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

FORTY-FIFTH ORDINARY SESSION

In re GUBIN and NEMO

Judgment No. 429

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints brought against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 11 April 1978 by Mrs. Irène Gubin and Mr. Jean Nemo, the Organisation's single reply of 19 July, the complainants' rejoinders of 15 September, the Organisation's surrejoinder of 18 January 1979, the complainants' further memoranda of 6 March and the Organisation's reply thereto of 23 May 1979;

Considering that the two complaints relate to the same matters and should be joined to form the subject of a single decision;

Considering the applications to intervene filed by:

Josephus Aelbrecht,
Daniel Aelvoet,
Pierre Agre,
Johannes Andriese,
Bouisa Aridjis,
Jean-Charles Bayoud,
Rita Beeckmans,
Siegfried Beil,
David Bell,
Georges Benoit,
Jörg Beyer,
Michel Biardeau,
Wulf Bodenstein,
Hans Bolz,
Juliette Bralet,
Willy Brohe,
Alfons Bruyneel,
Franeoise Caloo,
Frederik Carson,
Alfred Cartledge,
Bernard Cassaignau,
Mia Cassiers,
Norbert Cavel,
René Charpantier,
June Charon,
Michèle Chauvet,
Jean-Pierre Claes,
Gilbert Coatleven,
Bérénice Coosemans,
Maurice Cox,
August Cuveliers,
Joan Dalrymple,
William D'Arcy,
Pierre David,
Victor Day,
Jacques Decarnière,
Marcel De Becker,

Irène De Greef-Goossens,
Pierre De Groote,
Josiane De Keukelaere-Meyer,
Hugo De Maeyer,
Willem De Nies,
Jacques Depoorter,
Irène De Riemaeker,
Jacqueline Derozier,
Yvette Desailly,
Félix Destrijker,
Hubert Devry,
Jean Doignies,
Jacques Douplat,
Eckehard Dubiel,
Françoise Dufier,
Werner Dufraimont,
Francis Dupont,
Paul Durasse,
Chantal Duwe,
Ulrich Eckert,
Mireille Engels,
Roger Engels,
Hans Exner,
Françoise Faurens,
Michelinne Feyder,
Johannes Fiers,
François Filippi,
Jean-Louis Flament,
Jean-Pierre Florent,
Annick Fossion,
Guy Gabas,
Martine Gérard,
Marie-Thérèse Gilles,
René Gillis,
Johannes Glaesmaekers,
Jeanine Goyens,
Emile Guilbert,
Guy Harel,
Christiane Havet,
Hölger Herbert,
Els Hörig,
François Jadoul,
Eliane Jamez,
René Janssens,
Pierre-Olivier Jeannet,
Richard Jenyns,
Robert Johnson,
Keith Johnston,
Michel Jordens,
Sean Kelleher,
Théobald Knauss,
Cornelis Kraaij,
Josephus Kuijken,
Michael Kuijpers,
Gerard Lambert,
Nicole Lamard,
Pierre Lascar,

Gerhard Lauter,
Claude Leclerc,
André Lemaire,
Brigitte Lepas,
Linda Lievens,
Pierre Maes,
Josée Mager,
Rosalind Maloney,
Danielle Mauge,
Humphrey Marriott,
Brian Martin,
Willem Mesman,
Silvain Meurisse,
Eike Meyenberg,
Marie-Anne Minner,
François Moitier,
Henry More,
Eric Morgan,
Anne Mounier,
Christine Naylor,
Raymond Nesse,
Anne-Marie Nieuweling,
Christiane Nihoul,
Karl Pawlicz,
Marie-Magdeleine Pesty,
Amédée Philippart,
Pierre Philips,
Jean-Marie Pillard,
Jean-Paul Prochasson,
Malcolm Prosser,
Jean-Marie Purnelle,
Lucie Rabozée,
Marie-Claude Ragot,
Pierre Reisch,
Jean Richer,
Jean-Marie Rigolle,
Albert Ritchie,
Georges Riu,
Rita Rommelaere,
Françoise Roth,
Emile Rousée,
Barry Runacres,
Alain Rutherford,
Alexander Rutherford,
Christian Saey,
Robert Schaeffer,
Jan Schiettekatte,
Hugo Schmid,
René Schmitz,
Nicole Sebti,
Peter Seidel,
Hervé Simon,
Malcolm Simpson,
Alfred Smith,
Jan Storms,
Reginald Strauch,
Benedictus Stultiens,

Antoine Sunnen,
Sipke Swierstra,
Anthony Talboom,
Albert Taylor,
Adolf Tiarks,
Jean Timmermans,
Roger Thacker,
G. Thorel,
Corinne Tovy,
Emile Van Asbroeck,
Pauline Van Berckel,
Georges Van Campenhout,
Raymonde Van Cauwelaert,
Guillaume Van den Balck,
Christian Vandenberghe,
Joséphine Van den Broeck-Geeroms,
Alfons Van den Broeck,
Pieter Van der Kraan,
André Van Der Vekene,
Hendricus Van de Vorst,
H. Van Everdingen,
Jocelyne Vanelven,
Myriam Van Hemelrijck,
Bernard Valdenaire,
Jacobus Van Raayen,
Jan Van Riemsdijk,
Brigitte Vaury,
Jean-Bouis Verhauwaert
Josephus Verlinden,
Yvan Viroux,
Jacobus Wartenhorst,
Donald Waters,
Nicole Weil,
Maximilian Wildner,
Ralph Williams,
Armand Xhonneux,
Rose-Marie Xhrouet;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 14(2) of Appendix I to the International Convention relating to Co-operation for the Safety of Air Navigation, Articles 17, 19, 65 and 83 of the Eurocontrol Staff Regulations and Circulars No. 44/77 of 15 June 1977 and No. 54/78 of 20 July 1978;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. By Circular No. 44/77 of 15 June 1977 the staff of the Eurocontrol Agency were informed that the Permanent Commission for the Safety of Air Navigation had amended the Staff Regulations to increase the amount of staff members' contributions to the Pension Fund from 6.75 to 8 per cent of basic salary. No corresponding increase was made in the Organisation's contribution, which continued to be equivalent to 13.5 per cent. On being paid their salary for July 1977 the complainants found that because of the amendment to the Staff Regulations it was lower than their salary for June. On 13 September 1977 they submitted a claim to the Director General asking that with effect from July 1977 their salary should be restored to the figure for June 1977.That claim was dismissed on 7 February 1978.

B. The complainants contend: (1) The Permanent Commission's decision offends against the principle set out in Article 83(2) of the Staff Regulations whereby contributions to the Pension Fund are allocated in the ratio of one-

third for staff members and two-thirds for the Organisation. In breach of Article 83(3), moreover, the decision failed to refer to any actuarial assessment of the pension scheme. (2) The Permanent Commission misconstrued the facts by basing its decision on the false premise that the staff had not borne a large enough share of the increase in contributions due to the incorporation of cost-of-living adjustments into basic salary. Since 1964 salaries have been subject to weighting calculated to make allowance for changes in the cost of living. When the cost of living rises, there are alternative possibilities: either the basic salary scale is adjusted or else the weighting factor is increased. In the former case the amount of pension contributions increases in the same proportion as basic salary, in the latter case it does not change at all. For several years the preferred policy was to increase the weighting factor, and the result was that the amount of pension contributions lagged further and further behind actual remuneration. To correct the disparity, from January 1977 cost-of-living adjustments were incorporated into basic salary and the weighting factor was brought down to 100. According to calculations then made the position became exactly the same as if previous yearly adjustments had come from an increase in basic salary and not from application of the weighting factor. The complainants therefore maintain that staff members have borne their fair share of the increase in pension contributions. Since they have already borne the increase in contributions due to the incorporation of cost-of-living adjustments, it is a mistake to require them to contribute a higher percentage of their basic salary. (3) The decision constitutes a breach of acquired rights. The complainants contend that the rule whereby staff members pay one-third of the pension contributions and Eurocontrol two-thirds is one of the factors of which were of decisive importance to them when they accepted appointment. That rule is almost universal. The experts of the Committee of Management of the Pension Fund recommend abiding by the rule, and a draft scheme now under study for the budgetary financing of pensions formally prescribes allocation of costs in the ratio of one to two between staff members and Organisation. The rule is therefore one of the basic components of the structure of the contract of appointment.

C. In their claims for relief the complainants ask the Tribunal (1) to quash the decision not to restore their net salary to what it was before the unlawful increase in their pension contributions, (2) to order Eurocontrol not to increase the amount of their contributions unilaterally, and to pay them the same amount of salary as before; and (3) to award them costs.

D. In its reply Eurocontrol observes that the impugned decision was not a single measure, but one of several which created really new obligations in respect of the financing of pensions and are of benefit to the staff. Member States undertake henceforth to pay pensions until the term, even if Eurocontrol is dissolved in 1983. Moreover, the Organisation now guarantees the amount of benefits, whereas formerly, under Article 83(3) of the Staff Regulations, pensions might have been reduced. The increase in staff members' contributions from 6.75 to 8 per cent of basic salary is a form of consideration for those benefits. In any event the whole system will be reviewed later when a scheme for budgetary financing of pensions is introduced. The Organisation believes that the measures are fair: they have not meant any cut in salary, but only a slight reduction in income, and they were made necessary by the actual deficit due to the omission to incorporate cost-of-living adjustments into basic salary. The Organisation adds that the complainants have committed a breach of Articles 17 and 19 of the Staff Regulations by appending confidential documents to their complaints, and it asks the Tribunal to order that those documents be withdrawn. As to the receivability of the complaints, it argues that the second claim for relief - for an order forbidding any unilateral increase in staff contributions - is irreceivable because it did not form part of the internal appeal to the Director-General. Even if the ratio of one to two were observed, there would still be a reduction in the net remuneration of the staff, and so, if the second claim were met, the Organisation would itself have to pay the increase in pension contributions deducted from remuneration. As to the merits, it argues that the complainants' allegations of mistakes of law and of fact are immaterial: the decision to amend Article 83 was taken by the Permanent Commission, and the Commission's authority "is not subject to the restrictions set on subordinate bodies which are bound to respect the Staff Regulations and Staff Rules and whose decisions are, in that respect, subject to review by the Tribunal". Besides, for the reasons given above, the second claim for relief is irreceivable. The Organisation nevertheless puts forward subsidiary arguments on the merits. It contends that the ratio of one to two was not laid down as a matter of principle in the old text of Article 83, but was simply to be referred from paragraph (2) thereof and was not then referred back to in paragraph (3).[(1)]

The impugned decision was approved in accordance with the prescribed procedure in the form of an amendment to paragraph (2) unanimously adopted by the Permanent Commission. Nor was there any mistake of fact: the increase in staff members' contributions serves the purpose, which is to redress the balance of the Pension Fund. Subsidiarily, the Organisation argues that the cost-of-living adjustments formerly made by applying the weighting factor cannot be retroactively incorporated in basic salary, and so staff members' contributions were indeed too

low. The purpose of increasing the rate of contribution by 1.25 per cent was to bring them up to the right level. As for the argument based on the notion of acquired rights, it is irreceivable because the question of the ratio was not raised in the internal appeal to the Director-General. Subsidiarily, the Organisation argues that the complainants have no acquired right. "To allow every staff member an acquired right to the continuance of the rules in force at the date of his appointment would mean having as many different sets of rules and regulations as there are staff members appointed at different dates". Besides, it would not be in the staff members' own interests to preclude amendment of the staff rules, particularly on the subject of pensions, because benefits are improved and the methods of financing them have to be adapted accordingly. In any event, the principle of acquired rights has no bearing on this case. The old text of Article 83 contained a warning to the complainants at the time when they were appointed that if the scheme went into deficit the most drastic measures might be taken such as increasing the rate of contribution or raising the age of retirement. Lastly, it is in no way to the detriment of the staff that the Organisation's contribution is kept at 13.5 per cent. The Organisation has assumed new obligations and now guarantees the payment of pensions. It may therefore, if it wishes, postpone part of its contribution towards

Financing the pensions until they fall due.

E. In their rejoinder the complainants challenge the contention that the impugned decision was one of several measures. There was no coherent set of logically connected measures, merely a number of decisions which coincided. Thus the decision of principle whereby member States were to guarantee the payment of pensions had been taken by the Permanent Commission earlier, at its 45th Session. The complainants also disagree that the reform has laid new obligations on the Organisation. Contrary to what the Organisation contends, the old text of Article 83 did not provide for any deduction in benefits, and the guarantee by member States contained in the new text is no more than express sanction of an obligation which was formerly implied. The complainants believe that they have demonstrated two points: (a) There is no causal link between the impugned decision and the decisions relating to the guarantee of pension benefits. To be specific, the former is not consideration for the latter. (b) The guarantee in the new text of Article 33 creates no new obligations such as would require consideration, but is merely an explicit statement of obligations by which member States were bound in any event. As for the Organisation's application for the withdrawal of appended documents, the complainants formally object to it on the grounds that such withdrawal would infringe the principle of equality of the parties before the court. As to the receivability of their second claim they refer to paragraph 4 of the text of the internal appeal which they submitted on 13 September 1977 to the Director-General. That paragraph stated that the impugned decision rested on false reasoning and that the appointment between employer's and employee's contributions had been upset. The purpose of the complainants' second claim is not to get the Organisation's rate of contribution increased but to ensure that their own contribution is not increased unless the Organisation's is. When correctly construed, their claim is not a new one, and it is therefore receivable. As to the merits, they point out that they have challenged the lawfulness of the amendment under the Staff Regulations themselves, not by any external criterion. The Staff Regulations provide that the Organisation may change the rate of contribution only if an actuarial assessment of the scheme has been carried out. In fact that assessment had not yet been completed, and so the decision was based on misinterpretation of the facts and had no connection with the actuarial position of the scheme. Staff members are in danger of having their share of the contributions constantly increased in future until they alone are financing the Fund. The complainants wish to be paid the same net salary as before on the grounds that the decision which led to its reduction is unfair and unsound. Had the intention underlying the old text of Article 83 been that the rate of contribution of one party might be increased or reduced irrespective of the rate of contribution of the other, paragraph (3) would undoubtedly have said so. The statement in that paragraph that the rate of contribution might be modified quite clearly meant that both the employer's and the employee's contributions were to be modified. The complainants take exception to any suggestion that the staff had not borne a fair share of the additional cost of incorporating cost-of-living adjustments into basic salary: since the obligations were divided in the ratio of one to two the total additional cost ought to have been divided in the same ratio. It is quite wrong to put the whole burden on the staff, no less because they bear no blame for the delay in incorporating the cost-of-living adjustments into basic salary, which worked to their own detriment. The complainants do not accept the Organisation's reasoning on the subject of acquired rights. The notion is so firmly entrenched in the public service that when an amendment is made in Staff Regulations or in any provision of Staff Regulations the general rule is to adopt transitional measures or even special provisions to preserve benefits enjoyed by staff members under the previous provisions until their rights are extinguished. The breach of that rule affords scope for all sorts of abuses. The staff had therefore acquired a right to the continued application of the same ratio of contributions, and the guarantee of benefits cannot on any account discharge the Organisation of its duty to contribute to the Fund. It ill becomes the Organisation to argue that on the grounds of an assumption of "new obligations" and a "guarantee", it may shed all its own liabilities and actually impose new ones on the staff.

F. In its surrejoinder the Organisation maintains that the important point - and one which it observes that the complainants do not contest - is that the incorporation of cost-of-living adjustments into basic salary has no retroactive effect. Hence no contribution to the scheme will ever be levied on that part of the complainants' remuneration which formerly consisted of such adjustments. That was why there had to be a unilateral increase in the rate of staff members' contributions. Had the impugned decision been an isolated measure, the Permanent

Commission could have approved it by a majority vote. In fact, what was applied was the rule of unanimity, and that is the rule which governs amendments to the Staff Regulations. In other words, the decision forms part of a set of measures which introduced radically new obligations in respect of the financing of pensions and did not just sanction an implied guarantee. The Organisation has never argued that the increase in the rate of staff members' contributions was consideration for the guarantee of pension benefits: it was necessary because of a large actuarial deficit in the Pension Fund. The Organisation abides by its contention that the second claim for relief is irreceivable. In their internal appeal the complainants claimed entitlement to a particular amount of remuneration and accordingly asked to be paid "the same salary as before, irrespective of the rate of their contribution to the Pension Fund". It is only in their rejoinder that they add the phrase "irrespective of their contribution to the Pension Fund, which they consider it unlawful to increase unilaterally". In other words, it is in their rejoinder that for the first time the complainants contend that the increase in the rate of their contribution was unlawful. As to the merits, the Organisation observes that the decision was taken by a deliberative body whose actions are not subject to review by the Tribunal. According to the Tribunal's case law, the disturbance of the structure of the contract is at the core of any breach of acquired rights, but there was no such disturbance in this case. What is meant is impairment of the benefits enjoyed under the contract of appointment, but what happened in this case is that, the Organisation having assumed new obligations with regard to the guarantee of benefits and the financing of the Pension Fund, the reforms have greatly increased its liabilities towards the staff. In conclusion, the Organisation maintains that the documents appended to the complaints should be withdrawn, that the second claim for relief is irreceivable, that the other claims should be dismissed, and that costs should be awarded against the complainants.

G. Two tables are appended to the Organisations' surrejoinder. One, contained in Appendix II, bears the title "Incorporation of the weighting factor into basic salary". The other, contained in Appendix III, is entitled "Contributions not levied for the Pension Fund on that part of salary which consisted of cost-of-living adjustments: the case of Mr. Nemo". In a further memorandum the complainants seek to show that Appendix II is misconceived and tendentious. Their entitlements to remuneration have indeed been reduced since 1 July 1977 solely because of the increase in the rate of their contribution to the Pension Fund. They therefore ask the Tribunal, in construing Appendix II and the directly or indirectly relevant passages of the memorandum, to bear in mind the corrections and explanations in their further memorandum. In a reply to that memorandum the Organisation says that Appendix II has little bearing on the case and that the figures given by the complainants in their further memorandum actually tend to bear out the Organisation's own contentions. The figures in Appendix II and the conclusions which it drew from them are correct. It therefore asks the Tribunal to reject the conclusions of the complainants' further memorandum.

CONSIDERATIONS:

I. PROCEDURAL MATTERS

Receivability

1. The complainants' second claim for relief is for the Tribunal to order Eurocontrol "not to increase the amount of their contribution unilaterally, and to pay them the same amount of salary as before". The Agency retorts that the claim did not form part of the internal appeals and is therefore irreceivable.

The requirement that the internal means of redress should have been exhausted means that a complaint will be irreeeivable if its scope is wider than that of the claims which were submitted to the internal appeal bodies. There is no need, however, for the pleas submitted to the Tribunal to have been put to those bodies. A complainant does not, merely by developing the ease he put to the internal bodies, alter the scope of review by the Tribunal, which will apply the law proprio motu. The scope of review will alter only if the complainant submits new claims to the Tribunal.

Contrary to what the Agency contends, the complainants' second claim respects the rule that the internal means of

redress must be exhausted. The purpose of their internal appeals was to secure payment of the difference between their former salary at 1 July 1977 and their present salary. In other words, the complainants were unconditionally opposed to the reduction in salary due to the increase in their pension contributions. The purpose of their second claim is to ensure that their pension contributions are not unilaterally increased and that they are therefore paid the same salary as before. They thereby imply that, if the increase in their contributions is not unilateral, they will consent to it, and to the reduction in salary it will bring about. In other words, their opposition to the decision is not unconditional whereas in the internal proceedings it was. Their second claim is therefore narrower than their internal appeals and falls within the scope of those appeals.

The withdrawal of written evidence

2. Under the first paragraph of Article 17 of the Staff Regulations staff members are required to exercise discretion. They shall not, for example, disclose to any unauthorised person any document or information not already made public in any manner whatsoever. Moreover, according to the first paragraph of Article 19 they shall not on any grounds, without permission from the Director-General, disclose in any legal proceedings information of which they have knowledge by reason of their duties. The Director-General will refuse permission, however, only when the Agency's interests so require and such refusal would not entail criminal proceedings against the official.

On the strength of those provisions, which are supplemented by Circular No. 54/78 dated 20 July 1978, the Agency invites the Tribunal to order the withdrawal of several items of evidence which without permission the complainants have appended to their memoranda. The complainants take the view that they have merely exercised one of their rights. The provisions cited above govern the relationship between the Agency and its staff. As the Agency itself concedes, however, they are not binding on the Tribunal since no staff regulations may limit the Tribunal's competence to determine whether written evidence is admissible. The complainants have of their own accord filed evidence which the Agency wishes to have withdrawn, and the Tribunal will deal with the matter in the same way as it would deal with an application for discovery of written evidence which an organisation refuses to disclose. In both cases the Tribunal will decide the matter as it deems fit, with due regard to the interests of both parties - the complainant's interest in having written evidence to support his ease and the interest of the organisation or of third parties in preserving the privileged nature of such evidence.

