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

SIXTY-SEVENTH SESSION

In re AYOUB (No. 2), VON KNORRING, PERRET-NGUYEN (No. 2) and SANTARELLI

Judgment 986

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. El-Sayed Salah El-Din Ayoub, the complaint filed by Mr. Carl Anton von Knorring, the second complaint filed by Mrs. Hong-Trang Perret-Nguyen and the complaint filed by Mr. Jean-François Robert Santarelli against the International Labour Organisation (ILO) on 24 February 1988 and corrected on 13 June, the ILO's replies of 19 August, the complainants' rejoinders of 21 September, the ILO's surrejoinders of 25 November 1988 and its further submissions of 8 and 18 May 1989;

Considering Articles II, paragraph 1, and XII of the Statute of the Tribunal, Articles 3.1.1 and 13.2 of the Staff Regulations of the International Labour Office, ILO circular 383, Series 6 (Personnel), of 30 March 1987 and Article 54(b) of the Regulations of the United Nations Joint Staff Pension Fund;

Having examined the written evidence and heard in public on 23 May 1989 submissions from Mr. Jean-Didier Sicault, counsel for the complainants, and from Mr. Francis Maupain, the agent of the defendant;

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 et al.) explained, under A, how what is known as "pensionable remuneration" may affect the reckoning of pension benefits payable by the United Nations Joint Staff Pension Fund to the staff of the International Labour Office. In that judgment the Tribunal ruled on several complaints from ILO officials about the application of a new scale of pensionable remuneration that came into force at 1 April 1985. In Judgment 862 of 10 December 1987 (in re Picard and Weder) the Tribunal ruled on a second set of complaints which objected to the ILO's failure to adjust pensionable remuneration as at 1 April 1986. Both groups of complaints sought in vain to have the scale that had obtained up to 31 December 1984 remain in force.

By resolution 41/208, which it adopted on 11 December 1986, the United Nations General Assembly approved a new scale that was to apply as from 1 April 1987 to staff in the Professional and higher categories and it amended Article 54(b) of the Fund Regulations accordingly. In circular 383 (Series 6) of 30 March 1987 the head of the Personnel Policy Branch of the Office announced that at its 235th Session (February/March 1987) the Governing Body had authorised the Director-General to apply from 1 April 1987 the new scale approved by the Assembly and that the Director-General had approved the amendments to Article 3.1.1 of the Staff Regulations, which were to come into effect at the same date.

The complainants, who are in the Professional and higher categories of the Office staff, found on getting their pay slips for April 1987 that the amounts deducted by way of contribution to the Pension Fund in that month were lower than the amounts deducted under the scale of pensionable remuneration that had been brought in at 1 April 1985 (circular 325 (Series 6) of 27 March 1985). In keeping with Article 13.2 of the Staff Regulations Mr. von Knorring, Mrs. Perret-Nguyen and Mr. Santarelli lodged internal "complaints" with the Director-General on 30 September 1987 and Mr. Ayoub on 7 October challenging the decisions to apply the new scale to them from 1 April 1987. By letters dated 27 November 1987, the impugned decisions, the head of the Personnel Policy Branch rejected their complaints on the Director-General's behalf.

B. A principal plea in the first set of complaints and a subsidiary one in the second was breach of acquired rights. The present complainants again rely on that doctrine. They submit that although the plea failed in the earlier cases the cumulative effect of several measures has since been to erode their entitlements much further. The aggregate reduction in pension entitlements that has occurred since the replacement of the 1984 scale is put at 24.3 per cent for Mr. Ayoub, 21.8 for Mr. von Knorring, 20.1 for Mrs. Perret-Nguyen and 15.7 for Mr. Santarelli. Much, too, has

changed even since the date of the complaints that were dismissed in Judgment 832. For one thing, the new scale cannot be treated as something needed to sort out the Fund's finances. So much is clear from the preamble to the Assembly's resolution of 11 December 1986, which says that applying the new scale should not, apart from transitional measures, have any significant harmful effect on the Fund's actuarial position. The complainants submit that its effect is slightly adverse, or at best neither good nor bad, the real purpose being to bring the pensions of staff in the United Nations system down from figures thought to be altogether too high.

