

ADMINISTRATIVE TRIBUNAL

Judgement No. 404

Cases No. 395: BREDE II	Against: The United Nations
No. 396: QUINTERO-FERRO	Joint Staff Pension
No. 397: HERTZ II	Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Roger Pinto, Vice-President; Mr. Endre Ustor; Mr. Jerome Ackerman, alternate member.

The presence and participation of an alternate member ensured that the panel would always have three members, and could avail itself of the alternate's special knowledge of the large number of details which characterize these cases;

Whereas, on 25 June 1986, Walter Brede, the recipient of a retirement benefit from the United Nations Joint Staff Pension Fund, filed an application, the pleas of which reads as follows:

"MAY IT PLEASE the presiding member to agree to the holding of oral proceedings in this case.

AND MAY IT PLEASE the Tribunal:

1. To declare itself competent in this case;
2. To declare and judge the application receivable;
3. To order the rescission of the decision adopted by the Standing Committee of the United Nations Joint Staff Pension Fund, acting on behalf of the Board, at its 163rd meeting, held on 9 August 1985, to reject the Applicant's request for a review of the Secretary's decision to apply to him article 54 (b), as amended, of the Regulations of the Fund (modifying the method for calculating pensionable remuneration) in order to determine his pension entitlements for his entire period of contributory service and not solely for the period of contributory service following the critical

date of 1 January 1985 at 12.01 a.m.;

4. Accordingly, to order the payment by the Fund to the Applicant, with effect from the day following his separation, of a retirement pension recalculated by separating his period of contributory service into two parts and applying to the period prior to the critical date referred to in paragraph 3 above the set of rules (including those relating to the determination of pensionable remuneration) in force up to that date, and to the period following the critical date the set of rules (including those relating to the determination of pensionable remuneration) in force as from that date;
5. To award the Applicant, as costs, a sum payable by the Respondent, assessed at the time of the submission of this application at four thousand (4,000) United States dollars, subject to adjustment upon completion of the proceedings."

Whereas, on the same day, Carlos Quintero-Ferro and Kirsten Horneman Hertz, also the recipients of retirement benefits paid by the United Nations Joint Staff Pension Fund, filed applications containing the same pleas;

Whereas the Respondent filed his answers on 23 March 1987;

Whereas the Applicants filed written observations on 30 April 1987;

Whereas, on 5 June 1987 the Tribunal decided to postpone the consideration of these cases until its autumn session;

Whereas the Tribunal heard the parties in the course of oral proceedings held at Geneva on 1 and 2 June 1987;

Whereas, on 7 October 1987 the Applicants filed their reply to a question put by the Tribunal during the oral proceedings and the Respondent submitted its comments thereon on 15 October 1987;

Whereas, on 7 October 1987 the Applicants informed the Tribunal of the amounts sought as costs;

Whereas, on 7 October 1987 Jacques Celiset and Francesca Ronchi Proja submitted their applications for intervention in case No. 395;

Whereas, on 19 October 1987 the Respondent filed its comments on the aforementioned applications for intervention;

Whereas, on 23 October 1987 the Applicants submitted two

notes in reply to the comments furnished by the Respondent;

Whereas the facts in the three cases are as follows:

The Applicants, Walter Brede, Carlos Quintero-Ferro and Kirsten Horneman Hertz, are the recipients of retirement benefits paid by the United Nations Joint Staff Pension Fund, hereinafter referred to as the Fund. The Applicant Brede separated from service on 28 February 1985; the Applicant Hertz separated from service on 3 April 1985; the Applicant Quintero-Ferro separated from service on 28 February 1985.

The level of the benefit to which each of the Applicants is entitled depends on three factors: the length of contributory service, the rate of accumulation for each year of service and the level of the pensionable remuneration (a term which, in French, was changed in 1981 from traitement soumis à retenue pour pension to rémunération considérée aux fins de la pension).

The level of pensionable remuneration depends on the grade and step of each staff member. Pensionable remuneration determines the level of the contributions to be paid by him.

Prior to 1981, the sole article in the Regulations and Rules of the Fund which determined the pensionable remuneration was article 1 (p), which read as follows:

"(p) 'Pensionable remuneration' shall mean the remuneration, at its equivalent in dollars, of a participant which is pensionable under the terms of his appointment."

