Schlagworte: Anstellungsbedingungen, Änderbarkeit der Anstellungsbedingungen, Kranken- und Unfallversicherungssystem (Prämienerhöhung), dienstliche Mitteilung Nr. 824, Besitzstandswahrung

Mots-clefs: conditions d'emploi, modification des conditions d'emploi, assurance maladie et accident (augmentation des primes), note de service n° 824, protection des droits acquis

Key words: conditions of employment, change in conditions of employment, health and accident insurance (premium increase), service note n° 824, grandfathering of acquired rights

1/2006

Judgment of 13 December 2007

Administrative Tribunal of the Bank for International Settlements

Prof. David Ruzié, President,
Prof. Dr. Dr. h.c. Wolfgang Hromadka, Reporting Judge,
Prof. Dr. Franz Kellerhals, Panel Member,
lic. iur. Felix Heusler, Registrar.

X. _____,

Applicant

versus

the Bank for International Settlements, international organisation with registered office in Basel,
represented by M., _____,. attorney at law in Basel,

Respondent

re

Health and accident insurance scheme.

As to the facts

A.
[...]

B.
Particular

The Applicant has been employed by the Respondent since 1 June 1999, initially as _____, and since 1 July 2000 _____. He is married, has _____ children, is a _____ citizen and lives in _____.

His employment relations are based on the Respondent's offer of a contract ("letter of appointment") dated 25 March 1999, which the Applicant accepted by letter dated 31 March 1999. The offer contains no particulars concerning health and accident insurance. The fifth paragraph states: "Die Anstellungsbedingungen sind in der Personalordnung und der

Dienstlichen Mitteilung Nr. 911 (über das Verwaltungsgericht) festgelegt, welche diesem Schreiben beiliegen [The conditions of employment are laid down in the Staff Regulations and Service Note No. 911 (on the Administrative Tribunal) which are enclosed with this letter]."

The Staff Regulations of 1 October 1997 stipulate, insofar as is of relevance for the present case: "Unless special terms and conditions are stated in the letter of appointment, the appointment will be subject to the conditions of employment laid down in the present regulations" (Article 9, second paragraph). "Working conditions of members of staff ... are laid down in the relevant Special Staff Rule" (Article 17). "Detailed regulations ("Special Staff Rules") governing the application of the Staff Regulations or setting out conditions of employment not specified in the Staff Regulations will be issued by the Bank as necessary by decision of the General Manager with the approval of the President. The Staff Regulations may be modified from time to time by a decision of the Board of Directors of the Bank" (Article 21).

Neither the employment contract nor the Staff Regulations contained particulars regarding the health and accident insurance scheme. Nor was this changed in any way by the amended contract of 26/29 June 2000 or the amendments to the Staff Regulations of 8 May 2000 and 27 June 2005.

At the same time as the letter of appointment and the Staff Regulations, the Respondent issued to the Applicant upon his appointment a Staff Handbook containing the Bank's most important internal regulations. As part of a general overview of benefits, the Handbook included Service Note No. 824 of 16 June 1981 (as revised on 4 July 1991) concerning the Bank's health and accident insurance scheme. The introduction to the Service Note states: "I have pleasure in informing members of the staff that a number of improvements have been made in the Bank's health and accident insurance scheme. The principal changes agreed upon, which will come into effect on 1st July 1981, are as follows." The Service Note contains no particulars as to the period of validity. The insurance benefits were based on the Respondent's contract with the W. _____ insurance company. They provided full coverage of costs of hospitalisation in semi-public ward in the case of illness and accident. For outpatient treatment and for hospitalisation in first-class ward, members of staff could take out supplementary insurance with a 10 % co-payment, for which the Respondent granted a "special subsidy" which had stood unchanged since 1992 at CHF 1'280 per adult and CHF 760 per child. Costs of dental treatment, medical check-ups, etc. were reimbursed by the Respondent directly.

Following his appointment, the Applicant and all his family remained voluntarily insured with his previous health insurance provider, the B. _____. The B. _____ scheme provided full coverage for illness, accident and long-term care. The Respondent paid a "health insurance allowance" of CHF 5'600 towards the costs of ____ 10'883.76 in the year 2000.

