

FORTY-SECOND ORDINARY SESSION

In re HATT and LEUBA

Judgment No. 382

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints brought against the World Meteorological Organization (WMO) by Miss Vivienne Hatt and Mrs. Magali Anne-Maghi Leuba on 19 April 1978, the letter of

19 July 1978 from the complainants' counsel withdrawing several of the claims made in their original complaints, the WMO's reply of 31 August 1978 to the two complaints, the complainants' single rejoinder dated 28 December 1978 and their observations on Judgment No. 236 of the United Nations Administrative Tribunal (*Belchamber v. the Secretary-General of the United Nations*) and the WMO's surrejoinder of 28 February 1979;

Considering the applications to intervene filed by

M. Aebischer,
D. Allain,
R. Ancel,
M.J. Anderson,
R.T. Apollon,
A. Aprahamian,
R. Aubert,
L. Bachelard,
S. Baud,
L. Bertizzolo,
S. Bevilacqua,
P.M. Bigler,
G. Bionda,
M-L. Blanc,
D. Bouazria,
D. Burkert,
M. Caloz,
O. Cantamessa,
W. Cantopher,
A. Cappuccini,
M-C. Charriere,
G. Chatelain,
M. Cheseaux,
Y. Corazzola,
M-B. Colicchio,
R. Coni,
E. Dar-Ziv,
M. de Vere White,
G. Defferrard,
J. Demeyrier,
D. Despas,
S. Dieterle,
S. Doumbouya,
H. Dufay,
P. Dumont,
M. Favre,
G. Fitzgerald,
G. Flache,
G. Garcia,

M. Ghali,
M. Gonzalez,
M. Griesinger,
H. Habegger,
B. Halls,
F.M. Hidalgo,
J. Hinaekian,
N. Hugonnet,
A. Ioller,
N. Jaccard,
P. Jaccoud,
M. Jelowicki,
M. Jemaa,
A-H. Johnsen,
A. Kal,
M. Kanagasabay,
C. Lagnel,
M. Lee,
J. Lyssens,
J. Love,
G. Marchal,
C. Milne,
N. Montavon,
P. Morales,
Y. Moser,
H. Nabulon,
P. Nicholls,
B. Orsat,
J. Pardo-Calve,
S. Paschou,
E. Perrin,
S. Pfaendler,
E. Pillier,
R. Puel,
J. Purvis,
G. Rochat,
José Rodriguez,
Julia Rodriguez,
R. Roesy,
P. Romero,
J.A. Rousselot,
C. Saccardi,
M-C. Salamin,
A. Salini,
A. Salzman,
J.L. Sanchez-Peral,
M.E. Schifferli,
M.C. Schmidt,
J. Schwapp,
K. Siegrist,
R. Singh,
J.C.C. Smith,
G. Spadavecchia,
S. Stagno,
M. Stanojevic,
J. Stickings,
L. Stroiazzo,

H. Struck,
E. Tarry,
A.M. Thiam,
F. Thorimbert,
B. Tirelli,
A. Traffey,
M.A. Traore,
C. Van Hung,
S. Veltman,
J. Verdia,
A. Vial,
P. Villalba,
P. Wachs,
B. Waldron;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WMO Staff Regulations 3.1 and 8.1 and WMO Staff Rule 181.1.1;

Having examined the documents in the dossier and disallowed the complainants' application for oral proceedings;

Having ordered that the complaints be joined;

Considering that the material facts of the case are as follows:

A. Miss Hatt joined the staff of the WMO on 1 December 1965 and Mrs. Leuba on 1 March 1964. They are members of the General Service category. In their complaints they are objecting to the new salary scale which on 19 January 1978 the Secretary-General applied to their category by Amendment No. 29 to the Staff Rules. The new scale came into being in the following circumstances.

B. Since the early 1950s there has been a uniform salary scale for the General Service category staff of the United Nations Office and of United Nations specialised agencies in Geneva and it has been established by reference to the best prevailing salary rates in public and private employment in that city. To determine those rates, surveys have been carried out from time to time, but not at any set intervals, and by methods decided on after consulting the staff associations of the organisations. Since 1966 an institute independent of those organisations has collected and analysed data for the surveys. Giving effect to the results of the 1975 survey meant substantial salary increases, and the Administrations and the staff associations disputed the matter. The former refused to accept in full the results of the survey; the latter wanted them to be put into effect. The dispute led to a strike by United Nations staff from 25 February to 3 March 1976. On 23 April 1976 it was settled by an agreement which a "sole negotiator designated by the Secretary-General of the United Nations and by the Executive Heads of the Geneva-based agencies" concluded with the staff representatives of the organisations (the United Nations, the International Labour Organisation, the World Health Organization, the Interim Commission for the International Trade Organisation/General Agreement on Tariffs and Trade, the World Meteorological Organization, the International Telecommunication Union and the World Intellectual Property Organization). That agreement was a compromise providing for smaller increments, with different percentages for different grades. On 1 September 1976 the parties concluded a supplementary agreement, on interim cost-of-living adjustments.

C. Meanwhile, on 18 December 1974, the General Assembly of the United Nations had approved the statute of the International Civil Service Commission (ICSC). Article 1 of the statute states that the function of the Commission is "the regulation and co-ordination of the conditions of service of the United Nations common system" and that it shall perform its functions in respect of the United Nations and of those specialised agencies and other international organisations which participate in the United Nations common system and which accept the statute of the Commission. The WMO has accepted the statute and so recognized the competence of the Commission. By Resolution XXI/193 B of 22 December 1976 the United Nations General Assembly instructed the Commission to carry out a new survey. A working party set up by the Commission consulted the representatives of the Geneva-based organisations and of their staffs and, despite strong objections expressed orally and in writing by the staff representatives, chose a method for collecting data which differed from the methods applied in earlier surveys. The staff representatives later took the view that the application of that method, to which they had objected, had been defective and therefore incorrect. They therefore rejected the Commission's recommendations and refused to join

the Administrations in working out the arrangements for applying them, on the grounds that they did not afford an acceptable basis for discussion. No talks took place, and on 22 November 1977 the Secretary-General of the United Nations announced that the recommendations would be put into effect. On 19 January 1978 the Secretary-General of the WMO adopted the same arrangements namely: salaries, including incidental allowances, were reduced by 17 per cent, but the amount of the reduction was offset by a "personal transitional allowance" of the same amount. The staff took the view, however, that the new scale was to their disadvantage in that no cost-of-living adjustments were to be made until the difference of 17 per cent had been made up, and annual increments, increases resulting from promotion and compensation for overtime were to be paid in accordance with the new scale.

D. The new scale having come into force with the publication of Amendment No. 29 to the Staff Rules, the complainants wrote to the Secretary-General of the WMO asking him to reconsider his decision. On 6 March 1978 the Secretary-General answered that there was nothing to be done and that he authorised the complainants to appeal directly to the Tribunal.

E. In their claims for relief, as amended on 19 July 1978, the complainants ask the Tribunal -

(a) to find that the agreement of 23 April 1976 either creates a clear understanding on prior negotiations or recognises that a clear understanding was already in existence,

(b) additionally, to find that the Secretary-General of the WMO breached the agreement by unilaterally revising without prior negotiations with the staff representatives the salary scale of the General Service category he fixed pursuant to the agreement,

and therefore

(a) to quash the decision of the Secretary-General of the WMO dated 19 January 1978, introducing as from 1 January 1978 a new salary scale for General Service category staff in the WMO,

(b) to restore, retroactively as from 1 January 1978, the status quo ante on the basis of the 1976 agreements on salary scales and interim adjustments,

(c) to assign to the defendant organisation any expenses incurred by the complainants in the preparation of their cases before the Tribunal, including lawyer's fees, on the basis of documentary evidence which will be submitted to that effect by the complainants.

