

SEVENTY-NINTH SESSION

In re DAMOND, PAUTASSO and ROYLES

Judgment 1458

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mrs. Andrée Damond, Mr. Marco Pautasso and Mr. Malcolm Royles against the World Intellectual Property Organization (WIPO) on 17 December 1993;

Considering the interlocutory order in Judgment 1417 of 1 February 1995 and the submissions by the complainants, the Organization and the International Civil Service Commission (ICSC) that are cited in the first paragraph of the preamble to that order;

Considering the further submissions filed, in accordance with points 1 and 2 of the decision in Judgment 1417, by the Commission on 6 March 1995 and by the complainants on 12 April, and WIPO's letter of 1 May 1995 informing the Registrar that it did not wish to submit a final brief;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear in Judgment 1417 under 1 and 2. The complainants belong to the Professional category of staff of WIPO. According to WIPO Staff Regulation 3.5(a) base salaries of staff of the Organization in the Professional and higher categories are "adjusted" to variations in the cost of living at Geneva. That is done by reference to a "post adjustment index" and by payment to the staff of a non-pensionable allowance known as "post adjustment". The index for Geneva serves as a measure of the cost of living there as against New York, the duty station that the common system of the United Nations takes for the sake of comparison.

Regulation 3.5(e) reads:

"The multiplier applied for calculating the post adjustment shall be that established for Geneva by the International Civil Service Commission, and the effective date of any change in the multiplier shall be as fixed by the said Commission."

To calculate the post adjustment index, of which "rental/housing" costs are a main component, the Commission carries out periodic surveys into the cost of living at duty stations in the common system of United Nations organisations. Subtracting 100 from the post adjustment index gives the figure known as the "multiplier" which is multiplied by 1 per cent of base salary to yield the amount of the post adjustment allowance.

By circular 49/1991 of 2 July 1991 the Organization announced that the multiplier for July 1991 would be 78. Circular 58/1991 of 29 July explained that the new multiplier took into account changes in the index of consumer prices at Geneva since 1 July 1990, "the date of the last adjustment in Professional remuneration in Geneva".

A letter dated 30 April 1992 from the Controller and Director of the Budget and Finance Division of WIPO to the Chairman of the Commission observed that the post adjustment index for July 1991 failed to take account of increases in rents and in housing costs at Geneva. It asked the Chairman to review the matter so that the Organization might make "the necessary corrections" in the pay of the Professional and higher categories of its staff.

In a reply dated 1 June 1992 the Chairman said that he saw no grounds for revising the index.

On 14 September 1992 the Director of the Personnel Division sent staff in the Professional and higher categories a

memorandum in answer to queries about pay. As to the reckoning of the increase in housing costs to determine the figures for July 1991, he explained that the Commission relied on a "monthly projection factor" based on surveys among staff of the common system; between May 1990, the date of the previous survey, and March 1991 the factor had risen by 2 per cent and the multiplier for July 1991 had reflected that.

By letters of 26 October 1992 the complainants submitted to the Director General under Rule 11.1.1(b)(1) requests for review of the decision to apply the multiplier for July 1991. They claimed an increase of 1.2 per cent in pay for that month and proportionate increases for any later months in which the multiplier might not "correctly reflect the value of the housing component". They asked the Director General, if he refused, to relieve them of the obligation to go to the Appeal Board.

In the absence of a reply from the Director General within the six-week time limit in Rule 11.1.1(b)(2) they submitted appeals to the chairman of the Appeal Board on 12 January 1993.

In its report of 21 July 1993 the Board recommended rejecting their appeals. The Director General having taken no further decisions, the complainants are impugning the rejection which they infer under Article VII(3) of the Tribunal's Statute.

B. The complainants submit that the post adjustment index for July 1991 is unlawful. They have four main pleas.

The first is breach of *patere legem quam ipse facisti*. On 21 December 1990 the General Assembly of the United Nations approved a methodology which the Commission had proposed and which required (1) place-to-place comparison of housing costs, (2) assessment of housing costs based not on net but on gross rent or, in the case of home-owners, imputed gross rent and (3) "time-to-time adjustment" of the housing component of the post adjustment index using such "external data" as type of neighbourhood, distance from work and size of dwelling. But the Commission failed to apply its own methodology.

The complainants' second plea is that the method the Commission followed was on its own admission "inequitable" and "imprecise". The General Assembly acknowledged as much by calling on the Commission "as a matter of urgency ... to improve the measurement of the housing element in the remuneration package". But the Commission held to its old methods, which underestimated actual housing costs.

Thirdly, they allege breach of equal treatment. The Commission has a duty under the *Noblemaire* principle (for an explanation of this principle, see Judgment 825 (in re Beattie and Sheeran) under 1 to 5.) to see that pay at different duty stations has uniform purchasing power. Though it took account of the housing component of the consumer price index for New York, it did not do so for Geneva. Geneva reported a rise of 8.3 per cent in rents over the material period and on that account the post adjustment index for July 1991 should have been 1.2 per cent higher.

Lastly, the complainants plead neglect of an essential fact. The "monthly projection factor" rested on the results of a housing survey for 1988 which were flawed mainly because of the low rate of response - a mere 12 per cent - to the questionnaire. Worse still, the Commission's projection of net rents from the 1988 and 1990 surveys to July 1991 was "linear". So it overlooked the steep increase in mortgage rates which pushed up rents in Geneva by 8.3 per cent between May 1990 and May 1991 after a rise of only 4.8 per cent between May 1988 and May 1989.

The complainants seek the quashing of the decisions setting their pay for July 1991 and any months thereafter. They claim payment of the further amounts due, plus interest at the rate of 8 per cent a year, and awards of 3,000 Swiss francs each in costs.

C. In its reply of 14 April 1994 WIPO concedes that the complaint is receivable under Regulation 3.19(a), which gives staff two years in which to claim any payment due under the Staff Regulations or Rules.

On the merits the Organization submits that it had nothing to do with the Commission's choice of the method of determining the multiplier: that was a matter for the Commission alone. The Organization neither confirms nor denies the complainants' allegations.

D. In their rejoinder of 10 May 1994 the complainants contend that WIPO is yet again in breach of its duty, stated in Judgment 1265 (in re Berlioz and others), to see that any "elements of the common system or any other outside system" which it puts in its own rules are lawful. At least one other organisation that belongs to the common system has refused to apply a multiplier which it thought flawed.

E. The Commission sent WIPO on 13 May 1994 a letter and observations which the Organization filed on its behalf on 13 June. Commenting on issues the complainants raised in their letters of 26 October 1992 to the Director General about "methodology", the Commission acknowledges the value of data from outside sources but observes that no deadline was set for "the implementation of external data", which it was "always recognized" would take a long time. Although the Commission has used the rent component of the consumer price indices at New York and Washington D.C. it was not bound to do so elsewhere; its decision to use the component of the Geneva index took effect only as from August 1993. As to the response to its questionnaire about housing, an "accurate calculation" would have required replies from staff stationed at Geneva but living just over the Swiss border, in France; but such staff did not fill up the questionnaire. One reason for the "discrepancy" between the rate of inflation at Geneva and the steep rise in mortgage rates there is that mortgage rates affect new rents more than older ones; so it takes time for them to push up the consumer price index.

F. In their further submissions of 14 July 1994 the complainants contend that the Commission has ignored their whole complaint by confining comment to their letters of 26 October 1992 to the Director General.

They accuse it of dilatoriness in using external data. By failing to make the introduction of such data retroactive it ensured that earlier underestimates of housing costs would hold good.

They observe that neither the Organization nor the Commission disputes the soundness of their claims. All that the Commission challenges is the reasoning which they developed in their letters of 26 October 1992, and that is now immaterial. They nevertheless contest some of the Commission's statements in its brief. The purpose of the questionnaire being to gather data on costs in Geneva, the Commission did not invite staff living in France to fill it up; in the absence of data on costs in France any references to them are speculative.

The complainants claim further amounts in costs.

G. Further observations which the Commission made on 14 October 1994 and which WIPO filed on its behalf on 18 October address the complainants' brief of 14 July 1994.

H. In the further submissions which the Tribunal invited in point 1 of its decision in Judgment 1417 the Commission explains how the method of reckoning the rental/housing component of the post adjustment index has evolved over the years. Mistrust of data collected in surveys led the Commission to make improvements in the methodology on recommendations from its Advisory Committee on Post Adjustment Questions (ACPAQ).

The Commission says that it expressed the improvements "programmatically" rather than "normatively", the whole system being too complicated to allow of sudden change.

The Commission raises a procedural objection. Citing its own Statute and Rules of Procedure, it observes that they provide in elaborate detail for the participation of organisations and staff and that the staff representatives of WIPO may address it in writing or orally. So it -

"... behooves staff members who are not satisfied with some aspect of the work of the Commission ... to cause their staff representatives, and possibly the executive head of the employing organization, to raise these points with the Commission in a timely and formal manner ... so that they might be considered before definitive decisions are taken by the Commission ..."

In this case the complainants failed to do so.

I. In the final submissions which the Tribunal invited in point 2 of its decision in Judgment 1417 the complainants dismiss as "excuses" the Commission's reasons for not following the new methodology. They see in its attitude towards the ACPAQ "contempt for administrative practice and law" and contend that on the evidence the material decision was anything but "programmatic".

They claim yet further amounts in costs.

CONSIDERATIONS:

1. The pay of staff in the Professional and higher categories of the common system of the United Nations, to which

WIPO belongs, is determined by reference to the pay of United States federal civil servants as adjusted to take account of differences in the cost of living between Washington D.C. and New York. A "margin" in favour of United Nations salaries is considered necessary to compensate for specific patterns of expatriate service. The margin remains within a range of 110 to 120, and the International Civil Service Commission applies procedures to ensure that it does so. Adjustment to pay is made either when the cost-of-living index which the Commission uses shows a variation of 5 per cent or - according to what is commonly known as the "twelve-month rule" - at the date of the first anniversary of the previous adjustment, whichever contingency is the earlier. For New York adjustment is made in November. For Geneva, where WIPO has its headquarters, the adjustment is made each July according to the twelve-month rule.

2. This complaint objects to the adjustment made to the pay of the Professional category staff of WIPO for July 1991 and in particular to the reckoning of the variation of the "rental/housing component" of the post adjustment index. The complainants contend that the Commission determined the index for July 1991 in breach of the applicable methodology; that it was improper to use the old methodology; that that methodology was "inequitable" and "imprecise"; and that, since for some years a different one has been applied to pay of staff in the Professional category of the United Nations common system at New York, the staff of WIPO, who are stationed at Geneva, were unfairly treated.

3. In its reply the Organization stated that it and its Director General "neither affirm nor deny the information contained, or the statements set forth, or the allegations made by the complainants" and suggested that any additional information or commentary on the methodology involved or on the decisions challenged or any views on the merits of the complaint would have to come from the Commission. Judgment 1417 accordingly invited the Commission to file further submissions and the parties to file final briefs.

4. There is a general description of the system of post adjustment in Judgment 1457 (in re Di Palma and others), delivered this day, under 2 to 9. The same method has been used for many years, including 1991 and 1992, to establish the rental/housing component of the index, save at New York. It may be summed up as follows.

(a) Each year all "eligible staff" - broadly, those in grades P.1 to D.1 - are asked to fill up a questionnaire for the purpose of survey of the costs of housing and domestic service.

(b) The results of a survey are "tabulated" for each duty station and used to establish:

(i) the "weight of the housing component" as part of the post adjustment index for the duty station; and

(ii) the rental/housing component of the index at the duty station at the date of the survey.

(c) If that date coincides with the date of an interim adjustment the result of the survey is used to establish the rental/housing component of the index for the purpose of that adjustment; if not, the trend of the last two surveys before the date of the interim adjustment is "linearly extrapolated" to that date to establish the component.

5. Because of dissatisfaction with that part of the methodology - due mainly to the low rate of response by staff to the questionnaire - the General Assembly of the United Nations asked the Commission to look into the matter. After consulting its own Advisory Committee on Post Adjustment Questions (ACPAQ) the Commission did so and put conclusions and recommendations to the Assembly at its 45th Session in 1990. The relevant passage read (Report of the International Civil Service Commission for the year 1990 (General Assembly, Official Records, 45th Session, Supplement No. 30, paragraph 95.)):

"The Commission invited the General Assembly to note that, under its statutory authority, it was empowered to take decisions concerning post adjustment and rental subsidy matters. However, bearing in mind that its proposals outlined below in this area form an integral part of the overall conditions of service of the Professional and higher categories of staff arising from the comprehensive review and that significant financial implications were associated with these proposals, the Commission considered that it would be appropriate to make recommendations to the General Assembly concerning the treatment of housing within the remuneration system and the revised rental subsidy scheme. In view of the above, the Commission decided to recommend to the General Assembly that:

(a) the treatment of housing within the remuneration system should be improved by a series of measures focused to distinguish between duty stations where housing could be maintained within the post adjustment system and those duty stations where housing should be separated from the post adjustment system. Housing should be maintained

in the post adjustment system in Group A duty stations covering headquarters, North American and European duty stations and field duty stations where housing comparisons could be made without serious difficulty. Housing would be excluded from the post adjustment system for duty stations in the field where valid housing comparisons were difficult or impossible. These would constitute Group B duty stations.

(b) The treatment of the housing component in the calculation of post adjustment indices at Group A duty stations would be as follows:

(i) Place-to-place comparisons of housing costs would be retained as an integral part of the post adjustment system;

(ii) Post adjustment indices would incorporate housing cost relativities derived from gross, in place of net rents, so as to reflect correct place-to-place housing cost relativities. In the case of homeowners imputed gross rents would be used;

(iii) Time-to-time adjustment of the housing component of the post adjustment index would be governed by housing price indices using external data as recommended by ACPAQ and as defined as follows:

a. The areas covered must meet accepted standards in terms, inter alia, of safety, commuting distance, the availability of shopping and the adequacy of public services and should, in principle, be areas where most of the staff currently in the duty station reside;

b. The size and type of dwellings should reflect the structure of the common system population, the existing combination of common system renters and homeowners for the areas selected, and should not be below minimum housing standards in terms of dwelling size relative to household size;

c. If feasible, rents used for computing housing relativities should be obtained for both newly rented and other dwellings;

d. If feasible, the index should be weighted to reflect characteristics of the common system population in the selected areas as regards size and type of dwelling and the period of residence in the dwelling. The components should be those already included by decision of the Commission."

6. The complainants submit that those detailed proposals for the treatment of the rental/housing component of the post adjustment index set out the methodology that the Commission was thereafter to apply.

7. The Commission explains in its last brief that it was always understood that carrying out the proposals to make yearly adjustment to the component on the strength of data from external sources was a complicated matter and required extensive research. The main proposal made by ACPAQ and endorsed by the Commission itself was to replace the results of housing surveys obtained from the questionnaires completed by staff with "external data", i.e. data on actual rental/housing costs at the duty station. The Commission points out that it is far more complicated to price real property than to price goods and services and that "the only realistic possibility of assembling such data for all the duty stations of the UN system is to employ outside consultants". The secretariat of the Commission first obtained information on the type of housing used by staff. Then it was necessary to choose from among the available consultants by resort to the bidding procedures required by the Financial Regulations of the United Nations. Since none of the consultants met the precise specifications for reasonable fees, bids from others had to be put to ACPAQ for technical review. Preliminary bidding took place in April 1991 and the Commission's secretariat submitted the bids to the organisations and staff for comment in July 1991. There was further bidding in December 1992. A contract with one consultant was approved in December 1993. That consultant provided "survey design and data collection instructions" in February 1994 and they were sent to the organisations and staff for comment. The data obtained by that consultant on rents were put to ACPAQ in May 1994. A paper by the consultant on the methodology of "housing comparisons" was submitted to the Commission's secretariat in September 1994. But in October a working group on post adjustment expressed dissatisfaction with the consultant and asked the secretariat to find another source of external data on housing. The upshot was that in November 1994 the secretariat sent the organisations and staff for comment a paper by another consultant on the methodology of rent surveys. In December 1994 the new consultant provided data on rents at Geneva and at five other duty stations and in January 1995 made a survey of rents in New York. In February 1995 the secretariat's analysis of the data was presented to ACPAQ, which in turn provided guidelines for refinement of the data. The Commission was to review the matter in May 1995. It has been producing progress reports which acknowledge that much remains to be done in

consultation with the organisations and staff.

8. The Commission submits that paragraph 95 of its report to the General Assembly in 1990 - set out in 5 above - is "in programmatic rather than in normative terms" and that its recommendations "were to serve as goals rather than as precise instructions".

9. Having considered the Commission's report for 1990, the General Assembly adopted a resolution, No. 45/241, on 21 December 1990. As to the matter that forms the subject of this case the resolution noted "the Commission's intention to review and evaluate the proposed procedures for the treatment of housing in the light of the experience gained". The Assembly then:

"1. Urges the Commission to continue to pursue its examination of the remuneration structure, in particular concerning the treatment of housing, and to report its findings to the General Assembly, as appropriate, taking into account the views expressed by Member States in the Fifth Committee;

2. Takes note of the recommendations of the Commission with regard to the treatment of housing, as contained in paragraph 95 of its report;

3. Requests the Commission, as a matter of urgency, to continue to take measures to improve the measurement of the housing element in the remuneration package. ..."

10. The texts of the Commission's conclusions and recommendations and of the General Assembly's resolution support the Commission's contention that paragraph 95 of its report for 1990 set out no new methodology that was henceforth to be applied. Time must be allowed for the whole complicated matter to evolve: so much is plain from the foregoing account of the manifold difficulties the Commission has met in trying to collect data from external sources. The conclusion is that at the time material to this case the methodology was not the "new" one set out in paragraph 95 of the Commission's report, but the one that the Commission had been following till then.

11. The complainants further rely on a recommendation that ACPAQ made on the subject in its report dated 25 May 1990 on the work of its 15th Session (ICSC/32/R.5, paragraph 42(e)). The recommendation was that between full and interim place-to-place surveys, and "as an interim measure pending the use of data from external sources", the "housing component" of the local consumer price index should be used to update the post adjustment index, rather than the survey-based calculation made by means of "linear" extrapolation. That was the method followed for many years in New York and Washington D.C. But the Commission neither endorsed that recommendation nor reported it to the General Assembly. The Commission explains in its last brief:

"The difficulty with that proposal was that at many duty stations the housing component of the [consumer price index] is distorted by the inclusion of subsidized or rent-controlled housing, which is not normally available to international officials. Consequently arrangements had to be made to secure data not subject to such distortion. In Geneva the Commission has recently arranged for the Cantonal Bureau of Statistics to prepare a special housing CPI from which subsidized housing is excluded. Consequently it was not until August 1993 that the Commission: (The Commission's report of 14 September 1993 on its 38th Session (July-August 1993): ICSC/38/R.19, paragraph 58.)

'decided that, pending the acquisition of external data covering two periods with an interval of one year, local CPIs, divested of any element of subsidized housing if possible, should be used for the time-to-time updating of the [post adjustment indices] for headquarters duty stations'."

That decision of August 1993 was not retroactive and has no relevance either to the revision in July 1991 or to the revision in July 1992 of the rental/housing component under the twelve-month rule.

12. ACPAQ is a subsidiary body established by the Commission with the approval of the General Assembly to make recommendations to the Commission on the general administration of the system of post adjustments. It has no authority to make decisions. Its recommendations become part of the post adjustment system only when approved by the Commission. The conclusion is that the recommendation of ACPAQ which the complainants are relying on, and which the Commission did not accept, has no binding force and is therefore irrelevant to this case.

13. The complainants plead that the "old" methodology relating to the rental/housing component is inequitable and imprecise, and they base the plea on admission by the Commission of the inadequacy of the methodology in its

report to the General Assembly in 1990. That report does list shortcomings in the methodology, but it is clear that attempts were being made to improve it. It is mistaken to contend that it is invalid while it is still being revised. The work had not been completed at the material time and not until the Commission's decision of August 1993 - set out in 11 above - was the methodology for Geneva altered. The plea fails.

14. The complainants argue that the recommendation which the Commission made in paragraph 95 of its report to the General Assembly in 1990 - see 5 above - should be construed as encompassing the one relating to the provisional use of the housing component of the local consumer price index. Again the argument fails. As was explained in 10 above, the Tribunal accepts that paragraph 95 did not lay down any binding methodology.

15. The complainants point out that for staff in New York the Commission had been using for many years the housing component of the local consumer price index established by the local statistical offices. But the Commission has explained that it was unable to use the housing component of the local index in Geneva because of distortion by the inclusion of subsidised or rent-controlled housing. And it was not until August 1993 that the Commission decided to use the local index as negotiated with the Cantonal Bureau of Statistics for time-to-time adjustment to the rental/housing component. There is no suggestion of any distortion in the housing component of the local index in New York or in Washington D.C. for the "comparator" national civil service.

16. The Tribunal accepts that the Commission had to use different methodologies because of difficulty in getting hold of the correct data for Geneva. The fact that the shortcomings of the methodology applicable to Geneva are recognised does not make prior application of it invalid.

17. The complainants believe that it was improper to use the old methodology on the grounds that an improved methodology had been proposed and accepted. They are mistaken. The entire post adjustment system, not just the housing component, is complicated and the methodology is in a constant state of review. Suggested improvements may take time, as they have in the case of use of external data. Until a new methodology is adopted instead the Commission is not only entitled but indeed obliged to use the existing one. Since there was no instant adoption of a new methodology in 1990 the methodology to be applied in calculating the rental/housing component of the post adjustment index for July 1991 was the old one.

18. In its latest brief the Commission raises a procedural objection set out under H above. But since the complaint fails on the merits, there is no need to entertain that objection.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss. Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner