

ADMINISTRATIVE TRIBUNAL

Judgement No.

Cases No. 393: HERTZ I
No. 394: BREDE I

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; 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 13 July 1986, Kirsten Horneman Hertz, the recipient of a retirement benefit paid by the United Nations Joint Staff Pension Fund, filed an application in which she requested the Tribunal:

"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 her, after 31 December 1978, interest rates of 4.5 per cent with effect from 1 January 1983 and 6.5 per cent with effect from 1 January 1985, instead of a single rate of 4 per cent for the commutation into a lump sum of that part of her pension for which she elected to benefit from the provisions of article 28 (f) of the Regulations of the Fund;

4. Consequently, to order the application of a single rate of 4 per cent, after 31 December 1978, for the commutation into a lump sum of that part of the pension for which she elected to benefit from the provisions of article 28 (f) of the Regulations of the Fund;
5. To establish the amount of the compensation provided for in article 7.3 (d) of the Rules of the Tribunal as an amount equal to the difference between what was paid to the Applicant by applying the rates of 4.5 per cent and 6.5 per cent, and what she would have received if a single rate of 4 per cent had been applied after 31 December 1978 for the purposes of commuting part of the amount of her pension into a lump sum;
6. To award the Applicant, as costs, a sum payable by the Respondent, assessed at the time of the submission of this application at nine thousand (9,000) United States dollars, subject to adjustment at the conclusion of the proceedings."

Whereas on the same day Walter Brede, likewise the recipient of a retirement benefit paid by the United Nations Joint Staff Pension Fund, filed an application containing the same pleas;

Whereas the Respondent filed its answer on 27 February 1987;

Whereas the Applicants filed written observations on 30 April 1987;

Whereas the Tribunal decided on 5 June 1987 to postpone consideration of the above-mentioned case until the autumn session;

Whereas, on 20 August 1987 the Tribunal asked the Respondent questions to which he replied on 1 September 1987;

Whereas the Applicants provided additional information on 7 October 1987 concerning the sums requested as costs;

Whereas the President of the Tribunal decided on 4 November 1987 that there would be no oral proceedings in these cases;

Whereas the facts in the cases are as follows:

The Applicant Kirsten Horneman Hertz, a former staff member of the International Labour Organisation, retired on 1 May 1985. The Applicant Walter Brede, a former staff member of the International Labour Organisation, retired on 1 March 1985. They

are the recipients of retirement benefits payable by the United Nations Joint Staff Pension Fund.

At the time of their separation from service, the Applicants opted to commute into lump sums one third of the actuarial value of their benefits, in accordance with article 28 (f) of the Regulations of the Fund in effect at that time. In order to determine the amount of the lump sums to be paid, the Secretary of the Fund referred to the actuarial tables drawn up by the Board in accordance with the powers under article 11 (a), of the Regulations of the Fund. The actuarial tables include mortality tables and interest rates proposed by the Consulting Actuary and deemed appropriate by the Committee of Actuaries. The higher the interest rate, the lower the lump sum; the lower the mortality rate, the higher the lump sum.

The Secretary of the Board informed Mr. Brede and Miss Hertz of the lump sums payable to them in letters dated 17 april 1985 and 6 August 1985 respectively.

The lump sums were subsequently paid to them in accordance with their payment instructions.

In September 1978, in its report to the United Nations General Assembly at the Assembly's thirty-third session, the United Nations Joint Staff Pension Board recalled that, on the recommendation of the Committee of Actuaries, it had had under consideration since 1976 "the question of what the correct rate should be, in contemporary economic conditions, for the calculation which determines the commuted value of that portion of his periodic benefit which a retiring participant may elect to take in a lump sum". (A/33/9, para. 92). The Board concluded:

"... after considering the views of the Committee of Actuaries on this point, that the 3.25 per cent rate currently used for the purpose, now falls somewhat short of the proper rate as indicated above, and accordingly decided to use the power available to it under the Fund's Regulations to raise the rate with effect from 1 January 1979 to 4 per cent. To preserve acquired rights, however, the existing and revised rates would be applied proportionally according to the length of service rendered before and after that date, and the change would of course not apply to calculations necessary

for other purposes under the Regulations."

In November 1982, in its report to the United Nations General Assembly at the Assembly's thirty-seventh session, the Board recommended a number of measures designed to improve the actuarial balance of the Fund, one recommendation being to raise from 4 to 4.5 per cent, with effect from 1 January 1983, the interest rate used in the lump-sum commutation (A/39/9, paras. 36-40). The Committee added that in order "to preserve acquired rights, the new rate of interest will be applied only in respect of service performed after 31 December 1982."

The General Assembly approved that recommendation in resolution 37/131 of 17 December 1982.

In resolution 38/233 of 20 December 1983, the United Nations General Assembly requested the Board, with the assistance of the Committee of Actuaries, to consider, early in 1984, the various proposals discussed at the thirty-eighth session of the General Assembly with a view to reducing or eliminating the actuarial imbalance of the Fund. One of those proposals was the following:

"(a) Increasing to a realistic level the interest rate used to calculate the amount of the lump sum commutation;"

The Board, in its report to the General Assembly at the Assembly's thirty-ninth session, discussed the proposal and recommended that the interest rate should be raised from 4.5 to 6.5 per cent. The new 6.5 per cent interest rate would apply only to service performed after 31 December 1984 (A/39/9, paras. 19 and 20). The General Assembly approved that change in section I, paragraph 1 (g), of resolution 39/246 of 18 December 1984.

In letters dated 17 April 1985 and 6 August 1985, the Secretary of the Board communicated the statements of their benefits to Mr. Brede and Miss Hertz respectively.

In letters dated 29 May 1985 and 8 September 1985 addressed to the Secretary of the Board, the Applicants protested against the

application in their particular cases after 31 December 1978, of interest rates of 4.5 per cent with effect from 1 January 1983 and 6.5 per cent with effect from 1 January 1985, instead of a single rate of 4 per cent for the commutation into a lump sum of that part of their pensions for which they had elected to benefit from the provisions of article 28 (f) of the Regulations of the Fund. They requested the Standing Committee to review the decision by the Secretary of the Board to apply those rates to their particular cases.

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 that he was bound to take "pursuant to certain applicable decisions of the Board subsequently endorsed by the General Assembly".

By a letter dated 14 March 1986, the Secretary communicated to the Applicants the decision taken by the Standing Committee on behalf of the Board to uphold the decision by the Secretary of the Board. It is the decision notified by that letter which is being contested.

On 13 July 1986, the Applicants filed with the Tribunal the above-mentioned applications.

Whereas the Applicants' principal contentions are:

1. The contested decision was taken in violation of article 26 of the Regulations of the Fund.
2. The Board used the powers under article 11 (c) of the Regulations to establish the statutory interest rate for purposes that were unlawful and hence other than those which should normally guide the Board in its work.
3. The Applicants consider that, by taking its two decisions to increase the interest rate in 1982 and 1984, the Board contributed to the unjust enrichment of the Fund.

Whereas the Respondent's principal contentions are:

1. The Applicants' argument based on article 26 of the Fund's Regulations is not relevant to this case.

2. The Board did not abuse its authority under article 11 of the Fund's Regulations when it changed the interest rates from 1 January 1983 and 1 January 1985.

3. There was no "unjust enrichment" of the Fund.

The Tribunal, having deliberated from 29 May 1987 to 4 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. 393 and 394 relate to the same measures and contain the same pleas, the Tribunal orders the joinder of these cases.

II. At the time of their retirement - 1 May 1985 in the case of the Applicant Hertz and 1 March 1985 in the case of the Applicant Brede - the Applicants requested that part of their benefits be commuted into a lump sum. The amount of the lump sum may not exceed one third of the actuarial equivalent of the retirement benefit to which each Applicant is entitled (article 28 (f) (i) of the Fund's Regulations, now article 28 (g) (i)).

III. To determine the amount of this one-third lump sum, the Fund uses a rate of interest which the Board sets periodically in accordance with article 11 of the Regulations.

IV. By virtue of the same article 11 and on the advice of the Committee of Actuaries, the Board adopts and revises mortality tables when appropriate.

In 1985, the Board adopted a single updated mortality table for both sexes reflecting the average increase in life expectancy during the previous twenty years. This measure is not challenged by

the Applicants.

V. On the other hand, the Board decided on the same date to increase the rate of interest which, together with the life expectancy of the retiree, make it possible to calculate the lump sum due to him.

VI. The rate of interest was 3.25 per cent per annum before 1 January 1979, 4 per cent for the period of contributory service between 1 January 1979 and 31 December 1982 and 4.5 per cent for the period of contributory service between 1 January 1983 and 31 December 1984. The decision taken by the Board in 1984, covering the periods of contributory service after 1 January 1985, raised the rate of interest to 6.5 per cent.

VII. As a result of the application to the Applicant Hertz of the decisions thus taken, she received at her request, a lump sum, which amounted to \$US 139,578.72 (notification of 6 August 1985). This amount was calculated by the Fund on the basis of the old mortality tables until 31 December 1984 and on the basis of the new mortality tables from 1 January 1985 to 30 April 1985.

According to the information provided by the Fund at the Tribunal's request, that sum would have amounted to \$US 140,286.20 if it had been calculated by using interest rates of 3,25 and 4 per cent, on the basis of the old mortality tables.

VIII. In the case of the Applicant Brede, the lump sum received amounted to \$US 188,454.00 (notification of 17 April 1985). This amount was calculated by the Fund on the basis of the old mortality tables until 31 December 1984 and on the basis of the new mortality tables from 1 January 1985 to 28 February 1985.

According to the information provided by the Fund at the Tribunal's request, that sum would have amounted to \$US 189,143.50 if it had been calculated by using interest rates of 3,25 and 4 per

cent, on the basis of the old mortality tables.

IX. The Applicants are not contesting the application to them of the updated mortality table. However, they are impugning the validity of the application to them, after 31 December 1978, of a rate of interest of 4.5 per cent with effect from 1 January 1983 and of 6.5 per cent with effect from 1 January 1985, instead of a single rate of 4 per cent.

X. The Applicants invoke the following arguments:

- (a) Violation of article 26 of the Regulations of the Fund;
- (b) Abuse of power in the application of article 11 (c) of the Regulations;
- (c) Unjustified enrichment of the Fund.

XI. As the Tribunal observed in its Judgement No. 403 (Gretz et al), it is for the Fund to take the initiative with regard to the application of article 26 of the Regulations. It is the Fund which must determine whether a de facto situation exists that would justify addressing a request to the member organizations to pay the sums necessary to make good a deficiency. It is the Fund which must evaluate the advisability of such a request. The Tribunal is not seized of appeals against a decision of the Board concerning the application of article 26 and the conditions for such application. There is thus no reason to apply article 48 of the Fund's Regulations, which provides for the submission of applications "alleging non-observance of these Regulations arising out of the decision of the Board". No such decision has been taken.

XII. The Applicants contend, however, that the decisions they are contesting have been taken in violation of article 26 of the Regulations.

The Tribunal considers in this regard that article 26 does not confer on participants in the Fund a right to direct application

that can be invoked by the Applicants. The Applicants have no justification for maintaining that the violation of article 26 would render invalid separate measures aimed at making good a deficiency in the Fund's assets. The validity per se of each such measure must be evaluated by the Tribunal.

XIII. The Applicants next contend that the Board committed an abuse of power by using its authority under article 11 (c) of the Regulations "for purposes that were unlawful and therefore not those which should normally guide the Board in its work".

XIV. They invoke articles 28 (f), 29 (c) and 30 (c) of the Regulations, according to which a benefit can be commuted into a lump sum paid to participants "to the extent of one third of its actuarial equivalent". The Applicants consider that this provision entitles them to the actuarial equivalent to the extent of one third. Unless the whole amount of this actuarial equivalent is paid to them, their statutory rights have not been respected.

XV. At the same time, the Applicants acknowledge that the Board can take into account, in setting rates of interest, such factors as interest rate trends, global economic conditions, the rates of return on the Fund's investments, the assumptions utilized in the actuarial valuations of the Fund, and even the Fund's actuarial situation. The Applicants agree in principle with the Respondent on the factors taken into account by the Fund in setting the rate of interest.

XVI. The Applicants affirm, however, that in setting the rates of interest, the Fund must not render article 26 of the Regulations totally meaningless. The Tribunal has already found that the application of article 26 is independent of the application of the other provisions of the Regulations. The correct application of these provisions must be evaluated on its own merits.

XVII. The Tribunal must therefore determine whether the contested decisions violate the statutory rights of the Applicants set forth in articles 28 (f) and 29 (c) of the Fund's Regulations. It considers that these articles, as they stand, do not confer on the Applicants a right "to the actuarial equivalent". They merely set a limit on the amount of the lump sum that can be paid to them.

XVIII. The Tribunal considers that, in exercising its power to set rates of interest, the Fund has a margin of discretion when assessing the factors to be taken into account. In deciding in 1982 to set the rate of interest at 4.5 per cent with effect from 1 January 1983, and in 1984 to set it at 6.5 per cent with effect from 1 January 1985, the Fund did not exceed the limits of that discretionary power. In the light of the various factors to be taken into consideration, the increase in the rate of interest is not unreasonable.

XIX. The Tribunal must emphasize, however, as it did in its Judgements No. 404 (Brede II et al), the importance of the fundamental principles established in Article 101, paragraph 3, of the Charter of the United Nations. It expresses the hope that economy measures, no matter how necessary they may be in the current situation, must not be allowed to lead, cumulatively, to the deterioration of the international civil service.

XX. The Tribunal cannot but endorse the observations made by the ILO Administrative Tribunal in paragraph 16 of its Judgement No. 832 (1987) in re Ayoub et al., para.16:

"... An international organisation should refrain from any measure which is not warranted by its normal functioning or the need for competent staff. It is bound by the general principles of law such as equality, good faith and non-retroactivity. It will act from reasonable motives and avoid causing unnecessary or undue injury."

XXI. Since the Tribunal did not accept the foregoing pleas of the Applicants concerning the illegality of the measures taken by the Fund, the grounds derived by the Applicants from the theory of unjust enrichment are automatically refuted.

XXII. The Tribunal having rejected the applications, there are no grounds in the absence of special circumstances, for ordering the Respondent to pay costs.

XXIV. For the foregoing reasons, the Tribunal decides that the applications are rejected.

(Signatures)

Samar SEN
President

Roger PINTO
Vice-President

Endre USTOR
Member

New York, 12 November 1987

R. Maria VICIEN-MILBURN
Executive Secretary