



1 January 1985, the rules resulting in the scale contained in annex A to Staff Notice No. 2965, dated 14 March 1985 (hereinafter referred to as the new scale);

4. Accordingly, to order the restoration of the rules resulting in the old scale for the benefit of the Applicant[s] in such a way that [their] entitlements to pension, death or disability benefits and related benefits and, where applicable, those of [their] beneficiaries, are paid by the United Nations Joint Staff Pension Fund (hereinafter referred to as the Fund) on the basis of the rules resulting in the old scale or, failing that, that ICAO should pay to the Applicant, in the month of each payment made by the Fund, the difference between the amounts which would have been paid by the Fund if the rules resulting in the old scale had continued to be applied and those actually paid by the Fund as a consequence of the introduction of the rules resulting in the new scale;

5. To award the Applicant[s], 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, in a letter dated 31 July 1986, the Respondent informed the Executive Secretary of the Tribunal that he would not be presenting an answer under article 8 of the Rules of the Administrative Tribunal of the United Nations, because he believed that he was not the Respondent with respect to the applications;

Whereas, on 16 September 1986, the Applicants submitted comments on the Respondent's reply;

Whereas, on 7 October 1986, the Respondent reaffirmed his position on the grounds that the applications were directed against the decisions of other bodies or entities over which the Secretary General of ICAO had no power;

Whereas, on 29 May 1987, the Applicants filed written observations on the above-mentioned letters submitted by the Respondent;

Whereas, in a letter dated 12 June 1987, the Respondent confirmed his position with regard to the three cases as he had stated it in the letters dated 31 July and 7 October 1986. He also

informed the Executive Secretary of the Tribunal that he did not object to his letters of 31 July 1986, 7 October 1986 and 12 June 1987 being considered as fulfilling the requirements of article 8 of the Rules of the Tribunal;

Whereas, on 20 August 1987, the President of the Tribunal transmitted to the Secretary of the United Nations Joint Staff Pension Board, hereinafter referred to as the Board, a copy of each of the applications submitted by the Applicants, in accordance with article 21 of the Rules of the Tribunal;

Whereas, on 22 October 1987, the Tribunal ruled that no oral proceedings would be held in these cases;

Whereas the facts in the cases are as follows:

The Applicants, Jaime Cabrera, Gaël Quedrue and Jorge Sanchez, are staff members in the Professional category who hold permanent appointments. ICAO is a specialized agency within the meaning of Article 57, paragraph 2, of the Charter of the United Nations; it participates in the common system of salaries, allowances and other conditions of service of the United Nations and the specialized agencies, and is a member organization of the Fund, under article 3 of the Regulations of the Fund. Accordingly, the Applicants are participants in the Fund and, upon separation, will be entitled to the benefits referred to in the Regulations of the Fund, as calculated on the basis of the rules laid down in the Regulations and Rules of the Fund.

The amount of the benefit to which each Applicant will be entitled will depend on three factors: the length of contributory service; the percentage rate of accumulation for each year of service; and the amount of 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 term "pensionable remuneration" is defined in article 54 of the Regulations of the Fund. The rate of such remuneration depends on the level and step of the staff member. The

determination of the amount of contributions and the calculation of benefits due upon separation are based on pensionable remuneration.

In resolution 39/246 of 18 December 1984, the General Assembly agreed to the adjustment of pensionable remuneration with effect from 1 October 1984. The Assembly also approved, for implementation with effect from 1 January 1985, a new scale of pensionable remuneration, and accordingly approved an amendment to article 54 (b) of the Regulations of the Fund, the new text reading 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." It can be seen from the new scale of pensionable remuneration for each level and step in the categories concerned that there was an increase in the amount of pensionable remuneration at the P-1 and P-2 levels, and a decrease at the P-3 level and above.

In addition, the General Assembly rejected the transitional measures proposed by the International Civil Service Commission for staff already in service at that time. Under those measures, for staff members participating in the Fund prior to 1 January 1985, the date on which the new scale was to take effect, the old scale was to continue to be applied if the amount of pensionable remuneration was higher under that scale; on the other hand, for staff members receiving promotions or step increases after 1 January 1985, the amounts of pensionable remuneration determined in accordance with the two scales was to be compared, and the higher of the two amounts was to be used (A/39/30, para. 47). The Assembly also requested the Board to submit to it at its fortieth session recommendations on compensatory or interim measures for staff members in service as at 31 December 1984. Lastly, the Assembly suspended any further adjustment for one year.

On 20 June 1985, one of the Applicants, Mrs. Quedrue, sent a form letter to the Secretary General asking him to reconsider his decision to apply the new scale to her individual case, and noting that the retroactively adjusted amount of withholdings as

contributions to the Fund for the months of January, February and March 1985, inclusive, was lower than it would have been if the old scale had been applied. On 25 and 26 June 1985 respectively, the other Applicants, Mr. Cabrera and Mr. Sanchez, sent similar form letters to the Secretary General.

In a letter dated 25 February 1986, the Secretary General confirmed his decision and agreed to the direct submission of the dispute to the Administrative Tribunal.

On 23 June 1986, the Applicants filed with the Tribunal the above-mentioned applications.

Whereas the Applicants' principal contentions are:

1. The application of the rules resulting in the new scale of pensionable remuneration is in violation of ICAO staff rule 106.1, which was in effect until 1 March 1986.

2. The decision by the Secretary General of ICAO to apply to the Applicants the rules resulting in the new scale of pensionable remuneration is illegal having regard to the timing of the application of the rules. Staff Notice No. 2965, dated 14 March 1985, stipulated that the new scale of pensionable remuneration would be applicable as from 1 January 1985. Accordingly, application of the new scale for the period 1 January to 31 March 1985 was retroactive in its effect. To that extent it was illegal because it violated the principle of non-retroactivity.

3. The violation of the principle of non-retroactivity in respect of the contested administrative decisions is compounded by the violation of acquired rights, a general principle of law which is applicable even in the absence of statutory provisions. Retroactive application of an amendment to the Staff Regulations which is prejudicial to staff members is incompatible with article XII, paragraph 12.1, of the ICAO Staff Regulations.

4. Even if the higher norm (article VI, paragraph 6.1, of the ICAO Staff Regulations) were to prevail over the lower norm (staff rule 106.1), the Applicants would be entitled to compensation

for the injury sustained because of the violation of the general principle "nemo auditur propriam turpitudinem allegans".

Whereas the Respondent's principal contention is:

It is not within the powers of the Secretary General of ICAO to vary the applicable regulations of the United Nations Joint Staff Pension Fund.

The Tribunal, having deliberated from 22 October to 13 November 1987, now pronounces the following judgement:

I. The Applicants, Mr. Cabrera, Mrs. Quedrue and Mr. Sanchez, all serving staff members of the International Civil Aviation Organization (hereinafter referred to as ICAO) filed, on 23 June 1986, applications relating to the same decisions affecting them, decisions which were taken by the Secretary General of ICAO. They have submitted identical pleas. The Tribunal has therefore decided on a joinder of these three applications.

II. The Respondent has contested the receivability of the applications, contending that he cannot be regarded as the real Respondent. He maintains that the Applicants' action should have been directed against the decision of another entity.

III. The irreceivability argument was made by the Respondent in several letters addressed to the Executive Secretary of the Tribunal. It would have been better if the argument had been developed in observations submitted in the form of an answer. The Tribunal regrets that it did not receive all the assistance it was entitled to expect from the Respondent.

IV. The Tribunal has officially received applications relating to decisions dated 25 February 1986 which were taken by the Secretary General of ICAO and were communicated to each Applicant.

V. It is indeed ICAO, not another entity, that is designated as Respondent in the applications. The contested decisions were taken by the Secretary General of ICAO. Accordingly, all the requirements have been fulfilled for ICAO to be regarded as the Respondent and for the case before the Tribunal to proceed.

VI. Moreover, the Secretary General of ICAO has agreed to the direct submission of the applications to the United Nations Administrative Tribunal, in accordance with ICAO staff rule 111.5, paragraph 1 (a). The applications are therefore receivable.

VII. The applications relate, first of all, to the implementation of a resolution of the United Nations General Assembly establishing a new scale of pensionable remuneration (resolution 39/246 of 18 December 1984). The Applicants contend that the new scale adversely affects their rights and may not be applied to them. This is an objection to the application of the Regulations of the Pension Fund (hereinafter referred to as the Fund). The Applicants are participants in the Fund, and ICAO is a member organization. Such being the case, the Applicants should have raised their objection with the Fund and, if need be, contest its decision in accordance with article 48 of the Regulations of the Fund. Since the Applicants did not take that course of action, the Tribunal cannot make a determination on the merits on this point.

VIII. However, the Applicants also allege that ICAO itself has violated their rights, that by applying to them the General Assembly resolution with effect from 1 January 1985, ICAO made the resolution retroactive, thus violating the principle of non-retroactivity embodied in article XII, paragraph 12.1, of the ICAO Staff Regulations and article 49 (b) of the Regulations of the Fund. The Tribunal rejects this line of argument.

IX. The General Assembly resolution took full legal effect on the date on which it was adopted, 18 December 1984. Its application as from 1 January 1985 was therefore in no way retroactive.

X. Upon its adoption, this General Assembly resolution became binding on all member organizations and on all participants in the Fund.

XI. Action taken by member organizations to enforce the new regulations is of an internal nature.

The fact that ICAO did not adapt its Staff Rules to the new regulations until February 1986 is therefore irrelevant. In this connection, the Tribunal notes that article VI, paragraph 6.1, of the ICAO Staff Regulations refers to the Regulations of the Fund. It would be useful to point out, if there was any need to do so, that article VI, paragraph 6.1, of the ICAO Staff Regulations is a higher norm than staff rule 106.1, as the Applicants admit. This article VI has the effect of making the amendments to the Regulations of the Fund directly and immediately applicable. As was so rightly stated by a qualified observer, a former President of the Federation of International Civil Servants' Associations:

"This [Joint Staff Pension] Fund is in effect an autonomous body with its own regulations, which the General Assembly has the power to amend. Accordingly, Assembly decisions pursuant to the Regulations of the Fund are immediately enforceable, without there being any need for a ruling by the intergovernmental bodies of the other organizations." (Revue générale de droit international public, vol. 91, No. 2 (1987), p. 402, para. 68)

XII. The amendments in question were brought to the attention of ICAO staff long before February 1986 - in Staff Notice No. 2965 of 14 March 1985, issued by the Secretary General of ICAO. The latter contented itself with purely and simply applying General Assembly resolution 39/246. No general principle of law was violated by ICAO when it implemented the resolution. The Applicants therefore have

no grounds for claiming, on this score, compensation for an injury which they alleged to have suffered, without however producing any evidence to that effect.

XIII. Accordingly, the Tribunal rules that the conditions under which General Assembly resolution 39/246 was applied to the Applicants did not involve any violation of their rights by ICAO.

XIV. For the foregoing reasons, the Tribunal:

- Declares the applications receivable;
- Rejects the applications on the merits.

(Signatures)

Samar SEN  
President

Roger PINTO  
Vice-President

Endre USTOR  
Member

New York, 13 November 1987

R. Maria VICIEN-MILBURN  
Executive Secretary