

SIXTY-THIRD SESSION

***In re* PICARD and WEDER**

Judgment 862

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Loïc Picard and Mr. Gerald Weder against the International Labour Organisation (ILO) on 17 December 1986, the ILO's replies of 23 January 1987, the complainants' rejoinders of 1 April and the ILO's surrejoinders of 17 July 1987;

Considering Article II, paragraph 1, of the Statute of the Tribunal, Articles 3.1.1.2(b), 8.2, 13.2 and 14.7 of the Staff Regulations of the International Labour Office, Article 48, former Article 54(b) (in force from 1 January 1981 to 31 December 1984) and new Article 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 disallowed the complainants' application for oral proceedings;

Considering that the facts of the case and the pleadings may be summed up as follows: A. These complaints are the sequel to several - Ayoub and others - on which the Tribunal ruled in Judgment 832.

That judgment described in some detail, under A, the pension scheme of the United Nations and facts that are common to the former and to the present series of disputes.

In its former version Article 54(b) of the Regulations of the United Nations Joint Staff Pension Fund made the following arrangements for adjusting pensionable remuneration:

"In the case of participants in the Professional and higher categories, the pensionable remuneration effective 1 January 1981 shall be established at the level which will be reached by the application of the present Weighted Average of Post Adjustments (WAPA) system through September 1980. Thereafter, the pensionable remuneration for such participants shall be as follows:

(i) When, on a subsequent 1 April or 1 October, the weighted average of the post adjustment classifications of the headquarters and regional offices of the member organizations, as determined by the International Civil Service Commission on the preceding 1 January and 1 July respectively, shows a variation of 5 per cent or more, the pensionable remuneration for establishing contributions to the Fund in accordance with article 25 shall be increased or decreased, as the case may be, by the full extent of the variation in the weighted average of the post adjustment classifications, provided however that it shall not be less than the pensionable remuneration under (ii) below.

(ii) When, on a subsequent 1 April or 1 October, the Consumer Price Index for the United States of America, as measured on the preceding 1 January and 1 July respectively, shows a variation of 5 per cent or more, the pensionable remuneration for computing the final average remuneration under article 1(h) shall be increased or decreased, as the case may be, by the full extent of the variation in that Consumer Price Index."

At its 39th Session, in resolution 39/246 of 18 December 1984, the General Assembly of the United Nations suspended those arrangements and amended the first sentence of 54(b) to read: "In the case of participants in the Professional and higher categories, the pensionable remuneration effective 1 January 1985 shall be that set out in the appendix to these Regulations".

At its 40th Session the Assembly decided to prolong the suspension.

The complainants are officials of the International Labour Office. They noticed from their pay slips for April 1986 that a rise in the consumer price index, which they put at 5.6 per cent, had not been applied to the amount of their pensionable remuneration.

On 18 September 1986 they lodged internal "complaints" with the Director-General under Article 13.2 of the Staff Regulations challenging the individual decisions not to apply to them the increase in the pensionable remuneration of staff in the Professional and higher categories which they believed had been due as from 1 April 1986.

By minutes of 21 November 1986 the Director of the Personnel Department answered that since their new appeals came to the same thing as the earlier complaints about pensions "the Director-General sees no need to take a new decision". Those are the final decisions impugned.

B. The complainants' main plea is breach of the rule *patere legem quam ipse fecisti*: the Organisation may not repudiate the binding character of Article 3.1.1.2(b) of the Staff Regulations, which lays down rules identical in substance to those in the second sentence and following of Article 54(b) of the Fund Regulations, so long as 54(b) has been neither repealed nor amended. Article 8.2 of the Staff Regulations applies too, and it refers, as to pension matters, to the Fund Regulations.

Patere legem is a general principle hallowed by precedent: an authority is bound by the rules it has itself laid down until it repeals or amends them. At the material time, April 1986, Article 3.1.1.2(b) of the Staff Regulations and the substantive rules in the second sentence and following of 54(b) had been neither repealed nor amended, and the complainants should therefore continue to benefit by those provisions until the Assembly chooses to alter the rules.

The complainants have a further and subsidiary plea, which is breach of acquired rights. They submit that at the material time they were entitled to continuance of the arrangements set out above for adjustment of pensionable remuneration between general reviews of the scale, whether or not the rules had been repealed or amended.

