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

SIXTY-SIXTH SESSION

In re CUVILLIER (No. 2)

Judgment 960

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Rolande Cuvillier against the International Labour Organisation (ILO) on 15 March 1988 and corrected on 18 March, the ILO's reply of 20 May, the complainant's rejoinder of 22 August and the ILO's surrejoinder of 14 October as supplemented on 21 October 1988;

Considering the application to intervene filed by Miss Simone Bénazéraf;

Considering Article II, paragraph 1, of the Statute of the Tribunal, Chapters 2, 3, 4 and 5, Article 8.2, Chapter 11 and Article 13.2 of the Staff Regulations of the International Labour Office and Section J of Annex I (Administrative Rules) to the Regulations of the United Nations Joint Staff Pension Fund;

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

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

A. An account of the United Nations pension scheme appears in Judgment 832 under A.

The complainant, a French citizen, joined the staff of the United Nations in New York in 1953 at grade P.3 and was transferred in 1959, still at P.3, to the International Labour Office in Geneva. She was promoted in 1969 to P.4, in 1979 to P.5 and in November 1982 to D.1 as Chief of the Salaried Employees and Professional Workers Branch. She retired two years and ten months before the age of retirement, at the end of February 1987.

On 5 August 1987 she lodged an internal "complaint" under Article 13.2 of the ILO Staff Regulations. Her case was that because of a new scale of pensionable remuneration that had been brought in in April 1985 the amount of her pensionable remuneration had been falling in her last five years of service even though in that period she had been granted promotion and step increments and her actual salary had gone up. Observing that the scale of pensionable remuneration dated October 1984 was the last one to have ensured the steady increase in pensionable remuneration she believed she was entitled to, she asked that she continue to be assessed under that scale up to the end of February 1987; failing that, she claimed financial compensation.

The Chief of the Personnel Policy Branch wrote her a letter on 5 October 1987 asking her to explain the nature of her appeal: if she was objecting to the introduction of the new scale in April 1985 it was irreceivable because it was time-barred and also by the rule of res judicata, the Tribunal having upheld the new scale in Judgment 832 (in re Ayoub et al.).

On 19 October 1987 the complainant answered that the decision she was challenging was a notice of 20 February 1987 from the Secretary of the ILO Staff Pension Committee giving her the estimated amount of her pension on retirement. By a letter of 23 December 1987 the Director of the Personnel Department told the complainant that in itself the notice caused her no injury and in any event did not engage the ILO's liability; it had been addressed to her under arrangements the United Nations Joint Staff Pension Fund was required to make through secretaries of staff pension committees of member organisations for the purpose of notifying benefits payable by the Fund and so it formed part of the procedure set out in Section J of the Fund Regulations; in recent judgments, Nos. 404 and 407, the United Nations Administrative Tribunal had dismissed complaints from former officials challenging the application of new amounts of pensionable remuneration; and, without prejudice to her right to appeal under the Fund Regulations, the Director-General dismissed her claims as irreceivable. That is the decision she is impugning.

B. The complainant contends that, though the Fund bears the main responsibility for pension benefits, the

Organisation's obligations are important too. The payment of a retirement pension is the outcome of a series of decisions and calculations, and the notice of 20 February 1987 was an essential step in the final discharge by the ILO of its responsibility for determining the amount of the pension. The Organisation ought at that point to have realised that the trend in pensionable remuneration was at variance with its commitments towards her under the career system and to have taken proper action. It was empowered to do so under Article 8.2 of the Staff Regulations, which says that though subject to the Fund Regulations an official shall be so "except as otherwise provided in his terms of appointment". Failing that, it could have paid her financial compensation. So what is at issue is not the validity and binding character of the 1985 scale, but the consequences of combining it with other binding scales in force in her last five years of service, the period that the Fund Regulations prescribe for the purpose of working out her entitlements. Judgments 404 and 407 of the United Nations Administrative Tribunal are therefore immaterial.

She gives the following figures covering her last five years of service to show the injury she has sustained:

March - October 1982; grade and step: P.5/9; pensionable remuneration in US dollars: 82,130.

November 1982 - December 1983; grade and step: D.1/5; pensionable remuneration in US dollars: 86,764.

January - September 1984; grade and step: D.1/6; pensionable remuneration in US dollars: 89,242.

October - December 1984; grade and step: D.1/6; pensionable remuneration in US dollars: 94,061.

January - March 1985; grade and step: D.1/6; pensionable remuneration in US dollars: 85,700.

April - October 1985; grade and step: D.1/6; pensionable remuneration in US dollars: 85,700.

November 1985 - February 1987; grade and step: D.1/7; pensionable remuneration in US dollars: 87,900.Had the October 1984 scale held good until the end of February 1987 her yearly pension would, according to the reckoning by the pension unit of the ILO, have come to $56,550 instead of $53,100. Multiplying the amount of the difference by 25, the average number of years of life expectancy at her age, she puts her total loss at $86,250, or 187,156 Swiss francs at the prevailing rate of exchange.

