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

NINETY-NINTH SESSION

Judgment No. 2467

The Administrative Tribunal,

Considering the complaint filed by Mr S.A.C. against the United Nations Industrial Development Organization (UNIDO) on 30 June 2004, the Organization's reply of 4 November, the complainant's rejoinder of 20 December 2004 and UNIDO's surrejoinder of 23 March 2005;

Considering the complaint filed by Ms S.A.C. against UNIDO on 7 July 2004, the Organization's reply of 8 November, the complainant's rejoinder of 20 December 2004 and UNIDO's surrejoinder of 23 March 2005;

Considering the complaint filed by Mrs B.N.M.B. against UNIDO on 30 June 2004, the Organization's reply of 7 December 2004, the complainant's rejoinder of 12 January 2005 and UNIDO's surrejoinder of 23 March 2005;

Considering the complaint filed by Mrs M.S. against UNIDO on 6 July 2004, the Organization's reply of 25 October, the complainant's rejoinder of 21 December 2004 and UNIDO's surrejoinder of 23 March 2005;

Considering the complaint filed by Ms U.S. against UNIDO on 1 July 2004, the Organization's reply of 21 October, the complainant's rejoinder of 20 December 2004 and UNIDO's surrejoinder of 23 March 2005;

Considering the complaint filed by Mrs E.W. against UNIDO on 28 June 2004, the Organization's reply of 20 October, the complainant's rejoinder of 19 December 2004 and UNIDO's surrejoinder of 23 March 2005;

Considering the complaint filed by Mr J.Z. against UNIDO on 6 July 2004, the Organization's reply of 2 November, the complainant's rejoinder of 20 December 2004 and UNIDO's surrejoinder of 23 March 2005;

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 cases and the pleadings may be summed up as follows:

A. Information concerning the "end-of-service allowance" (EOSA) is given in Judgment 2123 delivered on 15 July 2002.

The complainants, all former staff members of UNIDO in the General Service category, retired between January 1999 and April 2001 after spending between 20 and 30 years working for the Organization. At the time of their retirement they received an EOSA calculated in accordance with Staff Rule 110.07(c) and Administrative Circular UNIDO/DA/PS/AC.58 issued on 8 November 1989. Following, in most cases, a preliminary exchange of correspondence with the Administration, the complainants individually wrote to the Director-General, between 29 January and 9 May 2001, requesting that the calculation of their EOSA be reviewed. They contested the fact that the deductions applied were based on final salaries and did not take into account the fact that their salary levels had increased over time due to promotion and step increments. The Human Resource Management Branch informed them, in several replies from 26 March to 5 June 2001, that the payment they had received upon separation had been made in accordance with their entitlement. Between 17 April and 9 July 2001 the complainants filed individual appeals with the Joint Appeals Board. The Board, after meeting many times between 30 October 2003 and 20 May 2004, issued reports dated from 6 January to 20 May 2004 on all the cases individually. In each case it considered that the appellant was not entitled to any calculation of EOSA that departed from the established UNIDO methodology valid at the time of his or her retirement and recommended that the appeal be dismissed. The Director-General endorsed those recommendations in decisions taken between 20 January and 4 June 2004, which were forwarded to the complainants by the Secretariat of the Joint Appeals Board between 5 April and 17 June 2004. Those are the decisions impugned by the complainants.

B. The complainants put forward the same three pleas in their complaints.

Firstly, they deplore the "[l]ack of stability, foreseeability and clarity" in the methodology applied for the calculation of EOSA. They cite Judgment 2123, under 11:

"*Prima facie*, the argument that it was flawed is very convincing since the method used leads to a deduction from the allowance that is theoretically due which is higher than the compensation paid in the form of salary increases prior to 1987. [...]"

They point out that the Chief of the Human Resources and Staff Development Section had recognised, in an internal note dated 15 September 2000, that "the staff concerns [were] understandable" since "it was not foreseen" that the current method of calculation would lead to such a situation. The note concluded that the method was "not sustainable" and recommended that UNIDO take "corrective action". The complainants also produce a letter sent to another official on 19 September 1997, that is three years before the aforesaid note, which in their view proves that the Administration was fully aware of the inherent shortcomings of the methodology used. They also mention the positions taken by the Staff Council and the Joint Appeals Board in a number of cases, from which they deduce that the methodology outlined in Administrative Circular UNIDO/DA/PS/AC.58 and also described in an appendix of the Staff Rules does not comply with the criteria of "stability, foreseeability and clarity" established by the Tribunal. Furthermore, by maintaining over an extended period a flawed methodology that was known to be unfair to staff, UNIDO was not acting in good faith and was guilty of *dolus*. This is shown, according to the complainants, by the fact that the methodology was eventually changed in Administrative Circular UNIDO/DA/PS/AC.58/Amend.1 of 25 October 2001, with retroactive effect from 1 September, in order to take account of changes in salary.

Secondly, given the lack of clarity of the provisions governing EOSA and the "ambiguous" nature of the 1989 circular, they should be interpreted in favour of staff.

Thirdly, they complain of a breach of the Agreement between the United Nations and the UNIDO – annexed to the United Nations General Assembly resolution 40/180 of 17 December 1985 – Article 16 of which relates to harmonisation of personnel arrangements between the two organisations designed "to avoid unjustified differences in terms and conditions of employment". Yet where EOSA is concerned the lack of harmonisation is particularly striking, as noted by the Joint Inspection Unit of the United Nations in 2003, since the allowance would have been markedly higher using the methodology introduced at the United Nations Office at Vienna by the Secretary-General in June 1996. The complainants add that this allowance belongs to the "core conditions of service" and therefore falls within the scope of the aforementioned Article 16. Mrs S. draws attention to the financial consequences of the methodology – which she evaluates in her case at a loss of 15,869.20 euros – and submits that the Organization, which in addition charged interest on sums supposedly overpaid, created an illegal source of income borne by the staff members at the very time when their regular income was already reduced by separation from service.

Lastly, the complainants object to the excessive delay in their appeal proceedings. They recall that the Tribunal has previously sanctioned UNIDO for similar delays (see Judgments 2072 and 2197) and contend that in their case the delay was so substantial that it amounted to "an obstruction [to] the course of justice and intentional harm".

They ask the Tribunal to order the payment with interest of the difference between the amount determined on the basis of the impugned methodology and the amount computed on the basis of the revised methodology that came into effect in September 2001 (with an alternative claim by Mrs S. for payment of the sum of 15,869.20 euros, if this amount is higher); payment of damages and costs in the amount of 20,000 euros on account of the Organization's negligence for the delay in deciding their appeals (with Ms C. claiming only 8,000 euros under this head); compensation for moral damages in the amount of 10,000 euros (7,000 euros for Ms C.) for the excessive delay, related obstruction to the course of justice and wrongful denial of their right to an appropriate end-of-service allowance; and lastly payment of costs in the amount of 5,000 euros.

C. In its replies UNIDO requests the joinder of the cases. It points out that in Judgment 2123 the Tribunal upheld the legality, particularly with respect to the "Flemming" principle, of the method used to calculate the EOSA as set forth in Administrative Circular UNIDO/DA/PS/AC.58, even though it does not take account of variations in grades and steps. In the same judgment the Tribunal expressly found that the methodology "did meet the criteria of predictability and stability required by the case law […] and did not offend against any general

principles of international civil service law". The methodology in question could not therefore be ambiguous. In this regard, the defendant notes that the claims for the retroactive application of the 2001 circular have nothing to do with the complainants' plea that the provisions of the 1989 circular should be interpreted in the staff's favour. It denies having acted in bad faith and submits that the conditions of *dolus* are not met in this case.

With regard to the Agreement between the United Nations and the UNIDO, the defendant points out that the expressions "as far as possible" and "to the extent feasible" contained in UNIDO's Constitution and in the agreement show that harmonisation was not mandatory but merely desirable. It denies the allegation of unjust enrichment.

The Organization accuses all the complainants of having submitted documents concerning other staff members and an internal working document which was not signed by its author and which, it maintains, was not submitted to the Director-General. It requests that the Tribunal offer its views as to whether such conduct is in conformity with the standards of the international civil service.

The defendant contends that there are no legal reasons which would justify the retroactive application to the complainants of the methodology introduced in September 2001, considering that the methodology applicable at the time of their retirement was lawful.

As far as the alleged delays in deciding their appeals are concerned, it submits that the complainants, having themselves contributed to the delay in the appeal process, have not shown negligence on the part of the Organization warranting redress.

Lastly, it argues that the complainants are submitting two claims for compensation for the same alleged delay and have not furnished any precise evidence to substantiate their alleged moral injury.

D. In their rejoinders the complainants state that they cannot accept that the deductions made in calculating the EOSA should be greater than the total salary adjustments paid up to 1987. They point out that although the circular that applied at the time did not specify that grades and steps had to be taken into account, there was nothing in it to say that they should not. Noting that the criterion of clarity has not been referred to by the Organization, they draw attention to the lack of clarity of the provisions governing EOSA and the "ambiguity" of Administrative Circular UNIDO/DA/PS/AC.58. According to them, the "breach" of the agreement between the United Nations and UNIDO is due to negligence on the defendant's part. In this respect, they argue that UNIDO has not offered proof that changing the EOSA calculation was not feasible once it had notice of the methodology introduced at the United Nations Office at Vienna in June 1996. The only reason for not making the change appears to have been concern for the financial implications, although the fact that the EOSA was eventually changed in September 2001 rules out, according to the complainants, financial concern as a valid reason.

Referring to case law, the complainants reject the defendant's objections to the disclosure of certain documents. They maintain that the blame for the delay in the appeal proceedings rests fairly and squarely on the shoulders of the Administration and the Joint Appeals Board. They consider that the situation thus warrants redress and the award of both compensation and moral damages. They press their claims, and Ms C. brings her own into line with those of her former colleagues.

E. In its surrejoinders UNIDO reiterates its objections to the disclosure of documents by the complainants and points out that the Joint Appeals Board's reports concerning other staff members are confidential in nature. It denies that it omitted to address the issue of the clarity of the provisions governing EOSA and rejects any allegation of negligence. It contends that it complied with Article 16 of the Agreement between the United Nations and the UNIDO since it amended its EOSA calculation methodology. In its view, it is not required to furnish proof that it could have amended its calculation methodology in 1996, insofar as an organisation has a broad discretion to take decisions based on its own financial position, while the decision of whether to apply a methodology for the EOSA calculation does not depend on other organisations.

UNIDO draws attention to the fact that the Joint Appeals Board is an independent body and that any delay which might have occurred could not be blamed on the Organization. Lastly, it submits that the sum of 30,000 euros which each complainant is claiming in damages for the alleged delay is out of all proportion with the additional amount of EOSA that lies at the heart of these complaints.

CONSIDERATIONS

1. The complainants, who are former General Service category staff members of UNIDO, contested the amount of the end-of-service allowance to which they were entitled when they reached retirement between January 1999 and April 2001. When they received negative replies from the Administration, they lodged appeals with the Joint Appeals Board, which through different panels recommended in 2004 that their appeals be rejected. They then filed complaints with the Tribunal against the final decisions to reject their appeals taken by the Director-General pursuant to the Board's recommendations.

2. Although the individual situations of the complainants differ, their pleas are the same: they all criticise the method used to calculate sums deducted, in accordance with a methodology relinquished by the Organization as from 1 September 2001, from the allowances to which they were theoretically entitled. The Tribunal therefore decides that the complaints shall be joined.

3. In order to appreciate the complainants' line of argument, it is worth recalling the method used to calculate the end-of-service allowance prior to 1 September 2001 by referring to what was said in Judgment 2123 in that respect.

4. As recalled in that judgment, it was for the sake of applying the "Flemming" principle that the international organisations based in Vienna, following the recommendations of the International Civil Service Commission (ICSC), decided to offer staff in the General Service category a benefit comparable to the end-of-service allowance paid since 1971 to employees in Austria upon their retirement. Initially, staff were compensated by means of a salary adjustment (a 2.85 per cent increase from 1 January 1972 to 1 April 1981 and 3 per cent thereafter). Then, following a recommendation by the ICSC, the organisations concerned, including UNIDO, decided to replace the adjustment with an end-of-service allowance similar to the Austrian one, to be paid subject to certain conditions to staff members upon their retirement. In order to avoid compensating staff under both the old and the new systems, it was specified that, in calculating the amount of the allowance, the entire service of the staff member would be taken into account, subject to an appropriate reduction of the service credit for the period from 1 January 1972 up to 30 September 1987 in the case of staff in the General Service category, during which period the element of severance pay was taken into account in their respective salary scales.

5. The Administrative Circular of 8 November 1989 gives the reasons for introducing the end-of-service allowance and sets rules for calculating it which specify that a deduction is to be applied to staff in the General Service category who were compensated for the allowance between 1 January 1972 and 30 September 1987. The circular sets out a four-step procedure for computing the allowance:

"(a) The allowance that would have been due for the staff member's total completed years of service had the scheme been in effect from the date of entry on duty will be calculated as a percentage of final annual salary;

(b) The payment made through the salary scales for service performed between 1 January 1972 and 31 March 1981 (2.85 per cent per annum) and between 1 April 1981 and either 28 February 1987 or 30 September 1987 (3 per cent per annum) will be calculated as a percentage of annual salary;

(c) The percentage obtained under (b) will be subtracted from the percentage obtained under (a);

(d) The percentage obtained under (c) will be multiplied by the staff member's annual salary upon separation to arrive at the amount payable."

6. Becoming aware of the drawbacks of that method of calculation, the Organization decided to change its methodology in an Administrative Circular of 25 October 2001 which stipulated that the changes would become effective on 1 September 2001.

7. The complainants challenge the methodology used to calculate their allowance on the grounds that it lacked the required stability, foreseeability and clarity, that it was ambiguous both in its principle and in its application and that it breached the Agreement between the United Nations and the UNIDO. They claim the payment, with interest, of the difference between the amount of allowance they have been paid and the amount computed on the basis of the revised methodology. They also claim damages for the Organization's delay in deciding their appeals as well as moral damages and costs.

8. Regarding the drawbacks of the methodology used to calculate the complainants' allowance, the Tribunal can but recall the comments it made in its Judgment 2123. However questionable the method of calculating the deduction may be, the effects of the calculation did not lead for the staff members to a breach of the Flemming principle, while the methodology used, "[t]hough questionable, which is why UNIDO abandoned it, […] did meet the criteria of predictability and stability required by the case law […] and did not offend against any general principles of international civil service law".

9. In an attempt to avoid this precedent being applied to their own cases, the complainants put forward several pleas: firstly, they mention the opinions of several panels of the Joint Appeals Board which emphasised the complexity of the system and the need to adopt a uniform and unambiguous approach to the calculation of the end-of-service allowance among the Vienna-based organisations. Yet these considerations, which are not unlike those voiced by the Tribunal itself, did not lead the competent bodies to recommend allowing the complainants' appeals, which in any case would not have been binding for the Organization.

10. Secondly, the complainants refer to an internal note of 15 September 2000 addressed to the Director-General – which the defendant oddly denies was ever submitted to the addressee – concluding that the method of calculation provided for in the Administrative Circular of 8 November 1989 was "not sustainable" and that when the modalities of implementing the allowance had been designed in 1987, it was not foreseen that some 13 years later they would lead to a situation where the amount deducted from the allowance was more than what the complainants had actually received for the years prior to 1987. The defendant complains about the use of internal documents of the Organization which should have remained confidential. The note in question, however, was clearly not obtained by fraudulent means and the complainants should not be blamed for trying to use it in support of their arguments. In actual fact, this working document in no way commits the Organization as such but simply expresses the legitimate concerns of an administration official regarding the methodology used to calculate the end-of-service allowance. The fact that its author indicated that some results of the methodology were unforeseen does not imply that the method of calculation, which was perfectly clear, might have caused surprise to the staff members at the time of their retirement. The outcome of the calculation which every staff member could undertake at leisure was perfectly predictable.

11. Thirdly, the complainants contend that by maintaining a methodology even though it was aware of its shortcomings and adverse effects, UNIDO did not act in good faith. There is no doubt that in this respect the Organization was slow to introduce the necessary changes which the United Nations Office at Vienna had made as far back as 1996. But as noted in Judgment 1086 and recalled in Judgment 2123, there was no text requiring coordination between the Vienna-based organisations, nor any obligation for UNIDO to align its methodology with that used by the United Nations Office at Vienna. Such alignment was required neither by Article 11, paragraph 5, of UNIDO's Constitution, which provides that "[t]he conditions of service of staff shall conform as far as possible to those of the United Nations common system", nor by the provisions specified in Article 16 of the Agreement between the United Nations and the UNIDO, calling for the development of uniform standards "to the extent feasible", nor by the conclusions contained in a report by the Joint Inspection Unit of the United Nations. And in view of the complexity of the problem and of the need for discussions with staff representatives, the complainants' allegations of bad faith or even *dolus* do not stand.

12. Lastly, the complainants assert that the Organization should have calculated the amount of their end-of-service allowance on the basis of the Administrative Circular of 25 October 2001, even though they retired prior to 1 September 2001, which is when the circular took effect. That plea fails: the Organization applied a methodology which the Tribunal had accepted did not breach the principles of the international civil service and did not disregard the requirements of stability, foreseeability and clarity. While UNIDO could undoubtedly have modified that methodology in order to take account of its shortcomings and to align it with the methodology used by the United Nations Office at Vienna, it was under no obligation to reconsider the entitlements of retired staff members in receipt of an end-of-service allowance calculated under the system which applied prior to the introduction of the new rules. The complainants therefore had no right to benefit from the new system, since their allowances had been calculated according to a methodology which was not unlawful.

13. While the complainants ask to be compensated for the loss resulting from the application to their case of a methodology which they consider unlawful, these claims must be dismissed in view of the outcome of their main claim. They also claim compensation for the injury resulting from the delay with which their internal appeals were considered. The defendant does not deny the excessive time taken to deal with the cases, but submits that the Joint

Appeals Board is a body that has its own rules and that its procedure is in no way open to pressure from the Administration. On this point, the Tribunal must recall that international organisations are fully responsible for the way their internal appeal bodies operate. In the cases in hand, however, it is worth noting that the long delay between the filing of the appeals and the reply given to them is to a large extent due to the fact that the complainants themselves waited until June 2003, and in some cases until August or October 2003, to file a rejoinder to the replies sent on behalf of the Director-General between June and August 2001. Even though their rejoinders were not mandatory from a legal point of view, these long delays show that the complainants did not pursue their appeals as diligently as precedent would require (see Judgment 1970 on this point). The Tribunal takes the view, therefore, that given the circumstances, the duration of the internal appeal procedure was not such as to amount to wrongdoing on the part of the Organization warranting redress.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.