ADMINISTRATIVE TRIBUNAL

Judgement No. 478

Case No. 517: SUNDARAM

Against: The Secretary-General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Francisco A. Forteza; Mr. Ioan Voicu;

Whereas, on 22 June 1989, Sylvia Sundaram, a staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application, the pleas of which read as follows:

"Section II - Pleas

I request that:

a) The decision of the Secretary-General of ICAO (...) dated 26 January 1989 not to grant dependency benefits in regard to my spouse be rescinded;

b) The decision of the Secretary-General dated 1 May 1989 (...) not to grant any retroactive and future dependency benefits to me in regard to my husband be rescinded;

c) The Secretary-General of ICAO be ordered to pay dependency benefits to me in respect of my husband retroactively for the maximum period allowed under the Rules of the Organization;

d) The Secretary-General of ICAO be ordered to continue to pay dependency benefits to me in respect of my husband from 1 January 1989."

Whereas the Respondent filed his answer on 19 September 1989;

Whereas, on 27 March 1990, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and on 4 May 1990, the Respondent provided answers thereto;

Whereas the facts in the case are as follows:

The Applicant has been employed by ICAO since 1 March 1961. She currently holds a permanent appointment at the General Service, G-8 level, as a Personnel Clerk in the Technical Assistance Bureau. She is married to Chittur S. Sundaram, a former staff member of ICAO, and a recipient of a pension from the United Nations Joint Staff Pension Fund (UNJSPF).

In a Circular Memorandum dated 31 May 1988, the Administration announced to staff in receipt of a dependent spouse allowance, the requirements to qualify for the allowance and the administrative procedures to be followed in order to file a claim therefor. In accordance with ICAO staff regulation 3.7:

"...

1) A dependent spouse shall be a spouse whose occupational earnings, if any, in any calendar year for which an entitlement is claimed, do not exceed the lowest entry level of the United Nations General Service gross salary scales applicable to the place of work of the staff member's spouse ...".

Attached to the Circular was a form entitled "Application for Dependent Spouse Benefits" which contained a footnote with a definition of "occupational earnings". According to the definition, "occupational earnings" includes:

"... the total gross salary from employment before any tax deductions or obligatory contributions ... income from other sources (e.g. pension, annuities, rental income, investment income, grants, scholarships, etc) is not included in the 'occupational earnings'."

On 3 June 1988, the Applicant, who had, until then, been under the impression that she was not entitled to claim a dependency allowance for her husband, requested payment of the allowance on the ground that, according to footnote (d) of the attachment to the

Circular Memorandum, "only occupational earnings are considered in determining dependency status". She noted that she was "unaware that pension benefits were not considered as 'income'" and requested retroactive payment of the allowance "on a retroactive basis up to the maximum permissible time period".

In a reply dated 11 July 1988, the Chief, Personnel Branch, approved payment of the spouse allowance from 31 May 1988 only, the date of the Circular Memorandum in which "a new definition of occupational earnings adopted by the Organization effective 31 May 1988 and superseding any previous definition or interpretation given to the word occupational earnings of staff regulation 3.7" had been given.

On 23 August 1988, the Applicant asked the Chief, Personnel Branch, to reconsider his decision not to pay her a spouse allowance retroactively. She argued essentially that the Staff Regulations and Rules refer to occupational earnings and that the clarification contained in the Circular Memorandum had not changed the intent of the rules itself.

In a reply dated 16 December 1988, the Chief, Personnel Branch, informed the Applicant that the question of defining occupational earnings had been reviewed and the Secretary-General had decided, on 7 December 1988, to issue a new paragraph to personnel instruction PI/3.7 stating that:

> "Periodic pension payments, with the exception of those deriving solely from a private superannuation plan, and unemployment benefit, shall be considered as occupational earnings ...".

As regards her claim, he confirmed that the previous definition in footnote (d) of the attachment to the Circular Memorandum of 31 May 1988 had been "a new definition of occupational earnings effective from the same date of that circular memo".

On 13 January 1989, the Applicant requested the Secretary-General to review the administrative decision not to pay her a dependent spouse allowance, "both on a retroactive and continuing basis". On 26 January 1989, the Secretary-General informed the Applicant that he could not accede to her request for administrative review.

