

**SIXTY-THIRD SESSION**

***In re* EL BOUSTANI (No. 2) and NASCIMENTO**

**Judgment 865**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Fouad El Boustani and the complaint filed by Mr. Geraldo Nascimento against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 October 1986 and corrected on 12 December 1986, UNESCO's replies of 3 February 1987, the complainant's rejoinders of 1 April and UNESCO's surrejoinders of 9 July 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, UNESCO Staff Rule 103.20, paragraph 7(a) of the Statutes of the UNESCO Appeals Board, 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 - Cabral and others - on which the Tribunal ruled in Judgment 836.

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 UNESCO. 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.

On 26 May 1986 they lodged with the Director-General under paragraph 7(a) of the Statutes of the Appeals Board internal appeals against 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 letters of 17 July 1986 the Director of Personnel answered that the Director-General rejected their appeals and consented to their going straight to the Tribunal.

B. The complainants' main plea is breach of the rule *patere legem quam ipse fecisti*: the Organization may not repudiate the binding character of the rules in the second sentence and following of Article 54(b) of the Fund Regulations, so long as they have been neither repealed nor amended. Staff Rule 103.20 applies too, and it refers, as to the pensionable remuneration of staff in the Professional and higher categories, to the Fund Regulations.

*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, 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 to continuance of the arrangements set out above for adjustment of pensionable remuneration between general reviews of the scale, whether or not the rules had been repealed or amended.

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 the second sentence and following of Article 54(b) of the Fund Regulations, 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 UNESCO observes that the complainants are relying on the second sentence and following of Article 54(b) even though in resolution 39/246 the Assembly suspended the application of the arrangements therein provided for.

The old arrangements no longer apply and the complaints are irreceivable because they disclose no new cause of action. Besides, they serve no purpose. Either their purpose is the adjustment of the old scale, and in that case the answer is that that scale no longer applies; or else the purpose is the adjustment of the new scale in force as from 1 April 1985, and in that case the answer is that no adjustment was yet due on 1 April 1986 by the method the complainants are relying on, the variation in the indices not having reached the required 5 per cent. Their complaints are therefore devoid of substance and irreceivable.

As to the merits the Organization points out that what was suspended was not the material provisions of the Staff Rules but the arrangements for adjustment. The means was the formal amendment by the Assembly of Article 54(b) of the Fund Regulations so as to leave, albeit in altered form, only the first sentence and suspend the rest of it.

In answer to the plea of breach of acquired rights the Organization cites its submissions in the earlier complaints.

It concludes that the complaints should be dismissed because they disclose no new cause of action and because in any event they are 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.

The conditions for bringing about the adjustment were met because the consumer price index in the United States rose by 5.6 per cent from 306.2 at 1 July 1984 to 323.4 at 1 January 1986, and the rules have to be complied with. 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 UNESCO maintains that the complaints have the same purpose as the earlier ones. In both cases the challenge is to the amount taken for the purpose of reckoning pensionable remuneration. The Organization has taken no decision that causes the complainants injury. In refusing to increase pensionable remuneration the Director-General has merely complied with resolution 40/245 of the General Assembly, which prolonged the suspension of the arrangements for adjustment in Article 54(b) of the Fund Regulations.

#### CONSIDERATIONS:

1. In 1985 several UNESCO officials lodged complaints - in which the present complainants intervened - seeking the quashing of individual decisions by the Organization to apply a new scale of pensionable remuneration to its staff as from 1 January 1985. The Tribunal dismissed those complaints - and the applications to intervene - in Judgment 836 of 5 June 1987, which gave an account of the pension scheme that covers staff of 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 because they cover the same ground.

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 it may hear complaints alleging non-observance of the term of appointment and of the Staff Regulations, viz. any breach of conditions of service.

The only rule the complainants rely on is UNESCO Staff Rule 103.20, which says that pensionable remuneration is defined by the Regulations of the United Nations Joint Staff Pension Fund. The sole derogation it allows is where an official's pensionable remuneration would fall on his promotion from the General Service to the Professional category.

In itself the provision can cause the complainants no injury and so cannot support their case.

5. Actually they are not pleading breach of any provision of the Staff Regulations or any term of their appointment. Their sole purpose in citing 103.20 is to bring in 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. Their main plea is that in refusing them an adjustment UNESCO was in breach of *patere legem*; their subsidiary plea is breach of acquired rights.

The Organization's answer is that 54(b) has been amended and its application suspended 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 the Fund Regulations: by Article 48 the United Nations Administrative Tribunal alone may hear complaints alleging breach of those Regulations.

#### 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

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