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

SEVENTY-FOURTH SESSION

In re BARTON, EMMANUEL and GARRETT-JONES

Judgment 1241

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. William Leftwich Barton, Mr. Jean Constantin Emmanuel and Mr. Charles Garrett-Jones against the World Health Organization (WHO) on 18 February 1992, the WHO's single reply of 22 May, the complainants' single rejoinder of 2 July and the Organization's surrejoinder of 4 September 1992;

Considering that, Charles Garrett-Jones having died on 14 November 1992, his successors have stated that they wish to pursue his complaint;

Considering that the complaints raise the same issues and should therefore be joined to form the subject of a single ruling;

Considering the letter of 15 April 1992 from Mr. Barton's counsel communicating to the Tribunal a letter of 8 April from the Director-General of the WHO to the Association of Former WHO Staff Members;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal and paragraphs 60, 390 to 410, 415, 430 and 570 and Appendix A of the WHO Staff Health Insurance Rules, which are contained in Annex A to Section II.7 of the WHO Manual;

Having examined the written submissions;

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

A. Mr. Barton retired from the staff of the WHO in 1983, Mr. Emmanuel in 1973 and the late Charles Garrett-Jones in 1970. The first two draw and the third drew a pension from the United Nations Joint Staff Pension Fund, and each of them exercised his right under paragraph 60 of the Staff Health Insurance Rules to continued coverage under the Organization's Staff Health Insurance plan. Those rules appear in Annex A to Section II.7 of the WHO Manual.

Until 31 December 1985 paragraph 410 of Annex A provided that the contributions by a retired staff member or surviving dependant should be based on the higher of two amounts: the full amount of the pension payable by the Pension Fund, any commutation to a lump-sum being discounted, or the equivalent of two-thirds of the staff member's last yearly net salary.

Paragraph 410 was amended as from 1 January 1986 to read:

"The contributions of retired staff members (see para. 60) are computed on the basis of the higher amount of:

410.1 the full benefit granted to the retired staff member under the Regulations of the United Nations Joint Staff Pension Fund based on a minimum length of service of twenty years; staff members retiring with less than twenty years of service contribute on the basis of the pension payable after twenty years of service; staff members with twenty years or more of service contribute on the basis of their full pension entitlement;

410.2 an amount equal to one-third of the annual net salary payable to the staff member at the date of his or her retirement or death."

The Organization announced the amendment in information circular 103 of 25 November 1985 which said that the new measure would apply to staff members retiring as from 1 January 1986.

In 1989 a consultant made an actuarial study of the Fund's finances and in a final report of 20 September 1989 warned that unless action was taken to increase the Fund's resources it would be in "grave danger".

From 6 to 8 November 1989 the regional and headquarters "surveillance" committees, staff committees and representatives of retired officials met to consider the report. The Director-General approved their recommendations and informed the staff of implementing measures in information circular 11 of 16 January 1990. Paragraph 5 of the circular reads:

"The contributions of retired staff who have had less than thirty years of service will be based on the full pension to which they would have been entitled with 30 years of contributory service. This provision applies also to staff members who have already retired."

The measures took effect as from 1 January 1990. Each of the complainants was sent a statement dated 16 March 1990 showing the amount of his 1990 premiums based on a notional 30-year pension. They protested to the Director-General: Mr. Emmanuel on 26 April against what he called a "catastrophic 300 per cent increase" in his premium; Mr. Barton on 11 May against a nearly fourfold increase he said he could not afford; and Mr. Garrett-Jones on 12 May against a 296 per cent "leap" he found especially hard on those who had retired long ago. The secretary of the headquarters surveillance committee replied on 18 June 1990 that staff who joined the Organization late in their working life "would normally have had income from other sources previously and, in some cases, would have a pension" and that the rise in contributions was "preferable" to a fall in benefits.

The complainants all gave notice of appeal to the headquarters Board of Appeal on 9 August 1990. They agreed to a stay of the proceedings to let the Administration hold talks with the Association of Former WHO Staff Members. In an unnumbered circular dated 22 April 1991 the Administration informed retired staff of arrangements for phasing in the increases up to 1995. But that failed to satisfy the complainants and they asked that their appeals go ahead.

The Board of Appeal reported on 11 December 1991 that the increases in premiums were not in breach of any acquired right but recommended that the surveillance committee review the matter and see whether they might be phased in more gradually. In letters to the complainants of 3 January 1992, which they impugn, the Director-General endorsed the Board's recommendations.

B. The complainants submit that it is unlawful to reckon their health insurance premiums on the strength of notional pensions corresponding to thirty years' service in the United Nations. They have three main pleas.

They contend, first, that the decision is arbitrary and rests on mistaken assumptions of fact. There were many ways of making the WHO's health scheme solvent again. The one the WHO chose assumed that pensioners with few years' service in the Organization would have other income. But that assumption was wrong: before joining the WHO Mr. Emmanuel worked for over 20 years in a developing country with no pension entitlement; Mr. Garrett-Jones, too, spent 15 years in non-pensionable work, including military service in the Second World War, studies and non-pensionable WHO employment; and Mr. Barton's 36 years' employment gave him pension rights that came to the equivalent, after tax, of a United Nations pension based on just over 13 years' contributory service. Some pensioners, too, had to surrender pension rights acquired elsewhere when they went to work for the WHO.

The second plea is breach of the rule against discrimination. The WHO's health insurance scheme being founded on the notion of mutual aid, the better-off pay more than the less well-off but everyone stands to get the same benefits. All serving staff contribute a fixed percentage of net pay. Actuarial factors that would warrant higher premiums for older officials, say, or women are discounted. Rating pensioners one way and everyone else another is blatant discrimination and offends against the whole idea of mutual aid.

They submit, lastly, that the decision is in breach of their acquired rights. In 1986, when the WHO based minimum premiums on a United Nations pension corresponding to 20 years' service, it allowed retired staff a dispensation because an essential term of their health insurance contract would otherwise have been altered. But in 1990 it inflicted huge increases in premiums on a "captive audience" in that those who had retired long ago could not get other insurance. Worse, the increases were due, not to a rise in the rates, which would have affected everyone alike, but to a change in the very basis of assessment. Though financial solvency is a sound reason for reform, it is not so worthy as to make any means to the end lawful. The big increases in the complainants' premiums, though temporarily eased by the Director-General's decision to spread them over five years, cause disproportionate and

unnecessary injury. There was no need for the Organization to keep the scheme's reserves far above those of comparable health schemes, and it was wrong to behave like a private company under threat of demise.

The Organization was also wrong to treat as their representative at the joint meeting of November 1989 someone who had no mandate from former staff to represent them.

The complainants seek the quashing of the decision of 3 January 1992 and the refund of excess premiums already paid. Mr. Barton claims 10,000 Swiss francs in costs and Mr. Emmanuel and Mr. Garrett-Jones 2,500 francs each.

C. In its reply the WHO submits that the Director-General's decision rested on accurate assessment of the facts. The aim was to restore the scheme's finances. The Organization has been "magnanimous" by agreeing to put its own contributions up from 60 to 73 per cent within ten years. Fourteen committees went over the actuary's report and a joint meeting of all surveillance committees at which the retired staff were represented endorsed the final recommendations unanimously. Since retired staff with thirty years' service had been paying higher premiums the reform sought to correct an "inequitable" situation as between the pensioners themselves. The assumption that some might have other income was not actually the basis for the decision, but it would still have been only reasonable of the staff to anticipate higher health insurance costs.

The WHO has not penalised pensioners. It has put up contributions from all groups. Far from discriminating against anyone, the decision meant that someone with thirty years' service no longer had to pay three times as much as someone with only ten. Since serving staff are assessed on net salary and post adjustment it is only fair to assess former staff on gross pension. Even at the higher rates retired staff with only ten years' service are paying but a third of what they would for commercial health insurance. As for the notion of mutual aid, the premium structure covers six different categories, so that, for example, couples with children pay more than members with no dependants.

The Organization has not infringed the complainants' acquired rights. What was taken in 1986 was an "interim measure": only after the actuary had reported in 1989 did the Administration have a full grasp of the problem. The decision was a collective one and came after a close look at other remedies. No clause in the insurance contract barred changing the basis for assessment. In doing so the WHO sought only to stave off collapse. The effect was not the same for all pensioners: some had small increases while those with the minimum ten years' contributory service had to pay three times as much, though still less than under private schemes. The Organization helped out by letting them pay by monthly instalment and by phasing in the increases. It also accepted the Board of Appeal's recommendation for more gradual phasing-in after review by the surveillance committee. The requirement about the scheme's reserves, which is in the rules, is binding on management and in the members' interests anyway.

Since until the complainants objected in their internal appeal there was no challenge from any of the pensioners to the credentials of their representative, the WHO had no reason to question his standing.

D. In their rejoinder the complainants enlarge on their pleas and press their claims. They accept the broad aim of the changes as sound but challenge the reasons given for the individual decisions. In its replies of 18 June 1990 to their requests for review the Organization said that anyone who joined the staff late in his career would ordinarily have income from other sources and sometimes another pension on top of the United Nations one. It saw it as "somewhat inequitable" that someone with many years of WHO service had to pay higher premiums and it explained that the decision to reckon everyone's premiums on the strength of thirty years' service was "taken in order to correct this anomaly". So the WHO is estopped from alleging that "the assumption of 'other pension income' is in no way the factual basis" for the decision. As was held in Judgment 1047 (in re Nuruzzaman), where just one of the stated reasons is unsound the decision cannot stand.

They maintain that the WHO has applied one way of assessment to serving staff and another to pensioners. It takes net pay, which includes the post adjustment allowance, as the basis for reckoning the premiums of serving staff but gross notional pension for reckoning pensioners'. The material issue is the distribution of costs between members: since the scheme rests on the idea of social "solidarity" comparison with what pensioners would have to pay under commercial schemes is "not meaningful". Making a big contribution of its own does not entitle the WHO to interfere with members' rights.

The only conceivable reason for reckoning pensioners' premiums on anything but actual pension is that some may have other income. But the Organization now wants to disregard the point. Since it has never known how much

income its former staff have apart from their United Nations pension it does not have a full grasp of the problem, despite the actuary's report. Though mutual aid within the scheme falls short of "cross-subsidisation" of officials with dependants by those without dependants, that does not warrant scuppering the notion of mutual aid by changing the basis of assessment for a single group.

The distinction between the basis of assessment and rates of contribution has a bearing on the issue of acquired rights. Rates vary a great deal and may be changed under the simplified procedure in paragraph 430 of the Staff Health Insurance Rules, whereas the basis of assessment remained constant for years. Moreover, it is defined in the Rules and may be changed only under the procedure for amendment in paragraph 570. True, it is only reasonable for a staff member to anticipate the cost of his health insurance: indeed that is what the complainants did when they opted for continued health care under the scheme, taking into account its practice and rules. But what is unreasonable about relying on long-standing legal provisions? Unless the requirement about reserves is lowered with proper heed to reality, premiums will soar just to guard against the unlikely contingency of WHO's disappearing altogether.

E. In its surrejoinder the WHO submits that the complainants' rejoinder raises no new facts or issues. An assumption that some pensioners had other income was not the factual basis of the impugned decision: the reference to other income was merely the "expression of an opinion", not "a link in the reasoning". Insurance schemes in other international organizations, the World Bank for one, require specific groups to cover their own costs. In any event basing the assessment of pensioners' contributions on the actual amount of their pension is financially unsound for anyone with under thirty years' service. The WHO never gave acquired rights as a reason for not applying the minimum service condition to former staff members in 1985: what it wanted to achieve was "proportionality of the reform to perceived needs". The reform in 1989 was warranted; it has neither upset the structure of obligations between the parties nor caused pensioners undue injury.

CONSIDERATIONS:

1. Mr. Barton and Mr. Emmanuel are, and the late Charles Garrett-Jones was, retired WHO officials. Their complaints object to the way of reckoning their premiums under the Organization's health insurance scheme in accordance with an amendment made as from 15 October 1990 in the Staff Health Insurance Rules. They want the Tribunal to quash the Director- General's decisions of 3 January 1992 rejecting their protests against assessing their premiums, because of the amendment, not, as before, on their actual pension from the United Nations Joint Staff Pension Fund, but on a higher "notional" pension positing thirty years' contributory service.

2. The complainants themselves want the Tribunal to join their complaints and the defendant, which concurs, treats them in its reply and thereafter as a single case. Pleading the importance of the case the complainants also apply for hearings, but the WHO believes that the Tribunal has before it full and accurate written statements of the issues of fact and law. The Tribunal takes the same view, especially since the case turns on matters of principle, not on the personal circumstances of this, that or the other litigant.

3. According to paragraphs 390 to 415 of the Rules the health insurance scheme is financed by contributions ordinarily assessed on a member's salary or pension. The contributions so reckoned are shared between member and Organization, with the member paying one-third and the Organization two-thirds. According to Appendix A of the Rules the base rates of contribution were 1.1 per cent for members and 2.2 per cent for the WHO in 1990 and are to rise gradually to 1.5 per cent and 3 per cent by 1994.

4. Such a system means that the premiums that serving and retired staff pay vary according to salary and pension and it raises a special problem where, like the present complainants, the retired official has not had a full career with the Organization by the date of retirement. To cope with that the Organization has already changed the Rules once - and the change is not now in dispute - so as to bar health insurance for former staff with under ten years' membership of the scheme by the date of retirement.

5. For those who did have ten years' membership but do not have full pension rights the straight application of the new rules meant that everyone got the same benefits though some were paying lower premiums than others who by length of service qualified for a full pension. So things stood up to 1986, when the Organization first amended the Rules to assess pensioners' premiums on a notional pension corresponding to at least twenty years' contributory service. That rule was not applied to those who had retired before it came in and they continued to benefit from the earlier arrangements.

6. But doubts arose over the solvency of the scheme as the costs of treatment kept going up, and the Organization had a review carried out by an actuary in 1989. The actuary's report disclosed an alarming turn for the worse which it blamed on the dwindling proportion of serving to retired staff; a fall in the reserves to well below the minimum the Rules required; an actuarial imbalance of 21.8 million United States dollars; and a deficit of $1.9 million in 1989 alone in the total contributions from retired staff as against their benefits.

7. In the light of the report and thorough discussion with the "surveillance" committees, various staff bodies and representatives of former staff the Organization drew up a set of remedial measures which it incorporated in the Rules in 1990. They included a comprehensive rise in rates of contribution staggered over five years; a rise in the Organization's own share; and an increase from twenty to thirty years in the notional pension for any retired official with a lesser period of contributory service. It is the last change that has prompted this case: the figure of the twenty-year notional pension never applied to officials who had already retired, but the amount of the thirty-year one does.

8. The last change is in paragraph 410.1 of the Rules and was notified to the staff in information circular 11 of 16 January 1990, which says, in 5:

"The contributions of retired staff who have had less than thirty years of service will be based on the full pension to which they would have been entitled with thirty years of contributory service. This provision applies also to staff members who have already retired."

9. Having got a notice dated 16 March 1990 of their premiums for the year, the complainants protested to the Director-General against the increases and asked him to review them. In its replies the Administration held its ground and explained the purpose of the change and just how it had come about.

10. The complainants thereupon went to the Board of Appeal. In its report of 11 December 1991 the Board held that the Administration had complied with the proper procedure in making the reform and had not infringed the complainants' acquired rights; but it did suggest that the Director-General phase the increases in even more gradually for pensioners.

11. The Director-General sent the complainants personal letters dated 3 January 1992 to say that he endorsed the Board's conclusions, including the recommendation for more gradual phasing-in; he hoped they would accept, but pointed out that if they did not they might appeal to the Tribunal.

12. Those are the identical decisions impugned in the complaints, which the complainants filed on 18 February 1992. They have since asked the Director-General about the possibility of intervention by other pensioners in like case. In a letter of 8 April 1992 to the Association of Former WHO Staff Members the Director-General agrees, so as to avoid many interventions, to apply the Tribunal's ruling to any former official affected by the reform.

13. The complainants have three pleas.

(a) The measure was arbitrary inasmuch as it overlooked material facts and applied to the health scheme considerations that would at best have been relevant to a pension scheme. The Administration also failed to explain why one of the reforms had to be a marked rise in some pensioners' premiums when there were other less costly remedies, such as lowering the requirement about the reserves.

