

**SIXTY-EIGHTH SESSION**

***In re* CUVILLIER (No. 3)**

**Judgment 990**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs. Rolande Cuvillier against the International Labour Organisation (ILO) on 21 December 1988, the ILO's reply of 14 March 1989, the complainant's rejoinder of 2 May and the ILO's surrejoinder of 19 July 1989;

Considering Articles II, paragraph 1, and VII, paragraph 3, of the Statute of the Tribunal and Articles 3.1.1, 13.2 and 14.8 of the Staff Regulations of the International Labour Office;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Facts material to this case appear in Judgment 832 under A. The General Assembly of the United Nations brought in a new, and lower, scale of pensionable remuneration as from 1 January 1985. Though the Director-General of the International Labour Office applied that scale as from 1 January 1985 to new staff, he froze pensionable remuneration for serving officials at the level it had reached, according to the scale dated October 1984, at 31 December 1984. At its February-March 1985 session the Governing Body of the Office authorised the Director-General to apply the new scale to staff as from 1 April 1985 and the Director-General amended Article 3.1.1 accordingly as from that date.

In her second complaint the complainant applied for recognition of her right to "parallel progression" of her career and her pensionable remuneration. In her rejoinder in that case she made further claims to recalculation of her pension in accordance with the October 1984 scale up to the end of March 1985 or, failing that, to an award of 19,800 Swiss francs in damages. The Tribunal dismissed those further claims in Judgment 960 of 27 June 1989 on the grounds that they were irreceivable, the complainant having failed to exhaust the internal means of redress.

Meanwhile she had lodged with the Director-General, on 25 August 1988, an internal "complaint" under Article 13.2 of the Staff Regulations making the same claims and, having got no final answer, she is now impugning the implied decision to reject them.

B. The complainant submits that since she is seeking the enforcement of Article 3.1.1 of the ILO Staff Regulations the Tribunal is competent under Article II(1) of its Statute to hear her complaint, which is also receivable under VII(3).

She submits that the ILO has failed to abide by the Governing Body's decision to apply the new scale only as from 1 April, and not from 1 January, 1985, and has therefore committed an abuse of authority. Since that scale is less to her advantage than the old one, her yearly pension has been wrongly worked out at 53,100 United States dollars instead of \$53,465, to take the figures she obtained from the Benefits Branch of the Office.

The Organisation's liability is beyond question since the new scale could not be incorporated into the Staff Regulations until the Governing Body had so decided. As Judgment 832 made plain, Article 3.1.1, the provision about pensionable remuneration, is quite independent of the corresponding provisions of the Regulations of the United Nations Joint Staff Pension Fund.

The complainant asks the Tribunal to declare her complaint receivable and order the Organisation to recalculate her retirement pension and pay her the arrears due as from 1 March 1987, the date since which the Fund has paid her that pension, or, failing that, 19,800 Swiss francs in damages. She claims 500 Swiss francs in costs.

C. The Organisation replies that the complaint is not receivable. Article 14.8 of the Staff Regulations says that no claim shall be entertained if submitted after the expiry of twelve months from the date at which the right to make it accrued. The complainant could have made her claim as soon as she got confirmation of the amount of the pension the Fund was to pay her. The Secretary of the ILO Staff Pension Committee gave her preliminary information on 20 February 1987 and she must have got the confirmation some time in April 1987. Like any other staff member she had received in 1985 and 1986 annual statements from the Fund that made it plain that the October 1984 scale of pensionable remuneration applied only up to 31 December 1984 and the new one applied as from 1 January 1985; the ILO Staff Union drew everyone's attention to the matter in its bulletin of 23 July 1986; and a minute the complainant wrote on 2 March 1987 to the Benefits Branch asking what her pension would have been if the scale of pensionable remuneration in force in December 1984 had continued to apply to her seems to bear out that she knew of the problem at the time. Her internal "complaint" of 25 August 1988 was therefore out of time.

The ILO realises the difficulty that arises out of the Fund's refusal to take account of the contributions the ILO paid on the strength of the scale in force from January to March 1985. Though it acknowledges its duty to give effect to 3.1.1 as then in force, it points out that there is no text determining just what its duty is under that article. In particular there is no provision that says what it must do with any contributions levied over and above the amounts due to the Fund. It is therefore under no duty to do as the complainant asks and apply the Fund Regulations to her additional contributions. That expedient would be unfair since the only staff members to gain would be the few who retired at the right time.

What the ILO proposes to do, after holding consultations on the subject, is to pay back to everyone who was on the staff in the first quarter of 1985 the full amount of additional contributions made over to the Fund on their behalf. The complainant would accordingly be paid 986.65 Swiss francs. There is no text that entitles her to any additional amount in pension. As for lump-sum compensation, the proper method of reckoning is the one the Fund applies, and the amount comes to 11,592.33 Swiss francs.

The Organisation concludes that the complaint is irreceivable and, subsidiarily, that its liability towards the complainant is confined to refund of 986.65 Swiss francs.

D. In her rejoinder the complainant submits that her internal "complaint" was not out of time since the time limit starts only when the staff member can have no further doubt about the substance of the decision he wants to challenge. In this case the decision was not obvious from the information she got in February and March 1987 about the amount of her pension, and the ILO concealed it to boot. The annual statement she got from the Fund did not worry her in 1985, despite the Staff Union's bulletin, because she did not then know that she would be taking early retirement. As for the statement for 1986, she never got it. The minute she wrote on 2 March 1987 to the Benefits Branch is irrelevant to this case. The ILO can scarcely believe that she would not have reacted on becoming aware of the position. Besides, the time bar is no obstacle: a right does not lapse just because it has not been respected, and she suffers wrong every time she is paid her pension.

Contrary to what the ILO says, there is no doubt about the substance of its duty under the Staff Regulations. The Governing Body having decided that for the period from January to March 1985 the scale would continue to be the one dated October 1984, the mere refund of the additional contributions would neither discharge the ILO's liability nor give effect to the Governing Body's decision. If the Fund fails to pay her an additional pension it is the ILO's duty to do so, wherever the money may come from. As to the actual amount, she abides by the figures in her complaint.

E. In its surrejoinder the Organisation contends that the time limit would be too elastic if, as the complainant argues, it began only when there could be no doubt about the content of the decision. In any event, when she got formal notice of the amount of her pension she had the annual statement of her Fund contributions for 1985, which plainly showed that the amount of her pensionable remuneration for the first quarter of 1985 corresponded to the new scale, not to the one of October 1984. Her argument that each monthly payment of pension sets off a new time limit is also unsound since what she is really challenging is the amount, not of her monthly pension, but of the pensionable remuneration taken to work it out.

#### CONSIDERATIONS:

1. The complainant, who was a grade D.1 official of the International Labour Office, applied for and was granted early retirement at 1 March 1987. She and the ILO disagreed over the figures to be applied in reckoning her

pension and she lodged a complaint with the Tribunal, which dismissed it in Judgment 960 of 27 June 1989. The judgment reserved, under 8, a claim arising out of the level of pensionable remuneration at which she had contributed from 1 January to 31 March 1985: the Tribunal held that she had not exhausted the internal means of redress and might not enlarge the scope of her original claims to cover that issue.

2. In an internal "complaint" she addressed to the Director-General of the Office on 25 August 1988 the complainant claimed additional pension in redress for breach, from 1 January to 31 March 1985, of the provisions of Article 3.1.1 of the Staff Regulations as in force at the time. The ILO having taken no decision on the claim, she may, under the Tribunal's Statute, lodge this complaint and, as the Organisation acknowledges, she has respected the time limit for doing so.

3. There have been several judgments about pensionable remuneration. One in particular, No. 832 of 5 June 1987 (in re Ayoub et al.), observed that Article 3.1.1 of the Staff Regulations prescribed pensionable remuneration for ILO staff and held that it was an independent provision with "a force of its own" which did not reproduce word for word the corresponding provision of the Fund Regulations.

The complaint arises out of a discrepancy between the Fund Regulations and the ILO Staff Regulations. Whereas the Fund brought in a new scale of pensionable remuneration at 1 January 1985, the amendment of Article 3.1.1 did not come into force until 1 April 1985.

The Fund worked out the complainant's pension by its own methods and the ILO failed in attempts to get the Fund to change its reckoning of the amount.

4. The Organisation contends that the complaint is out of time. It cites Article 14.8 of the Staff Regulations, which reads:

"Except where these Regulations otherwise provide, no claim under them shall be entertained if it is submitted after the expiry of 12 months from the date on which the right to bring it forward accrued to the person concerned."

The ILO cites several facts which in its submission show that the complainant knew by April 1987 of the effect of the Fund's refusal to change its stand, and it argues that the time limit of twelve months in Article 14.8 had run out by 25 August 1988, when she lodged her internal "complaint".

The issue is the more difficult because there are two authorities competent in the matter of pensions: while the Fund has consistently and adamantly refused to apply 3.1.1 as in force at the material time, the ILO has sought means of complying with its own rules.

It is quite plain on the evidence that the ILO staff at large must have known of the predicament. The Fund sent its participants statements in 1985 and 1986, and the Staff Union drew the staff's attention to them in its bulletin for July 1986.

For two reasons, however, those statements have no effect in law. The main one is that the listing of figures without comment cannot be treated as repeal of an explicit provision of the Staff Regulations, and the other is that the statements came not from the ILO but from an outside body.

For the reasons it set out in Judgment 960 the Tribunal will also discount the information dated 20 February 1987 from the Secretary of the ILO Staff Pension Committee about the complainant's pension benefits.

A more cogent case may be based on the minute she sent the Benefits Branch of the ILO on 2 March asking what her pension would have come to had the scale of pensionable remuneration in force in December 1984 continued to apply to her. As a matter of fact the meaning of her question is not clear: was she referring to the change in the scale or merely to the period from 1 January to 31 March 1985?

The Staff Regulations contained an explicit provision which determined the rights of staff. Whatever doubts the Fund's attitude may have raised about how to apply it, the staff were not told of any valid ILO decision not to abide by the Staff Regulations. Moreover, although the head of the Benefits Branch gave the complainant official notice in a letter of 14 April 1988 of the Fund's rejection of her claim, he did leave her some cause for hope since he added that consultations were going on about how to settle the matter.

There is no evidence before the Tribunal of any ILO decision refusing to apply Article 3.1.1.

The Organisation is therefore mistaken in contending that the complaint is time-barred and irreceivable.

5. As to the merits, the ILO is undoubtedly bound, as indeed it acknowledges, by the provisions of the Staff Regulations so long as they remain in force and is therefore liable towards the complainant for the breach of them. That its difficulty is due to the stand taken by the Fund cannot alter its liability as employer towards its staff.

The complainant being entitled to damages for material injury, the only real issue is the amount, which must offset the loss.

6. In the ILO's view the fairest solution for the staff concerned is to pay them back in full the amount of the additional contributions wrongly levied in the first quarter of 1985, and the sum it accordingly offers the complainant comes to 986.65 Swiss francs.

That expedient, besides being straightforward, may have the further advantage of putting on a par everyone who was on the staff in the first quarter of 1985. But it is not admissible in law. To allow it would be tantamount to declaring inapplicable a provision of the Staff Regulations that the Organisation had adopted by virtue of the authority vested in it and that was quite lawful. Suffice it to say that the Tribunal rejects the Organisation's solution, which is prompted merely by a desire to make savings.

Having put the scale of pensionable remuneration into its own Staff Regulations, the ILO has a duty to ensure the payment of the corresponding benefits. The sole purpose of pensionable remuneration is the reckoning of the pension, and if the pension discounts the scale in the Staff Regulations because the Organisation has entrusted the matter to another body, the ILO must make good the loss to its staff, who are entitled to have the Regulations applied. Any difference of opinion there may be between the ILO and the Fund is of no concern to the staff.

7. That the complainant has sustained injury is beyond question: it is equivalent to the difference between the amount of the pension she would have got had 3.1.1 been duly applied from 1 January to 31 March 1985 and the amount of the pension she has actually been paid.

8. What, then, is the amount of the damages due to her? Her principal claim is to the recalculation of her pension and to payment of arrears as from the date of her retirement at the rate of exchange applicable to her pension in Swiss francs.

But the Tribunal may not order any increase in her pension in redress for the breach of the Regulations since the body that determines the pension is outside its jurisdiction.

9. The complainant makes a subsidiary claim to an award of damages in the amount of 19,800 Swiss francs, the sum she says corresponds to the capitalisation of her reduction in pension.

The ILO challenges her calculations on some points.

The Tribunal is not bound by the parties' submissions on such matters but may declare whatever method it believes to be the fairest form of compensation for the injury sustained according to the circumstances of the case.

In this case it holds that the complainant is entitled, at the date of each payment of pension by the Fund, to compensation from the ILO in an amount equal to the difference between the pension she was entitled to under the Staff Regulations and the pension she has actually received since 1 March 1987. The sums due in arrears shall bear interest at 10 per cent a year.

10. The complainant claims 500 Swiss francs in costs, and that is the sum the Tribunal awards.

**DECISION:**

For the above reasons.

1. The Director-General's implied decision rejecting the claim the complainant addressed to him on 25 August 1988 is set aside.

2. The ILO shall pay the complainant as from 1 March 1987, at the date of each payment of pension, compensation in an amount equal to the difference between the pension she was entitled to under the Staff Regulations and the amount she has actually received.

3. The arrears shall bear interest at the rate of 10 per cent a year.

4. The ILO shall pay the complainant 500 Swiss francs in costs.

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 January 1990.

(Signed)

Jacques Ducoux  
Mohamed Suffian  
Mella Carroll  
A.B. Gardner