On 16 February 1989, the Applicant lodged an appeal with the

Advisory Joint Appeals Board (AJAB). The Board adopted its report on 18 April 1989. Its recommendation reads as follows:

"RECOMMENDATION

> In view of the above, the Board unanimously recommends that the Secretary-General review his decision and that the Appellant be paid the dependent spouse allowance covering a five-month period from 1 January 1988 to 31 May 1988 which would complete the payment for the entire calendar year 1988.
>
> The Board rejected the Appellant's request for payment of the dependent spouse allowance beyond 31 December 1988 as unfounded in facts and in law."

On 1 May 1989, the Secretary-General decided to:

> "...
>
> ... accept the recommendation of the Board and order that Mrs. S. Sundaram be paid dependent spouse allowance for the period 1 January to 31 May 1988, thus completing the payment for the entire calendar year.
>
> In all other respects the claim of Mrs. S. Sundaram is unfounded in facts and in law; it is also unfounded in equity since Mrs. Sundaram's husband is not economically dependent on her. Consequently, in that respect the appeal stands rejected by the Advisory Joint Appeals Board and I accept this recommendation."

On 2 May 1989, the Secretary of the AJAB transmitted to the Applicant a copy of the AJAB report, together with the Secretary-General's decision thereon.

On 22 June 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The new definition of occupational earnings dated 7 December 1988, including pensions as such, was formulated six months after the Administration had communicated to the staff that pensions could not be considered occupational earnings.

2. The new definition of occupational earnings discriminates against recipients of UN pensions because pensions from private sources, as well as income derived from investments,

are not included therein.

3. The new definition of occupational earnings is not applicable to the case since the UNJSPF should be considered by the Administration as a private superannuation plan.

Whereas the Respondent's principal contentions are:

1. The definition stated in footnote (d) of the attachment to the Circular Memorandum of 31 May 1988 was the first definition by the Administration for the term "occupational earnings" and was intended to apply for the future.

2. The pension received by the Applicant's husband exceeds the amount referred to in staff regulation 3.7(1) and is excluded in accordance with the new paragraph added to PI/3.7 on 7 December 1988.

3. The UNJSPF cannot be considered as a private superannuation plan because of its special status.

The Tribunal, having deliberated from 2 May to 18 May 1990, now pronounces the following judgement:

I. The questions presented to the Tribunal in this case are:

(a) Whether pensions received may be considered as "occupational earnings" when entitlement to a dependency allowance payable in respect of a "dependent spouse" is limited by only the "occupational earnings" of the spouse;

(b) Whether, if a change is made to exclude pensions from the definition of "occupational earnings", such liberalization has retroactive effect; and

(c) If, when a further change is made to include pensions within the definition of "occupational earnings", which results in depriving a staff member of the continued right to receive the dependency allowance, this amounts to a denial of acquired rights.

II. Before entering into an analysis of these issues, as they apply in the case before the Tribunal, some preliminary observations may be in order. From the inception of the spouse allowance, the dependency of the spouse, which was a condition for its payment, was considered non-existent if the spouse's occupational earnings

exceeded a certain amount. No explanation was ever furnished why dependency should be determined solely by reference to the source of the income and not by its amount.

III. In the absence of a satisfactory explanation for this distinction, it is difficult to know what, if any criteria may be considered appropriate to draw a distinction between occupational earnings and pensions derived from an occupation.

IV. The history of the treatment of pensions by ICAO in this context shows that the Organization does not seem to have arrived at a rationale for the distinction, which at one time led it to exclude pensions from occupational earnings and then to include them. In reply to a question put by the Tribunal, the Respondent stated that: "the ICAO Staff Rules and Regulations never defined, prior to 31 May 1988, the term 'occupational earnings' and the first attempt to do so was in the footnote of the Circular Memorandum of 31 May 1988, which specifically excluded pension income from occupational earnings".

V. As a result of the Circular Memorandum of 31 May 1988, which stated that "income from other sources (eg. pension, annuities, rental income, investment income, grants, scholarships, etc) is not included in the 'occupational earnings'", the Applicant submitted a claim in respect of her husband with retroactive effect up to the maximum permissible period. That application was granted without retroactive effect, from 1 June 1988 onwards.On 7 December 1988, a new paragraph was added to personnel instruction PI/3.7, that effective 1 January 1989, "periodic pension payments, with the exception of those deriving solely from a private superannuation plan, and unemployment benefit, shall be considered as 'occupational earnings'...". In reply to a further question put by the Tribunal, the Respondent stated that ICAO considered a private superannuation plan to be "a plan for which the employee has been solely responsible for the cost involved and which is established on a voluntary basis".

The Applicant's dependency allowance was discontinued from 1 January 1989, as her husband's pension exceeded the maximum amount

allowed for occupational earnings. When the Applicant appealed that decision, she was granted a dependency allowance for the first six months of 1988, but her claim to receive it retroactively for a period prior thereto and prospectively after 1 January 1989, was rejected.

VI. A special feature of the present case is the fact that the pension received by the Applicant's husband is being paid by the United Nations Joint Staff Pension Fund and was earned by the Applicant's husband through his own service with ICAO.

VII. The first question to be determined by the Tribunal is whether it is permissible, under any circumstances, to consider pensions as "occupational earnings". It could be argued that if "occupational earnings", are to be considered earnings derived from an occupation, it would be logical to exclude them from the definition of a pension, as not being from a current occupation. On the other hand, if pensions are considered, as they are in some countries, as "deferred earnings", it would be just as logical to treat them as "occupational earnings". Accordingly, the changes in ICAO's attitude appear to have a rational basis rather than, as alleged by the Applicant, to introduce legislation specially designed to deprive her of her rights.

Whatever the reasons for the variations in approach by ICAO, which led at first to pensions being treated as occupational earnings and then, for a short time, as not being so, and then by the present rule, the Tribunal does not find that they are arbitrary or discriminatory. However, the Tribunal does not look favourably upon frequent fluctuations in the conditions affecting staff members' entitlements. It is preferable to maintain a system, despite doubts concerning its justification, until such time as a definitive conclusion has been reached on what system is to replace it, rather than go back and forth between two systems, particularly if no explanation is furnished for the changes.

VIII. The Tribunal finds no reason, in this case, to pronounce on what would be a suitable definition of "occupational earnings". It notes that the most appropriate test to determine whether a

dependency allowance ought to be payable or not to a staff member whose spouse is in receipt of a pension would seem to be whether the spouse is or is not economically dependent on the staff member.

IX. The Tribunal must now consider whether the Applicant is entitled to payment of the allowance retroactively. In this connection, the Respondent in his answer argued that "it has been the established practice of the Organization not to exclude pension benefits from 'occupational earnings'". In addition, in reply to a question put by the Tribunal, the Respondent stated that: "Before 31 May 1988, there was no precedent in ICAO of dependency allowance being paid to a staff member whose spouse received pension benefits other than the eligibility threshold set forth in the Staff Rules ...". In light of the considerations set forth above, and being satisfied that it has been the Respondent's consistent practice to treat pensions as "occupational earnings", the Tribunal finds that the Applicant is not entitled to any retroactive payment of the dependency allowance for a period prior to 1 January 1988.

X. The question that remains to be considered is whether, once a change has been made in the definition of dependency, by treating pensions as "occupational earnings", resulting in the loss of the allowance previously being paid, that is a denial of acquired rights to the staff member affected.

The Tribunal has been asked to consider on a number of occasions whether a modification in the pertinent rules could affect an acquired right. It has held that "respect for acquired rights carries with it the obligation to respect the rights of the staff member expressly stipulated in the contract" and that "respect for acquired rights also means that all the benefits and advantages due to the staff member for services rendered before the coming into force of a new rule remain unaffected ...". (Judgement No. 273, Mortished, para. XV, (1981)). The Tribunal finds that in this case the Applicant was not deprived of any acquired rights.

XI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Francisco A. FORTEZA
Member

Ioan VOICU
Member

Geneva, 18 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary