

## Judgement No. 328

(Original: French)

Cases Nos.  
**311: Cuvillier**  
**312: Nussbaumer**  
**313: Starr**

Against: **The United Nations  
 Joint Staff Pension  
 Board**

*Requests by three staff members of ILO to declare null and void the decision of the United Nations Joint Staff Pension Board to propose certain changes in pension benefits and the approval of these proposals by the General Assembly, and to cancel these decisions.—Request for preliminary measures: joinder of the three applications and suspension of the entry into force of the contested decisions.*

*The Tribunal orders a joinder of the three applications inasmuch as they refer to the same measures and contain the same pleas.*

*Nature of the contested decisions.—The applications call for partial rescinding of proposals of the Board in so far as they recommend to the General Assembly measures affecting the benefits of persons already participating in the Fund.—Concern of the Tribunal that if the actuarial imbalance of the Fund continues the interests of the participants may suffer.—Contention of the Respondent that the Tribunal lacks competence to rescind the Board's decisions.—The Tribunal regrets that the Respondent failed to develop any supporting arguments, thus depriving the Applicants of the opportunity to discuss them.—Finding of the Tribunal that the Board's decision to raise the interest rate used for actuarial valuations fell within the Board's competence.—Question of the meaning of "decisions" under article 48 (a) of the Fund's Regulations.—The Tribunal considers itself competent to rule on general decisions or decisions in the nature of regulations only when they apply to a particular case.—Finding that the applications do not relate to individual cases.—Judgements No. 237 (Powell) and No. 268 (Mendez).—Similar jurisprudence of the ILO Administrative Tribunal.—The Tribunal infers from article 48 of the Fund's Regulations and from article 2 of its statute that its competence with regard to the decisions of the Board extends only to applications relating to individual rights.—The Tribunal finds that it lacks competence.*

*Applications rejected.*

### THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, Vice-President, presiding; Mr. Herbert Reis; Mr. Roger Pinto; Mr. T. Mutuale, alternate member;

Whereas, on 9 February 1983, Rolande Cuvillier, a staff member of the International Labour Organisation, hereinafter referred to as ILO, filed an application dated 4 February 1983 in which she requested the Tribunal:

*"In regard to form:*

*"To declare in order, valid and receivable this application, filed within 90 days of the issuance on 10 November 1982 of the report of the United Nations Joint Staff Pension Board to the United Nations General Assembly at its thirty-seventh session, which contains the contested decisions.*

*"Whereupon, by way of substantive action*

*"As preliminary measures:*

“To order the joinder of this application and the applications today filed by Mr. Gerald Frank Starr and Miss Marie Anna Nussbaumer.

“To order, as a preventive measure, the suspension of the entry into force on 1 January 1983 of the increase in the interest rate in the commutation of periodic benefits and changes in the system of adjusting pensions and deferred pensions, and to order the application of those measures suspended until the Tribunal pronounces its judgement.

*“As principal measures:*

“To adjudge and declare that the Pension Board’s decision to propose to the General Assembly various changes in benefits under the United Nations Joint Staff Pension Fund is null and void because it is contrary to the Regulations of the Fund.

“Consequently to declare that the approval of those changes by the General Assembly on 16 December 1982 was null and void, in view of the illegality of the proposals.

“Consequently to cancel the increase from 4 to 4.5 per cent in the interest rate in the commutation of periodic benefits, as well as the changes in the system of adjusting pensions and deferred pensions.

“To dismiss all other claims or counter-claims by the Pension Board or any intervener in these proceedings and to order them to pay all costs, including a reasonable share of the Applicant’s costs.”;

Whereas, on the same day, Marie Anna Nussbaumer and Gerald Frank Starr, also staff members of ILO, filed similar applications;

Whereas, on 20 April 1983, the Respondent filed the following answer:

“. . . None of these applications relates to any decision taken by the United Nations Joint Staff Pension Board or by any of its subsidiary organs to which the procedures in section K of the Administrative Rules apply. Instead, the applications are directed either against discretionary actions taken by the Board which under the Regulations are not subject to review, or against decisions of the United Nations General Assembly taken under article 49 (formerly article 50) of the Regulations and/or under the Charter of the United Nations and the Rules of Procedure of the General Assembly. The applicants also purport to interpret article 26 (formerly article 27) of the Regulations although no authority to do so is given to them by the Regulations.

“As the applications do not fall under article 48 (formerly article 49) of the Regulations, no response thereto is required from the United Nations Joint Staff Pension Board. . . .”;

Whereas the Applicants filed written observations on 17 August 1983;

Whereas the facts in the case are as follows:

Mrs. Cuvillier, who joined ILO on 18 February 1959, had been in the service of the United Nations since 3 May 1953, when she became a participant in the United Nations Joint Staff Pension Fund. Miss Nussbaumer and Mr. Starr joined ILO on 15 June 1953 and 30 April 1973 respectively and became participants in the Fund on those dates. In November 1982, the Joint Staff Pension Board, in its report to the United Nations General Assembly at its thirty-seventh session, recommended, among other measures to improve the actuarial balance of the Fund, an increase of 4 to 4.5 per cent in the interest rate in the commutation of periodic benefits, and certain changes in the system of pension adjustments (A/37/9, paras. 36-40). In a report dated 16 December

1982, the Fifth Committee of the General Assembly recommended that the Assembly should approve those measures with effect from 1 January 1983 (A/37/761, para. 12), which the Assembly did in its resolution 37/131 of 17 December 1982. On 9 February 1983, the Applicants filed the aforementioned applications.

Whereas the Applicant's principal contentions are:

1. In regard to receivability:

The applications are receivable because they were brought against decisions of the Pension Board on grounds of non-observance of the Regulations of the Fund and were filed within the time-limits prescribed.

2. In regard to merits:

(a) The Applicants are qualified to act and have a legal interest in contesting the decisions at issue;

(b) The existence of an actuarial deficiency is incontestable and is acknowledged by the Pension Board;

(c) Such being the case, the Pension Board should have applied article 27 (now article 26) of the Regulations of the Fund by calling on the organizations to pay the sums necessary to make good the deficiency. Having refused to invoke the article, the Pension Board had no power to recommend or adopt measures that would affect the benefits of participants and mean transferring to them responsibility for a deficiency which is supposed to be borne solely by the organizations, according to the clearly expressed will of the authors of the Regulations, which rule out, in such cases, any reduction in the Fund's obligations.

Whereas the Respondent's principal contentions are:

1. In regard to receivability:

The applications do not fall under article 48 (formerly article 49) of the Regulations of the Fund.

2. In regard to merits:

(a) The action is valid because it was taken by the Pension Board in the exercise of its discretionary power,

(b) And/or was taken or approved by the United Nations General Assembly.

The Tribunal, having deliberated from 9 to 23 May 1984, now pronounces the following judgement:

I. Inasmuch as the applications filed in cases Nos. 311, 312 and 313 refer to the same measures and contain the same pleas, the Tribunal orders a joinder.

II. The applications call for the partial rescinding of proposals of the United Nations Joint Staff Pension Board in so far as they recommend to the General Assembly measures affecting the benefits of persons already participating in the Fund. The Tribunal notes that those measures were approved in General Assembly resolution 37/131 dated 17 December 1982. Essentially they relate to an increase from 4 to 4.5 per cent in the interest rate in the commutation of periodic benefits and to cost-of-living pension adjustments; specifically, they reduce the frequency of pension adjustments. They have been applied since 1 January 1983. Without questioning the need to improve the actuarial balance of the Fund, the Applicants contend that such measures should not have been taken before article 26 of the Regulations of the Fund was applied. This article requires the member organizations to pay into the Fund the

sums necessary to make good the deficiency in the event that an actuarial valuation of the Fund shows "that its assets may not be sufficient to meet its liabilities under [the] Regulations". The Tribunal notes that actuarial valuations in fact showed that the assets of the Fund might not be sufficient; nevertheless, the Pension Board did not apply the provisions of article 26 of the Regulations. The Tribunal recognizes that if the situation continues, it might damage the interests of participants in the staff pension scheme of member organizations.

III. The Respondent contends that the Tribunal lacks competence to rescind the Pension Board's decisions referred to in the applications; however, the Respondent fails to develop any supporting arguments. The Tribunal regrets the complete lack of argumentation on the part of the Respondent, which, as the Applicants correctly pointed out, is contrary to article 8 of the Rules of the Tribunal. It was not possible for the Applicants to make a detailed response in their written observations to the Respondent's unexplained plea that the Tribunal lacks competence. That made the Tribunal's task more difficult.

IV. The Pension Board's decision to raise from 4 to 4.5 per cent the interest rate used for actuarial valuation fell within the competence of the Board under article 11 (c) of the Regulations of the Fund. The fact that the Pension Board sought and obtained the approval of the General Assembly does not change the nature of the decision.

V. As to the Pension Board's recommendations to the General Assembly, the Tribunal has no need to determine whether, as the Applicants contend, they constitute "decisions" within the meaning of article 48 (a) of the Regulations of the Fund, because in any event, for the reasons given below, the Tribunal considers itself competent to rule on general decisions or decisions in the nature of regulations only when they apply to a particular case.

VI. The Tribunal notes that the Applicants have not claimed reparation for present or even imminent damages to them personally, which would thus be distinct from damages which the measures in question might cause participants in the Fund as a whole. The Pension Board's decisions contested by the Applicants are of a general nature. The applications do not relate to individual cases; they do not refer to specific decisions that apply directly to the Applicants.

VII. The Tribunal observed in the *Powell* case (Judgement No. 237, para. XVII) "that under its Statute it is competent to hear and pass judgement upon applications submitted in individual cases." It added: "However, the Tribunal has not been given competence to rescind *erga omnes* a decision which is in the nature of a regulation." This holding was confirmed in the *Mendez* case (Judgement No. 268, para. II).

VIII. The ILO Administrative Tribunal has also ruled that it is competent to determine the validity of provisions of regulations, general decisions and even international conventions relating to the staff of an international organization, but only in connection with an application concerning a "particular case" [Judgements Nos. 365 (*Lamadie* (No. 2) and *Kraanen*), 366 (*Biggio* (No. 3), *Van Moer* (No. 2) and *Fournier*), 368 (*Elsen* and *Elsen-Drouot*) and 371 (*Mertens* (No. 2))].

IX. It is true that the *Powell* and *Mendez* cases dealt with general decisions taken by the Secretary-General of the United Nations within the framework of the Staff Rules and Regulations of the United Nations. In the present case, the Tribunal's competence derives from its Statute and from

article 48 of the Regulations of the United Nations Joint Staff Pension Fund. Article 48 reads as follows:

“(a) Applications alleging non-observance of these Regulations arising out of a decision of the Board may be submitted directly to the United Nations Administrative Tribunal”.

X. In the absence of any clarification in the text regarding the nature of the “decision” of the Pension Board, that term could be interpreted as applying to any decision of the Board, whether of a general nature or relating to individual cases.

XI. The Tribunal observes, however, that article 48 (a) (ii), *in initio*, of the Regulations of the Fund clarifies the scope of that attribution of competence by opening the appeals procedure to any person “who can show that he is entitled to *rights* under these Regulations” [Emphasis added]. In this context, the word “rights” refers to the individual rights of participants. The same applies to article 48 (a) (i), *in fine*. Accordingly, article 48 does not permit the filing of applications with a view to the rescission *erga omnes* of a general decision of the Pension Board.

XII. The Tribunal further observes that article 48 of the Regulations of the Fund attributes competence to the United Nations Administrative Tribunal within the framework of its Statute. The Powell and Mendez rulings were based on that Statute. They should be applied in the present case.

XIII. Article 2, paragraph 1, of the Statute of the Tribunal, in defining the competence of the Tribunal, explicitly refers to applications alleging non-observance of “the staff pension regulations”. Paragraph 2 (b) of that article opens the appeals procedure “to any other person who *can show that he is entitled to rights under* any contract or terms of appointment . . .” [Emphasis added]. That subparagraph served as a model for article 48 (a) (ii) of the Regulations of the Fund, which likewise opens the appeals procedure to “any other person who *can show that he is entitled to rights under* these Regulations” [Emphasis added]. In both cases, therefore, applications relating to individual rights are envisaged.

XIV. For the foregoing reasons, the Tribunal decides that it does not have competence in this case. The applications are rejected.

(Signatures)

Arnold KEAN  
*Vice-President, presiding*

Herbert REIS  
*Member*

Roger PINTO  
*Member*

Geneva, 23 May 1984

T. MUTUALE  
*Alternate member*

Jean HARDY  
*Executive Secretary*