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

EIGHTY-SECOND SESSION

In re Evalet Arsène, Haeberli (No. 2) and Maurer

Judgment 1613

The Administrative Tribunal,

Considering the complaints filed by Miss Chantal Evalet Arsène and Miss Elvira Maurer and the second complaint filed by Mr. Heinz Haeberli against the European Free Trade Association (EFTA) on 15 March 1996, EFTA's reply of 2 July, the complainants' single rejoinder of 16 August and the Association's surrejoinder of 28 October 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The complainants, who are Swiss, used to be established officials of EFTA. Miss Evalet Arsène joined its staff in 1964 and Mr. Haeberli in 1967. They left on 30 June 1995, when it abolished their posts. Miss Maurer, who had been on the staff since 1973, left on 28 February 1995 to take up another job; her post too was to be abolished on 30 June 1995.

When it recruited them EFTA had no pension scheme but a Provident Fund, which they joined. They were also contributing to the Swiss national scheme for old-age and survivors' pensions known as the AVS (*Assurance vieillesse survivants*) and EFTA matched their contributions with its own. In 1980 it introduced a "Staff Insurance Scheme" (SIS) with effect from 1 July 1977. Under that scheme the staff were free to choose between a Pension Fund and a Savings Fund if they did not want all their assets in the Provident Fund to move automatically to the Pension Fund. The complainants chose the Savings Fund. They and the Association continued to make payments to the AVS.

In 1989 the Association reformed the Pension Fund and told the complainants that it would stop making payments to the AVS for them. They then chose to leave the AVS and join the reformed Pension Fund as from 1 January 1989. To qualify for a pension under the Fund required ten years' contributions. Participation carried the right to cover under a group health insurance policy.

Several countries having withdrawn from membership, EFTA dissolved the Pension Fund on 30 June 1995 and a private Swiss insurance company took over its assets and liabilities.

By a single memorandum of 10 February 1995 the complainants had asked the Secretary-General for leave to buy at the rate of 21.3 per cent of the "reference salary" the further three-and-a-half years' membership in the Fund which each of them needed to make up the ten and so qualify for a pension. In letters of 30 June 1995 the chairman of the Management Board of the SIS offered them validation of the three-and-a-half year periods in return for payments to be reckoned at a much higher rate. The complainants refused and by letters of 12 December 1995 appealed to the Secretary-General.

In letters of 19 December 1995, the decisions they impugn, the Deputy Secretary-General, who had also been chairman of the Management Board told them that his letters of 30 June had conveyed "the official position of the Secretary-General" and that appeal lay to the Tribunal under Staff Regula-tion 41(b).

B. The complainants submit that the impugned decisions are unlawful. The offers in the chairman's letters were *ultra vires* and had no basis in law. When revising the Pension Fund in 1989 EFTA gave rise to legitimate expectation that the Fund would last for at least ten years. There has been breach of equal treatment inasmuch as

EFTA let other officials validate periods of membership at better rates.

The complainants want the Tribunal to order EFTA to let each of them validate another three-and-a-half years' membership of the former Pension Fund by making payments to be reckoned at the rate of 21.3 per cent of final "reference salary" and transfer those sums to the Fund's successor, *Rentes genevoises*, so as to secure the pension rights deriving under the former Staff Insurance Scheme from ten years' membership. They claim costs.

C. EFTA replies that the complaints are irreceivable because the complainants have failed to exhaust the internal remedies set out in the Regulations of the Staff Insurance Scheme. It challenges their *locus standi* on the grounds that acceptance of the "transfer value" of their entitlements has deprived them of the status of beneficiaries of the Pension Fund, who also enjoy the right of appeal.

In subsidiary argument, the Association submits that the complaints are devoid of merit. It complied in full with the Regulations. There was nothing in its original offer of membership to suggest that the Fund would survive for at least ten years or indeed that the complainants would be on its staff that long. It denies breach of equal treatment: the officials they mention are not in like case.

D. In their rejoinder the complainants rebut various points of fact and law in the reply and press their claims.

E. In its surrejoinder EFTA says the complainants have not put forward any new arguments in law. Because they have produced with their rejoinder a "restricted" document about the rules of procedure of the Management Board of the SIS, it asks the Tribunal to sanction such "intentional abuse of process".

CONSIDERATIONS

1. The complainants, who are Swiss, were officials of the European Free Trade Association (EFTA) until 1995, when they left. The decisions they are impugning are those that the Secretary-General took on 19 December 1995 confirming earlier ones, of 30 June 1995, that allowed them to purchase the three-and-a-half further years' membership of the Association's former Pension Fund that they each needed to qualify for the grant of minimum pensions. The dispute is not about their right to validate, which EFTA thus concedes, but about the cost of validation. The Administration argues that they should pay the "real cost", whereas they say they should pay no more than the equivalent of 21.3 per cent of final "reference salary", that being the rate to which they are entitled under Article 13(2) of the Regulations of the old Staff Insurance Scheme (SIS).

2. An account of the changes EFTA made in its pension scheme over the years will shed light on the material issues. Until 1977 it had no pension fund at all. Instead it offered a savings scheme under which its staff might contribute to a Provident Fund; staff members of Swiss nationality paid a share into the Swiss scheme for old-age and survivors' pensions known as AVS and the Association contributed equal amounts on their behalf. In 1977 it set up a Pension Fund and a Savings Fund and invited its staff to opt for one or the other. In the knowledge that they would be getting old-age pensions from the AVS the complainants opted for the Savings Fund.

3. Further reforms came into effect at 1 January 1989. EFTA then invited its staff to choose between the Savings Fund and the Pension Fund. This time it said it would stop paying half the contributions to the AVS, and the pressure on the complainants grew so great that they chose to leave the AVS and joined the Pension Fund as from 1 January 1989. They declined, however, to validate past periods of membership, which would have required them to transfer some of their holdings from the Savings Fund. The complainants duly contributed for six-and-a-half years to the Pension Fund which ceased to exist at 30 June 1995. At that date the Association abolished several posts in the context of reforms required by the withdrawal of three member States to join the European Union. It then ended the complainants' and other appointments and wound up the Pension Fund. A Swiss company known as "*Rentes genevoises*" took over the Fund's assets and liabilities. That left the complainants with no pension entitlements at all since only someone who had been contributing to the Fund for at least ten years qualified for a pension. So on 10 February 1995 they applied for their right to buy the further three-and-a-half years' membership they needed to qualify. By letters of 30 June 1995 the chairman of the Management Board of the SIS told them that, though they could not go back on the choice they had made in 1989 not to validate earlier periods of membership, the Board was willing if need be to waive any time limit to let them validate if they so wished, but only at "real cost"; there was no longer any question of validation at the rate of 21.3 per cent of "reference salary".

4. Two of the complainants, Miss Evalet Arsène and Mr. Haeberli, answered on 5 July 1995 that they were

declining that offer. They then applied for transfer to their own accounts of the lump sums due from the Fund under Article 18(2) of the Regulations of the SIS. Miss Maurer too turned the offer down in letters dated 3 and 20 July 1995. She had already in March 1995 been paid the sums due to her.

5. The complainants wrote letters to the Association on 12 December 1995 asking what had become of their claims. The answer came in letters dated 19 December 1995 which confirmed the Secretary-General's official position as notified in the letters of 30 June 1995. In answer to an earlier letter Mr. Haeberli was also told that the Association had been unable to set up the Advisory Board provided for in the Staff Regulations and that appeal would therefore lie to the Tribunal under Staff Regulation 41(b). The complainants came to the Tribunal on 15 March 1996.

6. In its reply the Association demurs at joinder but in its surrejoinder it agrees. The cases are joined to form the subject of a single judgment.

7. EFTA raises cogent objections to receivability. It contends that the complainants should, under Article 10 of the SIS Regulations, have appealed against the Management Board's decision of 30 June 1995; that such appeal lay either to the Secretary-General within ninety days or to the Board itself; but that the complainants, who chose appeal to the Secretary-General, waited until 12 December 1995, 165 days after they had had notice of the Board's decision.

8. For one thing, EFTA itself admits to mistakes in the numbering of the provisions to which Article 10(1) of the Regulations refers, and they may well have misled the complainants. For another, the Association set up no Advisory Board, though Staff Regulation 40 provided for one. Yet the complainants were entitled to expect referral to the Advisory Board of their refusal to accept what they thought an unfair offer. And thirdly, the Deputy Secretary-General himself told them in the decisions of 19 December 1995 that in the absence of a recommendation from the Advisory Board they might go to the Tribunal. All things considered, the complaints must be declared receivable.

9. They also succeed on the merits.

10. Article 13 of the Regulations of the SIS lays down the terms on which members of the Pension Fund may, with the Management Board's consent, validate further periods of membership. Although they are required as a rule to apply within one year of getting a permanent appointment, the last sentence of 13(1) empowers the Board to grant exceptional consent thereafter to such an application and "fix the conditions of its acceptance".

11. EFTA admits to having applied that provision to officials who had permanent appointments in 1989 and who did not therefore fill the applicable conditions. On that score it says that the provisions of Articles 36 and 36bis of the SIS Regulations, which set a time limit of one year for exercising the option of validation, preclude offering that option thereafter.

There is some force to the plea. Yet what it overlooks is that Article 13 is quite unrestricted in scope and indeed it was, as the defendant acknowledges, by so construing the text that it felt able to accept, on certain terms, the complainants' claims to validation.

12. Was the competent authority free, on the strength of the last sentence of 13(1), to lay down conditions as to the cost of validation otherwise than as prescribed in 13(2)? Article 13(2) reads:

"The cost of purchasing added periods of membership in accordance with the provisions of paragraph 1 shall be calculated on the basis of the member's reference salary (Article 15) at the time his application is made."

It sets at 21.3 the percentage of reference salary. Since 13(2) refers back to the whole of 13(1) without distinguishing between ordinary and exceptional validation, the conclusion must be that the cost is invariable and consent to validation may not be made to depend on the acceptance of other terms. Once the Management Board had conveyed through its chairman its "exceptional" consent to the complainants' claims, it had no grounds in law for setting the cost of validation otherwise than as stipulated in 13(2).

13. There is no need to entertain any of the complainants' other pleas or their application for the disclosure of evidence. The Tribunal will set aside the Secretary-General's decisions of 19 December 1995 confirming the decisions of 30 June 1995 by the chairman of the Management Board of the SIS and refer the case to the Association for new decisions on the complainants' claims. It may not itself take the decisions that the complainants

want, which fall within the competence of EFTA bodies. It therefore disallows their claims to an order that EFTA let them validate "at the price of 21.3%" of the reference salary and "transfer these amounts to the Rentes Genevoises".

14. The Association has sent the Tribunal in a sealed envelope the full text of a document of which part is produced as an annex to its reply and invites the Tribunal to decide whether to let the complainants see it. As a rule any item disclosed by one of the parties to judicial proceedings in support of its case must go to the other. But in the circumstances the text produced by counsel for the Association is immaterial. So it is simply disregarded and is to be returned to the Association.

15. The complainants are entitled to a total award of 10,000 Swiss francs in costs.

DECISION

For the above reasons,

1. The decisions of 19 December 1995 by the Secretary-General of EFTA are set aside.

2. The cases are referred to the Association for new decisions on the complainants' claims.

3. The Association shall pay them a total of 10,000 Swiss francs in costs.

4. Their other claims are dismissed.

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

Delivered in public in Geneva on 30 January 1997.

(Signed)

William Douglas
Michel Gentot
Mella Carroll
A.B. Gardner

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