*Registry's translation, the French text alone being authoritative.*

**SEVENTY-FOURTH SESSION**

# *In re* GEORGIADIS, KAZINETZ, McCALLUM and POLYCARPOU

**Judgment 1226**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Argyris George Georgiadis, Mrs. Nadia Kazinetz, Mr. Alexander McCallum and Mr. Andreas Polycarpou against the Food and Agriculture Organization of the United Nations (FAO) on 12 March 1991;

Considering the interlocutory order in Judgment 1186 of 15 July 1992;

Considering the complainants' further submissions of 4 September 1992 and the Organization's final brief of 26 October 1992 which the Tribunal ordered in that judgment;

Considering the further applications to intervene filed since the date of that judgment by:

J.C. Abbot

C.E. Allison

U. Altobelli

T. Anastasio

G. Andrade

L.C. Arulpragasam

J. Banfield

O. Biancardi

C.H. Biass

F. Binet

R.A. Bishop

W.A. Boelen

A. Boerma

I. Bogajevsky-Sakoff

L. Bonello

M. Calogero

A. Caracciolo

B.M. Cassimatis

T. Chacho

S. Cice

J. Courtiol

M.J. Creek

O. Cumbo

A. Cziller

A.A. da Costa

M. Dawed

W.R. Dingle

N. Erus

G. Fasciani

R. Girometti

A.D. Goseco

R. Grande

T. Grande

J. Hadjigeorgiou

H.P. Harding

H. Herzog

R.U. Hodes-Castellani

J.A. Howard

H.J. Huuhtanen

O. Jamot Faunce

N.O. Jayasundera

K. Kallay

N. Kojima

G. Lambrinides

K.H. Lappe

J. Leclerc

A. Lombardi

B. Ly

G. Mallamaci

A.D. Mather

H. Matsuo

F. Mattioli

A.L. McKay Totaforti

A. Monaco

U. Murphy

K. Myung-Soo

V.D. Nguyen

J.P. O'Hagan

E.A. Osanyinjobi

S.A. Plier

O. Radelet

D. Ramadan

G.C. Rawson

H.J. Reichardt

A.K. Reichensperger

O-L. Reinaldo

J-M. Sala

D. Schirone

O.L. Sidi

M.D. Thorpe

E. Venturi

R.D. Verma

T.F. Weaving

G.S. Welsh

B.C. Widman

T.W. Wood

T. Yamamoto

C.T. Zaki

F. Zamarriego Crespo

Having examined the written submissions;

A. In their further submissions the complainants develop the three pleas the Tribunal did not rule on in Judgment 1186.

The first is breach of their acquired right to continued free health insurance coverage for retired FAO officials. They distinguish between the Organization's financial situation and the health scheme's and point out that there was a reserve fund of several million United States dollars at the end of 1991.

Their second plea is that the Organization has a duty to avoid causing its staff unnecessary or undue injury. None of the insurance companies they have approached offers health coverage to people over the age of 70. So they do not have the option of changing health schemes, though they might have done so when they took retirement had they known that free insurance would later be denied them.

Their third plea is breach of good faith. The Organization gave them a written undertaking on retirement that they would have free health coverage for an unlimited period of time. So they did not seek alternative health insurance and now have to pay if they want to be covered. The FAO's contract with van Breda, as extended to the end of 1991, provides under Article 6(a) for application to former officials and their dependants "without payment of premium".

B. In its final brief the FAO again observes that the scheme is financed solely by contributions from its members and the employer, whose actual share is 60 per cent though it is only 50 in theory. The technical reserve fund was set up to meet reimbursement contingencies in the first two years after each accounting period. As for the profit-sharing reserve fund, which came to $2.2 million in June 1989, common sense meant saving it against unforeseen commitments. The joint health committee was aware of both reserve funds when it decided to change the conditions applied to retired staff in the interest of everyone.

The 4 per cent rate of contribution applicable to all retired staff takes account of each member's full pension rights, including payments some of them have taken in lump sums.

CONSIDERATIONS:

1. As was explained in Judgment 1186, the complainants are in dispute with the FAO over the Director-General's decisions of 1 June 1989 that their after-service medical insurance coverage should no longer be free of charge. They put forward four pleas in favour of quashing those decisions. Judgment 1186 dismissed the first of them but ordered further submissions on the other three.

The complainants having commented on the FAO's surrejoinder and in particular on the additional information and evidence supplied therewith, the Tribunal may now take up those three pleas and make a final ruling on the case as a whole.

The complainants' application for hearings

2. The complainants apply for hearings. They have already had the opportunity of enlarging on their original submissions and on their rejoinders and of commenting on the ample evidence at their disposal. They sought leave to file submissions in answer to the surrejoinder and the disclosure of additional information and items. The interlocutory judgment granted the parties leave to file further submissions, which are now before the Tribunal. It therefore has all the material required for a final ruling. It dismisses the complainants' application as pointless.

Breach of acquired rights

3. The complainants contend that it was in breach of their acquired rights to change to their detriment the terms of their after-service medical insurance coverage.

Judgment 832 (in re Ayoub and others) stated the doctrine: an acquired right is one the staff member may expect to survive any amendment of the rules. The amendment of a rule amounts to breach of an acquired right when it disturbs the structure of the contract of appointment or impairs any fundamental term of appointment that induced the official to join the organisation or, if the term was introduced later, to stay on.

So the issue in each case is whether the altered term is fundamental and essential, and there are three tests. The first is the nature of the altered term: whereas the contract may give rise to an acquired right the regulations and rules do not necessarily do so. The second test is the reason for the change: terms of appointment may often have to be adapted to circumstances, and particularly to the finances of the organisation that applies them. And the third test is the consequence of allowing or disallowing an acquired right.

4. The complainants submit that they have an acquired right to the continuance of free coverage as a term of their appointment by virtue of the administrative circular of 15 November 1971 which made medical insurance coverage free of charge for FAO pensioners, and which is a binding text. So the existence of such a right depends first and foremost on the reasons for the abolition of free coverage and the consequences thereof.

5. In support of abolition the FAO pleads mainly its own financial plight and that of its health insurance scheme.

Medical insurance coverage was free of charge for retired staff as from 1 January 1972 and the complainants joined the Organization before that date. Even though free coverage may be deemed to have become a term of appointment that induced them to stay on, they had no acquired right to it since the arrangements for after-service coverage depended on trends that were bound to shift a great deal according to circumstances.

As was said in Judgment 1186 under 5, only since 1959 have FAO staff kept their medical insurance coverage on retirement. At first they had to pay for it. The FAO introduced the subsidised coverage in 1969. From 1972 the coverage was free of charge for pensioners provided that they met certain requirements of age and had been paying contributions for long enough. The scheme has since been amended several times and for several purposes, such as abolishing free coverage for some officials, raising contributions for serving staff and limiting the rate of refund of medical costs.

All that goes to show that underlying the scheme was a set of variables that precluded the inception of any acquired right.

The scheme's rising and falling fortunes over the years are plainly attributable to its own financial circumstances and of course to those of the FAO itself. There was no question of the Organization's meeting pensioners' contributions in full or even in part until the end of 1971, when it could afford to do so. So it is, to say the least, inconsistent to object to its giving similar financial reasons for going back to the pre-1972 scheme of subsidised coverage.

6. At all events the complainants' objections to the financial reasons stated for the impugned decisions are unconvincing.

They say that the Organization's finances are irrelevant because the scheme, being autonomous, could have financed itself and that the cost is a trifling charge on the FAO's total budget.

The plea cannot be upheld.

It is hard to see how the scheme could have financed itself when some beneficiaries were relieved of contributing. The fact is that the only reason why the changes made in 1972 worked was that the Organization took on much of the financing of the compulsory scheme known as the Basic Medical Insurance Plan (BMIP), the serving staff's contributions being capped at 5 per cent of gross salary. So, as the FAO says, the trouble came from its finding the financial burden heavier and heavier, and understandably enough, because the number of pensioners kept going up (from 163 in 1972 to 2,217, plus 4,175 dependants, in 1989) and the cost of medical treatment and repayments was rising more and more steeply. Several solutions were proposed to a problem that threatened the scheme with collapse. One was to increase the FAO's own share, but the Organization thought that unrealistic because it had been in sore financial straits since 1986, largely owing to the failure by several member States to pay their dues.

The urgent need for reform to keep the scheme going was shown up by two actuarial studies which the Organization commissioned. They were of unimpeachable objectivity and authority and led the Organization to set up a joint working party comprising representatives of management and former and serving staff to look into the matter of after-service medical insurance. The working party recommended that it should cease to be free of charge. The Organization's endorsement was therefore the upshot of lengthy consultation and there was nothing one-sided about it.

7. The complainants argue that the finances of the scheme were not so bad as the Organization makes out: there was a large reserve fund that could have been used to avoid change.

But again their plea fails. The Organization says in its reply, and the Tribunal has no reason to doubt, that the financial reserve is intended to meet medical costs incurred during a given period but not yet declared and that, although the use to be made of it has been discussed on several occasions in joint bodies, no final decision has been taken.

The Tribunal will not compare the options open to the FAO in the area of financial policy since it might ignore the realities that the FAO has to take into account. All the Tribunal need do is acknowledge that it was because of the financial plight of the scheme and its own that the Organization decided to do away with free coverage for pensioners.

8. The change does cause the complainants detriment. Their income has fallen from salary to pension, and as they get older they are likely to need more medical care. So losing free coverage makes a much greater impact on them than it would have made on serving staff.

But that alone does not amount to breach of any acquired right.

First, the effect of the change was to put all FAO pensioners on a par. Besides keeping after retirement the coverage they had on recruitment, the complainants now fare as do those who, not satisfying the requirements set in 1972 about age and period of contribution, have never had free coverage. They are on a par, too, with those who failed to get free coverage either because they qualified for insurance for the first time after the change or recovered entitlement to it after a break exceeding twelve months at or after 1 July 1987.

Secondly, there were transitional measures to lighten the impact of the change: a "grace period", a maximum limit on contributions of 4 per cent of full pension, and dispensation for those on low pensions.

The conclusion is that, since the change was made by way of rules, and because of the reasons for it, the complainants have suffered no breach of any acquired right despite the injury to their interests. Their plea fails.

Unnecessary and undue injury

9. In the complainants' submission the Organization had a duty to tell them on retirement, or to warn them beforehand, that their coverage would cease to be free of charge; they might then have opted for some other scheme. Moreover, in their view the letter sent on 1 June 1989 to all pensioners gave them no choice but to join the amended scheme since, if they left it, they might have lost coverage altogether because they were too old to get it elsewhere.

The FAO's answer is that in 1986, when the complainants retired, it could not yet foresee the need for the change, which it did not make until 1989. By way of example it cites the form it sent to Mrs. Kazinetz and indeed to everyone else on retirement. The form, which was headed "Application for after-service medical coverage - AFP-186", did not promise that coverage would continue indefinitely to be free of charge: it said "No contribution is payable [to ENPDEP, BMIP and MMBP] ... at least for the duration of the present contracts" with the insurance broker.

The Organization is right. Although the complainants felt they had to consent to the new scheme, the Organization was merely following the recommendations by the joint working party, including the staff representatives, who saw reform as inevitable to save the scheme from collapse. The conclusion is that the change, which was reasonable and could be reconciled with the pensioners' own interests, did not cause the complainants unnecessary or undue injury.

The plea again fails.

Breach of good faith

10. The complainants allege breach of good faith in that on retirement they were promised in writing free coverage without limit of time.

That argument fails for the reasons set out in 9 above.

11. They further object to the Organization's saying that free coverage had been guaranteed only during the currency of the agreement with van Breda, which had come to an end. They point out that the agreement was extended by five years up to 31 December 1990 and that clause 6(a) stated that it applied to former staff "without payment of premium".

That argument is mistaken. It is plain on the evidence that the agreement with van Breda was amended in January 1990 to substitute for "without payment of premium" in clause 6(a) "with payment of group premium as per Article 24". That amendment was adopted as from 1 November 1989 in line with the decision taken shortly before to do away with free coverage.

There is therefore no question of any breach of good faith, and the plea is dismissed, like the others.

The Tribunal's ruling

12. The conclusion is that there is no need to go into the complainants' further arguments, either because they are irrelevant or because they are superfluous, and the complaints must fail.

13. Since the principal claims are dismissed so too is the claim to costs.

14. The applications to intervene cannot succeed where the complaints themselves have failed.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

(Signed)

William Douglas
Mella Carroll
E. Razafindralambo
A.B. Gardner

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