For another thing the two scales differ in effect: the 1987 one means a reduction as against the 1985 one for staff in the Professional and higher categories at all grades and steps.

What is more, the fall in benefits is not even offset by any improvement in other conditions of service but aggravates an almost general decline in terms of employment.

The complainants further submit that the ILO was in breach of its duty, affirmed in Judgment 832, to "accept restraint in its dealings with staff". The fall in pensions brought about by the series of cuts in pensionable remuneration may hamper the recruitment of the best qualified people to the international civil service and so be at odds with the Noblemaire principle. It may also encourage many staff to retire early. The new scale discriminates between staff arbitrarily, or at least without proper cause, according to the date at which they retire.

The complainants seek the quashing of the individual decisions applying to each of them the 1987 scale of pensionable remuneration brought in on adoption of the text of Article 3.1.1 of the Staff Regulations in circular 383; the consequent reinstatement of the 1985 scale in circular 325; or, failing that, payment to each of them by the Organisation of the difference between the sums the Fund would have paid them had the former scale held good and those they will actually be paid. They seek awards of 22,500 French francs each in costs.

They ask the Tribunal to declare that they have an acquired right to the retention in the Staff Regulations of an independent definition of the pensionable remuneration of the Professional and higher categories, such as the one in Article 3.1.1, on the grounds that striking it out would strip them of the right to appeal to the Tribunal on the matter.

C. In its replies the ILO points out that the protection the pension scheme affords has been growing steadily better since 1948. Yet several things have lately hampered that broad trend. One factor of disruption has been fluctuation in the value of the United States dollar, the Fund's currency of account, and another the worsening of the actuarial position of the Fund, which is still showing a worrying deficit. For want of sounder expedients makeshift remedies were tried at first, but they merely made for more trouble that has called in turn for others and caused some departure from basic principles like Noblemaire. Other steps have been taken such as setting "floor" rates of exchange in December 1987 to counteract wild currency movements, and putting up the rate of contribution as from 1 July 1988.

The Organisation denies breach of acquired rights. In its submission, since the scale of pensionable remuneration forms part of the Staff Regulations, a change in the scale will, to go by precedent, amount to breach of acquired rights only when the structure of the contract of appointment is disturbed or there is impairment of any term in consideration of which the official accepted appointment or stays on the staff. An inherently variable factor like the amount of pensionable remuneration may not be treated as essential and therefore may not constitute an acquired right: it has to be constantly adjusted and the change need not always be to the staff's benefit.

The Organisation further maintains that the wrong the complainants allege is not of the kind they make out, and not so serious either. In reckoning the injury - however sound their actual figures may be - they err in adding up the effects of the three changes in the scale because the Tribunal has already upheld the first two. The only one at issue is the change from the 1985 scale to the 1987 one. By the ILO's own way of reckoning, which it explains in detail, the complainants stand even to gain on certain conditions, especially if their pensions are converted into local currency at the "floor" rate of exchange. The present system has good points that offset the drawbacks.

The ILO submits that the amendments do not go beyond the bounds the Tribunal set in Judgment 832 and are therefore admissible. The many variables in the pension scheme are linked with each other and have to keep in line with changes in circumstances, an important point being the need to balance the Fund's books. What the complainants say about the purpose of the new scale is wrong: its true purpose was to bring benefits into line with Noblemaire, not to improve the Fund's actuarial position, which it does not affect. Compliance with Noblemaire is

not under threat since there is still a margin between the international civil service and the relevant national civil service. Though the date of retirement does matter in working out pension benefits, absolute equality is scarcely conceivable in an intricate scheme that is partly based on the idea of solidarity and is in constant flux.

To the complainants' contention that repeal of Article 3.1.1 of the Staff Regulations would be in breach of their acquired rights the ILO answers that their fears are premature.

It invites the Tribunal to dismiss the complaints as devoid of merit.

D. In their rejoinders the complainants enlarge on their pleas and take up seriatim the ILO's pleas, which they seek to rebut.