There are no grounds for ordering the removal of the evidence which the complainants have produced without permission. The Agency is not contending that the filing of the evidence iS detrimental to anyone's interests. It has even appended to its reply a document which is identical to one of those which it wishes to have removed. In the light of the first paragraph of Article 19 of the Staff Regulations it would not have been right to refuse permission which it charges the complainants with having failed to seek. In fact it is objecting to the filing of evidence merely because it wishes to secure compliance with rules which the Tribunal is under no duty to apply and which it will therefore not seek to construe. That is not an adequate reason for seeking the removal of evidence which, although it may have no direct effect or the Tribunal's decision, is undoubtedly material.

II. MERITS

The subject of the dispute

3. On 13 September 1977 the complainants appealed to the Director General claiming payment of the sum by which their salary had been reduced since July 1977. Their first claim is for the quashing of the Director General's implied decision to dismiss their appeals. Their second claim, which is for an injunction against a unilateral increase in their contributions to the Pension Fund, falls within the scope of the internal appeals, as is clear from paragraph 1 above, and therefore also within that of their first claim for relief. The decision they impugn is therefore the decision to dismiss their internal appeals although, presumably by an oversight, they state that the impugned decision was taken on 15 June 1977, the date of Circular No. 44/77.

The only possible grounds for dismissing the appeals are afforded by Article 83(2) of the Staff Regulations. Before the amendments approved by the Permanent Commission for the Safety of Air Navigation on 9 June 1977 Article 83(2) as follows: "The official's contribution shall be equal to 6.75% of his basic salary, leaving out of account the weightings provided for in Article 64. Such contribution shall be deducted monthly from the salary of the official concerned and transferred to the Pension Fund by the Agency which, at the same time, shall pay a contribution equal to twice the amount of the deduction effected". Article 83(2) now reads: "The official's contribution shall be equal to 8% of his basic salary, leaving out of account the weightings provided for in Article 64. Such contribution

shall be deducted monthly from the salary of the official concerned, and transferred to the Pension Fund by the Agency which, at the same time, shall pay a contribution equal to 13.5%". In other words, the effect of the amendments was to increase the official's contribution from 6.75 to 8 per cent but leave the Agency's at 13.5 per cent and so do away with the ratio of one to two between the official's and the Agency's contributions.

While not contending that the decision to dismiss their appeals was in breach of the new text of Article 83(2) S the complainants submit that the provision is unlawful. The real subject of the dispute is therefore the validity of the Permanent Commission's approval of Article 83(2). The complainants' plea on this point is receivable. The right to impugn a decision subsumes the right to challenge the rule on which the decision is founded. But the Tribunal may not exercise as wide a power of review over the rule as over the decision taken under it.

The basis for approval of Article 83(2) of the Staff Regulations

4. The Tribunal will first consider whether in approving Article 83(2) of the Staff Regulations the Permanent Commission acted under Article 14(2) of Appendix I to the International Convention relating to Co-operation for the Safety of Air Navigation or under the first paragraph of Article 83(3) of the Staff Regulations. It does not have the same authority under each of those provisions.

Under Article 14(1) of Appendix I to the Convention the Committee of Management is empowered to draw up the staff regulations, which govern such things as the nationality of personnel, salary scales, disqualifications for office, professional secrecy, continuity of service, authority to report infringements and the accumulation of posts. Article 14(2) requires unanimous approval of the Staff Regulations by the Permanent Commission. In other words, under Article 14(2) there is only one condition of the lawfulness of the Staff Regulations: they must be approved unanimously.

The first paragraph of Article 83(3) of the Staff Regulations reads: "Should an actuarial assessment of the pension scheme, carried out by one or more qualified experts at the request of the Committee of Management, show the contributions to be insufficient to finance the benefits payable under the pension scheme, the competent budgetary authority may, in accordance with the budgetary procedure, modify either the rate of contributions or the retirement age". Under this provision the Permanent Commission will act on an actuarial assessment as the "competent budgetary authority". The so-called "weighted" majority is required and the scope of action is limited to modifying the rate of contributions or the retirement age.

Comparison shows that whereas Article 14(2) of Appendix I to the Convention requires unanimity, Article 83(3) of the Staff Regulations does not; but that Article 83(3) sets conditions which Article 14(2) does not.

5. In their original memoranda the complainants state that in amending the Staff Regulations the Commission acted under Article 14(2). That is correct, as is clear from what follows.

On 9 June 1977, at its 49th Session, the Permanent Commission not only amended the rate of contributions as prescribed in Article 83(2) of the Staff Regulations but took several other decisions: it replaced the second paragraph of Article 83(3) of the Staff Regulations with a provision containing a collective guarantee of the payment of pensions by the States Members of the Organisation; it adapted staff remuneration; it incorporated adjustment weightings in basic salary; and it released credits and made several amendments. In considering the lawfulness of those decisions a distinction must be drawn. Under the first paragraph of Article 83(3) of the Staff Regulations the Committee of Management was empowered merely to revise the rate of contributions. The Permanent Commission, on the contrary, was empowered under Article 14(2) of Appendix I to the Convention either directly or by virtue of Article 65(3) of the Staff Regulations, to decide all matters submitted to it, the revision of the rate of contributions being one of them. According to the minutes of its 49th Session the Permanent Commission approved the adjustment of remuneration (i.e. to cover the increase in the cost of living), the incorporation of adjustment weightings, the release of credits and the amendments "subject to an increase in the staff's contributions to the pension fund". Thus all those decisions were linked together and must have had a single common basis. That basis must have been Article 14(2), the only provision under which all the decisions could have been taken.

Moreover, in "approving" the amendments to Article 83 of the Staff Regulations - to quote Circular No. 44/77 of 15 June 1977 - the Permanent Commission made clear its intention of relying on Article 14(2), that being the provision which requires "approval" of any revision of the Staff Regulations. Had the Commission intended to rely

on Article 83(3), first paragraph in its capacity as the "competent budgetary authority", it would not have followed the "approval" procedure.

Lastly, as the complainants observe, at least one member of the Permanent Commission forbore to state his reservations about the increase in the staff's contributions and instead said that he would agree so that the cost-of-living adjustment could go through. This means that, in the minds of the members of the Permanent Commission, the increase in contributions required the unanimous approval prescribed, not in Article 83(3), first paragraph, but in Article 14(2). The Permanent Commission therefore did indeed act under Article 14(2).

The lawfulness of approval of Article 83(2) of the Staff Regulations

6. As appears from 5 above, the Tribunal will consider the lawfulness of the approval of Article 83(2) of the Staff Regulations inasmuch as the Permanent Commission was acting under Article 14(2) of Appendix I to the Convention. The question differs according to whether the Commission was acting as the supreme Eurocontrol body or as an executive organ. In the former case the Tribunal is bound by the decision. In the latter case it will exercise at least a limited power of review over the decision. In fact there is no need for it to decide in what capacity the Commission was acting. Even if it acted as an executive organ, the Tribunal may not interfere with its decision. The reason - namely that the complaints must be dismissed in any event - is explained below.

7. The complainants do not deny that, as required by Article 14(2), approval was unanimous. It is true that one member of the Permanent Commission abstained, but an abstention is not the same thing as opposition, and only opposition destroys unanimity.

8. In their first plea the complainants raise three objections to the decision of the Permanent Commission. Each of the objections fails. First, they contend that the increase in staff contributions to the Pension Fund was made in disregard of the condition set in Article 83(3), first paragraph, of the Staff Regulations: there had been no actuarial assessment of the pension scheme showing the contributions to be insufficient. The Tribunal need not settle the matter. The Commission was acting under Article 14(2), not Article 83(3), first paragraph, and it is therefore immaterial whether the latter was applied or not. Besides, so long as the Commission is acting under Article 14(2) it is free to amend the Staff Regulations if it pleases, and is therefore not bound by them.

Secondly, the complainants allege that the Commission failed to respect the ratio of one to two which they say the former text of the first paragraph of Article 83(3) required between staff contributions and Agency contributions. This plea fails for the same reason as the first.

Thirdly, the complainants contend that in approving the increase in staff contributions the Commission acted on the strength of a misrepresentation of the facts. But only the body empowered to amend Staff Regulations may determine whether the amendments it adopts are desirable. That is a matter for the governing bodies of the organisation, not the Tribunal, to decide.

9. In their second plea the complainants allege breach of an acquired right which they infer from the requirement in the old text of Article 83(2) of the Staff Regulations that the Agency's contributions should be twice the amount of the official's. The Tribunal will consider the plea since there is a general principle of law protecting acquired rights, even in the absence of express provision.

The plea nevertheless fails. An organisation's rules do not confer any acquired right on staff members except where it was the rules that induced them to join the international civil service and the amendment of the rules will substantially alter conditions of service which they were entitled to expect would continue. In prescribing that the official's contribution should be half the amount of the Agency's the old text of Article 83(2) conferred no acquired right on the complainants. When they joined the staff they naturally took a keen interest in pension matters such as the amount of their contributions and of the pension itself, and perhaps they did acquire a right from the rules on such matters. But the rate of contribution by the Agency was a matter of lesser importance to them: its effect on their position was not direct enough for any acquired right to arise. Moreover, they cannot at the same time allege the existence of an acquired right and argue that member States were bound to guarantee the payment of pensions even before such a guarantee was embodied in the Staff Regulations. The guarantee assured them of their entitlements, whatever the rate of contribution by the Agency might be. It was therefore not that rate of contribution that led them to join the international civil service.

Besides, even if on joining the staff the complainants had obtained the acquired right on which they rely, they would have lost it with the adoption of the new text of the second paragraph of Article 83(3), which guarantee the payment of pensions by member States. The Agency's rate of contribution therefore scarcely matters now to the staff.

On 5 July 1978, at its 51st Session, the Permanent Commission approved the "budgeting" of pensions with effect from 1 January 1979, i.e. their payment under the budget and independently of the position of the Pension Fund. Again it is clear that the complainant's rights are unaffected by the rate of the contribution by the Agency, which is required to meet any deficit of the Fund. There is therefore no longer any question of their possessing an acquired right to any particular rate of contribution.

The applications to intervene

10. Since the Tribunal dismisses the complaints it also dismisses the applications to intervene, and it need not consider their receivability.

DECISION:

For the above reasons,

1. The Agency's application for the removal of written evidence is disallowed.

2. The complaints are dismissed.

3. The applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 11 December 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy

1. Article 83(2) and (3) formerly read as follows:

"2. The official's contribution shall be equal to 6.75% of his basic salary, leaving out of account the weightings provided for in Article 64. Such contribution shall be deducted monthly from the salary of the official concerned, and transferred to the Pension Fund by the Agency which, at the same time, shall pay a contribution equal to twice the amount of the deduction effected.

3. Should an actuarial assessment of the pension scheme, carried out by one or more qualified experts at the request of the Committee Management, show the contributions to be insufficient to finance the benefits payable under the pension scheme, the competent budgetary authority may, in accordance with the budgetary procedure, modify either the rate of contributions or the retirement age.

However, without prejudice to the provisions of the preceding paragraph, in case of financial imbalance constituting a hazard as regards the payment of benefits by the Fund, the Committee of Management, on the proposal of the Director General and after consultation with the Staff Committee shall submit for the approval of the Commission the appropriate measures to enable the Fund to meet its commitments."

The text adopted in 1977 reads as follows:

"2. The official's contributions shall be equal to 8% of his basic salary, leaving out of account the weightings provided for in Article 64. Such contribution shall be deducted monthly from the salary of the official concerned, and transferred to the Pension Fund by the Agency which, at the same time, shall pay a contribution equal to 13.5%.

3. Should an actuarial assessment of the pension scheme, carried out by one or more qualified experts at the request of the Committee of Management, show the contributions to be insufficient to finance the benefits payable under the pension scheme, the competent budgetary

authority may, in accordance with the budgetary procedure, modify either the rate of contributions or the retirement age.

However, without prejudice to the provisions of the preceding paragraph, the States members of the Organisation collectively guarantee the payment of the pensions prescribed in the Service Regulations."

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