(b) The measure was both discriminatory and at odds with the notion of mutual aid at the heart of the scheme, because it assessed the complainants' premiums on a hypothetical amount whereas everyone else was assessed on actual pay.

(c) There was breach of their acquired rights, which indeed the Organization acknowledged when it brought in the twenty-year notional pension but expressly decided against applying the figure to anyone who had already retired.

14. Besides the quashing of the impugned decision the complainants want the refund of the additional premiums they have paid under the new rules.

15. The WHO replies that the decisions form part of a package of measures intended to make the scheme solvent. In its submission things had reached such a pass that everyone had to make financial sacrifices, and the complainants may not properly opt out.

16. The Organization sees nothing discriminatory in applying a notional pension to officials who because they did not serve it long enough do not draw a full pension. In consideration for the same benefits that everyone gets it expects the complainants to pay premiums in future according to the figure of the pension they would have secured by the end of a full career. In its submission the change is calculated to remove an anomaly and a glaring injustice towards officials who served full careers and were having to pay much more in return for the same benefits.

17. The Organization contends that under a scheme based on the idea of collective mutual aid there is nothing unfair about such realignment to officials in the complainants' case. Any retired official might ordinarily be expected to have set aside savings from earnings before WHO service so as to have no difficulty in meeting his full share of insurance costs under the scheme, which, after all, he freely chose to stay in on retirement.

18. Receivability not being at issue, the Tribunal will go into the merits.

19. As has been seen, the change the complainants object to is part of wider reforms the WHO made to put the scheme on a sounder financial footing over the long term. The Organization is right to pursue that aim by all suitable means at its disposal, and they include measures to ensure that, in keeping with the notion of mutual aid, everyone bears a fair share of costs. The material issue is whether the new arrangements for determining the complainants' premiums meet that requirement.

20. The complainants' premiums used to be, and they still want them to be, assessed as a percentage of actual income. That method of assessment did give a semblance of equality, but in fact it allowed especially favourable treatment of retired staff who did not qualify for the full pension. If the complainants' pleas were upheld they would have all the benefits of the scheme in consideration for premiums far below the charges ordinarily met by other contributors. That would offend against fair sharing of costs. That was how things were before, and it was proper to change the Rules and assess premiums not on actual pension but on a notional pension figure corresponding to a full WHO career.

21. Contrary to what the complainants make out, the reform overlooks no material feature of pensioners' circumstances. It is only reasonable to assume that the pensioners' ability to pay depends not only on the amount of their United Nations pension but also on any earnings which had already accrued to them as experienced professionals who joined the Organization late in their working life. That is a position that the Organization rightly took to be typical and common. Accounts of the complainants' own plight and the selective pleading of a score of other individual cases, which they put, to no avail, to the Board and now put to the Tribunal, do not amount to conclusive evidence to the contrary.

22. Nor may they plead that they are discriminated against within the scheme. The whole purpose of the reform was to get them to contribute as much as the other members and that is fully in line with the notion of mutual aid that underlies social security schemes. They would have been discriminated against only if the Organization had required retired staff who were not on a full pension to pay premiums reckoned on the strength of a notional pension that went beyond a figure corresponding to the span of a normal career.

23. It may be assumed that the former twenty-year figure was lower than that normal figure. So it was proper for the Organization to increase the period. Indeed the thirty-year period in the revised Rules may be regarded as giving a more appropriate figure. Another point is that the membership of the scheme even at the new rates is a substantial benefit to the complainants in absolute terms, largely owing to the WHO's own especially generous financial contribution.

24. Lastly, the change from the former arrangements constitutes no breach of the complainants' acquired rights. As has just been said, the Organization has not discriminated against them: far from it. Its purpose was to remove an unfair advantage the Rules used to confer on them. Such corrective action may not be treated as breach of acquired rights even if the advantage was enjoyed for a long time.

25. True, when the Organization brought in the twenty- year notional pension it did not apply the new figure to those who had already retired. Whatever the reason for that decision may have been, there is no construing it as recognition of an acquired right: even then the purpose was to do away with a privilege that was plainly at odds with the need to share out health costs fairly.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

(Signed)

José Maria Ruda
Mella Carroll
P. Pescatore
A.B. Gardner

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