They seek the quashing of the Director-General's decisions not to apply to them the adjustment of pensionable remuneration due as from 1 April 1986 in keeping with Article 3.1.1.2(b) of the Staff Regulations, which lays down rules identical in substance to those in the second sentence and following of Article 54(b) of the Fund Regulations, and the consequent reckoning of their pensions according to pensionable remuneration as so adjusted; failing that, payment of the difference between the sums actually due and the sums that would have been payable had pensionable remuneration been duly adjusted. They claim 10,000 French francs each in costs.

C. In its replies the ILO contends that one purpose of the earlier complaints was to secure the right to application of the arrangements for adjustment in 3.1.1.2(b). No new issue of fact and no new cause of action arose on 1 April 1986. Either the present purpose is the adjustment of the old scale, and in that case the answer is that that scale no longer applies; or else the purpose is the adjustment of the new scale in force as from 1 April 1985, and in that case the answer is that no adjustment was yet due on 1 April 1986, the variation in the indices not having reached the required 5 per cent.

As to the merits the Organisation points out that what was suspended was not the material provisions of the Staff Regulations but the arrangements for adjustment. The means was the formal amendment of Article 3.1.1 for that purpose, and the amendment was duly notified to the complainants by circular 325, Series 6, of 27 March 1985. According to *patere legem* the Director-General was bound to apply at 1 April 1986 the Staff Regulations in force at that date, and they made it clear that the former arrangements for adjustment did not apply. The Assembly amended Article 54 of the Fund Regulations so as to leave, albeit in altered form, only the first sentence and suspend the rest of it.

In answer to the plea of breach of acquired rights the Organisation cites its submissions in the earlier complaints.

It concludes that insofar as they serve any new purpose the complaints are unsound both in fact and in law.

D. In their rejoinders the complainants seek to distinguish the purpose of their complaints from that of the earlier ones. What the earlier complaints were challenging was the application of a new scale of pensionable remuneration brought in after a general review, and the cause of action was breach of an acquired right to application of the old scale. What the present complaints seek is the application of yet another scale which, by dint of the arrangements for adjustment set out above, would stand 5.6 per cent higher than the old one.

The conditions for bringing about the adjustment were met because the consumer price index in the United States rose by 5.6 per cent from 306.2 at 1 July 1984 to 323.4 at 1 January 1986, and the rules have to be complied with. The Director-General may not rely on *patere legem* to justify the unlawful suspension of the text. Besides, contrary

to what the Organisation contends, the text was suspended, not amended. It is hard to cite amendment by the Assembly when there is no declaration whatever of such amendment.

The complainants demur at the Organisation's failing to comment on the cumulative losses the staff have sustained. What is at issue is not just a detail affecting the method of reckoning pensionable remuneration but a fundamental change that impairs the content of a right. Losses range from 13 to 39 per cent according to grade.

E. In its surrejoinders the ILO again maintains that there was formal amendment and that the suspension amounted to amendment of the arrangements for adjustment. The authority that made the rule on the arrangements therefore amended it, and without retroactive effect, and there was no breach of *patere legem*.

As for the supposed breach of acquired rights, the new arrangements, which are linked to variation in net pay, bar the risk of any impairment of pension entitlements that might drastically lower their value.

CONSIDERATIONS:

1. Early in 1986 several ILO officials - Mr. Ayoub and others - lodged complaints seeking the quashing of individual decisions by the ILO to apply a new scale of pensionable remuneration to its staff as from 1 January 1985. The Tribunal dismissed those complaints in Judgment 832 of 5 June 1987, which gave an account of the pension scheme that covers ILO staff and which makes further description unnecessary.

2. What the complainants want is the quashing of decisions notified by the Director of the Personnel Department on 21 November 1986 on behalf of the Director-General. After reminding them of the ILO's stand on the earlier complaints the Director rejected their claim to intermediate adjustments in their pensionable remuneration as from 1 April 1986.

The decisions undoubtedly cause the complainants injury in that there is rejection of their claims. Oddly stated though it may be, the argument was - and still is - that their claims cover the same ground as the earlier cases.

The earlier cases were about comprehensive review of the scale brought in on 1 January 1985; these are about the working of the arrangements for adjustment as at 1 April 1986. The purpose, the cause of action and even the parties being different, the defendant is mistaken in pleading that there is no call to go into the merits.

3. The complaints are joined because each makes the same pleas and claims and rests on the same facts.

4. Article II of the Tribunal's Statute says it may hear complaints alleging non-observance of the terms of appointment and of the Staff Regulations, viz. any breach of conditions of service.

5. The complainants' main plea is that in the manner of its applying to them Article 3.1.1.2 of the ILO Staff Regulations and Article 54(b) of the Regulations of the United Nations Joint Staff Pension Fund the Organisation was in breach of *patere legem*. The subsidiary plea is breach of acquired rights.

6. In the complainants' submission the case hinges on 3.1.1.2, which reads:

"(b) thereafter the pensionable remuneration shall be adjusted on the following basis:

(i) When, on a subsequent 1 April or 1 October, the WAPA index, as determined by the International Civil Service Commission on the preceding 1 January and 1 July respectively, shows a variation of 5 per cent or more, the pensionable remuneration for establishing contributions to the United Nations Joint Staff Pension Fund shall be increased or decreased, as the case may be, by the full extent of the variation in the WAPA, provided however that it shall not be less than the pensionable remuneration under (ii) below.

(ii) When, on a subsequent 1 April or 1 October, the Consumer Price Index for the United States of America, as measured on the preceding 1 January and 1 July respectively, shows a variation of 5 per cent or more, the pensionable remuneration for computing the final average remuneration under article 1(h) of the Regulations of the United Nations Joint Staff Pension Fund shall be increased or decreased, as the case may be, by the full extent of the variation in that Consumer Price Index."

The complainants contend that the conditions are fulfilled, the United States index having risen from 306.2 at 1 July 1984 by over 5 per cent to 323.4 at 1 January 1985.

The ILO does not challenge the principle the complainants are relying on but answers that the method of adjustment set forth above was no longer in force by 1 April 1986. By a circular of 27 March 1985 the Director-General announced amendments to Article 3.1.1 of which the main effect was to suspend the text as from 1 April 1985.

The complainants submit that as quoted above the text was still in force on 1 April 1986, the material date, since by then it had been neither repealed nor amended; that suspension did not affect the substantive rules; that at the material date there was no repeal since, though suspended, the text was in time to be either brought into effect again or repealed or else amended; and that that bears out that the text stood since a repealed one can have no effect in law.

7. The distinction the complainants draw is unsound. Suspension is temporary repeal: while in force it makes the text void. What distinguishes it from repeal is that it is not final, its purpose being to provide against some temporary contingency, and it need only be lifted for the text to come into force again. But repeal is final and once a text has been repealed the law-maker has to adopt a new one to bring the provisions back into effect.

Thus only the body competent to adopt or repeal a rule may suspend it, and by due process. In this case it did. It was not the circular of 27 March 1985 that suspended 3.1.1, its sole purpose being to tell the staff of the decision to amend the Staff Regulations by the procedure laid down in Article 14.7. The declaration of suspension was incorporated in the text of 3.1.1 and was properly applied. The first plea therefore fails.

8. The complainants cite Article 8.2 of the Staff Regulations in pursuit of their contention that there was breach of *patere legem*.

The provision reads:

"Except as otherwise provided in his terms of appointment an official shall be subject to the Regulations of the United Nations Joint Staff Pension Fund."

The complainants' sole purpose in citing it is to bring in Article 54(b) of the Fund Regulations, which says that, subject to stipulations about the speed and degree of change, pensionable remuneration may vary with the rates of post adjustment that obtain at headquarters and field offices and with the index to consumer prices in the United States. Their main plea is that the ILO was in breach of *patere legem* in refusing them an adjustment.

The ILO's answer is that 54(b) has been amended and its application suspended by the General Assembly of the United Nations in resolution 39/246. The complainants are misreading it

The Tribunal will not take the point since it is not competent to construe the Fund Regulations: by Article 48 the United Nations Administrative Tribunal alone may hear complaints alleging breach of those Regulations.

9. Having rejected the main plea, the Tribunal comes to the subsidiary one of breach of acquired rights.

10. Judgment 832 set forth at length the criteria for recognition of the acquired rights an international organisation is bound to respect, and there is no need to repeat them here, the issues of fact being akin. The Tribunal held: "... because the altered term is in the rules and because of the reasons for the amendment, and notwithstanding the financial injury to the complainants, there was no breach of an acquired right". And it went on to say that if the injury increased because of decisions that were not then before it there might be further review.

The complainants say they cannot put a figure on the loss sustained but they submit a table showing losses that range from 13 to 39 per cent according to grade.

The table does not distinguish between loss due to the measures of which the Tribunal was informed in the earlier proceedings - and which it declared lawful - and loss alleged to be due to the failure to revise the scale on 1 April 1986.

So in any event the Tribunal cannot but endorse its ruling in Judgment 832 under 16.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner