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

NINETY-SECOND SESSION

***In re* Cuvillier (No. 4)** **Judgment No. 2111**

The Administrative Tribunal,

Considering the fourth complaint filed by Mrs Rolande Cuvillier against the International Labour Organization (ILO) on 4 December 2000, the ILO's reply of 27 February 2001, the complainant's rejoinder of 3 May, the Organization's surrejoinder of 23 July, the complainant's further observations of 3 September and the ILO's comments thereon dated 3 October 2001;

Considering Articles II, paragraphs 1 and 7, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, who has British and French nationality and is resident in Switzerland, was an official of the International Labour Office (ILO), the secretariat of the International Labour Organization, from 1959 to 1987. She took early retirement on 1 March 1987, when she was Chief of the Salaried Employees and Professional Workers Branch, at grade D.1.

On 26 July 2000, she filed an internal complaint with the Director- General under Article 13.2 of the Staff Regulations alleging "unjustified treatment inconsistent with the status of an official". She contested: (1) the non-establishment of a tribunal as envisaged in Article 27 of the Agreement between the Swiss Federal Council and the ILO concerning the legal status of the Organization in Switzerland (hereinafter the "Headquarters Agreement"); (2) the refusal of the Office to issue her with an attestation "that the legal relationship [of the complainant] with the Organization has not ended and that [her] retirement benefits are a public service pension"; and (3) the failure of the Administration to inform officials "of the letter from the Swiss Mission, due to the fact that it had given rise to disputes and the ensuing court rulings [by the Swiss Federal Tribunal]"[(1)]. The complainant asked the Director-General to acknowledge that the letter of 17 December 1984 (hereinafter the "*note verbale*") had been received by the ILO, to indicate the action that he intended to take thereon, giving her reasons, and to undertake to do what was necessary for the establishment of the tribunal envisaged in Article 27 of the Headquarters Agreement.

By a letter of 5 September 2000, the Director of the Office of the Director-General replied that her communication could not be considered as an internal complaint under Article 13.2, as it did not concern treatment that was inconsistent with the Staff Regulations; even if this communication addressed rights arising out of the complainant's employment in the Office, her complaint would be out of time, as the Office had already replied to the issues it raised by letters dated 31 July and 14 December 1989. Finally, insofar as she intended to obtain a clear position from the Swiss authorities and the international organisations in the United Nations Common System on the tax status of retirement pensions paid in Switzerland by the United Nations Joint Staff Pension Fund (UNJSPF), her communication was devoid of purpose, since both the Swiss authorities and the Office had clearly indicated that such pensions were liable to taxation in Switzerland.

That is the impugned decision.

B. The complainant asserts that this complaint is receivable under Article II, paragraph 1, of the Statute of the Tribunal, and that her internal complaint was receivable under Article 13.2 of the Staff Regulations. She contends that the Office misrepresented her internal complaint and reaffirms that "there was indeed treatment inconsistent

with the Staff Regulations and the fundamental principles of the Organization ... and unjustifiable treatment by the Director-General".

On the merits, the complainant has several pleas in support of her claim that the retirement pension is not liable to taxation at the national level.

The retirement pension is taxed at the international level under the terms of the Staff Regulations by means of the monthly deduction from pay for the contributions by officials to the UNJSPF. It has the same legal character as their salary, of which it is the extension after employment has come to an end.

The resources pooled by member States, to finance the retirement pension, confer upon it immunity from taxation at the national level by virtue of a fundamental principle governing the operation of the ILO, namely equality between member States.

The Staff Regulations confer upon officials an individual right to the privileges and immunities enjoyed by the ILO under the relevant treaties insofar as their conditions of employment are concerned. Article 1.7 of the Staff Regulations "bears witness to the existence of such a right" and serves in practice to bring such privileges and immunities within the sphere of conditions of employment.

Officials are entitled to the jurisdictional guarantees set out in the Staff Regulations or deriving therefrom. In the event of disputes, their rights include recognition of the competence of the Tribunal, to which they are entitled to appeal.

The *note verbale* of 17 December 1984 implicitly denies that international pensions are covered by public international law, or by the rights of civil servants; in the first place, it refers to the rules of agreements on double taxation, which cover pensions outside the civil service; and secondly it adds that "the taxpayers concerned ... no longer by definition have a legal relationship with the organisations by which they were employed". However, in 1984 the United Nations Administrative Tribunal found that retirement benefits have the same legal nature as salaries and, in 1989, the ILO Administrative Tribunal dismissed word for word any denial of the continuation of the legal link with the Organization in finding in Judgment 986 (*in re* Ayoub No. 2 and others) that "the relations of staff with an international organisation do not end when they leave its employ".

The complainant then sets out her claims against the ILO.

She says that the Office provided her with ambiguous replies (for example, with regard to the establishment of the "arbitration tribunal" envisaged in Article 27 of the Headquarters Agreement), concealed the *note verbale* and provided her with false information (for example, on the Organization's position).

She argues that the tax exemption of United Nations retirement pensions is in fact left to the good will of each State. As a result, there is no legal security regarding double taxation, and retirees of the United Nations will certainly be liable to double taxation if they live in a State which taxes the international retirement pension.

Lastly, in the view of the complainant, it is necessary to establish the arbitration tribunal: officials have an individual right to this jurisdictional guarantee, and prohibition of the denial of justice is one of the general principles of law.

She asks the Tribunal:

"1. ... to order the Director-General to:

a) acknowledge that the letter from the Swiss Mission was received by the ILO;

b) indicate its position concerning this letter; and

c) in any event, make the necessary arrangements for the determining legal classification to be duly recognized.

2. ... to order the Director-General to make the necessary arrangements without delay for the establishment of the arbitration tribunal envisaged under the Headquarters Agreement.

3. ... to reserve [her] rights:

a) to pursue the action that she has taken in this respect for as long as the tax status of retirement benefits has not been legally clarified in a manner which complies with the Staff Regulations and the fundamental principles of the Organization; and

b) to any damages deriving from this right when it is recognized.

4. ... to grant [her] compensation for costs in the amount of 5,000 Swiss francs in respect of this complaint."

C. In its reply, recalling the terms of Article II, paragraph 1, of the Statute of the Tribunal, the ILO observes that the complainant is not alleging any breach of regulations or contractual clauses, and that the omissions and refusals which she holds against the Office do not correspond to any right recognised in the Staff Regulations or her contract of appointment when she was in its employ. It says that the complainant - and her husband, whose claims she took up after his death - has been attempting unsuccessfully since 1988 to involve the ILO in a dispute which has arisen between her, as a retiree, and the Swiss tax authorities concerning the tax liability of the retirement pension provided to her by UNJSPF. But the Federal Tribunal gave a definitive ruling on the matter on 6 December 1996.

The ILO asserts that the complainant is wrong in contending that retirees of an international secretariat are and remain officials within the meaning of staff regulations and headquarters agreements and must benefit from the immunities, particularly in tax matters, conferred upon the organisation. It recalls that in a similar case the Tribunal found that "on expiry of the complainant's contract, he ceased to be a staff member" (see Judgment 1845, *in re* Palma No. 5, under 10). Nor do any rules give retirees from the international civil service, any more than current officials, an individual right to benefit from the privileges and immunities conferred upon the organisation with the sole object of enabling it to discharge its mandate. It also denies that officials have an individual right to the jurisdictional guarantee that would be afforded, in the complainant's view, by the tribunal envisaged in Article 27 of the Headquarters Agreement. This Agreement does not form part of the terms of appointment of officials of the Office, or of the Staff Regulations. The competence conferred upon the above tribunal excludes any recourse to it by officials themselves, and even more so by retirees.

The ILO asks the Tribunal to find that it is not competent *ratione materiae* and *ratione personae*, under Article II, paragraph 7, of its Statute, to entertain the complaint.

Subsidiarily, the Organization submits that the complainant's claims are irreceivable.

The *note verbale* which was addressed to all the international organisations based in Geneva, was received by the Office. The complainant cannot claim that the contents of this note were "unknown" to her or that the position of the host country was "concealed" by the Office. "Acknowledgement" of the receipt of the *note verbale*, even if the Tribunal were competent to order it, would not change the Organization's position. Claim 1(a), which is of no general or individual interest to the complainant, is accordingly without cause of action and therefore irreceivable.

The ILO adds that claims 1(b) and (c) are irreceivable because they are out of time. They reiterate claims made by the complainant (or her husband) on numerous occasions, to which clear replies were given, firstly, in a letter from the Director of the Office of the Director-General dated 31 July 1989 and, secondly, in a letter from the Deputy Legal Adviser of 10 January 1997. Neither the complainant nor her husband challenged these replies in any way at the time, and certainly not by means of an internal complaint under Article 13.2 of the Staff Regulations. The request made in her communication of 26 July 2000 to the Director-General was accordingly merely an attempt to set the clock back. It was therefore irreceivable under Article 13.2, as is her present complaint.

Claim 2 is also irreceivable. The tribunal envisaged in Article 27 of the Headquarters Agreement can only be established through negotiation between the Swiss authorities and the Organization, and this would lie solely within their competence.

Nor is claim 3(a) receivable because, firstly, it is in breach of the rules on the time limits for appeals and, secondly, by setting no precise limit, it would prejudice the principle of stability of the legal situation.

The ILO asserts that the principle of equality between States, which is at the very heart of international law, should not be cited to serve strictly private interests. The taxation of retirement pensions is not encompassed by this

principle, which is one of the bases for the tax exemption of international officials' salaries.

Lastly, the ILO recalls that the complainant and her husband have had recourse to Swiss jurisdictions. It is therefore particularly inappropriate, in the context of a complaint to this Tribunal, and in view of the fact that their claims before the competent national jurisdictions have failed, to plead denial of justice.

D. In her rejoinder the complainant reaffirms that the Tribunal is competent to entertain her complaint. She challenges the ILO's assertion that her retirement benefit is a pension provided by the UNJSPF, in disregard of Judgment 990 (*in re* Cuvillier No. 3), which shows the contrary. She submits that "the retirement pension that is due from the Organization and paid through the UNJSPF, is paid in part in [her] case by the Organization without going through the former".

The complainant also contends that the measures she is asking the Tribunal to order lie within its power of review. She endeavours to show that her claims are not only receivable, but also fully justified.

She rebuts the argument that it is necessary to be an official to benefit from the Organization's immunities, and that retirees have ceased to be officials. In her view, this link does not need to be established, as the tax immunity derives from the funds used to finance pay. The purpose and basis of this immunity is equality between States and it is the result of the origins of the funds (paid by member States). Financed from the same source as the salaries of active officials, retirement pensions are automatically covered by tax immunity.

The complainant asserts that, for the Tribunal and for the purposes of the Staff Regulations, the concept of "official" encompasses retirees. For the purposes of the Staff Regulations, which apply to officials without defining the term, the salient factor is the right to have recourse to the provisions therein. These cover some situations which are clearly only of interest to active officials, but also others which explicitly concern retired officials, or active staff members as future retirees, or both active staff members and retirees without distinction. In support of her argument, she cites various provisions of the Staff Regulations.

E. In its surrejoinder the ILO points out that the application to retired officials of the provisions on which the complainant bases her argument is established in each case by an explicit reference for a precise purpose. It is therefore absurd and contrary to the Staff Regulations to consider that provisions which do not refer to retired staff members, either directly or indirectly through reference to another text, are applicable to them.

The ILO recalls that in Judgment 990 the Tribunal dismissed the complainant's claim that it should order a recalculation of her pension, on the grounds that "the body that determines the pension is outside its jurisdiction". It also decided that "the complainant is entitled, at the date of each payment of pension by the Fund, to compensation from the ILO in an amount equal to the difference between the pension she was entitled to under the Staff Regulations and the pension she has actually received since 1 March 1987." It says that the complainant cannot modify at her every whim the nature of the payment, which is compensation, made by the Organization under the terms of Judgment 990.

It submits that, while the origin of the funds financing salaries provides the basis for the tax exemption conferred upon the Organization, as a counterpart for equality between member States, the enjoyment of this immunity by certain categories of persons is intended to allow, as indicated in Article 40 of the Constitution of the ILO, "the independent exercise of their functions in connection with the Organization".

The ILO presses its objections to the receivability of the internal complaint and, consequently on the same grounds, of the complaint before the Tribunal.

F. In further observations, based on the letters sent to her by the Office, the complainant asserts that it pays her a "pension supplement". As explained in Judgment 990, it is because the body that determines the pension is outside the Tribunal's jurisdiction that this supplement is paid by way of compensation. But she says that it is indeed a pension supplement in an amount equal to the difference between the amount to which she is entitled under the Regulations of the UNJSPF and the amount to which she is entitled under the Staff Regulations.

Lastly, she states that Switzerland exonerated the retirement pensions of non-Swiss nationals from taxation up to the end of 1984.

G. In its comments the ILO denies that the compensation it pays the complainant under Judgment 990 is a "pension

supplement". Nothing in the regulations or rules calls for the payment of such a supplement to a former official.

It explains that the *note verbale* did not create an entirely new situation for retirees. The conditions respecting the taxation of former international officials changed, but not the principle of their tax liability.

The Organization adds that, while it appeared appropriate in 1946, as suggested by the then Secretary-General of the United Nations, to examine the situation of pensions in relation to the general problem of immunities, it has to be recognized that the solution adopted is not that advocated by the complainant.

Lastly, it says that it is not within its competence to proceed further on an issue which lies within the mandate of the United Nations General Assembly and the UNJSPF.

CONSIDERATIONS

1. The complainant, who is resident in Switzerland, was an official of the ILO from 1959 to 1987 and has been receiving a retirement pension since 1 March 1987, when she was granted early retirement. Since then she has continued to challenge, through both the Federal and Genevan tax authorities and the ILO, the right of Switzerland to tax her pension. Having never succeeded, and in particular having had appeals to the Swiss Federal Tribunal rejected on 6 December 1996 and 19 June 1997, she filed an internal complaint with the Director-General of the ILO on 26 July 2000 under Article 13.2 of the Staff Regulations against "unjustified treatment inconsistent with the status of an official". In her internal complaint she alleged that the ILO had allowed a situation of non-law to develop, had wrongly supported the position of the Swiss authorities and had disregarded the fact that the "salaries, emoluments and indemnities", exonerated from taxes under Article 17(b) of the Headquarters Agreement concluded between Switzerland and the ILO, also included pensions. She requested the Director-General to:

- acknowledge that the *note verbale* of 17 December 1984 of the Permanent Mission of Switzerland addressed to the international organisations based in Geneva respecting the tax liability of retired officials in Switzerland had indeed been received by the ILO;

- provide an indication of the action he intended to take thereon, giving his reasons; and

- undertake to do what was necessary for the establishment of the tribunal envisaged in Article 27 of the Headquarters Agreement.

She reserved her right to compensation once the legal situation had been clarified.

2. The Director of the Office of the Director-General replied to this "internal complaint" on 5 September 2000 by indicating that the complainant could not have recourse to Article 13.2 of the Staff Regulations as her claims were not related to treatment inconsistent with the Staff Regulations, unjustifiable treatment by a superior official or rights deriving from the duties discharged by her when she worked. The complainant was also reminded that the Office had already replied to her claims on 31 July and 14 December 1989 and that the Swiss authorities as well as the Office had made it known from the beginning that "UNJSPF periodical pension benefits [were] liable to taxation in Switzerland".

3. Dissatisfied with this reply, the complainant came to the Tribunal asking for the decision contained in the letter of 5 September 2000 to be set aside. She asks the Tribunal to order the Director-General to acknowledge that the *note verbale* from the Swiss Mission had indeed been received by the ILO, to make known his position on this communication, to "make the necessary arrangements for the determining legal classification to be duly recognized", and to take steps for the establishment of the tribunal envisaged in the Headquarters Agreement. Lastly, she asks that her rights be reserved and that she be compensated for the costs incurred.

4. In response the ILO argues that the Tribunal is not competent to entertain the complaint, and pleads irreceivability on several grounds.