The complainant contends that by virtue of a principle she calls "parallel progression" she was entitled to increases in pensionable remuneration that kept in step with the advancement of her career in the last five years. In her submission the principle is essential to any career system, of which the pension scheme forms part, and it is indeed reflected in Chapters 2, 3, 4, 5 and 11 of the ILO Staff Regulations and in the salary scales. In this case there was breach of the principle.

She asks the Tribunal to declare that her career advancement ought to have been matched by parallel progression in her pensionable remuneration up to the date of retirement and that it did not in her last five years of service. She claims damages and an award of 1,500 Swiss francs in costs.

C. In its reply the Organisation contends that the complaint is irreceivable insofar as it challenges the notice of 20 February 1987. The notice merely set out the results of calculations based on earlier decisions about the amount of the complainant's pensionable remuneration, of which she had been informed by monthly pay slip. The notice does not in itself amount to a decision to apply the April 1985 scale in working out her pension but merely records the result of the decision taken to that effect two years before. She must have realised that since the new scale applied in reckoning her pension contributions it would also serve in reckoning the amount of her pension benefits.

What is more, the ILO is not liable for the notice. In writing it the Secretary of the ILO Pension Committee, though an ILO official, was carrying out the duties assigned to him by Section J of Annex I to the Fund Regulations. The ILO's and the Fund's respective functions in determining pension benefits is clear from the disposal of contributions for January, February and March 1985, when the ILO had not yet brought in the new scale of pensionable remuneration that had applied since 1 January 1985. The Organisation is bound to comply with the Fund's decision to take account only of contributions based on the scale it had brought in at that date, and it is considering arrangements for refunding the surplus paid by serving and former staff members, including the complainant.

As to the merits, the ILO submits that the complainant adduces no evidence in support of her view that there is a

principle requiring "parallel progression" and conferring specific pension rights. Nor, for that matter, does she explain how respect for that principle would amount to a right forming part of the terms of her appointment. In point of fact her contract of employment made it plain that the terms of her membership of the Fund would be governed by the Fund Regulations. Besides, the alleged principle of parallel progression is simply the doctrine of acquired rights under another name, and Judgment 832 has already declared that the introduction of the new scale was not in breach of the staff's acquired rights.

The ILO invites the Tribunal to declare the complaint irreceivable and, subsidiarily, to dismiss it on the merits.

D. In her rejoinder the complainant seeks to refute the ILO's pleas. As to receivability she says that the reason why she challenged the notice of 20 February 1987 about her pension benefits was that the amounts, determined according to a whole set of earlier decisions, were based on an anomaly for which the ILO was liable. She filed her complaint on realising the effects of the anomaly, which was when she was actually on the point of retirement.

As for the merits, she sees no need for any express provision embodying the principle of parallel progression. The Organisation is mistaken in assimilating it to the doctrine of acquired rights and so what Judgment 832 says on that score is immaterial. As regards the refund of the surplus made over to the Fund for the first quarter of 1985, she received a letter dated 14 April 1988 from the Chief of the Benefits Branch telling her that the matter was under study. She therefore invites the Tribunal to allow further claims and order the Director-General to have her pension recalculated in accordance with the October 1984 scale up to the end of March 1985 or, failing that, to award her 19,800 Swiss francs in damages. She raises to 3,000 Swiss francs the amount she claims in costs and presses her other claims.

E. In its surrejoinder the Organisation enlarges on the pleas in its reply and submits that the complainant has failed to put forward in her rejoinder any new plea on receivability or any evidence to suggest that she is entitled to benefit under any supposed principle of parallel progression.

The ILO says that a final decision is to be taken soon about the refund of the surplus paid for the first quarter of 1985. It submits that the complainant's additional claims on that score, which are the subject of an internal "complaint" she has lodged under Article 13.2 of the Staff Regulations, are irreceivable because she has failed to exhaust the internal means of redress. Subsidiarily, it contends that the claims are devoid of merit.

In a supplement to its brief it states that the matter of the refund is so complex as to call for further study and that the complainant will be given a full answer on the point in the context of her 13.2 "complaint".

CONSIDERATIONS:

1. The complainant, who was a D.1 official of the International Labour Office, applied for early retirement from the end of February 1987. The ILO having agreed, she was sent a notice headed "International Labour Organisation" and "United Nations Joint Staff Pension Fund" and offering her several pension options. The text did no more than set out the options and against each of them stated what the amount of the pension and the arrangements would be. The factors of the reckoning were not shown.

On receiving the notice the complainant asked for and got an explanation of how the amounts had been worked out.

She then, on 5 August 1987, lodged an internal "complaint" which she addressed solely to the Director-General of the ILO and said she was filing under Article 13.2 of the Staff Regulations. After correspondence about the purpose and basis of her suit the ILO rejected it as irreceivable in a letter the Director of the Personnel Department wrote her on 23 December 1987 on the Director-General's behalf.