They contend that the purpose of the new scale was to lower pensions and that lip service was paid to Noblemaire and the Fund's actuarial position only in an attempt to justify the reduction. Although the Tribunal acknowledged that in the matter of pensions there were many variables that might preclude the creation of acquired rights, it said that there might be further review if the injury increased. The complainants doubt whether there is any margin between the pensions of international civil servants and those of United States federal civil servants and they object to the application of "floor" rates in reckoning pensions.

E. The Organisation maintains in its surrejoinders that the Assembly wants to abide by Noblemaire and redress the actuarial balance of the Fund. To show that Noblemaire is still being observed it appends a table showing the retirement benefits of United Nations staff and those of United States federal civil servants. It pleads that the complainants take too rigid a view of acquired rights and misread Judgment 832. It owns to surprise at their objections to applying "floor" rates in converting pension entitlements into local currency: the Staff Union seemed to be in favour.

F. In further submissions the ILO states that the figures it gave of the complainants' losses were wrong and that there have been further increases in the scale of pensionable remuneration in 1989. It appends a new table drawing "aggregate" comparisons on the strength of the scale in force as from 1 March 1989 as it applied to the complainants, and a comparative table showing rises and falls in pensionable remuneration since 1985 at the top of each grade in the Professional and higher categories: there is a net loss of 1.1 per cent at the top of grade D.2 and a net gain for all other grades ranging from 0.5 up to 14.2 per cent.

CONSIDERATIONS:

1. This is the third case to come before the Tribunal about the scale of pensionable remuneration in the ILO. The first case arose out of an amendment of the scale that took effect on 1 April 1985 and the Tribunal's ruling was in Judgment 832 of 5 June 1987 (in re Ayoub et al.). The second case came up in 1986, when staff took the ILO to task for not letting them have interim adjustment in pensionable remuneration, and it led to Judgment 862 of 10 December 1987 (in re Picard and Weder).

What prompts these complaints is a new scale that was brought in on 1 April 1987 by virtue of Article 3.1.1 of the Staff Regulations and is set out in circular 383, Series 6 (Personnel), of 30 March 1987.

Each of the complainants is impugning an individual decision of 27 November 1987 by the head of the Personnel Policy Branch rejecting his or her internal appeal on the Director-General's behalf.

The purpose of their suit and the material issues being the same, their complaints are joined to form the subject of a single ruling.

Since there is a cause of action and the time limits have been met they are receivable.

2. In support of their challenge to the impugned decisions the complainants are alleging breach of the Staff Regulations: to be precise, of Article 3.1.1, which defines pensionable remuneration. As it held in Judgments 832 and 862 the Tribunal is competent under Article II(1) of its Statute to entertain complaints of that kind, seeking as they do the quashing of decisions allegedly in breach of the terms of appointment of staff. What is at issue is the relationship between the Organisation and its staff, the Tribunal is fully competent and, subject only to Article XII of its Statute, whatever it rules will be binding on both sides.

3. The nub of the complainants' case is breach of acquired rights. The Tribunal went into the doctrine at some length in Judgment 832, and all it need state again here is its view that even when there has been amendment of staff regulations there will be breach of an acquired right that warrants setting the decision aside if the altered term of appointment is "fundamental" and "essential".

It was the Director-General who, acting under the Staff Regulations and with authority from the Governing Body of the International Labour Office, brought in the new scale of pensionable remuneration for the Professional and higher categories on 1 April 1987. A few examples may be given of the new figures. For a staff member at grade D.2, step 1, the yearly amount fell from 84,600 United States dollars - the figure since 1 April 1985 - to $81,800; at D.1, step 1, the figure went down from $74,500 to $71,400; and at P.5, step 1, from $66,100 to $64,300. Further examples would bear out that the new scale means a drop for every grade in the staff categories it applies to.

4. How pensionable remuneration and, for that matter, the pension scheme as a whole will fare turns on a set of political, economic, financial and social factors. For years things grew steadily better; then, as the earlier judgments explained, came a leaner time; and the main issue the decisions of 27 November 1987 raise is whether the drop in pensionable remuneration went too far.

The Organisation's answer to the complainants' internal appeals was that the new scale was part and parcel of a tougher policy calculated, at a time of wide currency fluctuation, to get the scheme back on an even keel. Such a purpose, which meets the demands of good management and indeed a broader expediency, may afford just cause for the impugned decisions, but do the facts support it and were the reductions excessive?

5. How did the finances of the United Nations Joint Staff Pension Fund stand at the time?

The complainants cite a resolution the United Nations General Assembly passed on 11 December 1986 to approve a new scale much like the one later applied by the ILO. One passage says that applying the new scale "should not - apart from the transitional measures - have any significant harmful effect on the actuarial position" of the Fund. The parties do not really take issue on that point. The complainants do say that what was done had a slightly adverse effect or at best none at all, whereas the Organisation makes out that it was rather to the good; but it is a nice distinction.

Even supposing that the action the complainants object to did not at once ease the Fund's finances, that would not in itself be a finding of any decisive moment. How a scheme like the Fund is run has to be seen over the middle and long terms, and the evidence does not suggest that the effect will in time be to upset its financing.

A point of more general import is that in any event the Tribunal may not review the management of the Fund, the sole basis of its competence in this case being the ILO's Staff Regulations.

The Tribunal is satisfied that the decisions under review were founded on cogent considerations of policy.

6. Another prop of the complainants' case is the Noblemaire principle: by their lights the reduction is so big as to be in breach of long-standing usage, and the policy will deter and is already deterring qualified people from joining the staff.

The ILO's retort is that the purpose was to check a drift away from Noblemaire.

7. That general principle was born in League of Nations days, in 1920, and taken over by the United Nations. Though it has never been set down as a written rule, no international organisation or official text has ever challenged it, and it is a custom binding on any organisation that belongs to the United Nations system.

In defining the principle Judgment 825 (in re Beattie and Sheeran) of 5 June 1987 said that it embodied two rules:

"One is that, to keep the international civil service as one, its employees shall get equal pay for work of equal value, whatever their nationality or the salaries earned in their own country. The other rule is that in recruiting staff from their full membership international organisations shall offer pay that will draw and keep citizens of countries where salaries are highest".

As so defined Noblemaire covers both pay and pension. The relations of staff with an international organisation do not end when they leave its employ. The pension scheme forms part of the administrative arrangements they may

look forward to and, like pay, pensions are governed by basic rules that are binding on the organisation. Foremost among them is Noblemaire, the purpose of which is not to bestow privilege on international civil servants but to draw some of the best people from every country into the service.

8. In the ILO's submission comparison lies with the best-paid civil service.

The complainants' argument is that the principle goes further than that and, if it is to work properly, the yardstick is not just pay in public service but all pay, in the private sector as well. They make much of the idea of pension as "substitute income" and by and large see any cut in pensionable remuneration as at odds with Noblemaire. They have doubts about which is the country with the best-paid civil service.

In practice pay in the international civil service is higher than pay in the best-paid national civil service, and sound comparison cannot but lie with pay in the public service of the relevant country, if only because the criteria would otherwise become unworkable and mean precious little.

9. Appended to the ILO's surrejoinders are comparative tables showing the pension benefits payable to United Nations staff and to United States federal civil servants. The figures do bear out the Organisation's case, but at the hearings the complainants did not seriously challenge them.

10. The complainants' objections to the choice of national civil service fail because, though the issue is one of law, the Tribunal lacks the means of resolving it and the parties have not asked it to do so anyway.

11. The complainants' contention that lesser financial incentives will make it harder for the ILO to recruit is mere surmise and must be rejected.

So must the plea that there is a risk of many early retirements.

12. The Tribunal is not satisfied on the evidence before it or from what was said at the hearings that there has been any breach of Noblemaire, let alone misuse of authority.

13. As the complainants see it the broad purpose of pension policy is to redress the financial balance of the scheme by making the staff bear the brunt.

The ILO contends that, though what has been done may not be always quite up to the mark, neither is it always to the staff's detriment.

Taken together, the complainants' pleas under these heads do not warrant setting the decisions aside.