5. The dispute concerns the dismissal of an internal complaint filed under Article 13.2 of the Staff Regulations, which reads as follows:

"Any complaint by an official that he has been treated inconsistently with the provisions of these Regulations, or with the terms of his contract of employment, or that he has been subjected to unjustifiable or unfair treatment by a superior official shall, except as may be otherwise provided in these Regulations, be addressed to the Director-General through the official's responsible chief and through the Personnel Department, within six months of the treatment complained of. ..."

6. In principle, this provision only entitles an "official", who considers that she or he is entitled to do so, to have an internal complaint examined according to the established procedure. However, the Tribunal acknowledges that the relationship between officials and international organisations does not come to an end when they cease to work (see in this respect Judgment 986). It must therefore be recognised that former officials who consider that the terms of their contracts of employment or staff regulations have been disregarded, or that the administration has not accorded them the protection and guarantees deriving from their position as international civil servants, may avail themselves of the means of recourse available for the recognition of their rights, and therefore seek redress under Article 13.2 of the Staff Regulations. It should also be noted that in the impugned decision the competent authority did not tell the complainant that her capacity as a former official prevented her from filing an internal complaint under Article 13.2, but that it rejected her complaint on the grounds that, *ratione materiae*, it did not lie within the scope of the article and was moreover out of time.

7. As pointed out by the ILO, the Tribunal's competence is admittedly limited, in accordance with Article II, paragraph 1, of its Statute, to "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case". But this provision does not prevent the Tribunal from ruling on complaints filed by officials of international organisations who no longer work and consider that, following their retirement, they have suffered injury to the rights and guarantees conferred upon them by their status.

In the present case the complainant reproaches the Organization with failing to provide the protection, to which she considers herself entitled, to establish her tax exoneration.

8. While the Tribunal is competent to judge whether the impugned decision is well-founded, to do so the complaint still has to be receivable. In this respect, the ILO's pleas of irreceivability must succeed.

9. In the first place, the evidence shows that, although the complainant is asking what action will be taken pursuant to the *note verbale* from the Permanent Mission of Switzerland, which was clearly received by the ILO and is among the submissions produced by the complainant, her real motive is to exhort the Organization to contest the letter, according to which "as from 1 January 1985 ... taxpayers who are retirees of the organisations will be taxed in accordance with normal law and shall submit a complete tax declaration including all their earnings and assets". This issue has been raised in many letters addressed to the ILO - either by the complainant's spouse, also a retired official of the ILO and now deceased, or by the complainant herself, or by both of them - which have either explicitly or implicitly received negative replies. Even though the letters dismissing her argument that the pensions are not liable to taxation do not refer to the *note verbale*, there is no evidence that the ILO endeavoured to conceal it with a view to misleading its officials. In any case, the complainant is wrong to use the Article 13.2 procedure to challenge decisions, reached long ago, not to contest the position of the Swiss authorities with regard to the legal status of the pensions paid to former international civil servants and the issue of their tax liability.

10. Secondly, the claims that the ILO should be ordered to make the necessary arrangements for the establishment of the tribunal envisaged in Article 27 of the Headquarters Agreement are also irreceivable: they have already been rejected in earlier decisions which were not challenged in time, and the Tribunal is not competent to issue orders to organisations which have recognised its jurisdiction (in this respect see, inter alia, Judgment 501, *in re* Petruc).

11. Lastly, there is no evidence that the ILO failed in its duty of protection towards its officials and, where appropriate, former officials. And the complainant clearly cannot challenge the decision of the Swiss Federal Tribunal through the ILO, or through this Tribunal.

12. Moreover, while the complainant considers that she has grounds for challenging the fact that the further observations which she was authorised to submit were forwarded to the ILO, the Tribunal finds that, far from tainting the procedure, as she claims, it ensured strict compliance with the principles of adversarial proceedings.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

Michel Gentot

Mella Carroll

Hildegard Rondón de Sansó

Catherine Comtet

1. On 17 December 1984 the Permanent Mission of Switzerland to the International Organisations in Geneva had sent a *note verbale* informing them that the retirement pensions of former officials who did not have Swiss nationality would no longer be exempt from taxation as from 1 January 1985.

Updated by PFR. Approved by CC. Last update: 15 February 2002.