

B., S. and T.

v.

FAO

123rd Session

Judgment No. 3740

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr P. B., Ms L. S. and Mrs S. T. against the Food and Agriculture Organization of the United Nations (FAO) on 14 November 2013 and corrected on 18 February 2014, the FAO's reply of 14 July 2014, the complainants' rejoinder of 17 October 2014 and the FAO's surrejoinder of 5 February 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

The complainants challenge the legality of changes to the FAO General Service category staff (GS staff) salary scale consequent to the implementation of recommendations contained in an International Civil Service Commission (ICSC) report in 2012 on local employment conditions in Rome.

The complainants began employment with the FAO in Rome in 1985, 1984 and 2004 respectively, and at the time when they filed their complaints held G4, G5 and G2 positions in continuing appointments. The ICSC is an independent expert body established by the United Nations General Assembly with a mandate to regulate and coordinate the

conditions of service of staff in the United Nations common system, while promoting and maintaining high standards in the international civil service. The FAO is a common system member that has accepted the statute of the ICSC.

In 2012 the ICSC conducted a salary survey in relation to Rome-based organizations which followed a 2011 revised methodology for such surveys, and published a report entitled “Survey of the best prevailing conditions of employment in Rome (including service differential)”.

The FAO Council approved a revised GS staff salary scale pursuant to the ICSC Rome Salary Survey at its 145th Session in December 2012. The revisions to remuneration of the GS staff were then notified to staff of the FAO by means of an Administrative Circular on 25 January 2013. The relevant provisions state that “the new salary scale (referred to as the secondary scale) is 9.2 per cent lower than the current salary scale [and] will only apply to staff members recruited on or after 1 February 2013” as well as providing that no interim adjustment would be granted to staff members on the existing scale in effect from November 2010, “until such time as the secondary scale reaches the level of the current scale as a result of interim adjustments”. The new scale, affecting only staff appointed on or after 1 February 2013, contains salaries set at a lower level than those on the “primary” scale.

The complainants each appealed individually against the individual administrative decisions to apply to them the statutory decision consisting of the revision of the remuneration of the GS staff stationed in Rome on the basis of their payslips. They alleged that the impugned decisions are illegal as they emanate from a decision of the ICSC constituting the result of the 2012 Rome salary survey, which they allege was illegal. In their request for review they asked, in case of a negative reply from the Director-General, that he agree to his decision being considered final in order to bring their cases directly to the Tribunal without going through the Appeals Committee. The Deputy Director-General rejected the appeals by letter of 19 August 2013, and agreed to waive the jurisdiction of the Appeals Committee, authorizing the complainants to proceed directly to the Tribunal.

The complainants impugn the decisions of the Deputy Director-General of the FAO rejecting their requests for review in relation to the individual administrative decisions reflected in their February 2013 payslips. They request firstly that the Tribunal find itself competent and that the complaint be receivable. They also ask the Tribunal to set aside the Director-General's decision conveyed in the Deputy Director-General's letter of 19 August 2013 and draw all the legal consequences from this rescission, and to order that the FAO pay their legal costs.

The FAO requests the Tribunal to dismiss the complaints and deny all the relief sought.

CONSIDERATIONS

1. These complaints arise from changes the FAO made to the GS staff salary scale as a result of its implementation of the recommendations in the 2012 ICSC Report on local employment conditions in Rome. The decision was communicated to the staff members in a 25 January 2013 Administrative Circular. The complainants lodged internal appeals against "the individual administrative decisions to apply to [each complainant] the statutory decision consisting in the revision of the remuneration of the General Service Staff stationed in Rome" as reflected in their respective February 2013 paysheets. The complainants claimed that the contested decision was illegal because the statutory decision it applied, namely, the 2012 ICSC Rome salary survey, was illegal and maintained that they were adversely affected by the challenged decision. On 19 August 2013, the Deputy Director-General informed the complainants that their respective appeals were rejected. He also waived the jurisdiction of the Appeals Committee and authorized the complainants to proceed directly to the Tribunal.

2. In the complainants' common brief, they raise the same issues of fact and law and seek the same redress. Accordingly, their complaints are joined and will be the subject of a single judgment.

3. The complainants submit that the FAO's decision communicated to them in the 25 January 2013 Administrative Circular is "illegal inasmuch as it is based on a salary scale which emanates from a decision of the ICSC, of August 2012, which constitutes the result of the 2012 Rome salary survey, which is itself illegal."

4. Before turning to the positions of the parties, some additional background to the 25 January 2013 Administrative Circular is necessary. In its August 2012 Report, the ICSC took several decisions, two of which are relevant for the purposes of the present discussion. They are:

- (h) To recommend, as of the date of promulgation by the organizations, the revised salary scale for the General Service category of the Rome-based organizations, which is set out in annex VII.A to the present report;
- (i) To recommend, as of the date of promulgation by the organizations, the revised levels of dependency allowances, as set out in annex VII.B to the present report."

5. The FAO Council's Finance Committee considered the above ICSC recommendations at its 147th Session in November 2012 and submitted the following report to the FAO Council:

"The Committee:

- (a) noted the recommendation of the [ICSC] following the 2012 Rome Salary Survey for the General Service category to introduce a revised salary scale that is 9.2 per cent lower than the current scale in effect since November 2010;
- (b) noted that this measure would imply that two salary scales would be in effect during a transition period; and
- (c) agreed to transmit the ICSC's recommendations in this regard to the upcoming 145th session of the Council for approval of the revised salary scale."

6. At its 145th session in December 2012, the FAO Council "approved, as recommended by the [ICSC], a revised General Service Salary Scale, to be implemented with respect to staff recruited on or after the date of promulgation by the Rome-based Organizations".

7. The 25 January 2013 Administrative Circular states that "[o]n the basis of the findings of the 2012 ICSC Salary Survey, and following

approval by the FAO Council at its 145th session, the remuneration of the General Service staff stationed in Rome will be revised as follows”. The Circular states that a new salary scale based on the survey (referred to in the Circular as a “secondary salary scale”) that is 9.2 per cent lower than the existing 1 November 2010 salary scale (which the Circular defines as “the primary salary scale”) will be implemented on 1 February 2013. The following relevant provisions are detailed in the circular:

- the primary salary scale will remain in effect for all GS staff recruited before 1 February 2013 and who remain employed without a break in service;
- the secondary salary scale will only apply to GS staff recruited on or after 1 February 2013;
- only staff on the secondary salary scale will be entitled to the interim adjustment;
- staff on the primary scale will not be granted the interim adjustment until the secondary salary scale reaches the level of the primary scale as a result of the interim adjustments;
- within-grade salary increments and promotions will be granted on the basis of the applicable salary scale;
- only the dependency and language allowances granted on or after 1 February 2013 will be at the revised amount.

8. Turning to the question of receivability, it is not disputed that the complainants exhausted the internal means of redress and respected the relevant time limits. However, the FAO submits that as the complaints do not disclose a cause of action within the Tribunal’s competence as defined in Article II of the Statute they are irreceivable. The FAO notes that the complainants’ February 2013 salaries were based on the November 2010 salary scale. The change to the GS staff salary scale had no impact on the complainants’ respective February 2013 salaries.

9. The complainants counter that even though the 9.2 per cent reduction in salary in the new salary scale did not apply to them because they were recruited before 1 February 2013, other elements of the change

to the salary scale apply to them. They will continue to receive salaries that are frozen until the secondary salary scale reaches the November 2010 salary level. Additionally, if they were to have a break in service, the secondary salary scale would be applied upon re-appointment. The complainants contend that the paysheet was the only decision they could challenge and point out that they have suffered actual damage through the loss of the benefit of the interim adjustments.

10. Neither of the asserted foundations for the parties' respective positions is entirely accurate. At the outset, it must be observed that, according to the documents that have been presented to the Tribunal, the recommendations in the relevant ICSC decisions were limited to and only established two things: a revised salary scale for the GS category in Rome and revised levels for dependency allowances. The recommendations were silent with respect to all of the other matters dealt with in the 25 January 2013 Administrative Circular. In particular, they did not deal with setting an implementation date; the application of the revised salary scale to only certain staff members; the freezing of interim adjustments for staff appointed prior to 1 February 2013; the break in service consequences; or that the new level of dependency allowances would only apply to allowances granted after the implementation date. As the record shows, none of these measures were mandated by or derived from the new ICSC salary scale or dependency allowance recommendations or were necessary for their implementation. Out of a number of possible options for the implementation of the recommendations, these are the measures FAO decided to adopt. Thus, it cannot be concluded that the interim adjustment freeze or the break in service and reappointment salary consequences were derived from the ICSC's allegedly illegal decision and were not measures that the FAO decided to adopt as options for implementation of the ICSC recommendations.

11. It is clear from the pleadings that the complainants challenged the 25 January 2013 Administrative Circular. It is also evident that they viewed the Administrative Circular as a single decision. The Tribunal notes that the revised salary scale was not applied to the complainants and did not adversely and directly affect them. However, as of 1 February 2013

up to the date the secondary salary scale reached the primary salary scale applicable to the complainants, the complainants would not be paid any interim salary adjustments, that is, their salaries were frozen. Although the February paysheets therefore did not reflect any change in their salaries, nor would any change be reflected in subsequent paysheets while the freeze was in effect, at that point in time it was evident that the salary freeze was liable to cause them financial injury. As the Tribunal explained in Judgment 3168, under 9, for there to be a cause of action a complainant must demonstrate that the contested administrative action caused injury to the complainant's health, finances or otherwise or that it is liable to cause injury. Accordingly, the complaints are receivable.

12. This does not end the matter. The difficulty lies in the position taken by the complainants. In their internal appeals and in their submissions before the Tribunal, they challenged the lawfulness of the 25 January 2013 decision solely on the ground that it was based on the ICSC's August 2012 allegedly unlawful decision which in turn was based on an illegal survey and underlying illegal methodology which were discussed at length. These submissions and arguments are irrelevant in the circumstances given that the ICSC's revised salary scale recommendation had no bearing on the complainants' positions as the new salary scale was not applied to them.

13. The further difficulty is that the complainants did not advance any submissions or arguments regarding the legality of the salary freeze, which appears to be an internal decision of the FAO. Instead, they only referenced the freeze and the break in service salary consequence for the purpose of establishing harm. As a result, there is no information or argumentation before the Tribunal, either in the complainants' submissions or in the documents included in the file, regarding the decision to impose the salary freeze that affected the complainants. Moreover, there is no basis upon which to call into question the lawfulness of those measures. Accordingly, the Tribunal is left with no option but to dismiss the complaints.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 3 November 2016,
Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores
M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I,
Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