Each member organization of the Fund, which, under article 3 (b) of the Regulations participated in the common system of salaries, allowances and other conditions of service of the United Nations and the specialized agencies, determined the level of pensionable remuneration for each participant in the Fund.

The International Civil Service Commission (ICSC), hereinafter referred to as the Commission, had undertaken in its annual report to the General Assembly at the latter's thirty-third

session (A/33/30), a general examination of the many effects on the United Nations salary system of currency fluctuations and of the depreciation of the dollar, and in particular on the pensionable remuneration of staff in the Professional and higher categories. The United Nations General Assembly in its resolution 33/119, section II, of 19 December 1978:

"3. [Approved] the Commission's intention to make, as a matter of priority, a comprehensive examination of the functioning, methods of establishment and adjustment and appropriate level of pensionable remuneration, in particular with a view to preparing, in co-operation with the United Nations Joint Staff Pension Board, proposals to be submitted to the General Assembly at its thirty-fourth session for correcting anomalies in the United Nations pension system brought about by the current economic and monetary circumstances;"

In 1979, in its report to the General Assembly at the latter's thirty-fourth session (A/34/30, chap. III), the Commission presented a study on "pensionable remuneration and pension entitlements as elements of total remuneration". Therein, the Commission described the anomalies of the system and indicated various options as regards possible changes in the system of pensionable remuneration. While the Commission made no concrete recommendation for a long-term solution, it did advocate the elimination of the prevailing pensionable remuneration adjustment system based on changes in the Weighted Average of Post Adjustments (WAPA) and the adoption of an interim measure consisting of an adjustment in the initial amount of pensions.

The Pension Board was unable to reach agreement on a basic solution to the question and rejected the Commission's suggestion to eliminate the adjustment system for pensionable remuneration based on changes in WAPA. The Board proposed interim measures to eliminate the most serious anomalies.

Accordingly, the General Assembly in its resolution 34/221 (sect. VI) of 20 December 1979:

"1. [Requested] the International Civil Service Commission

and the United Nations Joint Staff Pension Board to conclude in 1980 their comprehensive examination of the functioning, methods of establishment and adjustment and appropriate level of pensionable remuneration with a view to submitting proposals to the General Assembly at its thirty-fifth session for correcting, not later than January 1981, anomalies in the United Nations pension system brought about by the current economic and monetary circumstances, ...;"

The Commission and the Board agreed on a solution in 1980. In the light of their recommendations the General Assembly, in its resolution 35/215 of 17 December 1980, decided that as from 1 January 1981 pensionable remuneration would be adjusted in accordance with two different methods, one for calculating contributions and the other for calculating benefits, and therefore amended article 55 of the Regulations of the Fund, which, after amendment, became article 54. This article provided that WAPA in the various duty stations would be used to adjust the pensionable remuneration - for establishing contributions to the Fund - when this average showed a variation of 5 per cent or more. The Consumer Price Index (CPI) for the United States would be used to adjust the pensionable remuneration for benefit purposes when it showed a variation of 5 per cent or more.

Thus, as of 1 January 1981 the scale of pensionable remuneration became part of the Regulations of the Fund, as did the methodology for its subsequent adjustment. All the member organizations of the Fund were therefore bound to apply the scale and the adjustment procedure described in article 54 (b), since upon joining the Fund they had accepted the Fund's Regulations.

An actuarial valuation, whose principal objective is to determine whether the present and future assets of the Fund will be adequate to enable it to meet its obligations, is normally carried out every two years by the consulting actuary, on the instructions of the Board, in accordance with article 12 of the Fund's Regulations. The actuarial valuation made as at 31 December 1980 showed that the rate of contribution prevailing at the time - 21 per cent of pensionable remuneration - would not, over the long term,

enable the Fund to meet its obligations. The General Assembly in its resolution 36/118 B of 10 December 1981 welcomed the intention of the Pension Board to undertake a comprehensive analysis of all possible measures to improve the actuarial balance of the Fund and requested the Pension Board, "in co-operation with the International Civil Service Commission where necessary, to consider alternative courses of action that might be taken" (para. 1).

In 1982, the Board recommended a series of economy measures, which were approved by the General Assembly in resolution 37/131 of 17 December 1982.

In its report to the General Assembly at the latter's thirty-eighth session (A/38/9), the Board recommended to the Assembly "that it should approve an increase in the total rate of contribution from 21 to 24 per cent" of pensionable remuneration, to be implemented "gradually", in four stages, beginning with an increase of 0.75 per cent (0.5 per cent by member organizations and 0.25 per cent by participants) with effect from 1 January 1984 (para. 27).