What exactly was the appeal of 5 August 1987 about? The complainant contended that her pension had been worked out by reference to pensionable remuneration figures taken for the period up to 1 April 1985 from the October 1984 scale and thereafter from a new scale that was less to her advantage. She alleged that the injury to her interests was serious and that the reduction was in breach of the terms of her appointment. She accordingly asked that the scale that had applied up to 1 April 1985 should apply also up to the date at which she had retired.

2. The present complaint, which she filed on 15 March 1988, reproduces the claims in her internal appeal. She maintains that the complaint is receivable and asks the Tribunal to order the ILO to pay her such financial

compensation as it deems fit.

In her rejoinder she presses her original claims but adds new ones that relate to the first quarter of 1985, during which the old scale was mistakenly applied.

The Tribunal will first take up her objections to the decision of 23 December 1987.

3. The notice of 20 February 1987 that prompted her internal appeal cannot in itself afford grounds for a complaint to the Tribunal since it merely showed the amount of the benefit she would get according to the option she preferred, and that amount is determined by the United Nations Joint Staff Pension Fund. If, as the ILO maintains, that is how the notice is to be construed, the Tribunal may not review the lawfulness of the decision.

The complainant does not really object to that reasoning but takes a different line. Her case is that on getting the notice she asked for and got information on how the competent authority had reckoned the amount of her pension and only then did she find that account had been taken of the new scale of pensionable remuneration which the Director-General had brought in as from 1 April 1985.

It is the employer organisation that reports the record of service that constitutes the basis for reckoning the amount of the pension. The Fund comes in only later, and it is not its actual reckoning she is objecting to. She rests her case on Article 8.2 of the ILO Staff Regulations, which says that an official is subject to the Fund Regulations only "subject to the terms of his appointment", and on the fact that the applicable scales of pensionable remuneration were approved by the Director-General who, as the Tribunal has ruled before, is the only authority competent in the matter.

She is not seeking any change in the amount of her pension, a claim the Tribunal would not be competent to entertain. The financial compensation she is claiming would, if the Tribunal allowed her complaint, be paid by the ILO and though it would not constitute a factor of her actual pension would make up for the injury to her interests which she sets down to the Organisation's negligence or error.

The Tribunal accepts that reasoning, which is but the corollary of Judgments 832 and 862 (in re Picard and Weder), and will entertain the claims in her complaint.

4. The Organisation pleads res judicata. But a judgment that dismisses a complaint has only relative force in that it is binding only on those who are parties to the case.

5. Lastly, the Organisation argues that the internal appeal was time-barred. Since the notice of 20 February 1987 did not amount to a decision that could be challenged before the Tribunal the only challengeable decision by the ILO dates back to April 1985, when an amended scale of pensionable remuneration was applied to the complainant, as indeed to everyone else. The time limit for appealing against that decision had, says the ILO, run out long before 5 August 1987, when the complainant lodged her internal appeal.

Yet, although she must have known for over two years that amending the scale would have consequences when she left she could not know what the financial consequences would be. If the Tribunal allowed the plea the complainant might feel that there had been a miscarriage of justice since up to the date at which she actually retired she could not have known just how much she was being asked to forfeit.

6. In any event there can be no doubt about the answer to the claims in her original complaint. Although Judgment 832, which dismissed complaints by Mr. Ayoub and other officials against the ILO, does not have the authority of res judicata in respect of the present complainant, the ratio of that judgment and the ruling hold good. Without going into the details the Tribunal declares that the ILO acted lawfully in adopting the new scale as from 1 April 1985, its decision was not in breach of any promise and did not have retroactive effect, and although it did cause the complainant financial injury the reasons were objective and the extent of the injury admissible.

7. The complainant's objections to the decision of 23 December 1987 are therefore devoid of merit and the claims in her complaint cannot succeed.

8. After filing her complaint on 15 March 1988 the complainant got a letter dated 14 April 1988 from the Chief of the Benefits Branch of the Personnel Department informing her of the Fund's refusal to take account of the rate of pensionable remuneration at which she had contributed in the first quarter of 1985 and adding that consultations

were going on about how to settle the matter once and for all.

In her rejoinder the complainant asks the Tribunal to entertain a further claim that it order the Director-General to recalculate her pension on the strength of the October 1984 scale up to the end of March 1985 in accordance with a decision by the ILO Governing Body or else to award her 19,800 Swiss francs in damages.

The claim is for the time being irreceivable because she has not exhausted the internal means of redress. In any event she is required, if she wants to press the matter as she says she does, to follow the internal appeal procedure right to the end.

Besides, although a complainant may put forward a new plea at any point in proceedings before the Tribunal, he may not in his rejoinder enlarge the scope of his claims as stated in his original complaint.

9. The complaint therefore fails, as does the application to intervene filed by Miss Bénazéraf.

DECISION:

For the above reasons,

The complaint and the application to intervene 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 27 June 1989.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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