant and by the intervenors Matthey and Millot in connection with this action, the amount of which shall be taxed by the President of the Tribunal, shall be borne by the Organisation.

8. The remainder of the complaint and of the interventions of Messrs. Matthey and Millot is dismissed.

As judged on 4 September 1962 by the Right Honourable Lord Forster of Harraby, K.B.E., Q.C., President, Mr. Maxime Letourneur, Vice-President, and Mr. André Grisel, Judge, who have attached their signatures to these presents, as well as myself Lemoine, Registrar of the Tribunal and delivered in public sitting on the same date by Mr. Letourneur on behalf of the Tribunal.

Signatures:

Forster of Harraby

M. Letourneur

André Grisel

Jacques Lemoine