

ADMINISTRATIVE TRIBUNAL

Judgement No. 400

Case No. 352: CONNOLLY-BATTISTI

Against: The United Nations
Joint Staff Pension
Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, President; Mr. Roger Pinto,
Vice-President; Mr. Endre Ustor;

Whereas on 4 January 1985, Norah Connolly-Battisti, a participant in the United Nations Joint Staff Pension Fund, filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas on 9 May 1985, the Applicant, after making the necessary corrections, again filed an application, the pleas of which read as follows:

"II. Pleas

1. That the Tribunal instruct the Secretary of the United Nations Joint Staff Pension Fund to calculate my initial pension in the local currency (i.e. Italian lira) using the rate of exchange received by the Fund on the day of payment of my monthly pension benefit for the first time, i.e. 9.9.1981 ... (the rate of exchange was US\$ 1 = Lit. 1,240¹ in September 1981) in accordance with article 48 of the Regulations of the Fund
2. To order the UNJSP Board to remove the discrimination between General Service Staff members retiring in the country of the duty station, and professional and higher categories, by applying the differential factor to increase final average pensionable remuneration for all

¹ This was the UN operative rate of the previous month.

participants retiring in high cost countries. At present this increase in FAO [Food and Agricultural Organization] is only applied to professional and higher categories.

3.To order that the cost-of-living increases be applied to the full retirement benefit of all participants. The benefit is calculated on the Final Average Remuneration for all participants. Those who take a lump sum (Art. 29(d) of ... and a reduced annual benefit receive no CPI [Consumer Price Index] increases related to the lump sum. In establishing the lump sum no calculation was made to cover future cost-of-living increases. If there is an increase of 3.6% on two-thirds of the full entitlement (the annual benefit) then one-third of that increase should be applied to cover the one-third of the full entitlement taken as a lump sum. Or order that initially on calculation of the lump sum, some increase should be made to that sum to take into account prospective increases. Order this to be done to my lump sum, if the principle is accepted."

Whereas the Respondent filed his answer on 26 November 1986;
Whereas the Applicant filed written observations on 21 July 1987;

Whereas on 22 September 1987, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent;

Whereas on 25 September 1987, the Respondent informed the President of the Tribunal that he was amending his answer;

Whereas on 1 October 1987, the Respondent provided answers to the questions put by the President of the Tribunal;

Whereas on 2 October 1987, the Applicant filed additional documents and on 14 October 1987 the Respondent commented thereon;

Whereas on 3 November 1987, the Applicant requested the Tribunal to postpone its consideration of the case;

Whereas on 5 November 1987, the Respondent commented on the Applicant's request;

Whereas on 9 November 1987, the Applicant filed additional documents;

Whereas on 10 November 1987, the Executive Secretary of the Tribunal informed the Applicant that the Tribunal had rejected her request and would adjudicate the case at its present session;

Whereas the facts in the case are as follows:

The Applicant is a former General Service staff member of the Food and Agriculture Organization. She became a participant in the UN Joint Staff Pension Fund on 31 August 1954 and separated from the service of the FAO on 31 May 1981. On 1 June 1981, she became entitled to a benefit under article 29 of the Regulations of the Fund then in force, and elected to commute into a lump sum one-third of its actuarial value under article 29 (d)(i). She thus became the recipient of a one-third lump sum cash payment and of a reduced annual periodic benefit, payable to her in monthly instalments.

At the time of her separation from the service of the FAO, the two track pension adjustment system, as adopted by the UN General Assembly in 1978 and revised effective 1 January 1981, was in force.

According to this system, the Fund established two base amounts for each beneficiary:

"(a) One in United States dollars, which will be adjusted periodically to reflect changes in the United States Consumer Price Index;"

and

"(b) The other in local currency, which will be adjusted periodically to reflect changes in the Consumer Price Index [CPI] in the beneficiary's country of residence." (A/33/9, Annex V, para. 3)

Each beneficiary, on submission of the required proof of his or her country of residence became entitled, on the effective date of the new system, to the greater of: the local currency equivalent of the dollar amount of his pension adjusted to reflect changes in the United States CPI between the fourth month preceding the date of the adjustment and the month for which the last utilized United States CPI was established; or the local currency amount adjusted in the same way, but in accordance with the CPI of the country of residence (A/33/9, Annex V).

The modifications introduced by the United Nations General Assembly in its resolution 35/215 of 17 December 1980 were intended, inter alia, "to increase the initial entitlement in local currency when the recipient resides in a country where the cost of living is substantially higher than that which was reflected in the

pensionable remuneration used to determine his basic dollar entitlement under the Regulations." This was to be accomplished by the application of a cost-of-living differential factor to a portion of the beneficiary's final average remuneration. At the same time, the local currency amount was to be derived solely from the use of the average rate of exchange between the U.S. dollar and the currency of the country of residence "computed over the 36 consecutive calendar months up to and including the month of the separation ..." (A/35/9, annex V, paras. 3 and 6).

In a letter dated 20 September 1981, the Applicant inquired about the rate of exchange used for the conversion of her dollar base pension into the lira base pension. She asserted that the Fund should use the dollar/lira exchange rate on the date of payment of her first pension. In a reply dated 28 October 1981, the Secretary of the Board transmitted to her the Board's report to the General Assembly for 1980 which contained the description of the two-track pension adjustment system adopted by the General Assembly in 1978 and revised effective 1 January 1981, and informed her that a 36-month average rate of exchange was applicable in her case.

On 18 November 1982, the Applicant provided the Secretariat of the Fund with a certificate attesting that she resided in Italy. Accordingly, the Applicant's local currency pension was established by conversion of her dollar pension using the 36-month average of UN operational rates of exchange during the period 1 June 1978 through 31 May 1981, in accordance with the two-track pension adjustment system adopted by the General Assembly in its resolution 35/215 of 17 December 1980.

On 20 April 1982, the Applicant requested the Standing Committee of the Board, under Section K of the Administrative Rules of the Fund, to review the Secretary of the Board's determination of her pension in local currency and other aspects of the application to her case of the pension adjustment system. At its 159th meeting, held on 29 March 1984, the Standing Committee rejected the Applicant's claims and decided to uphold the decision by the Secretary of the Board. On 25 July 1984, the Secretary of the Board informed the Applicant of the Committee's decision.

On 9 May 1985, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Respondent should use the US dollar/Italian lira spot rate of exchange in effect on the date of payment of the Applicant's first monthly pension, throughout the period of her entitlement, under article 48(b) of the Regulations of the Fund then in force.

2. The two-track system of adjustment should be applied to the one-third of the Applicant's pension entitlement that was commuted into a lump sum at the time of her separation from the service of the FAO.

3. The cost-of-living differential to which retirees from the Professional and higher categories are entitled should be applied to the Applicant's pension although she served in the General Service category.

Whereas the Respondent's principal contentions are:

1. The challenged features of the Two-Track Pension Adjustment System are neither arbitrary nor discriminatory.

2. The Applicant's acquired rights were not violated.

3. The Applicant was not misled by erroneous or missing information.

The Tribunal, having deliberated from 26 October 1987 to 12 November 1987, now pronounces the following judgement:

I. In his answer to the application, the Respondent submitted legal arguments objecting to the jurisdiction of the Tribunal in the present case, principally on the ground that the authority of the Tribunal does not extend to decide upon disputes concerning pension adjustment matters which have never formed part of the Pension Fund Regulations.

In the course of the proceedings, the Respondent, referring to the Tribunal's Judgements No. 378 (Bohn et al) and No. 379 (Gilbert et al) withdrew his arguments and pleas which questioned the Tribunal's jurisdiction.

II. In the light of the withdrawal of the Respondent's objections

and for the reasons expounded in its above-mentioned judgements, the Tribunal decides that it has jurisdiction in the present case.

III. As to the merits, the Applicant's first plea reads as follows:

"1. That the Tribunal instruct the Secretary of the United Nations Joint Staff Pension Fund to calculate my initial pension in the local currency (i.e. Italian lira) using the rate of exchange received by the Fund on the day of payment of my monthly pension benefit for the first time, i.e. 9.9.1981 ... 47(b) (the rate of exchange was \$US 1 = Lit. 1,240² in September 1981) in accordance with article 48 [now article 47(b)] of the Regulations of the Fund".

IV. The Applicant was fully entitled under article 47(b), to request payment of her initial periodic benefit in Italian lira - which she did not do. Had she done so, the conversion from U.S. dollars to Italian lira of her first monthly pension would have been effected not at the 36-month average exchange rate, but at the exchange rate "obtained by the Fund on the date of payment".

V. However, the essential element of the complaint is directed against the change introduced as of 1 January 1981 to the pension adjustment system by General Assembly resolution 35/215 adopted on 17 December 1980. This resolution altered, in certain respects, the pension adjustment system as it was previously in force under the General Assembly resolution 33/120 of 19 December 1978.

The Applicant retired from the FAO on 31 May 1981. Consequently, her adjusted pension was calculated and paid not on the basis of the system which was in force between 1 January 1979 and 31 December 1980, but on the basis of the system as modified with effect from 1 January 1981.

VI. Undoubtedly, the new system introduced five months before the retirement of the Applicant, was less advantageous to her than the previous one. According to the previous system, the higher of the 36-month average rate of exchange and the spot exchange rate on the

² This was the UN operative rate of the previous month.

date of separation would have been used for the conversion of the dollar amount to the local currency amount for the establishment of the initial base pension benefit on the local currency track.

Effective from 1 January 1981, the use of the exchange rate at the date of separation (spot rate) was eliminated for the purpose of the calculation of the local track and only the 36-month average exchange rate has been employed.

At the date of the Applicant's retirement, the 36-month average exchange rate was 867 lira to the dollar while the spot rate was higher: 1,240 lira per U.S. dollar according to the Applicant, 990 lira per U.S. dollar according to the Respondent.

VII. The Applicant asserts that this change in the pension adjustment system violates her acquired rights. This claim, however, cannot be upheld. The pension adjustment system does not apply and consequently has no effect whatsoever until a participant separates from service and becomes entitled to a benefit from the Fund. The revision of the two-track pension adjustment system was adopted by the United Nations General Assembly and given effect from 1 January 1981 i.e. several months before the Applicant's separation from service on 31 May 1981. Therefore, the change in the system occurred before the Applicant retired, and hence she could not have enjoyed a specific right to the conversion of her pension into local currency that was embedded in the previous system. Accordingly, her claim to any acquired rights in this respect cannot be sustained.

VIII. The Applicant's claims seem to be based on the assumption that she has a legal right to the maintenance of the purchasing power in local currency of her pension. She states in her application that her pension was in the first four months of her retirement from June 1981 fixed at \$880.30 monthly; this was adjusted from January 1982 to \$923.44, from April 1982 to \$956.69, from October 1984 to \$1,056.72, from April 1986 to \$1,082.79 and from July 1986 to \$1,097.09. The Applicant appears to complain, that in fixing her adjusted monthly pension, the increases in the consumer prices in Italy, where she has her permanent residence, were not fully taken into account.

IX. As a matter of law, the Applicant is not entitled to an unconditional guarantee for the maintenance of the purchasing power of her pension, neither by her contract with the FAO, nor by the Regulations of the UNJSPF (Judgement No. 182, Harpignies, para. VII). Furthermore, in the absence of a contractual provision to this effect, there is no general principle of law requiring an increase of the pension strictly parallel with the rise in the cost of living. (ibid.).

X. The introduction of the various pension adjustment schemes by the General Assembly upon the recommendation of the Pension Board are measures designed to increase the pensions of the beneficiaries of the Fund and to limit thereby the loss of purchasing power of these amounts due to the devaluation of the dollar and to the inflationary tendencies in many countries of the world. The fact that these systems do not provide for a complete panacea for the ills of the world's monetary system cannot be regarded as an infringement upon the Applicant's rights.

XI The Respondent has admitted that "Beneficiaries of the Fund are entitled as of right to a meaningful, reasonable pension adjustment system that provides to them an adequate measure of protection from cost-of-living changes occurring after their retirement". The Tribunal has confirmed this view in Judgements No. 378 (XXXI) and 379 (XXX) in the following terms:

"The Tribunal agrees with this argument. It holds that the revisions in the pension adjustment system are applicable without retroactivity to all beneficiaries of retirement pensions. These modifications must not be arbitrary. They must be reasonable and must be adapted to the aim of the system: adjustment of pensions to cost-of-living changes in the various countries of residence of the retired staff members. They may not be used for purposes other than the protection of the purchasing power of retired staff members - nor with greater reason can they be allowed to result in forfeiture or deprivation."

The Respondent in his answer to the present application, has reiterated his views quoted above and has added the following:

"This does not, however, mean that prospective modifications of the pension adjustment system, whether to meet new economic

conditions, to correct existing anomalies, or to effect certain savings in view of the Fund's actuarial situation at the time, are foreclosed with respect to adjustments to either benefits that first become payable in the future or benefits already in payment."

The following explanation of the Respondent in his same answer is also worth recalling:

"The pension adjustment system does not give rise to an absolute right to an adjusted pension benefit at a certain level. The system responds to variations, not only to increases, in the cost of living. Thus, in a period of deflation, the pension adjustment system as established can lead to a lowering of an already adjusted periodic benefit in payment, although not to an extent that it would be reduced below the basic benefit under the Fund's Regulations. Likewise, currency fluctuations can result in a lowered pension benefit from one quarter to the next quarter, whether on the local currency track (expressed in the U.S. dollar equivalent) or on the US dollar track (expressed in the local currency equivalent)."

The Tribunal accepts the validity of these statements by the Respondent.

XII. The Applicant's second plea is as follows:

"To order the UNJSP Board to remove the discrimination between General Service Staff members retiring in the country of the duty station, and professional and higher categories, by applying the differential factor to increase final average pensionable remuneration for all participants retiring in high cost countries. At present this increase in FAO is only applied to professional and higher categories."

This plea is obviously directed against that part of the modified pension adjustment system (as of 1 January 1981) which introduced, in the determination of the initial amount of the local currency pension, a cost-of-living differential factor in strictly defined cases.

XIII. According to the "Details of revised pension adjustment system" as adopted by the General Assembly (see annex V to the Report of the United Nations Joint Staff Pension Board - General Assembly Official Records, 35th session, Supplement No. 9 (A/35/9) page 52, para. 7(c)):

"No cost-of-living differential factor would be determined for

participants in the General Service category whose country of residence after separation is the country of their duty station at time of separation. In other words, no adjustment would be made to their final average remuneration for purposes of paragraph 6(b),"

i.e. for the purposes of the calculation of their local currency base amount.

XIV. As explained by the Respondent:

"[The] cost-of-living differential factor, introduced effective 1 January 1981, [has] not [been] applied to General Service participants retiring in the country of last duty station: [the] reason is that for General Service staff, pensionable remuneration already reflects the cost of living at the duty station because it equals gross salary (article 54(a)(i) of Fund's Regulations) ...; i.e. net salary, established by reference to best prevailing conditions at the duty station, plus staff assessment, which corresponds to income tax, provide the gross salary; the cost-of-living differential factor is therefore only applied to General Service participants retiring to a country with a higher cost of living than at their last duty station, as the pensionable remuneration of such participants could not and did not take this element into account. By contrast, for Professional and higher category participants pensionable remuneration is the same world-wide and is adjusted on a world-wide basis (article 54(b) (ii)); and the cost-of-living differential factor is applied only when these participants retire to a country where the cost of living is considerably higher than at the base in New York."

The Tribunal agrees that the different treatment of the General Service pensioners is not an undue discrimination as the Applicant claims. As shown by the above-quoted provision, pensionable remuneration for General Service staff reflects the cost of living at the duty station.

Consequently, the cost-of-living differential factor only applies to General Service participants retiring to a country with a higher cost of living than that of their last duty station. In the present case, the Applicant's country of residence after separation is the same as her duty station at the time of separation (Italy).

XV. The Applicant's third plea is as follows:

"To order that the cost-of-living increases be applied to the full retirement benefit of all participants. The benefit is

calculated on the Final Average Remuneration for all participants. Those who take a lump sum (Art. 29(d)) ... and a reduced annual benefit receive no CPI increases related to the lump sum. In establishing the lump sum no calculation was made to cover future cost-of-living increases. If there is an increase of 3.6% on two-thirds of the full entitlement (the annual benefit) then one-third of that increase should be applied to cover the one-third of the full entitlement taken as a lump sum. Or order that initially on calculation of the lump sum, some increase should be made to that sum to take into account prospective increases. Order this to be done to my lump sum, if the principle is accepted."

The concept that a cost-of-living adjustment should be added to the calculation of that part of the pension benefit which is being commuted into a lump sum at the beneficiary's option is outside the present system of pension adjustment.

The Respondent recalls in this connection that commutation is a voluntary act by the participant concerned and once this option is exercised, an adjustment can only be made on the pension to be paid periodically.

This plea again cannot be entertained as it has no legal foundation in the existing pension adjustment system and the practice established does not impair any of the rights of the Applicant.

XVI. The Applicant's complaints concerning the slow and inadequate manner of the information she received from the Respondent do not seem to be completely unfounded. A greater effort on part of the Respondent to explain promptly, in plain language, his position in cases similar to the present one would be desirable and reduce the time, effort and cost involved in litigation.

XVII. In this connection the Tribunal draws the attention of the Respondent to the practice of the Standing Committee whose decisions do not always indicate reasons. An examination of the possibility of a change in this practice on the above grounds is suggested.

XVIII. For the foregoing reasons, the application is rejected.

(Signatures)

Samar SEN
President

Roger PINTO
Vice-President

Endre USTOR
Member

New York, 12 November 1987

R. Maria VICIEN-MILBURN
Executive Secretary