

SIXTY-THIRD SESSION

***In re* FREEMAN (No. 2) and MALCOLM (No. 2)**

Judgment 867

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaints filed by Mr. Edward James Freeman and Mr. Neil Stuart Malcolm against the Food and Agriculture Organization of the United Nations (FAO) on 2 December 1986, as corrected on 15 December 1986, the FAO's replies of 27 February 1987, the complainants' rejoinders of 1 April and the FAO's surrejoinders of 19 August 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulation 301.061, FAO Staff Rules 302.3101, 302.3102 and 303.1311, Article 48, former Article 54(b) (in force from 1 January 1981 to 31 December 1984) and new Article 54(b) (in force since 1 January 1985) of the Regulations of the United Nations Joint Staff Pension Fund;

Having examined the written evidence and disallowed the complainants' application for oral proceedings; Considering that the facts of the case and the pleadings may be summed up as follows:

A. These complaints are the sequel to several - Cortez and others - on which the Tribunal ruled in Judgment 838.

That judgment described in some detail, under A, the pension scheme of the United Nations and facts that are common to the former and to the present series of disputes.

In its former version Article 54(b) of the Regulations of the United Nations Joint Staff Pension Fund made the following arrangements for adjusting pensionable remuneration:

"In the case of participants in the Professional and higher categories, the pensionable remuneration effective 1 January 1981 shall be established at the level which will be reached by the application of the present Weighted Average of Post Adjustments (WAPA) system through September 1980. Thereafter, the pensionable remuneration for such participants shall be as follows:

(i) When, on a subsequent 1 April or 1 October, the weighted average of the post adjustment classifications of the headquarters and regional offices of the member organizations, as determined by the International Civil Service Commission on the preceding 1 January and 1 July respectively, shows a variation of 5 per cent or more, the pensionable remuneration for establishing contributions to the Fund in accordance with article 25 shall be increased or decreased, as the case may be, by the full extent of the variation in the weighted average of the post adjustment classifications, provided however that it shall not be less than the pensionable remuneration under (ii) below.

(ii) When, on a subsequent 1 April or 1 October, the Consumer Price Index for the United States of America, as measured on the preceding 1 January and 1 July respectively, shows a variation of 5 per cent or more, the pensionable remuneration for computing the final average remuneration under article 1(h) shall be increased or decreased, as the case may be, by the full extent of the variation in that Consumer Price Index."

At its 39th Session, in resolution 39/246 of 18 December 1984, the General Assembly of the United Nations suspended those arrangements and amended the first sentence of 54(b) to read: "In the case of participants in the Professional and higher categories, the pensionable remuneration effective 1 January 1985 shall be that set out in the appendix to these Regulations".

At its 40th Session the Assembly decided to prolong the suspension.

The complainants are officials of the FAO. They noticed from their pay slips for April 1986 that a rise in the consumer price index, which they put at 5.6 per cent, had not been applied to the amount of their pensionable

remuneration.

They lodged internal appeals with the Director-General under FAO Staff Rule 303.1311: Mr. Freeman on 22 July 1986 and Mr. Malcolm on 23 July. They challenged the individual decisions not to apply to them the increase in the pensionable remuneration of staff in the Professional and higher categories which they believed had been due as from 1 April 1986. By minutes of 9 September 1986 an Assistant Director-

General answered that their appeals covered the same ground as the earlier complaints about pensions and that the Director-

General consented to their going straight to the Tribunal.

Since the complaints were filed Staff Rule 302.3101 has been amended and 302.3102 repealed as from 1 August 1986.

B. The complainants' main plea is breach of the rule *patere legem quam ipse fecisti*: the Organization may not repudiate the binding character either of FAO Staff Rule 302.3102 at the material time or of the second sentence and following of Article 54(b) of the Fund Regulations (to which Regulation 301.061 and Rule 302.3101 refer) after 31 July 1986, so long as those provisions were neither repealed nor amended.

Patere legem is a general principle hallowed by precedent: an authority is bound by the rules it has itself laid down until it repeals or amends them. At the material time, April 1986, Staff Rule 302.3102 and the substantive rules in the second sentence and following of 54(b) had been neither repealed nor amended, and the complainants should therefore continue to benefit by those provisions until the Assembly chooses to alter the rules.

The complainants have a further and subsidiary plea, which is breach of acquired rights. They submit that at the material time they were entitled, whether or not the rules had been repealed or amended, to continuance of the arrangements for adjustment of pensionable remuneration between general reviews that were provided for in Rule 302.3102 for the period from 1 April 1986 to 31 July 1986 and have been provided for in the second sentence and following of 54(b) for the period since then.

They seek the quashing of the Director-General's decisions not to apply to them the adjustment of pensionable remuneration due as from 1 April 1986 in keeping with Rule 302.3102 for the period from that date to 31 July 1986 and with the second sentence and following of Article 54(b) of the Fund Regulations for the period since 31 July 1986, and the consequent reckoning of their pensions according to pensionable remuneration as so adjusted; failing that, payment of the difference between the sums actually due and the sums that would have been payable had pensionable remuneration been duly adjusted. They claim 10,000 French francs each in costs.

C. In its replies the FAO submits that the complaints may not be distinguished from the earlier ones. There are inextricable links between the two sets of appeals, which have the same foundation in law and rest on the same facts. What is at issue here is the mere corollary of what was at issue earlier, and both sets of complaints are about the joint staff pension scheme and the FAO Staff Regulations, which refer to the Fund Regulations. The *renvoi* is in Staff Regulation 301.061, which prevails over Rule 302.3102. Accordingly, it is the Fund Regulations that contain the material rules.

As to the merits the Organization points out that what was suspended was not the material provisions of the Staff Regulations but the arrangements for adjustment. The means was the formal amendment by Assembly resolution 39/246 of 18 December 1984 of Article 54(b) of the Fund Regulations so as to replace the first sentence and suspend the rest of it. Thus the Assembly decided that the arrangements in 54(b) should cease immediately to apply.

The FAO concludes that the complaints serve no purpose distinct from that of the earlier ones and are in any event devoid of merit.

D. In their rejoinders the complainants seek to distinguish the purpose of their complaints from that of the earlier ones. What the earlier complaints were challenging was the application of a new scale of pensionable remuneration brought in after a general review, and the cause of action was breach of an acquired right to application of the old scale. What the present complaints seek is the application of yet another scale which, by dint of the arrangements for adjustment set out above, would stand 5.6 per cent higher than the old one.

Contrary to what the Organization contends, the text was suspended, not amended. It is hard to cite amendment by the Assembly when there is no declaration whatever of such amendment.

The complainants demur at the Organization's failing to comment on the cumulative losses the staff have sustained. What is at issue is not just a detail affecting the method of reckoning pensionable remuneration but a fundamental change that impairs the content of a right. Losses range from 13 to 39 per cent according to grade.

E. In its surrejoinders the FAO enlarges on some of the pleas in its replies about the identity of purpose between these and the earlier suits and about the material date of any adjustment.

CONSIDERATIONS:

1. In 1985 the complainants lodged complaints seeking the quashing of individual decisions by the FAO to apply a new scale of pensionable remuneration to them as from January 1985. The Tribunal dismissed those complaints in Judgment 838 of 5 June 1987, which gave an account of the pension scheme that covers the United Nations and other organisations. The present complaints are the sequel.

2. What the complainants want is the quashing of individual decisions not to make intermediate adjustments in their pensionable remuneration as from 1 April 1986.

The earlier cases were about comprehensive review of the scale brought in on 1 January 1985; these are about the working of the arrangements for adjustment as at 1 April 1986. Both the purpose and the cause of action being different, the defendant is mistaken in pleading that the complaints are futile and therefore irreceivable.

3. The complaints are joined because each makes the same pleas and claims and rests on the same facts.

4. Article II of the Tribunal's Statute says that it may hear complaints alleging non-observance of the terms of appointment and of the Staff Regulations, viz. any breach of conditions of service.

5. The complainants' main plea is that in its manner of applying to them the Staff Regulations and Staff Rules and Article 54(b) of the Regulations of the United Nations Joint Staff Pension Fund the FAO was in breach of *patere legem*; their subsidiary plea is breach of acquired rights. Insofar as the complaints are founded on breach of the FAO's own rules they are receivable only provided the application of those rules causes them injury.

6. Staff Regulation 301.061 says that provision shall be made for the participation of FAO staff members in the Fund in accordance with its Regulations. But that regulation has nothing to do with the reckoning of adjustments and insofar as the complaints challenge the manner of applying it they fail.

7. The complainants are also relying on Staff Rule 302.3102, which was in force when the dispute arose and may be material.

Judgment 838 said that the rule did "not appear to create rights or duties" and was "merely informative": the full reasoning is in 8 and 9. That disposes of the allegations of breach not only of acquired rights but also of *patere legem*.

8. The last and indeed main plea is breach of Article 54(b) of the Fund Regulations which says that, subject to stipulations about the speed and degree of change, pensionable remuneration may vary with the rates of post adjustment that obtain at headquarters and field offices and with the index to consumer prices in the United States.

The FAO's answer is that 54(b) has been amended by the General Assembly of the United Nations in resolution 39/246 and that the complainants' reading of it is wrong.

The Tribunal will not take the point since it is not competent to construe 54(b): by Article 48 the United Nations Administrative Tribunal alone may do so. The complainants' two pleas call for interpretation of the Fund Regulations, which are unclear. The issue being the relationship between the Assembly and the Fund, this Tribunal is not competent to determine whether the FAO correctly applied the provisions that empower it, expressly or by implication, to give effect to United Nations decisions on the matter in dispute.

DECISION:

For the above reasons,

The complaints 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 10 December 1987.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner