

SIXTY-SECOND ORDINARY SESSION

***In re* CABRAL, EAVES, IDRISSE,
MALROUX and DE PADIRAC**

Judgment 836

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the United Nations Educational, Scientific and Cultural Organization (UNESCO) by Mr. Nelson Cabral, Mr. John Kenneth Eaves, Mr. Abdelhafid Idrissi, Miss Anny Malroux and Mr. Bruno de Padirac on 22 December 1985, as corrected on 10 March 1986, UNESCO's replies of 29 April, the complainants' rejoinders of 6 August, UNESCO's surrejoinders of 27 November 1986, the telex of 23 April 1987 from the complainants' counsel to the President of the Tribunal about their claim to costs and UNESCO's comments thereon of 7 May 1987;

Considering the applications to intervene filed by:

A. Abid
M. Abtahi
G. Adames-Suari
G. Airut
A. Ajina
R. Alvarez-Orgaz
G. Anim
L. Attinelli
K. Bahr
S. Balde
N. Barbier
C. Barbin
H. Ben-Amor
M. Berchiche
M. Bercot
P. Berry
R. Bolivar-Velez
R. Brain
R. Brouard
M. Brown
P. Bulenzi
J. Camilleri
G. Carceles Breis
M. Cavicchioni
M. Chamakhi
M. Chang
M. Chapdelaine
K. Chlebowska
M-C. Cilia
R. Constandse
Y. Courier
L. d'Andigne de Asis
M. de Madariaga
F. de Mur
J. de Weck
S. Dumitrescu
M. El Baghir

F. El Batraoui
F. El-Boustani
S. El-Boustani
M. El Boustani
E. Eynon-Balin
F. Falchier
E. Fischer
M. Fournier
S. Gajraj
F. Gallo
M. Giersing
A. Gillette
J. Gladwell
G. Glaser
B. Goddard
J. Gomes Leite
C. Gottschalk
J. Grosbout
A. Hancock
H. Hanna
M. Herve
J. Hillig
K. Hochgesand
P. Hougues
P. Kalfon
H. Kaltenecker
A. Kazancijil
M. Khawajkie
X. Khin Wai Thi
G. Kitaka
J. Knott
S. Kol
D. Krause
B. Kulla-Beauzethier
M. Lakin
F. Laporte
N. Laroche
R. Lefort
R. Loewald
M. Lord
F. Luqman
D. Makinson
M. Malevri
H. Marchl
L. Marques
J. Martin
K. Mathur
M. Miskovitch
R. Missotten
H. Mobarak
S. Morcos
M. Nanos
G. Nascimento
C. Navarro
E. Nguni
B. Ntim
F. Nuovo

C. Ondobo-Ndzana
L. Opena
J. Ory
W. Parmel
B. Pavlic
T. Phouangsavath
A. Pinilla
J. Porras Zuniga
F. Rath
M. Roux
A. Rowley
M. Rushworth
E. Sainz Rubio
A. Salinas
S. Salomon
A. Sammak
M. Sandman
R. Santos Cuyugan
L. Schaudinn
R. Schreyer
M. Shatton
C. Shearmur
M. Singh
J. Smyth
D. Stanwell
M. Steyaert
M. Tamzali
M. Thielens
W. Tochtermann
D. Troost
B. Verity
B. von Droste zu Hulshoff
M. Vulcanesco
G. Waldron
P. Woodrow
T. Worku
G. Wright
M. Yannarakis
R. Zapata
G. Ziogas

and UNESCO's observations of 29 April and 6 May 1987 on those applications;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Regulations 6.1 and 12.1, UNESCO Staff Rules 103.20 and 106.4, paragraph 7(a) of the Statutes of the UNESCO Appeals Board, Administrative Circular No. 1449(II) of 13 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 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 Administrative Circular No. 1449(II) of 13 May 1985 the Director-General of UNESCO 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 open a suspense account to make it easier to put into effect any compensatory measures later adopted. Payments to the Fund would be reckoned by the new scale but for those in the Professional and higher categories already on the staff by 31 December 1984 sums would be levied, also as from 1 January 1985, on the amounts in effect 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 the 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 UNESCO. Their pay slips for June 1985 were made out in keeping with the circular 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 Director-General under paragraph 7(a) of the Statutes of the Appeals Board appended to the Staff Rules: Mr. Cabral on 24 July 1985; Mr. Eaves, Miss Malroux and Mr. de Padirac on 25 July; and Mr. Idrissi on 26 July. They challenged the decisions to apply to them as from 1 January 1985 the new scale instead of the old one.

The Director-General rejected the appeals by letters of 24 September 1985, which are the final decisions now impugned.

B. The complainants are alleging breach of the UNESCO 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. The principle is set forth in Regulation 12.1: "These Regulations may

be supplemented or amended by the General Conference subject to the maintenance of the acquired rights of staff members". Acquired rights may be defined as any that the staff may in law demand observance of notwithstanding any amendment to the rules. Admittedly, neither the Staff Regulations nor the Staff Rules define pensionable remuneration. All that Rule 103.20(a) says is that "The definition of pensionable remuneration is set out in the Regulations of the United Nations Joint Staff Pension Fund", thereby referring to the Fund Regulations. Although the insertion of a definition in those Regulations as from 1 January 1981 led UNESCO to waive competence in the matter, the effect of 103.20 is to incorporate into UNESCO Staff Regulations and Staff Rules the provisions in the Fund Regulations on pensionable remuneration. That is borne out by Regulation 6.1 and Rule 106.4, which provide for Fund membership. The material provisions of the Fund Regulations may not be amended, insofar as they affect relations between UNESCO and its staff, unless the staff's acquired rights under UNESCO Staff Regulations and Staff Rules 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. Since the circular of 13 May 1985 said that the new scale would apply as from 1 January 1985 its application was retroactive and therefore unlawful as from that date.

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 rights. They claim costs.

C. In its replies the UNESCO 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 Organization 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 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 UNESCO 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, UNESCO'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 Organization 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, UNESCO 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 Organization 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 Organization 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 ILO 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 Organization 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) UNESCO 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. By an Administrative Circular - No. 1449(II) of 13 May 1985 - UNESCO informed its staff that the Director-General had decided to deposit the difference between the contributions under the old and the new scales of pensionable remuneration in a "suspense account" to be used for the purpose of transitional measures or paid back with interest.

4. Staff pay slips for June 1985 took account of the circular, 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-General alleging breach of an acquired right and of the rule against retroactivity. The Director-General rejected the appeals and authorised them to treat his decisions as final and 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. They 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 UNESCO 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 UNESCO staff to the Fund that it does not.

Regulation 6.1 of the UNESCO Staff Regulations says that provision shall be made for the participation of staff members in the Fund in accordance with its Regulations. 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.

According to Staff Rule 103.20 the definition of pensionable remuneration is set out in the Fund Regulations, saving only the case of a General Service category official who suffers a reduction in pensionable remuneration on appointment to a post in the Professional category.

That rule too has nothing to do with the issues the complainants raise and therefore cannot affect the Tribunal's ruling on the complaints.

Nor does Rule 106.4, which reads:

"A staff member shall participate in the United Nations Joint Staff Pension Fund according to his eligibility under the Regulations of the Fund, provided that his participation is not excluded by the terms of his appointment".

The complainants' plea of breach of the rule against retroactivity suggests that the Organization 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 complaints 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

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