The General Assembly endorsed that recommendation in its resolution 38/233 of 20 December 1983. In section III, paragraph 2, of that resolution, it requested the International Civil Service Commission, "in co-operation with the United Nations Joint Staff Pension Board, to submit to the General Assembly at its thirty-ninth session recommendations on the appropriate level of pensionable remuneration for the Professional and higher categories". It further requested the Commission, in co-operation with the Board, to examine the comparative levels of pensionable remuneration "as part of the total compensation comparisons to be carried out within the framework of the Noblemaire principle" and to report thereon to the Assembly by the beginning of the thirty-ninth session.

In response to that request by the General Assembly, the Commission decided to undertake an examination of pensionable remuneration and pension entitlements for staff in the Professional and higher categories (A/39/30, paras. 8-69).

In its annual report to the General Assembly (A/39/30), the

Commission recommended that the General Assembly should adjust the pensionable remuneration of staff members in the Professional and higher categories by applying the mechanism provided for in article 54 (b) of the Regulations of the Fund, which would result in an increase of 5.4 per cent in the scale, with effect from 1 October 1984. It also recommended the implementation of a new scale for staff members in the Professional and higher categories with effect from 1 January 1985. For staff members already in service on that date, it further proposed transitional measures under which, in the case of those who were participants in the Fund before 1 January 1985, the date on which the new scale took effect, the old scale should continue to be applied if under the latter scale the amount of pensionable remuneration was higher, while, for those receiving promotions or step increases after 1 January 1985, the amount of pensionable remuneration under the two scales would be compared and the higher of the two would be used (para. 47).

The Board, in September 1984, approved the Commission's proposal that a new scale of pensionable remuneration should be introduced and transitional arrangements applied. It also noted that the new scale would result in a reduction of the Fund's actuarial imbalance equal to 0.17 per cent of total pensionable remuneration.

By its resolution 39/246 of 18 December 1984, the General Assembly approved the adjustment of the scale of pensionable remuneration with effect from 1 October 1984. In addition, the General Assembly approved the implementation, with effect from 1 January 1985, of a new scale of pensionable remuneration. It therefore adopted an amendment to the text of article 54 (b) of the Fund's Regulations, which now stipulates that "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 hereto". It can be seen from the new scale of pensionable remuneration for each grade and level of the categories concerned that there is an increase in the amount of pensionable

remuneration for grades P-1 and P-2, while the new scale results in a decrease in the amount for grades P-3 and higher. Moreover, the General Assembly rejected the transitional measures proposed by the Commission and requested the Board to submit to it at its fortieth session recommendations on any compensatory or interim measures regarding staff members already in service as at 31 December 1984. Lastly, it suspended any other adjustment for one year.

The new scale came into effect on 1 January 1985, and became binding upon member organizations of the Fund.

By a letter dated 17 April 1985, the Secretary of the Fund informed the Applicant Brede of the lump sum and periodic benefit he would receive from the Fund. On 25 May 1985, the Applicant Brede sent a letter to the Secretary of the Board requesting that the Standing Committee review the decision by the Secretary of the Board to apply to his particular case article 54 (b), as amended, of the Regulations of the Fund, save for the period of contributory service subsequent to 1 January 1985.

On 8 September 1985, the Applicant Hertz sent the Secretary of the Board a similar letter.

The Applicant Quintero-Ferro addressed a similar request to the Secretary of the Board in an undated letter.

At its 163rd meeting, held on 9 August 1985, the Standing Committee decided to uphold the decision by the Secretary of the Board on the ground that it was a decision he was bound to take pursuant to section II, paragraph 2, of General Assembly resolution 39/246 of 18 December 1984.

By a letter dated 21 March 1986, the Secretary informed the Applicants of the decision taken by the Standing Committee on behalf of the Board to uphold the decision by the Secretary of the Board.

On 25 June 1986, the Applicants filed with the Tribunal the aforementioned applications.

Whereas the Applicants' principal contentions are:

1. The decision to apply revised article 54 (b) of the

Fund's Regulations in order to determine the Applicants' entitlement to benefits arising from the entire length of their contributory service was taken in violation of their acquired rights.

2. The contested decision involves unjust enrichment of the Fund.

3. The accepted practice whereby the Fund accepted contributions computed by each member organization conferred rights upon them.

Whereas the Respondent's principal contentions are:

1. Adoption and implementation of the new pensionable remuneration scale as from 1 January 1985 did not violate any acquired right of the Applicants.

2. Supplementary article C contained reasonable and legally adequate transitional measures.

3. Adoption and implementation of the 1 January 1985 scale of pensionable remuneration did not result in "unjust enrichment" of the Fund.

4. Granting the remedy sought by Applicants' counsel would put the Applicants in a worse position, as it would actually reduce their retirement benefits.

5. Adoption and implementation of the 1 January 1985 pensionable remuneration scale did not violate any established practice of the Fund.

The Tribunal having deliberated from 29 May 1987 to 5 June 1987 in Geneva and from 20 October 1987 to 12 November 1987 in New York, now pronounces the following judgement:

I. Since the applications submitted in cases Nos. 395, 396 and 397 relate to the same measures and contain the same pleas, the Tribunal orders the joinder of these cases.

II. The Tribunal has before it two applications for intervention

under article 19 of its Rules. It notes that the applicants for intervention are in receipt of retirement pensions from the United Nations Joint Staff Pension Fund. The Tribunal's judgement may affect their rights. Their applications are therefore receivable and they will share the fate of the principal applications.

III. The Applicants Brede and Quintero-Ferro separated from service on 28 February 1985; the Applicant Hertz on 30 April 1985. They belonged to the Professional category and were participants in the United Nations Joint Staff Pension Fund (hereinafter referred to as the Fund).

IV. The basic benefit of each Applicant was calculated and established by the Fund in accordance with the changes which were made by the United Nations General Assembly, on the recommendation of the International Civil Service Commission, to article 54 (b) (first sentence) of the Fund's Regulations (resolution 39/246 of 18 December 1984). Those changes took effect on 1 January 1985.

The new article 54 (b) of the Regulations of the Fund reads as follows:

"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 hereto."

That appendix establishes a scale of pensionable remuneration for the various grades and steps in the Professional and higher categories.

V. The Applicants are contesting the application of this scale to them for the entire period of their contributory service with the Fund instead of solely for that portion of their contributory service following the date on which the new regulation became effective, namely, 1 January 1985 at 12.01 a.m.

VI. The Tribunal ascertained from the Respondent and the Applicants the effect of the implementation of the scale on the amount of the basic benefit.

The calculations by the Fund produced the following differences:

- In the case of the Applicant Brede, the annual basic benefit would have been \$US 41,514.84 had the regulation not been changed by the General Assembly. Under the scale applicable on 1 January 1985, the basic benefit amounted to \$US 41,374.20, resulting in a difference of \$US 140.64;

In the case of the Applicant Quintero-Ferro, the difference is of \$US 111.72 (39,991.64 minus 34,879.92), and in that of the Applicant Hertz it is of \$US 96.96 (30,860.16 minus 30,763.20).

These figures have not been disputed by the Applicants.

VII. The Tribunal would observe, moreover, that the reduction in the annual amount of the basic benefit of each of the Applicants is even less substantial than appears from this calculation. While the Applicants seek the application of the regulation existing prior to 1 January 1985 to the establishment of their basic benefit, they concede that, in the determination of the benefit payable, the new regulation was applicable from 1 January 1985 onwards (i.e. for two months in the case of the Applicants Brede and Quintero-Ferro and for four months in the case of the Applicant Hertz).

VIII. The Applicant Brede has estimated the amount of his annual basic benefit at \$US 41,511.00, resulting in a difference of \$US 136.80 to his detriment. The calculations of the parties are thus very close. The figure put forward by the Respondent is \$US 140.64.

As regards the Applicant Quintero-Ferro, the amount of his annual basic benefit, calculated in what he considers to be a legally valid way, would exceed by \$US 111.00 that actually awarded to him. In the case of the Applicant Hertz, the difference in her

favour would be \$US 97.00.

IX. The Tribunal considers that these disparities are not significant. Whatever figures are used, the difference is not substantial, as the Applicants acknowledge.

X. The parties are agreed about the statutory nature of the General Assembly's amendment of article 54 (b) of the Regulations of the Fund, which introduces a new scale of pensionable remuneration for participant in the Professional and higher categories.

XI. They are agreed that the new measures adopted on 18 December 1984 were applied, without retroactive effect, as from 1 January 1985. In other words, the base amounts of benefits established before that date and paid to retirees were not affected by the changes.

XII. The Applicants assert, however, that the mere act of applying the changes to officials whose separation occurs after 1 January 1985 has the effect of violating their acquired rights.

They state that, in respect of their period of service prior to 1 January 1985, they have an acquired right to the retention of the existing regulation determining the level of pensionable remuneration.

XIII. The Tribunal notes that, if accepted, this argument would deprive the amendments to the Regulations of their immediate legal effect. This would lead to confusion between the contractual elements and the statutory elements of an official's status.

XIV. The Applicants invoke the judicial practice of the ILO Administrative Tribunal in respect of acquired rights. In Judgement No. 832 (in re Ayoub et al.) of 5 June 1987, the ILO Administrative Tribunal rendered a decision on the complainants' argument of "an

acquired right to application of the old scale of pensionable remuneration". The new scale whose application was being challenged by the complainants was, in fact, the scale deriving from the amendment to article 54 (b) adopted by the General Assembly on 18 December 1984.

XV. The ILO Administrative Tribunal notes that the complainants are relying "not on the contract ... but on a rule". It adds:

"... their right to the safeguarding of their conditions of service is not an unqualified one ...

To treat pensionable remuneration as a fundamental condition of service, an acquired right, and therefore inviolate, might be to overlook the real difficulties facing the Fund and the agencies".

The Administrative Tribunal concludes that:

"... because the altered term is in the rules and because of the reasons for the amendment ... there was no breach of an acquired right ...".

XVI. In the cases submitted to it, the Tribunal reaches the same finding as the ILO Administrative Tribunal, but for different reasons. It finds, as it did in Judgements No. 378 (Bohn et al) and No. 379 (Gilbert et al) (1986), that the doctrine of acquired rights is irrelevant because the amendments have a statutory nature.

XVII. On the other hand, the Tribunal observes that the Fund is under an obligation to maintain an effective and just retirement pension system. This system, being of a statutory nature, may, of course, be altered from time to time, without retroactive effect. But these modifications must not be arbitrary. They must be in conformity with the object of the pension system. They must promote implementation of the principles laid down in the Charter of the United Nations (Art. 101, para. 3) whereby:

"The paramount consideration in the employment of the staff and in

the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity." (Emphasis added by the Tribunal)

XVIII. In the cases which gave rise to the judgements of the Tribunal cited earlier (378 and 379), the Fund expressly acknowledged during the proceedings that it had such an obligation with respect to the pension adjustment system. There is all the more reason for such an obligation to exist with respect to the pension system itself.

XIX. The amendment to the Regulations contested by the Applicants is not in itself unreasonable. As far as the Applicants are concerned, if one accepts the calculation of the losses which they suffered, the amendment did not significantly alter the levels of their basic benefits. The Fund, moreover, contests that such losses occurred.

XX. In the circumstances, the application to the present cases of this amendment to the Regulations, even if one concedes that it was a "departure from accepted practice", as the Applicants contend, is not in violation of a legal right.

XI. As the Tribunal has not accepted the Applicants' preceding pleas concerning the illegality of the measures taken by the Fund, the Applicants' argument invoking the doctrine of unjust enrichment does not apply.

XXII. Accordingly, the Tribunal must reject the applications.

XXIII. At the same time, the Tribunal is bound to express its concern at measures which, taken individually, are of limited effect but which, taken as a whole, amount to erosion, and may seriously harm the integrity of the international civil service.

XXIV. As regards expenses and costs, the Tribunal decides that

there are no grounds for granting the Applicants' pleas, since the applications have been rejected. Nevertheless, pursuant to the practice established by the United Nations, the Respondent shall pay, upon substantiation, the travelling expenses and subsistence expenses in Geneva incurred by counsel for the Applicants when representing them in the oral proceedings, provided that no double payment is made.

XXV. For the foregoing reasons, the Tribunal decides that:

- The applications are rejected;
- The applications for intervention, though formally receivable, are rejected on the merits;
- The Respondent shall pay, upon substantiation, the travelling expenses and subsistence expenses in Geneva of counsel for the Applicants, incurred at the time of the oral proceedings.

(Signatures)

Samar SEN
President

Roger PINTO
Vice-President

Endre USTOR
Member

New York, 12 November 1987

R. Maria VICIEN-MILBURN
Executive Secretary