

SEVENTY-THIRD SESSION

***In re* AGUIRIANO, GRUAT,
VON KNORRING (No. 2)
and SANTARELLI (No. 2)**

Judgment 1199

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. José Antonio Aguiriano and Mr. Jean-Victor Camille Gruat and the second complaints filed by Mr. Carl Anton von Knorring and Mr. Jean-François Robert Santarelli against the International Labour Organisation (ILO) on 4 October 1990 and corrected on 28 February 1991, the ILO's single reply of 8 November 1991, the complainants' rejoinders of 18 February 1992 and the Organisation's surrejoinder of 24 April 1992;

Considering that the complaints raise the same issues of fact and of law and should therefore be joined to form the subject of a single ruling;

Considering Article II, paragraph 1, of the Statute of the Tribunal, Articles 3.1.1, 8.2 and 13.2 of the Staff Regulations of the International Labour Office; and ILO circular 429, series 6 (Personnel) of 31 January 1990.

Having examined the written evidence and disallowed the complainants' application for oral proceedings;

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

A. Judgment 832 of 5 June 1987 (in re Ayoub and others) explained, under A, how pensionable remuneration counts in reckoning pension benefits payable by the United Nations Joint Staff Pension Fund to the staff of the International Labour Office. That judgment ruled on complaints from ILO officials about the application of a new scale of pensionable remuneration that came in at 1 April 1985. Judgment 862 of 10 December 1987 (in re Picard and Weder) ruled on complaints that objected to failure to adjust pensionable remuneration at 1 April 1986. A third group of complaints challenged the adoption of a new scale as from 1 April 1987 announced in circular 383 (series 6) of 30 March 1987: Judgment 986 of 23 November 1989 (in re Ayoub No. 2 and others) quashed the impugned decisions and ordered the complainants' rights to be determined when each of them left the Organisation.

In 1989 the International Civil Service Commission (ICSC) and the Board of the Pension Fund again compared pensionable remuneration in the United Nations with that of the reference system and found that the gap between them had widened since 1 April 1987 when the new scale had been brought in.

Bulletins 234 of August 1989 and 235 of September 1989 informed ILO staff of the recommendations by the Commission and the Board and bulletin 239 of January 1990 announced the General Assembly's decisions.

Circular 429 (series 6) of 31 January 1990 issued the new scale of pensionable remuneration to take effect from 1 February 1990. It said that at its 244th Session, in November 1987, the Governing Body of the Office had empowered the Director-General to apply the measures approved by the General Assembly by amending the Staff Regulations. As amended at 1 February 1990 Article 3.1.1.2 read:

"The scales of pensionable remuneration of the Professional category and above shall be those specified [on another page of the text of the Staff 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 [amounts] as determined by the ICSC, provided that the first adjustment due after 1 January 1990 under this paragraph shall be reduced by 2.8 percentage points."

In May 1990 the complainants and other officials submitted an Article 13.2 "complaint" to the Director-General

alleging that it was unlawful to apply to them the new scales of pensionable remuneration. They said that their "complaints" related not only to February but also to any later month in which the ILO applied to them the scales based on the new text, which reduced by 2.8 per cent the first adjustment due after 1 January 1990 and did away with the multiplier of 1.22. By letters of 6 July 1990 the Director of the Personnel Department told them that the Director-General had rejected their "complaints", though they might if they wished appeal to the United Nations Joint Staff Pension Board and then to the United Nations Administrative Tribunal. It is the decision in those letters that they impugn.

B. The complainants submit that the impugned decision is unlawful because it is the outcome of a resolution the United Nations General Assembly adopted on recommendations from the Joint Staff Pension Board and the Commission which were in themselves unlawful. They put forward four pleas.

First, they say, the decision is in breach of the rule against retroactivity. Had the earlier system held good, pensionable remuneration would, because of a rise in net pay at New York of 4.5 per cent, have gone up by 5.5 per cent (4.5×1.22). The actual increase was only 1.7 per cent. So there is a 3.8 per cent loss because the 1.22 multiplier has gone altogether and because it does not apply to the period in which there was the former method of reckoning, i.e. from 1 April 1987 to 31 December 1989.

Their second plea is breach of acquired rights. Citing the case law on the doctrine including the judgments mentioned in A above, they submit that the ILO can show no objective justification for the impugned decision. What it says about economic and tax trends in the United States is unconvincing. And even if the Tribunal accepted that explanation it could still properly quash the impugned decision because of the serious injury it had caused. Compounding as it does the cumulative injury caused by earlier decisions on pensionable remuneration which the Tribunal set aside in Judgment 986, it is in flagrant breach of acquired rights.

Thirdly, the ILO overlooked essential facts. The decision came, when there was no emergency to warrant it, in the middle of a comprehensive review of pensions in the United Nations. By going ahead before it knew the outcome the ILO failed to take account of all the material facts.

The fourth and last plea is that the Director-General drew wrong conclusions from the evidence. The reforms in the method of adjustment reflected only the changes in tax law in the United States; yet economic trends in several typical countries were also relevant.

The complainants seek the quashing of the Director-General's decision of 6 July 1990 and awards of 20,000 French francs each in costs.

C. In its reply the ILO says that it is in a dilemma: it has obligations because it is affiliated to the Pension Fund and belongs to the common system; yet it also has obligations under the case law.

It submits that the complaints are irreceivable insofar as they rest on flaws in the General Assembly's decision-making procedure. For one thing, it cannot determine whether the Assembly's decision is lawful, let alone defend the reasons underlying it. For another, since under Article 8.2 of the Staff Regulations the complainants are "subject to the Regulations of the United Nations Joint Staff Pension Fund" they ought to have gone instead to the Board of the Fund and then to the Administrative Tribunal of the United Nations, before which similar cases were pending.

The Organisation seeks to refute their four pleas on the merits.

It denies breach of acquired rights. The clause that brought in the 1.22 multiplier which applied from 1987 to 1990 cannot in itself constitute an acquired right as defined in Judgment 832 and other rulings by the Tribunal. Besides, the complainants have taken the wording of Judgment 986 out of context: what was at issue in that judgment was the basis of determining actual pensions, namely pensionable remuneration, not the method of reckoning such remuneration, which, as the Tribunal observed, has altered time and again. The nature, cause and effect of the measure under challenge are irrelevant to the issue ruled on in Judgment 986, the downward adjustment of the scale. Far from impairing any acquired right, that measure was needed to ward off the danger there might have been had the 1.22 multiplier held good. The complainants ignore the Noblemaire principle, a prominent issue in Judgment 986. Since there was compliance with the principle the changes in the method of adjustment did not go to fundamental terms of employment.

Nor was the Organisation in breach of the rule against retroactivity. The case law does say that "an administrative

decision may not retroactively impair a right or alter any state of fact". But the material amendment took effect only as to the future, even though its purpose - as is that of any adjustment - was to offset the effects of applying the 1.22 multiplier in the past.

The plea that the ILO overlooked essential facts is groundless. There was nothing unreasonable about the General Assembly's decision, which the circumstances at the time fully warranted. There was no telling in 1989 whether the comprehensive review would be over by 1990. Any delay in remedial action would have meant that for at least a year pensionable remuneration would have continued to show the already identified "excess" of 2.8 per cent, and future adjustment to pensionable remuneration would have made things even worse.

The ILO drew no mistaken conclusions from the evidence. Making United States income-tax rates a relevant factor in adjusting pensionable remuneration ensured that levels of income replacement in the United Nations remained on a par with levels in the "comparator" system.

D. In their rejoinder the complainants challenge the ILO's objections to receivability. For one thing, the soundness of the reasons for a decision is not a matter of receivability but goes to the merits. For another, to object to receivability on the grounds that the complainants may not plead flaws in the General Assembly's decision-making is to disregard the case law. Any organisation must comply with the law, and the rule that its administrative decisions must be lawful means that when its executive head follows a decision by some other body his action must still be lawful, or the Tribunal will set it aside.

The ILO's suggestion that the complainants ought to have gone to the United Nations Administrative Tribunal is no longer relevant: in Judgment 546 of 14 November 1991 (in re Christy and others) that Tribunal dismissed similar cases, and the complainants are therefore right to address the ILO Tribunal.

On the merits they maintain their plea of breach of acquired rights. The Organisation is ignoring the trend in the case law towards wider recognition of acquired rights, and the economic reasons it gives for the impugned decision are highly dubious.

The Organisation's answer to the charge of breach of the rule against retroactivity rests on a false premise. The 1.22 multiplier brought the United Nations into line with the United States federal civil service in the matter of income replacement as the logic of the system required, and so there was no need for any action to alter effects it might have had in the past.

As to the ILO's disregard of essential facts, it has not taken the point that it should have awaited the outcome of the comprehensive review scheduled for 1990 before going ahead.

As for their plea that mistaken conclusions were drawn from the evidence, the complainants maintain that the ILO's answer in no way weakens their argument.

E. In its surrejoinder the ILO enlarges on its pleas on receivability and on the merits. It maintains that its reading of the doctrine of acquired rights is in line with the case law.

As to the rule against retroactivity, it submits that in Judgment 546 the United Nations Administrative Tribunal held the measure under challenge to be justified. The pleas that essential facts were overlooked and that mistaken conclusions were drawn from the evidence are, it maintains, irreceivable; it presses its subsidiary arguments on the merits in its reply.

CONSIDERATIONS:

1. By amendment of Article 3.1.1 of the Staff Regulations of the International Labour Office new scales of pensionable remuneration were adopted for the Professional and higher categories as from 1 February 1990. As members of the Office staff the complainants seek the quashing of decisions that applied those scales to them.

2. The principles that are material to this case have already been stated as to ILO staff in Judgments 832 (in re Ayoub and others), 862 (in re Picard and Weder) and 986 (in re Ayoub No. 2 and others).

This Tribunal has already ruled on other complaints about scales of pensionable remuneration against the International Training Centre of the ILO, the World Health Organization, the International Telecommunication

Union, the United Nations Educational, Scientific and Cultural Organization, the General Agreement on Tariffs and Trade and the Food and Agriculture Organization of the United Nations. The United Nations Administrative Tribunal, too, has had similar cases and on 14 November 1991 ruled, in Judgment 546, on complaints from staff of the Food and Agriculture Organization of the United Nations, the International Atomic Energy Agency and the International Maritime Organization.

3. The United Nations Joint Staff Pension Fund provides for the payment of pension benefits to staff of the United Nations common system in the event of retirement, death or disability. The ILO has been affiliated to the Fund since 1946.

One factor of the retirement pension is the staff member's pay. The staff are required to pay contributions towards financing the Fund and there is a scale of contributions.

The pension scheme is managed by the Board of the Fund, a United Nations body. But the ILO has arrangements of its own as to pensionable remuneration and in dealing with its staff acts independently of the Fund. Rules on pensionable remuneration are in its Staff Regulations, which define the term and give the actual figures. The material provisions - Article 3.1.1 - therefore have a force of their own and the Tribunal will entertain appeals against decisions that are based on them. That is the thrust of Judgment 832, for example, and the principle holds good both where the ILO fails to comply with decisions of the United Nations and the Fund and where the basic texts are the same.

Although, so as to run the scheme properly, the various competent bodies have in practice had to work together to some extent, the only material text in law is the ILO Staff Regulations. So the Tribunal may not, as the ILO suggests, seek to gloss over any disparity there may be between the position in law and the position in fact. Another point on which the Organisation is mistaken is that the Tribunal may and will entertain pleas of flaws in the decision-making process of the ILO which may entail examining the decision-making process in the United Nations.

4. What is at issue is the application as from 1 February 1990 of a new text of Article 3.1.1 of the Staff Regulations. As from that date the text reproduces Article 54 of the Pension Fund Regulations, at least in the passage material to this case.

The new text of 3.1.1 makes for a reduction in pensionable remuneration in two ways. First, it does away for good with the multiplier of 1.22 that was in the old text; and secondly, for the first adjustment to be made under the new article after 1 January 1990 the text prescribes a 2.8 per cent reduction.

The effect of those two reductions is to bring the increase in pensionable remuneration at 1 February 1990 down to 1.7 per cent from the 5.5 per cent that it would have been under the old text of 3.1.1. At 1 July 1990 there was an increase of 5.2 per cent as against the figure of 6.34 per cent that the old text would have yielded.

5. The complainants have four pleas: that there was breach of their acquired rights; that essential facts were overlooked; that clearly mistaken conclusions were drawn on the evidence; and that the rule against retroactivity was broken.

6. The doctrine of acquired rights was stated in Judgment 832. An acquired right is one the staff member may expect to survive any amendment of the rules. But in each case the issue is whether the amended term of appointment is fundamental or not. The first point is to determine whether the essence of the terms of appointment has altered, the second to assess the reasons for the change.

In this case the changes were made because of shifts in economic trends and tax rules in the United States. There is nothing wrong with such an approach in itself. Though the competent authorities might have followed another sort of policy, their aim was one of principle: they decided in the exercise of their discretion to keep the link with the civil service of the member State - the United States - that is customarily the "comparator" in determining pay in the international civil service. Their solution is not intrinsically unlawful. What is more, the facts were evident and had to be taken into account.

7. The complainants' second plea is disregard of essential facts. Their case is that a comprehensive review of pension problems was under way in the United Nations when the ILO amended its Staff Regulations and that by failing to await the outcome the Organisation was not seeing clearly. Moreover, no emergency warranted acting

when it did.

The plea fails. The facts the complainants are relying on had no direct bearing on the lawfulness of the decisions they impugn. Whether those facts should have been taken into account is a matter of policy on which the Tribunal will not rule. The complainants show no essential and material fact that the Organisation overlooked.

8. Their third plea - that the ILO drew wrong conclusions from the evidence - is also unsound. They make out that the arrangements for adjustment ought to have reflected average economic trends in more than just one country.

That is to question the whole basis of the pension scheme. The United States federal civil service was the "comparator" for determining the pay and pensions in the United Nations common system. It was therefore only reasonable to take economic trends in the United States alone into account. So it was not just a matter of policy: the ILO's decision was a logical application of the prescribed approach.

9. Last comes the complainants' plea that there was breach of the rule against retroactivity.

Insofar as they see such breach in the definitive repeal of the multiplier of 1.22 they are mistaken. The change affects only adjustments subsequent to the date at which the amendment to 3.1.1 took effect and so there was nothing retroactive about it. All that the ILO did was to remove as to the future an anomaly attributable to tax rules in the United States.

But the application of the 2.8 per cent reduction is another matter. The United Nations Administrative Tribunal ruled on the issue in Judgment 546 of 14 November 1991. The majority were in favour of dismissing the plea, but there was a dissenting opinion.

One preliminary point is that, being made as from 1 February 1990, the reduction was subsequent to the amendment of the Staff Regulations and from that merely formal point of view there was nothing retroactive about it.

The difficulty is over the practical arrangements for applying the reduction.

The dissenting member of the United Nations Tribunal cites items of evidence that show the purpose of the 2.8 per cent reduction to have been "to remove the past impact of the 1.22 factor", and quotes the following passage from the respondent organisation's brief: "The 2.8 percentage point 'excess' was due ... to the failure to eliminate the 1.22 multiplicative factor when changes in US tax laws so warranted".

Those statements, which appear in the submissions before this Tribunal as well, afford the basis for the ratio of the dissenting opinion:

"... everything takes place as though the 1.22 multiplicative factor had been eliminated from 1987 onwards by the amendment of article 54(b) of the Regulations of the Fund. However, that amendment was not made until 1989. ...

As a result of the 2.8 percentage points reduction in the adjustment of 1 February 1990, the Respondent applied retroactively the elimination of the 1.22 factor.

Acknowledging the validity of such a step would clearly deprive the principle of non-retroactivity of its substance. The system adopted eliminates retroactively the effects already produced by the application of the rules in force in the past from 1987 to 1989. ..."

The majority of the United Nations Tribunal held that the 2.8 per cent reduction in the adjustment made on 1 February 1990 did not offend against Article 49(b) of the Fund Regulations. "Its effect", they said, "was lawfully to provide for the future a smaller increase in pensionable remuneration than would otherwise have occurred, and this was done solely for the purpose of attempting to maintain a proper relationship between United Nations common system pensions and those of the United States comparator service".

As to the allegation of failure to maintain an "effective and just pension" system, the majority held that it was "within the province" of the competent authority, following proper advice, to "make reasoned judgments with regard to the pension adjustment system as it did here, which it viewed as correcting a feature introduced in 1987 that had become erroneous by the time it was applied in 1988 and 1989". Their conclusion was that they should not

"attempt to evaluate the complex considerations involved in making determinations as to comparable income replacement ratios, or the effect on comparable pensions of changes in the United States tax laws, or similar matters".

10. The Tribunal agrees with the majority view.

When there was no longer any need for the multiplier it was not enough just to do away with it for the future. There was still an imbalance between pensions in the United Nations and pensions in the comparator civil service because of the unnecessary application of the multiplier in the past. The 2.8 percentage reflects such prior application.

The figure of 4.5 per cent was the actual percentage increase in net remuneration for an official in the Professional or higher categories of staff in New York. United Nations pensions were brought back in line with the comparator service by cutting that figure on 1 February 1990 by the 2.8 per cent to yield an actual increase of 1.7 per cent. Had such action not been taken, the adverse effect of setting pensionable remuneration too high would have been projected into the future. It is wrong to say that the position is as if the multiplier had been removed in 1987.

The conclusion is that there was no breach of the rule against retroactivity.

DECISION:

For the above reasons, the complaints are dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner