Registry's translation, the French text alone being authoritative.

NINETY-SIXTH SESSION

Judgment No. 2303

The Administrative Tribunal,

Considering the complaints filed by Mrs B. B., Mrs M. E. - her second - Mr M. P. - his second - and Mrs P. S. C. against the Food and Agriculture Organization of the United Nations (FAO) on 16 August 2002 and corrected on 12 December 2002, the observations of 12 March 2003 from the International Civil Service Commission (ICSC), the Organization's reply of 26 March, the complainants' rejoinder of 26 June, the ICSC's observations of 19 September and the FAO's surrejoinder of 2 October 2003;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. According to what is known as the "Flemming" principle, the pay of staff in the General Service category should be aligned with the best prevailing conditions at each duty station. The latest version of the principle, enunciated by the ICSC at its fifteenth session in 1982, reads as follows:

"It is stated under Article 101 of the Charter of the United Nations that 'the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity'. To comply with the standards established by the Charter as regards the employment of locally recruited staff, the organizations of the United Nations system must be competitive with those employers in the same labour market who recruit staff of equally high calibre and qualifications for work which is similar in nature and equal in value to that of the organizations. Remaining competitive in order to both attract and retain staff of the high standards requires that the conditions of service for the locally recruited staff be determined by reference to the best prevailing conditions of service among other employers in the locality. The conditions of service, including both paid remuneration and other basic elements of compensation, are to be among the best in the locality, without being the absolute best."

The reaffirmation of this principle by the Commission in its eighteenth annual report was endorsed by the General Assembly of the United Nations on 23 December 1992 in resolution 47/216.

This principle forms the basis of the "general methodology" used by the ICSC in carrying out salary surveys among outside employers and in setting scales of pay for General Service staff and other locally recruited staff. Until 1992 the ICSC used a "language factor" to calculate the remuneration of local staff in cities where the national language was not a working language of the organisation, that is, in Rome and in Vienna. This reflected the fact that local staff outside the organisation, who served as a basis for comparison, worked in one language only and the resulting difficulty when it came to recruiting local staff with the desired language skills. When it revised its general methodology in 1992, the ICSC considered that, since this difficulty had gradually diminished, such amendments were no longer included. This decision, and its application at the time of the salary surveys conducted in Rome in 1994 and in Vienna in 1996, led to Judgments 1713 and 1915 of the Tribunal, delivered on 29 January 1998 and 3 February 2000 respectively.

In 2000 the ICSC carried out a survey into the best prevailing conditions of service in Rome. It decided not to

apply the language factor to the salary scale it recommended. The report entitled "Survey of best prevailing conditions of service in Rome", which the Commission adopted at its 53rd session in June 2001, stated as follows:

"71. The Commission examined with interest the findings of the survey and recalled that the rationale for its decision in 1992 to abolish the language factor was that the knowledge of one of the working languages of the organizations was considered an essential, not an additional qualification. A basic requirement for any job within a common system organization was oral and written fluency in at least one of the working languages; such knowledge was not to be misconstrued as an additional qualification requiring a separate payment. Furthermore, the Commission noted that staff of the Rome-based organizations, as well as employees in the local market, were usually required to work in one language only, i.e., in Italian in the local market and in English at the Rome-based organizations. For some staff, the required language might be their mother tongue; for others it might be a foreign language. There was, for instance, a large number of staff in the General Service category at FAO with mother tongue English or English acquired as a part of their formal education. To compensate those working in their mother tongue by a 'language factor' would not seem justified. The Commission recalled that the use of additional languages was compensated separately under the relevant FAO Staff Rules. The Commission also considered that during the job matching part of the survey it was important to find outside jobs with duties and responsibilities similar to those of the common system. That the outside secretary worked in Italian only and the secretary of the Rome-based organization worked in English only was irrelevant; what mattered was that both worked in one language only. Therefore, it was valid to match jobs with the majority of outside employers that required their staff to work in Italian only, as that would be comparing like with like. In that regard, the Commission observed that the ILO Administrative Tribunal, in Judgement 1915, had stated that it was not necessary to achieve a perfect match between outside jobs and those in the common system, but that there must be sufficient similarity between the jobs."

In October 2001 the Council of the FAO approved the scale recommended by the ICSC, which represented a net salary increase of 4.25 per cent. On 2 November 2001 the staff was informed in Administrative Circular No. 2001/27 that this decision would be applied with retroactive effect from 1 November 2000.

On 20 February 2002 the complainants, all General Service category staff at the FAO in Rome, filed appeals with the Director-General against their payslips for November 2001, the first individual applications of the above-mentioned general decision. In letters of 20 May 2002, which constitute the impugned decisions, the Deputy Director-General, acting on behalf of the Director- General, rejected the appeals and allowed the case to be brought directly before the Tribunal.

B. The complainants reject the FAO's view, as stated in the impugned decisions, that the Director-General is bound by the ICSC's decision to abolish the language factor in its revised general methodology. They argue that, even though the ICSC enjoys a certain discretion in establishing the methodology, its decisions and recommendations are subject to review by the Organization and, in the last resort, by the Tribunal. According to the complainants, the position adopted by the FAO is incompatible with the responsibility it has towards its staff and the judicial protection it owes them in accordance with the Tribunal's case law. They add that, under the terms of the Staff Regulations, it is up to the Director-General to fix the salary scales. They refer to a note expressing the shared opinion of the administrations and staff of Rome-based organisations that "the continuance of the payment of the language adjustment factor [...] would be justified".

They contend that the impugned decisions breach the Flemming principle. As their main plea, they submit that the labour market in Rome has not changed as regards the language skills required by outside employers. Referring to the position previously adopted by the FAO and quoted in Judgment 1713, they assert that "it is the practice prevailing in the local market that determines whether this adjustment should be made or not". In other words "[i]t is right to adjust pay by a language factor when jobs that do not require proficiency in a second language are matched with jobs that do. But it is wrong so to adjust pay when the matching is with outside posts that do require proficiency in a second language and that requirement is not compensated". According to the ICSC's own report, however, 19 out of the 21 employers used for purposes of comparison "required their staff to work in Italian only". The complainants object to the statement in the report that "the knowledge of another language was considered to be a desirable requirement by all employers in Rome", saying that it is not supported by any official survey document. Accordingly, the Commission's conclusion that "employers requiring their employees to work in a language other than Italian did not compensate for it" was based on an atypical situation and ignored the practice prevailing in the local market.

Subsidiarily, the complainants maintain that the arguments put forward by the ICSC to justify abolishing the language factor are unfounded. They submit that it is because the Tribunal, in its Judgment 1713, rejected the justification given by the Commission, namely the fact that it had gradually become easier to recruit local staff with the required language qualifications, that the ICSC now argues that knowledge of one of the working languages of the international organisations is considered an essential, not an additional qualification. They counter the arguments put forward by the Commission in its report. Firstly, they draw attention to the difference between a language allowance that is paid only to staff possessing language skills above those required for entry into the Organization (that is, proficiency in a second or even a third official language) and the language factor, which is intended to compensate for the fact that the basic job requirements of the Organization are not comparable to those of outside employers. Secondly, they argue that the fact that the working language at the FAO is for some staff their mother tongue is irrelevant, since, as the ICSC itself had pointed out in 1981, proficiency in Italian is necessary to live in Rome and proficiency in one of the official languages is necessary to obtain employment with an organisation of the United Nations system. This situation has not changed. Thirdly, they point out that, since 1975, all General Service staff are considered "local", that is to say coming from the area of their duty station, regardless of their place of recruitment, their nationality or their mother tongue. The purpose of depriving these officials of the benefits of non-local status by making them "local" and then denying them a language allowance on the grounds of their mother tongue can only be, according to the complainants, to extract the maximum profit from their employment. Fourthly, they argue that, regardless of the number of languages in which staff are asked to work, what matters is whether knowledge of a language other than Italian is required by outside employers. They recall that the Flemming principle implies a comparison based on job equivalencies, not on equivalency of organisational mandate or on the service provided by incumbents. Noting that the Commission in its report refers to two "independent" surveys, they comment that whereas the first of those, carried out by staff representatives, was officially registered, the second survey, carried out by the Commission's secretariat, was not brought to the representatives' attention. The general methodology excludes such informal contacts and the ICSC should not have taken them into account in its report.

The complainants ask for the impugned decisions to be set aside and for the matter to be sent back to the Organization for the procedure to be gone through again correctly. They also seek an award of costs.

C. In its observations, the ICSC refers to Judgement No. 1100, delivered by the Administrative Tribunal of the United Nations on 26 November 2002, which rejected complaints lodged against the findings of the salary survey conducted in Vienna in 1996. It points out that the decision taken in 1992 "to do away with what had until that time been the automatic application of a language factor" was not set aside by any of the three judgments delivered since then by the Administrative Tribunal of the United Nations or by that of the ILO.

The Commission notes that, except in Rome and Vienna, the salary scale is not adjusted for language proficiency in any of the duty stations where outside employers require as a working language a local language which is not one of the languages of the organisations applying the common system of the United Nations and that this has never been disputed. In those two cities, an "ad hoc solution" had been adopted in order to "deal with a recruitment problem for as long as it lasted". It recalls that while the employers surveyed in Rome considered proficiency in a language other than Italian "desirable", they did not offer any additional payment for this. Since the survey compared monolingual jobs in the common system (mainly based on the use of English) with outside jobs that were likewise monolingual (based on the use of Italian), it considered it was justified in excluding the language factor from the scale it recommended. According to the Commission, this line of reasoning is not disputed by the complainants. Lastly, it points out that knowledge of Italian was generally not required of officials in the posts selected for comparison purposes and that no data in that respect were collected during the survey.

D. In its reply the FAO explains that it would not be possible for it to depart from the scale recommended by the ICSC, partly because the salary survey process is extremely complicated and partly because any decision to do so would not be understood by the Organization's governing bodies. All organisations applying the common system have to bear in mind the views of their Member States when dealing with this issue.

Following the ICSC's line of argument, the Organization maintains that the latter followed the guidance set out in the Tribunal's Judgment 1713, and that the salary survey had shown that employers in Rome who require their employees to work in a language other than Italian do not pay them any special allowance for this. It adds that the conclusions of the salary survey comply fully with the requirements of the Flemming principle, since the conditions of service of the FAO's General Service staff remains "among the best in the locality without being the absolute best".

With respect to the abolition of the language factor, it agrees with the ICSC that the factor was only a temporary measure. It argues that, contrary to the view expressed by the Tribunal in Judgment 1713, the Flemming principle should take account of conditions prevailing in the local labour market. Citing Judgement No. 1100 of the Administrative Tribunal of the United Nations at length, it asks the Tribunal to come into line with the interpretation given by the latter of the Flemming principle, whereby "[o]ffering [...] conditions of service among the best in the locality, without being the absolute best, is an intermediate goal and a means to achieve a superior goal, that of being competitive, and this goal is, in its turn, a way to achieve the paramount objective of 'securing the highest standards of efficiency, competence and integrity' of United Nations staff." It contends that it was legal and practical considerations such as those highlighted by the Administrative Tribunal of the United Nations which led the Director-General to conclude that the ICSC had correctly applied the Flemming principle.

Furthermore, the FAO suggests that the ICSC may have been right in its view that "the language factor might not be an [essential] element of the Flemming principle". Firstly, since proficiency in at least one of the Organization's working languages is a basic requirement for employment with an organisation of the common system, this cannot be considered an additional qualification which would be separately remunerated. The FAO points out that half the General Service staff in Rome do not have Italian nationality and that most of these have one of the Organization's working languages as their mother tongue. As far as staff having Italian nationality are concerned, the Organization submits that "it appears more than likely that they studied at least one of the Organization's languages as part of their regular schooling" and that it is therefore "hard to justify further compensation on that account". Referring again to Judgement No. 1100 of the Administrative Tribunal of the United Nations, it draws attention to the fact that the free movement of persons in the European Union has substantially altered conditions of recruitment in Rome and in Vienna, thus justifying the removal of the language factor. Secondly, additional language skills are suitably rewarded under the terms of the Staff Regulations and Rules.

E. In their rejoinder the complainants point out that there is a distinct difference of approach between the majority opinion of the Administrative Tribunal of the United Nations, as expressed in its Judgement No. 1100, and the unanimous view of the present Tribunal. They say they agree fully with the critical analysis of Judgement No. 1100 given in the dissenting opinion of that judgment. In their view that judgment does not have the scope the ICSC and the FAO attribute to it: in the first place, it concerns Vienna and not Rome; secondly, its late delivery is probably explained by the fact that it is based on a new interpretation of the Flemming principle which aims to circumvent the real facts. They believe the Commission is wrong in maintaining that the language factor had been applied "automatically" until 1992 and point out that Judgment 1713 upheld those complainants' claims. They observe that the FAO and the Commission have not commented on the note by the Local Salary Survey Committee, which tends to show that the defendant not so long ago agreed with the complainants' view that the language factor should be maintained.

On the merits, they reject the FAO's argument that it is unable to ensure, as the Tribunal would require, that the measures it introduces in its internal system are lawful. They fail to see why the Organization's governing bodies could not accept a reasoned decision to depart from the ICSC's proposals. From a technical point of view, they consider that the FAO "has exaggerated the complexity of the matter". They also point out that the FAO's position is contradictory, since it is based on Judgement No. 1100 of the Administrative Tribunal of the United Nations, which concerns Vienna and which contains an interpretation of the Flemming principle that differs from that expressed in the present Tribunal's consistent case law. According to the latter, "the manner of applying Flemming does not turn on such variables as [...] the ease or difficulty of finding good local recruits". They draw attention to the fact that neither the ICSC nor the FAO has replied to the assertion that the Commission's conclusion is based on the atypical situation of two employers out of 21.

Subsidiarily, they point out that neither the FAO nor the ICSC has replied to their argument concerning the two "independent" surveys mentioned in the Commission's report. They maintain that the ICSC has completely shifted its position with regard to the reason for abolishing the language factor in 1992. Its explanations are forever changing in response to whatever judgments have been rendered on the issue. The complainants argue that it is not right to distinguish between different categories of staff, particularly from the point of view of their mother tongue. They express doubts regarding the good faith of the Commission and the Organization. They also wonder what use it is to ask local employers what conditions they apply in the case of languages other than Italian if the replies they obtain are not taken into consideration. Lastly, they contend that the "monolingualism" referred to by the ICSC was never considered in the past as an obstacle to the payment of an adjustment based on the language factor and that such an argument is based on a mistaken interpretation of Judgment 1713. The complainants conclude that, in the

light of the findings of the most recent salary survey conducted in Rome, the complaints should be allowed, as in Judgment 1713.

F. In its observations on the rejoinder, the Commission recalls that in accordance with its Statute it is responsible for establishing the facts and recommending salary scales. Organisations and staff representatives have the right only to be consulted. It maintains that it did not take account of the two surveys mentioned in its report. Since the conduct of salary surveys cannot be subject to unchanging rules, it finds it desirable to adjust its methodology from time to time.

According to the ICSC, the survey showed that 19 employers out of 21 only required Italian as a working language. Knowledge of another language was not essential and in any case did not give rise to compensation. The remaining two employers used English as a working language but did not pay their employees any bonus on that account. It was in the light of those findings that it confirmed its decision to abolish the language factor. The decision was taken within its power of discretion and is therefore subject to only limited review by the Tribunal. It may be set aside only for a limited number of reasons, which should have been demonstrated by the complainants. They have failed to do so. The Commission considers that the language factor is justified so long as jobs in organisations requiring two languages are compared with outside jobs requiring only one. It is not justified if jobs in organisations requiring only one language (whichever that may be) are compared with outside jobs which also require only one language, which is the case here. It recalls that nowhere does the Flemming principle refer to such a thing as the language factor. Lastly, it reiterates that, prior to 1992, the language factor was maintained automatically and that no judgment has ever condemned its abolition.

G. In its surrejoinder the FAO makes it clear that it is quite aware that the present dispute must be settled by the Tribunal in the light of its case law. It points out, however, that Judgement No. 1100 of the Administrative Tribunal of the United Nations may be taken to be "a recent and authoritative expression of the relevant law". It denies that it exaggerated the complexity of the matter. It admits that its budgetary and financial equilibrium would not suffer if the Tribunal were to allow the complaints, but emphasises that such a decision would be received with concern by both its administration and its governing bodies.

On the merits, the FAO contends, firstly, that the ICSC complied with the Tribunal's case law concerning the application of the Flemming principle, with regard both to its conduct of the survey and to the findings of the latter. In the light of the collected data, the Commission reached the conclusion that employers requiring their employees to work in a language other than Italian paid them no compensation on that account. This conclusion was borne out by other local employers who were not included in the sample because the terms of employment they offered were not among the best. According to the FAO, the Flemming principle must allow a degree of flexibility and the Tribunal's case law recognised very early on that the competent authority retained a certain discretion in the way the principle was implemented. It is completely wrong to suggest that the remuneration it offers its staff is not competitive on the local market, considering that it has no difficulty attracting and retaining General Service staff of the highest standard.

Secondly, the Organization contends that the ICSC's abolition of the language factor in fact preserves the true spirit of the Flemming principle. It recalls that, according to the Tribunal's case law, legal rules have to be interpreted according to both their letter and their spirit. Clearly, in letter, in spirit and in purpose, the Flemming principle reflects the wish to secure pay conditions for General Service staff which are competitive compared with those of the local market. Moreover, the very wording of the principle, for instance the expression "without being the absolute best", points to a flexible application of the rules determining conditions of service. The defendant adds that, as a result of the considerable number of staff who do not have Italian nationality, and of the restrictions on the recruitment of non-Italian staff, or nationals of countries outside the European Union, by many of the employers included in the comparative survey, the FAO's General Service category staff do not really compete directly with the staff of the best local employers. Thus the fundamental changes in the structure of the market, as well as in the composition and situation of staff, rightly led the ICSC to withdraw the language factor without thereby infringing the Flemming principle. It rejects any accusation of bad faith and points out that, since the Flemming principle applies generally, both at headquarters and in the field, keeping the language factor only in Rome might be construed as discrimination between different staff in the General Service category.

CONSIDERATIONS

1. The complainants, who are staff of the FAO in the General Service category, request the quashing of decisions determining their pay from 1 November 2000 according to a scale approved by the Council of the FAO at its 121st session, on the basis of an ICSC recommendation. This new scale, established following a salary survey carried out in Rome in 2000, increased salaries by 4.25 per cent, but excluded the application of a 4 per cent language factor. That factor had been granted under a previous methodology which took account of the fact that the national language in Rome was not an official language of the FAO, but which had been subsequently abandoned by the ICSC in 1992.

2. The issue of the abolition of an adjustment paid to General Service staff of organisations belonging to the United Nations common system, who work in cities where the national language is not one of the working languages of the organisation, has already given rise to much case law, which will be analysed below.

3. In the case leading to Judgment 1713, General Service staff of the FAO requested the quashing of decisions taken on behalf of the Director-General rejecting their appeals against the reckoning of their pay from November 1995. The Tribunal set aside those decisions insofar as they reduced the language factor allowed to the complainants. While making it clear that it was for it to check whether the standards used in the methodology chosen by the ICSC were lawful and determine whether they had been properly observed, the Tribunal recalled the principle that staff should be offered conditions of service including both remuneration and other basic elements of compensation which needed to be "among the best in the locality, without being the absolute best". After noting that the salary survey conducted at the time had included no question concerning the grant by the outside employers who had been involved in the survey of allowances to employees proficient in a language other than Italian, the Tribunal concluded, in the light of the evidence before it, that "the dropping, and even the phasing out, of the language factor is a decision that ignores the peculiarities of the employment market in Rome. It therefore amounts to breach of the right of General Service staff to one of the terms of employment - namely pay - that must [...] be 'among the best in the locality without being the absolute best'".

4. In its Judgment 1915, applying the same principle, the Tribunal rejected complaints filed by staff of the International Atomic Energy Agency in Vienna, who impugned a decision of September 1996 to phase out the language factor progressively. The Tribunal found on that occasion that the salary survey among employers in Vienna had been conducted properly, that the latter had been requested to indicate whether employees working in a language other than German were paid a bonus and that, "even though the majority of local reference employers in Vienna required their staff to have knowledge of and work in a language other than the local language, they paid no additional compensation for that requirement".

5. It was a similar reasoning which led the Administrative Tribunal of the United Nations, by a majority ruling in Judgement No. 1100, in response to an appeal by staff members of the United Nations in Vienna, to confirm the scales established following the salary survey conducted in Vienna. The United Nations Administrative Tribunal emphasised in its ruling that the 1996 survey seemed to confirm the "globalization" of the Vienna labour market and the relative abundance in that market of people either fluent in, or with a working knowledge of English from which the United Nations organisations could recruit adequate staff. Considering that the great majority of employers did not pay any premium for the use of a foreign language and that the organisations of the United Nations system had no difficulty recruiting staff with the required language skills, there was no need to add an increment for language proficiency to regular pay.

6. In order to convince the Tribunal that the circumstances surrounding the issue of whether to retain a language adjustment in Rome in 2000 are the same as those found in the 1994 Rome survey, which had led to the quashing of the decision impugned in Judgment 1713, the complainants argue, firstly, that the Director-General was wrong to consider himself bound by the ICSC's "decisions" in the impugned decision of 20 May 2002 taken in his name.

7. On this point, case law is well established and, despite certain ambiguities in the decision of 20 May 2002 and in the defendant's brief in reply, does not appear to be really disputed by the latter. The FAO certainly approved the ICSC's Statute on 20 March 1975 and it is indeed the Commission's responsibility to establish the methodology to be used, but with regard to salary scales the latter can only make recommendations and, under the terms of Article 301.134 of the FAO's Staff Regulations, it is for the Director-General to "fix the salary scales for staff members in the General Service category, normally on the basis of the best prevailing conditions of employment in the locality of the FAO office concerned". It is therefore up to the competent authority, subject to judicial review, to check whether the rules applied in the chosen methodology and the ensuing results do not breach either the Flemming principle concerning General Service staff or the general principles of law applying to the international

civil service. The defendant draws attention to the drawbacks of the system and to the "considerable inconvenience" it faced as a result of Judgment 1713. It even goes so far as to assert that it is virtually impossible for it to depart from the scale recommended by the ICSC, although it recognises explicitly that it "must analyse those recommendations and refrain from applying them if it considers that they are unlawful and if their implementation would have the effect of depriving staff of their legitimate rights", which in fact constitutes a very accurate rendering of its obligations in the light of the Tribunal's case law.

8. Secondly, the complainants maintain, and this is the nub of the dispute, that the withdrawal of the language factor for General Service staff of the FAO serving in Rome breaches the Flemming principle; they base their arguments mainly on the considerations of Judgment 1713.They contend that the labour market has remained practically unchanged in Rome since the salary surveys of 1990 and 1994. With regard to the salary survey of the year 2000, on which the decision establishing the disputed scales was based, the Tribunal should, therefore, reach the same conclusion as in Judgment 1713, namely that "the dropping, and even the phasing out, of the language factor is a decision that ignores the peculiarities of the employment market in Rome". The Local Salary Survey Committee, which comprises representatives of the administration and of staff, came out in favour of maintaining the language factor, while pointing out that "the data collected during the salary survey reveal without any doubt that the use of languages is still very much a peculiarity of the Rome labour market that needs to be addressed", and that, out of the 21 employers who took part in the survey, only two required language skills similar to those required by the Rome- based organisations. The complainants also express surprise at the new reasons given by the ICSC for withdrawing the language factor in the report it adopted at its 53rd session in June 2001, which is quoted in this judgment, under A.

9. In their submissions, both the ICSC and the FAO, which endorses the Commission's conclusions, recognise that the Flemming principle applies to staff of the General Service category of organisations in the common system of the United Nations, and they usefully cite the most recent rendering of the principle, which is also given in this judgment under A.

10. The Tribunal recalls that, while it considered, in its Judgment 1713 concerning the conclusions drawn by the Organization from the 1994 salary survey, that the dropping of the language factor was a decision that ignored the peculiarities of the employment market in Rome and therefore amounted to breach of the right of General Service staff to one of the terms of employment - namely pay - that must be among the best in the locality without being the absolute best, it took that view in the light of the evidence before it, which showed in particular that the outside employers concerned had not been specifically consulted regarding any compensation paid to employees required to work in a language other than Italian. The Tribunal had noted that "it could scarcely have proved a poser for the survey to determine whether working proficiency in a language other than Italian earned local employees a bonus". The survey carried out in Rome in 2000, however, like that held in Vienna in 1996, included a specific question to outside employers regarding the recommendations made by the ICSC following Judgment 1713: they were asked whether they paid any compensation to staff continuously using a language other than Italian. Out of 21 employers surveyed, in 19 cases Italian was the only working language required of their staff and only two used one of the working languages of the Rome-based organisations, though without paying any specific bonus to their employees on that account. In this respect, the ICSC's report adds that, while "the knowledge of another language was considered to be a desirable requirement by all employers in Rome" - a finding which does not appear in any of the submissions - employers requiring their employees to work in another language "did not compensate for it".

11. The complainants are certainly right to point out that the sample of outside employers whose employees work in a language other than Italian is of marginal interest, since, out of the 277 jobs selected for comparison, only 24 included language requirements similar to those of the Rome-based organisations, and since 98 per cent of employees included in the survey do not have to work continuously in one of the Organization's working languages. Nevertheless, the survey did not show that any bonuses were paid similar to the language factor formerly enjoyed by FAO staff working at headquarters, which they wish to maintain regardless of their mother tongue. While in support of their plea the complainants refer to a note by staff representatives concerning the payment of the language adjustment factor, it appears from the ICSC report that this note concerned employees living in border areas of Italy and not in Rome, and that its findings did not have to be taken into consideration when determining the pay of General Service staff of the FAO.

12. The only real issue, regardless of the arguments put forward by the defendant to justify the solution adopted, is whether the pay offered to General Service staff allows them conditions of service which are "among the best in the locality without being the absolute best". The evidence does not show that the Organization has experienced

any difficulty in either recruiting or retaining staff who might be tempted, for the same qualifications, to take up other forms of employment available on the local market in Rome. In the light of all the circumstances of the case, the Tribunal considers that the defendant Organization did not violate the Flemming principle by establishing a salary scale which includes an increase of 4.25 per cent but which excludes the language factor, following a salary survey conducted in accordance with a methodology not tainted by any obvious flaw.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 19 November 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.