With effect from 1 January 2001, the Respondent amended its health and accident insurance scheme. Based on an insurance contract concluded for three years with Q. _____ and insurance broker V. _____, the Respondent offered its staff and pensioners by letter dated 1 January 2001 "new insurance cover for medical costs" (Note to staff and pensioners of 10

November 2000). The insurance package now also included the costs of outpatient treatment in case of illness and accident, dental treatment, long-term care and hospitalisation in private (first-class) ward. Insured persons had to pay a deductible of CHF 300 per year and a co-payment of 10 % for medical treatment and pharmaceuticals and 20 % for dental treatment, up to a maximum of CHF 1'200 per year. Reimbursement for costs of dental treatment was limited to CHF 5'000. Hence the costs to be borne by each insured person could amount to a maximum of CHF 1'500 per year, and thus for the Applicant's family _____ a maximum of CHF _____. The Respondent reserved the right to amend the arrangements for reimbursing the costs of hospitalisation in first-class ward "if after three years the costs are considered too high". The Respondent also reserved the right to alter the percentage of costs reimbursed for outpatient treatment for illness "if Swiss practice changes" (footnotes 1 and 2 of the Note dated 11 October 2000). Under the heading "How much will I have to pay for the new package?", the Note to members of staff and pensioners of 11 October 2000 on the change in health and accident insurance stated: "The premiums for the insurance of members of staff, pensioners and dependent family members will be borne entirely by the Bank." And under the heading "What do I need to do?", it stated: "Those members of staff and pensioners who have concluded insurance contracts with other providers than W. _____ will have to examine whether there is double insurance. Where this is the case, they may want to terminate these contracts in accordance with the applicable terms and conditions. The decision to do so lies, however, with each individual."

In a further Note dated 10 November 2000, the Respondent provided details of the new health and accident insurance scheme. Concerning the arrangements for reimbursing the costs of hospitalisation in first-class ward and illness-related outpatient treatment, the Respondent reserved the right "[a]s regards illness cover, . . . to review these arrangements after three years if circumstances change".

At the same time as introducing the new health and accident insurance scheme, the Respondent discontinued payment of the "health insurance allowance". The Applicant cancelled his membership of B. _____and joined the Respondent's health and accident insurance scheme with effect from 1 February 2001.

In 2003, the Respondent entered into negotiations with V. _____ regarding a follow-on contract. In light of the increase in health care costs, V. _____ estimated a premium increase of 40 %. The Respondent succeeded in limiting the increase to 29 %. On this basis, a new, one-year contract was concluded with V. _____ and A. _____. At the same time, an internal working group set up in June 2003 was mandated, while ensuring optimal insurance coverage, to develop proposals for a solution that would be financially bearable for the Respondent in the medium term. This working group concluded that the cover and benefits provided by the Respondent's insurance scheme roughly corresponded to those of other international organisations, but that – unlike in the other organisations – the insured persons did not pay any contribution towards the premiums. The working group recommended that the insured persons should bear a share of the premium in the future and that the contributions should be determined on a basis of solidarity. The Respondent's management discussed the working group's proposals in 11 meetings. After an intensive

exchange of information with the staff committee, members of staff and pensioners, and after obtaining three opinions from acknowledged experts in international law [...] on the question of whether having insured persons contribute towards the premiums could be considered a violation of their acquired rights (the legal experts answered in the negative), the management approved the working group's proposals. The group insurance contract with V. _____ and A. _____ was extended.

The Respondent issued a "Special Staff Rule" dated 1 January 2005, together with an Annex containing transitional rules, setting out the new arrangements for the "Bank's health and accident insurance scheme". "Participation in this group insurance policy forms an integral part of the Bank's conditions of employment" (Section I.2 of the Special Staff Rule). As regards benefits, the new scheme provides for a reversion to hospitalisation in semi-private ward in case of illness; in terms of contributions, it provides for a contribution on the part of insured members of staff towards the insurance premium that will be raised stepwise until the contribution reaches 25 % of the overall premium at the end of the phasing-in period. The insured persons overall will then bear 30 % of the total costs, namely 25 % via contributions and 5 % via the deductible. The contribution towards the premium implies a contribution amounting to an average of 1.6 % of annual basic salary for individual members of staff, and 3.03 % for a married couple. Contributions will be increased in at least 10 annual steps such that they cover increases in health care costs that exceed the rise in the general cost of living, up to a maximum of 2.5 % per year. Thus the contribution rate of 25 % will be reached at the earliest in 2014. The annual basic salary or pension is taken into account up to a ceiling of CHF 200'000. "This ceiling may be adjusted from time to time by decision of the Bank" (Section III.4 of the Special Staff Rule). The Bank also reserves the right to review the share of insured persons in the costs of insurance (30 %) and to adjust it in light of circumstances (footnote 5 to Section III.1 of the Special Staff Rule). Pensioners who retired before 1 January 2005 do not have to contribute towards their insurance premium, which is fully borne by the Bank, with the exception of the premium for the option to be hospitalised in private ward in case of illness (#2 of the Transitional Rules governing the Special Staff Rule).

By letter to the Respondent's General Manager dated 15 December 2005, received on 16 December 2005, the Applicant requested that the Respondent pay in full the premiums for health and accident insurance for himself and his family. The Respondent declined this request by letter dated 14 March 2006. By letter dated 31 March 2006 the Applicant gave notice of his intention to file an Application, setting out the subject matter of the Application. By letter dated 6 June 2006, received by the Tribunal on 7 June 2006, the Applicant filed an Application against the Respondent.

The Applicant requests that the Respondent be ordered to pay the full amount of the premiums for health and accident insurance for himself and his insured family members with retroactive effect from 1 January 2005 and for the full period of coverage as employee/pensioner.

The Applicant asserts that he had accepted the Respondent's offer of employment in 1999 inter alia because the latter had assured him that the health insurance allowance would also

be preserved as an acquired right in the event of any changes, and that the new health insurance scheme planned for 1 January 2000 – and introduced with a delay of one year on 1 January 2001 – would not leave him any worse off. On 10 November 2000 members of staff had been requested to cancel their existing insurance policies as of end-2000. Upon his enquiry, Y. _____ of the Respondent's Human Resources section had assured him that, were there ever to be any change in the assumption of costs by the Respondent, this would apply only to new recruits and not to existing staff. This assurance, together with the Respondent's previous practice of not unilaterally retracting assurances, and together with the discontinuation of the health insurance allowance, had motivated him to give up his insurance with B. _____. In giving up his membership he had suffered irreparable prejudice. Insurance through the Respondent was more expensive; assuming a salary of CHF _____ in the year 2014, he would have to pay an estimated premium of CHF 9'400 and deductible of CHF 2'300 into the health and accident insurance scheme, as against a premium of CHF 8'032 and deductible of CHF 1'100 with B. _____. More especially, however, under the existing law there was no possibility of returning to B. _____.

The Applicant claims that in passing on part of the premium to staff members, the Respondent is inadmissibly violating their acquired rights, as evidenced inter alia by the fact that the previous arrangements were maintained for pensioners. In so doing, the Respondent is acting not only contrary to previous tribunal judgments concerning acquired rights, but also contrary to its previous practice (in connection with the amendment of the rules on salary bands and salary adjustment, the amendment of the expatriation allowance, and the abolition of the savings fund). Moreover, it is unreasonable. The Respondent had already known in 2001 that health care costs were rising faster than the general cost of living; the Respondent's own financial situation did not entail any change to the health and accident insurance scheme. The Applicant had only given up his membership in B. _____because he trusted that the Respondent would continue paying the full cost of the premium.

The Respondent requests:

1. The Application shall be completely dismissed.

2. In accordance with the Statute of the Administrative Tribunal of the Bank for International Settlements, the costs of the proceedings shall be borne by the Respondent. Each of the Parties shall bear its own costs of legal representation.

The Respondent considers that it did not violate the Applicant's acquired rights. The Respondent had given him no individual assurance of exemption from health and accident insurance premiums. The statutory arrangements for the health and accident insurance scheme are in principle maintained. There has been no reduction in the funding of the scheme; on the contrary, it increases from year to year. Modifications are admissible and had indeed been made on several occasions. The Respondent's objective of optimal insurance cover with medium-term financial sustainability is sufficient justification for having staff members contribute to the premiums. The scale of the contribution entails no serious financial consequences for the Applicant. The contribution to the premium is much more than offset by expected increases in salary. Terminating membership of B. _____was freely

decided by the Applicant. For the rest, he suffered no prejudice thereby. Even at the end of the phasing-in period, the costs of membership in B. _____are not inconsiderably higher than under the Respondent's health and accident insurance scheme, while benefits are lower.

The Administrative Tribunal gives consideration to the following:

Formal considerations

1.
Procedure

The Presiding Judge issued 11 procedural rulings. In particular, these concerned the following:

Pursuant to Ruling No. 1 of 29 June 2006, the Panel was formed of Prof. David Ruzié as Presiding Judge, Prof. Wolfgang Hromadka as Reporting Judge, and Prof. Franz Kellerhals as Member of the Panel.

By the same Ruling, German was determined as the language in which the proceedings were to be held. The Parties were reminded that they may at any time be assisted or represented before the Tribunal by a duly authorised person of their choice.

By submission dated 7 December 2006, the Applicant requested that Answer Exhibits Nos. 52, 54, 55 and 72 be translated into German and that the Respondent be ordered to disclose documents pertinent to the case.

By Ruling No. 5 of 22 December 2006, the Respondent was instructed to file German translations of Answer Exhibits Nos. 52, 54 and 55 with the Tribunal by 31 January 2007, but not of Exhibit 72. Answer Exhibits Nos. 52, 54 and 55 are legal opinions of relevance to the matter in dispute, while Answer Exhibit No. 72 is a general academic treatise, translation of which cannot be demanded.

By the same Ruling – and again by Ruling No. 6 of 5 February 2007 – the Applicant was requested to set out in the Reply the concrete circumstances which indicate that he was given an assurance of permanent exemption from premiums by the Respondent, and to file copies of the complete personal correspondence to which reference is made on page 31 of the Application (Application Exhibits PER_01 to P E R_04).

By submission dated 8 February 2007, the Applicant requested disclosure of further documents by the Respondent and that the time limit for filing the Reply be extended to one month after receipt of such documents.

By Ruling No. 7 of 16 February 2007, the Applicant's requests for the production of documents were refused for the time being. The Panel reserved the right to revert to these requests at a later date.

By the same Ruling, time limit for filing the Reply was extended. The Applicant was requested to reiterate in the Reply his requests for the production of documents, to specify in his Reply the concrete circumstances which indicate that he was given an assurance of permanent exemption from premiums by the Respondent, and to attach copies of the complete personal correspondence to which reference is made on page 31 of the Application (Application Exhibits PER_01 to PER_04).

By submission dated 8 May 2007, the Applicant, inter alia, reaffirmed the requests for production of documents made in his Reply.

By Ruling No. 10 of 15 May 2007, the Presiding Judge stated that he would not, at the current juncture, give consideration to the matters adduced by the Applicant in the letter of 8 May 2007 and that he would issue precise instructions regarding the burden of proof and other points following receipt of the Rejoinder.

By Ruling No. 11 of 11 June 2007, the double exchange of written statements and documents was closed. By the same Ruling, Y. _____ was summoned as witness and Z. _____, was summoned as expert.

The hearing of other persons was waived. All other requests for admission of evidence were declined for the time being under reference to Article 19, paragraphs 4 and 5 of the Rules of Procedure.

At the same time, the main hearing was scheduled for 5 July 2007 at the registered office of the Respondent in Basel.

By submission dated 20 June 2007, the Applicant reiterated his requests for the production of documents. He filed with the Tribunal as evidence a copy of the info pages of 2 October 2003 concerning the "Health Insurance Review" project. This filing was forwarded to the Respondent by the Registrar of the Tribunal on 25 June 2007. By submission dated 29 June 2007, the Respondent requested that the Applicant's submission be ruled inadmissible.

In the main hearing on 5 July 2007, both Parties were given the opportunity to comment on the Applicant's submission of 20 June 2007 and to make further requests for admission of evidence. While the Applicant abided by the requests for admission of evidence dated 20 June 2007, the Respondent waived any further requests for admission of evidence.

The Tribunal then decided to take the Applicant's submission of 20 June 2007 into account by including it in the files as document BIZ 28. At the same time, however, the Tribunal stated that it was not bound by the legal opinion of the Respondent's in-house counsel. The questions of law were to be decided independently of the opinions of the Parties.

The Tribunal heard Y. _____ as witness and Z. _____ as expert. Y. _____ stated that she had been responsible for the health and accident insurance scheme in the Respondent's Human Resources section and had acted as a point of contact for the staff. She had not had power of attorney, and assumed that members of staff had also been aware of this. She had

not given any assurance to the Applicant. Z. _____ stated that Exhibits Nos., 61 and 64 were from her, and that the data corresponded to the facts. Health care costs had risen by 3.5 % annually in the period 1999-2004; she did not know how much the cost of living had risen.

The Parties confirmed their requests and grounds in their final statements.

2.
Competence

The Application is admissible. The Administrative Tribunal called upon to decide the matter is competent. Under Article 4.1 of the Agreement of 10 February 1987 between the Swiss Federal Council and the Bank for International Settlements to determine the Bank's legal status in Switzerland ("Headquarters Agreement", SR 0.192.122.971.3), the Bank enjoys fundamental immunity from jurisdiction. In accordance with Article 4.2 of said Agreement, Article II of the Statute of the Administrative Tribunal of the Bank for International Settlements, in the version of 12 January 2004, provides that disputes arising in matters of employment relations between the Bank and its officials are settled by the Administrative Tribunal of the Bank. Matters of employment relations include in particular all questions relating to the interpretation or application of contracts between the Bank and its officials concerning their employment, and of the regulations to which the said contracts refer, including the provisions governing the Bank's pension scheme and other welfare arrangements provided by the Bank. The term "official" for the purposes of these provisions means any member of the Bank's staff who, in accordance with the Headquarters Agreement between the Swiss Federal Council and the Bank, is subject to the jurisdiction of the Administrative Tribunal.

The Applicant is an official within the meaning of both the Headquarters Agreement and the Statute of the Administrative Tribunal. He asserts a right in connection with the Bank's welfare arrangements. In addition to the pension scheme, these arrangements include other welfare arrangements such as the health and accident insurance scheme (cf. Article II, paragraph 2 of the Statute of the Administrative Tribunal of the Bank for International Settlements: "pension system and other welfare arrangements").

3.
Compliance with formal requirements and time limits

Formal requirements and time limits were respected. By letter to the Respondent's General Manager dated 15 December 2005, received on 16 December 2005, the Applicant requested that the Respondent pay in full the premiums for health and accident insurance for himself and his family with retroactive effect from 1 January 2005. The Respondent declined this request by letter dated 14 March 2006. By letter dated 31 March 2006, and thus within the 30-day time limit pursuant to Article VI, paragraph (2) (d) and Article VII, paragraph (2) of the Statute, the Applicant gave notice of his intention to file an application, setting out the subject matter of the application. The Respondent acknowledged receipt of the letter by letter dated 10 April 2006. By letter dated 6 June 2006, received on 7 June 2006, the Applicant

filed an Application against the Respondent. Hence the 90-day time limit pursuant to Article VI, paragraph (2) (e) and Article VII, paragraph (1) (a) of the Statute was respected. The Application is clearly formulated and complete; it contains all relevant particulars pursuant to Article 12.2 of the Rules of Procedure.

Material considerations

The Application is, however, unfounded. Neither under his contract of employment nor under a statutory rule is the Applicant entitled to have the Respondent provide a health and accident insurance scheme free of charge to him and his insured family members.

1.
No agreement and no contractual assurance

a) No agreement in the contract of employment

The contract of employment between the Applicant and the Respondent dated 25 March/31 March 1999 contains no agreement regarding health and accident insurance; nor does the amended contract of 26 June 2000.

b) No verbal agreement upon conclusion of the contract

Nor was there any verbal agreement such as would have assured the Applicant that the health and accident insurance scheme would remain non-contributory. Even if it is assumed that at the time of his appointment the Applicant was told upon his enquiry that the granting of the health and accident insurance allowance was an acquired right and that the new arrangements for the health and accident insurance scheme planned for 1 January 2000 would not leave existing staff any worse off, no assurance can be inferred from this. This was recognisably the provision of information, not declarations of intent that were to obligate the Respondent vis-à-vis the Applicant to retain the health and accident insurance scheme prevailing at that time.

c) No subsequent contractual agreement

Nor did the Applicant subsequently receive any assurance as to exemption from premiums. It is not possible to construe the e-mail from the witness Y. _____ in this way by any method of interpretation. Moreover, the witness did not have any power of attorney, and the Applicant must have been aware of this. In the final analysis, however, the question can remain open. The Applicant asked the witness for information, which he was given the same day. There is no question of an assurance or an agreement. The same is true of the correspondence with ____ S. _____ of the Respondent's staff committee. Apart from the fact that the staff committee has no authority to represent the Respondent, the wording ("there is no indication that this benefit will be considered in the near future for further cutting of benefits") cannot be taken to imply any form of intent to enter into a commitment.

2.
No statutory claim

Nor does the Applicant have any claim arising out of a statutory rule. The "Special Staff Rule" of 1 January 2005 does not provide for the legal consequence desired by the Applicant. While the health and accident insurance scheme of 1 January 2001 was based on exemption from premiums, that scheme was abandoned by the Respondent as of 31 December 2004. The Applicant therefore has a claim to exemption from premiums as from 1 January 2005 only if the Respondent was not entitled to amend the health and accident insurance scheme and hence to have the Applicant contribute towards the premiums. This is not the case.

The Respondent's health and accident insurance scheme is founded on a statutory rule made by the Respondent based on its freedom of organisation (Articles 1 and 2 of the Headquarters Agreement). It is collective in nature and was and is given effect by a unilateral commitment. As a supplement to the Staff Regulations, it shares their legal nature.

3.
Power to amend conditions of employment

a) Power to amend statutory rules: doctrine of acquired rights

Changes to statutory rules of international organisations are governed by the doctrine of acquired rights, which numbers among the general principles of the law of the international civil service. Under this doctrine, international organisations are bound not only by individual and collective agreements in contracts of employment but fundamentally also by commitments under statutory rules and other collective sources of law.

The right of international organisations to make statutory rules also encompasses as a matter of principle the right to amend them (as witness e.g. ATUNO Judgment No. 82 of 4 December 1961 (Puvrez), ATWB Decision No. 1 of 5 June 1981 (de Merode)). The employment relationship represents a continuing obligation that may possibly endure for decades and which requires repeated adjustment in light of internal or external factors that are neither foreseeable nor under the control of the employer. The official cannot expect conditions of employment to remain unchanged permanently. He must in fairness assume that they will get better in good times and worse in less good times. Ensuring the long term financial soundness of the organisation is quite understandably in the interests of the organisation and the staff. The lasting preservation of jobs takes precedence over the maintenance of conditions of employment. Conditions of employment therefore may not become ossified.

b) Limits to the power to amend

The right to amend conditions of employment is, however, not unlimited. No one would wish to work for an organisation where the employer can dictate conditions at any time (ATWB Decision No. 1 of 5 June 1981 (de Merode)). Stable conditions of employment are the price the employer has to pay so that the official forgoes his own market opportunities in the employer's favour. According to the now prevalent judicial practice of international tribunals

(see in particular ATILO Judgment No. 426 of 11 December 1980 (Settino); ATWB Decision No. 1 of 5 June 1981 (de Merode); ATILO Judgment No. 832 of 5 June 1987 (Ayoub 1); ATILO Judgment No. 986 of 23 November 1989 (Ayoub 2); ATILO Judgment No. 1226 of 10 March 1993 (Georgiadis)), with which this Tribunal concurs, material unilateral changes to fundamental conditions of employment that are essential to the reciprocal obligations are inadmissible on principle. What is admissible, however, are changes to non-fundamental conditions of employment, non-material changes to fundamental conditions of employment, and material changes to fundamental conditions of employment in situations of distress (ATWB Decision No. 1 of 5 June 1981 (de Merode)). The designation of the condition of employment ("fringe benefits") is immaterial.

Conditions of employment are fundamental if the staff member may expect them to survive all changes to his employment relationship. They must be so significant as to potentially be a factor in an applicant's deciding in favour of a firm or, if introduced at a later date, in the employee's remaining with that firm. What matters here is an objective view independent of the particular features of the individual case; the applicability of general rules cannot depend on the ideas or expectations of individual applicants or employees. Ultimately, it is not possible to circumscribe the concept exactly; more sizeable changes to the structure of reciprocal obligations are not excluded. What is decisive are the concrete circumstances: the (material or immaterial) importance of the condition of employment for the staff in its entirety, the quantitative or qualitative scope of the change, the reasons for it and the consequences for those affected (summarising ATWB Decision No. 1 of 5 June 1981 (de Merode), ATUNO Judgment No. 1225 of 30 September 2005).

c) No extension of limits through Article 21, paragraph 2 of the Staff Regulations

The Respondent was not able to extend its right to amend conditions of employment to a comprehensive right of amendment through Article 21, paragraph 2 of the Staff Regulations (ATWB Decision No. 1 of 5 June 1981 (de Merode). Article 21, paragraph 2 states: "The Staff Regulations may be modified from time to time by a decision of the Board of the Bank." As can be seen in connection with paragraph 1, this provision also applies to Special Staff Rules and hence also to then rules on the health and accident insurance scheme. If the Respondent had an unqualified power of amendment, all conditions of employment would be at its disposal. The Respondent itself does not take this to be the case, as is shown by the special reservations concerning individual arrangements under the health and accident insurance scheme. If the reservation is not to be regarded as null and void, or as merely indicative, on account of its undefined scope, then it requires qualification. It cannot give the Respondent more rights to amend general conditions of employment than it would have by application of general legal principles – in this case the doctrine of acquired rights.

d) Power to amend fundamental rights

Under the doctrine of acquired rights, it is not only rights already acquired that cannot be withdrawn, but also fundamental rights for which the basis has already been laid but which only fall due in the future. These fundamental rights include the Respondent's health and accident insurance scheme. In light of the significance of health and accident insurance for

the insured persons, the magnitude of the costs of such insurance and the expected increase in such costs in the coming years, there can be no doubt that, for the staff, a health and accident insurance scheme represents an absolutely essential condition of employment. The Respondent itself is of the same view.

However, fundamental conditions of employment can also be amended. But except in distress – which is not the case here – the amendments may not violate the essence of the condition. Having the active staff pay a contribution of 25 % towards the premium is consistent with this principle. The health and accident insurance scheme itself is left intact. It is true that a 25 % contribution is not merely a modification of the modalities of implementation; it is certainly a palpable amount that staff are being asked to pay. In future, they will have to pay an average of 1.6 %, and married staff 3.03 %, of their annual basic salary towards the premium. But health and accident insurance costs have risen considerably faster in past years than the general cost of living – by 3.5 % as against some 1 % during 1999 2004 – and in light of demographic developments and improvements in health care, they will in all probability continue to increase at a disproportionately high rate in the coming years. There is no reason why the Respondent should bear these costs on its own. Having the insured persons contribute is justified by the very fact that they also benefit from improvements in health care. Were the Respondent to bear the costs on its own, this would imply in the final analysis an extension of the "health care" component of its welfare arrangements. This the Respondent is not obligated to do. For the rest, the Respondent will continue in future to offset general inflation. This ensures that the commitment to provide a health and accident insurance scheme is not eroded.

e) No loss of power to amend

Members of staff could not assume that they would keep the 2001 insurance scheme for life. The Respondent amended its insurance scheme repeatedly in the past. As the freezing of the health insurance allowance in 1992 shows, it had also required its staff to contribute towards rising costs in the past. The behaviour of comparable institutions cannot be disregarded in this respect. The Respondent has to assume that its shareholders will regard this behaviour as a benchmark for adequate remuneration in a context of thrifty financial management.

The fact that the costs of the health and accident insurance system rose in the past without the Respondent having its staff contribute towards the premium does not deprive it of the right to do so now. Given continuously rising costs, it may admittedly be difficult – unlike in the case of a sudden cost increase – to find the right moment to adjust the conditions of employment, but this does not alter the necessity of such an adjustment.

The Respondent did not forfeit the power to amend the conditions of employment within the limits of acquired rights by virtue of having only reserved the right, in the 2001 health and accident insurance scheme, under certain circumstances to alter the arrangements for reimbursement of the costs of hospitalisation in first-class ward, and the percentage of costs reimbursed for illness-related outpatient treatment. The Applicant may be allowed that these provisions are confusing and *e contrario* suggest that other amendments are to be excluded.

In a stringent rule one would indeed expect either that all possible amendments are mentioned together with their preconditions – which could then go beyond the limits of the doctrine of acquired rights – or that there would be a tacit subjection to the principle of the doctrine of acquired rights. However, no waiver of existing rights is apparent in the rule.

Further, the fact that in the past the Respondent amended only the benefits side (deductible) and not the contribution side (premium) does not mean that the Respondent is bound by the previous health and accident insurance scheme. The relationship between the contribution side and the benefits side is that of communicating tubes. Taking a holistic view, as is appropriate for a collective welfare scheme, it is a question of expediency whether premiums are introduced, or benefits curtailed, in order to reduce costs. The Respondent is free to decide on one means or another after due assessment of the circumstances. For the rest, members of staff also had to pay premiums themselves under the insurance system that was in effect at the time the Applicant concluded the contract with the Respondent, since that system did not include outpatient medical treatment and the Bank's health insurance allowances had not been adjusted since 1992.

Finally, the fact that the Respondent granted compensation to existing staff in some other cases where it abolished benefits does not establish any obligation to do likewise for all time. In light of the particular characteristics of each individual condition of employment, no intent to commit itself in all cases can be inferred from the Respondent's behaviour in three concrete cases.

4.
Amendment only according to reasonably exercised discretion

The Respondent is in principle free to decide how it will take account of its justified financial interests. In so deciding, however, it must act according to reasonably exercised discretion (see inter alla ATWB Decision No. 1 of 5 June 1981 (de Merode); ATILO Judgment No. 832 of 5 June 1987 (Ayoub 1)). Since it represents an infringement of staff's rights, the curtailment may not be disproportionate, that is, it must serve a legitimate objective, for which it must be suitable, necessary and reasonable. The principle of equal treatment may not be violated.

a) Legitimate objective

The contribution by staff towards the premium satisfies these preconditions. It is a legitimate objective to remodel the health and accident insurance scheme such that it can still be financed over the medium term. The Respondent did not have to wait until the system got out of hand, that is, until its shareholders demanded that staff benefits be cut or it found itself in financial distress. Cautious and exemplary behaviour in this respect is expected in particular of a bank which works with funds entrusted to it and which offers its shareholders advice on how to handle borrowed funds. This also includes respecting the principles of thrifty financial management. A situation of financial distress would have entitled the Respondent to curtail benefits more and/or remodel the scheme more quickly.

b) Proportionality

The sharing of premiums between the Respondent and the insured persons is a suitable means of ensuring the medium-term financial viability of the health and accident insurance scheme. It is also necessary for this purpose. The Respondent was unable to "purchase" a less expensive health and accident insurance scheme at the same level. Curtailing benefits would have had the same financial impact on the insured persons overall as a contribution towards the premiums. The fact that other international organisations proceed in a similar fashion shows that the Respondent is not making the insured persons contribute towards the premiums more than is necessary. Finally, the Respondent's amendment of the insurance scheme is also reasonable. Not only is the Respondent not reducing its subsidy; rather, it is also continuing to absorb the costs of general inflation in future. The insured persons are merely being asked to contribute towards the additional costs of health care, which arise largely as a result of improvements in health care, in which respect they benefit. According to his own calculations, after a long phasing-in period, namely after 10 years at the soonest, the Applicant will probably have to contribute CHF 9'400 towards his premium. Given a salary of CHF _____ in 2014, which he himself forecasts, this represents ____ %. The increase in salary of CHF _____ assumed by the Applicant for the period 2006-14 is not only well in excess of the costs of contribution towards the premium, but is, notwithstanding this contribution, also not inconsiderably greater than the rise in the cost of living.

c) Equal treatment

The principle of equal treatment is respected. The exemption of pensioners from the contribution towards the premium is justified by the fact that, unlike active staff, they cannot expect any increase in their pensions over and above the rate of inflation. A contribution towards the premium would reduce their pensions in real terms. The question of whether in this respect unequal treatment is even imperative can be left unanswered in the present case.

D.
Distribution of costs

In accordance with Article XIV of the Statute of the Administrative Tribunal, the Bank shall bear the costs of the proceedings irrespective of the outcome of the dispute. The Applicant, since he loses the case, shall bear his extrajudicial costs. No grounds are apparent that might induce the Tribunal to derogate from this rule.

Therefore the Administrative Tribunal finds

1.
The Application is dismissed.

2.
The Respondent is ordered to bear the costs of the proceedings.

3.
Each of the Parties shall bear its own costs.

The Judgment shall be communicated to the Parties in writing.

Basel, 13 December 2007

The President of the Tribunal:	The Registrar:
Prof. David Ruzié	lic. iur. Felix Heusler