Being neither arbitrator nor mediator, the Tribunal has only a limited power of review in such matters and will declare whether the impugned decisions square with general principles, with the Staff Regulations and with the terms of the complainants' appointment. But it will come back to some of the issues raised above in taking up the parties' further pleas.

14. The complainants' main plea calls for a look at the effect the new scale will have on the lot of the staff. To put it another way, has there been serious disruption of the terms of their employment?

The examples in 3 above show that the new scale docks the figures of pensionable remuneration that obtained until 31 March 1987 by 3.4 per cent at D.2, step 1, by 4.2 per cent at D.1, step 1, and by 2.7 per cent at P.5, step 1. The figures go to show that of itself the new scale does not badly harm the complainants' rights, and on that score the reasoning in Judgment 832 holds good.

15. But the complainants would have the Tribunal look at the broader trend. They argue breach of their acquired rights not just in bringing in the new scale on 1 April 1987 but also in adopting the scale that applied as from 1 April 1985 and in failing to adjust it upwards on 1 April 1986. There is breach, they say, if everything is taken together. The Organisation demurs on the grounds that only the 1987 scale is at issue and proper comparison is with the state of affairs at the date at which it came in; the decisions of 1985 and 1986, which the Tribunal declined to quash, are final and beyond challenge.

16. Though there is of course no going back on what was said in Judgments 832 and 862, such a narrow reading of

the Tribunal's competence would have it forget the facts of economic life and would run counter to classical canons of interpretation.

A ruling on the lawfulness of a decision calls for review of all the material evidence, and especially in times of change material evidence must include evidence on the general context in which the decision has been taken. One relevant criterion is the ultimate purpose. A run of small amendments may offend against the whole spirit of the rules, and to ignore them would be a miscarriage of justice; indeed, though that is not the case here, there may in the end be breach of good faith or even misuse of authority. Though the Tribunal must keep within the ambit of the complaints before it there are no restrictions on the sort of evidence it may draw on. That is the thrust of Judgment 832, which said that if the financial injury to the complainants increased because of decisions that were not then before the Tribunal there might be further review. The construction is implied in the word "increased".

So the complainants may back up their case against the decisions they impugn by citing the earlier ones on the same subject. The full set of decisions is material in ruling on the plea of breach of acquired rights even though, if breach there has been, the consequences will touch only the decisions now under challenge.

17. The complainants give figures to show the injury which they set down to the policy on pensionable remuneration in 1985, 1986 and 1987. Reckoning in United States dollars, Mr. Ayoub puts at 24.3 per cent his cumulative loss due to the two changes in the scale and the non-adjustment, adding that any rise within his grade and for that matter promotion would make the injury worse. For Mr. von Knorring the loss is 21.8 per cent, for Mrs. Perret-Nguyen 20.1 and for Mr. Santarelli 15.7.

While still objecting to any calculation of that kind the ILO allows that the figures are "mathematically accurate".

So there is a large drop in what may prove an important factor of the pension.

18. In answer to the complainants' figures the Organisation gives others showing the amount of the full pension each of them would get at the age of sixty according to the scale in force in 1985, either in dollars or in Swiss francs converted at the average rate of exchange prevailing over the 36 months up to July 1988, and the amount of the pension converted at the same rate into the currency of the complainant's own country. The Organisation then gives the amount of the pension payable under the scale introduced on 1 April 1987 as adjusted by 3.9 per cent at 1 June 1988. The dollar pension is converted into Swiss francs at the average rate of exchange prevailing in July 1988 and again at the so-called "floor" rate. Lastly, there is the amount of the pension converted into the local currency at the floor rate.

In further submissions which the ILO filed out of time but which the complainants were able to address at the hearings the Organisation corrects mistakes in its earlier figures.

Actually it goes beyond mere correction. It cites new steps over and above the action taken at 1 June 1988 to help the complainants, so as to make what it calls "aggregate" comparison on the strength of the scale in effect at 1 May 1989.

What the figures show, in the Organisation's view, is that if the rises and falls from April 1985 to May 1989 are taken together there is a net increase for staff at every grade but D.2. It is 0.5 per cent for D.1 and grows in descending order of grades so that at P.1 it comes to 14.5 per cent. It is not clear just why there has been such a shift in policy.

19. Since the complainants' figures and the ILO's rest on different premisses it is hard or even impossible to compare them. Although neither side challenges the other's figures, and the Tribunal will therefore accept them as they are, it will look at how they have been worked out.

20. The ILO's figures disregard the effects of the 1985 scale and of the refusal to amend the scale in 1986. The Tribunal has explained in 16 above why that is wrong, and it need not do so again. There are grounds in law for rejecting the Organisation's method of reckoning.

21. To establish the lawfulness of its decisions the ILO takes a different approach and cites the policy it has followed since.

That raises an issue of law: in reviewing a decision may the Tribunal take account of later decisions and facts?

As a rule it may not: the decision will be reviewed in the context of fact and law that obtained when it was taken, else there would be breach of the general rule against retroactivity that is binding on any administrative authority and court of law.

22. That precept does, however, allow of limited qualification, and one exception may be thought to apply here. A decision taken after the one impugned may, if more favourable, repeal it with retroactive effect, the decision-maker being empowered to withdraw the earlier decision so long as he does not thereby offend against the rights of any third party. The withdrawal may be likened to reversal, and if there happens to be an appeal pending there will be no cause of action.

The exception is plainly irrelevant to this case. Neither in fact nor in law do the measures of relief - one of which was taken to meet an emergency and had no lasting effects - amount to reversal of the impugned decisions, and they have no bearing whatever on the lawfulness of those decisions.

Here again the defendant's argument fails, resting as it does both on the mistake of law mentioned above and on a mistake of fact: increases in the scale since April 1987 will be material only in reckoning the amount of any loss that may have been suffered.

23. As was said in 3 above, Judgment 832 set forth the criteria for ruling on a plea of breach of an acquired right by unilateral administrative action, and they apply again here.

The grounds for the decisions now under challenge, as for those reviewed in the two judgments in 1987, were objective. Yet, as was said above, all the complainants - even Mr. Santarelli - are again left worse off, to an extent indeed that goes beyond the bounds of the ILO's discretionary authority. The further reduction in the amounts that are one factor of the retirement pension is in breach of the essential terms of their employment.

Moreover, before the challenged measures took effect the ILO took no decision that might have mitigated their harmful consequences.

The complainants therefore succeed in their plea that the impugned decisions are unlawful.

24. Their main claim is to the reinstatement of the 1985 scale so that the Fund will determine according to that scale their entitlements on retirement, invalidity or death and the kindred benefits or, failing that, to payment by the Organisation, upon each monthly payment by the Fund, of the difference between the amounts the Fund would have paid under the 1985 scale and the amounts actually paid under the new one.

The Tribunal may not rule on the Fund's liability, but its competence to rule on the ILO's liability is beyond question. Yet, though it has held that the new scale impairs the complainants' rights, it cannot now set the amount of their entitlements. For one thing, it does not know at what age they will be retiring and what the rules will then say. The rules may indeed deprive its judgment of practical effect.

It will therefore make a ruling of principle on the complainants' claims to financial redress. They may in time have their entitlements as determined according to this judgment converted into compensation if the unlawful decisions cause them injury. If the amount of the pension each of them gets when the 1987 scale is taken into account proves to be at least 3 per cent lower than the amount he or she gets when it is not, compensation shall be due for any loss over and above the 3 per cent. They may also, if they wish, come back to the Tribunal in due course to have their entitlements determined and their rights enforced.

25. They contend that repeal of Article 3.1.1 of the ILO Staff Regulations would be in breach of their acquired rights.

The answer is that the Tribunal will not rule on a contingency.

26. The Organisation shall pay each of the complainants 10,000 French francs in costs.

DECISION:

For the above reasons,

1. The impugned decisions are quashed.

2. The complainants' rights to redress shall be determined when each of them leaves the service of the Organisation.

3. The ILO shall pay each of them 10,000 French francs in costs.

4. Their other claims 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 23 November 1989.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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