F. In support of their claims the complainants observe that under the new scale they suffer a reduction in salary and incidental allowances. Salary, they maintain, is an element of the employment relationship which is governed not by the staff regulations but by the contract of appointment, and so the Organization may not alter it unilaterally. The 1976 salary scale was not put into effect unilaterally: it was the outcome of collective bargaining and of the agreements of April and September 1976, which were binding on both sides. Those agreements succeeded earlier ones, such as those of 1968-69 on the survey methods. Neither the agreements of 1968-69 nor those of 1976 make any express provision for denunciation. In other words, argue the complainants, both sides took the view that the agreements remained in force from one survey to the next. The signatories had been duly accredited: the Secretary-General under WMO Regulation 3.1, and the staff representatives under WMO Rule 181.1. The complainants argue that the Secretary-General of the WMO may not plead the unilateral decision of the United Nations Secretary-General to apply the ICSC's recommendations in defence of his own arbitrary breach of his contractual relationship with the complainants' representatives.

G. In its reply the defendant organisation argues that whereas originally the Secretary-General of the WMO was competent to determine the salaries of staff of the General Service category with the approval of the Executive Committee of the WMO and in accordance with the local rates, the Executive Committee itself later took over that function. According to Rule 3.1 from 1963 and Regulation 3.1 since 1967, "The rate of pay for G-staff shall be determined by the Secretary-General in accordance with the equivalent scales for the office of the United Nations in Geneva." The Secretary-General no longer has any discretion in the matter: he is bound to follow the salary scales adopted by the United Nations. Regulation 8.1 states: "The Secretary-General shall make provisions for staff participation in the discussion of policies relating to staff questions." Rule 181.1 gives effect to Regulation 8.1 by setting up a Staff Committee, elected by the staff members, which shall be consulted on matters including salaries and related allowances. It was clear, however, that independent consultation of the Staff Committee on the new

salaries would serve little purpose since the decision of the Secretary-General must invariably follow that of the United Nations, particularly since Rule 181.1 is subject to Regulation 3.1, which takes precedence over it. The only valid interpretation of Rule 181.1 requires consultation in the context of United Nations consultations. That is the practice which has been followed since 1956 and it is, moreover, in conformity with Article IX of the Agreement between the United Nations and the WMO. It is all the more justified in that the WMO is a small organisation with a staff of only 280. As regards the 1976 agreements, the WMO did not enter into any independent commitments, but acted in solidarity with the United Nations, just as the staff representatives acted in solidarity in discussions with the "sole negotiator". The staff representatives did not agree to the meeting proposed by the United Nations in Geneva to discuss the ICSC's recommendations. They formed a defence committee and on 7 November communicated to the Secretary-General of the Director of Administrative and Financial Services of the United Nations the findings of a counter-survey. They later declined, however, to supply the data on which those findings had been based. The findings were submitted to the Chairman of the ICSC, who concluded that they did not warrant review of the Commission's recommendations. Later the staff representatives also refused to discuss how effect was to be given to those recommendations. From all this it is clear that the WMO was unable to hold discussions with its staff and was not even asked to do so. There is no custom in derogation from the express rules which creates an obligation to determine the salaries of staff in the General Service category by collective agreement, there being no *opinio juris* among the international organisations nor any sufficiently general and longstanding practice to that effect.

H. The WMO concludes from precedent - for example Judgments Nos. 61 (Lindsey) and 92 (Varlocosta Patrono) - that the Tribunal is not competent to review a general provision of the rules; it must confine itself to considering the legality of such a provision and, if it finds it unlawful, to rescinding the decision which applies it. And what the complainants are challenging is indeed a provision of the rules. If the Tribunal held that it was competent to review decisions giving effect to such a provision, its judgment would apply only to the two complainants. Moreover, the complaints are irreceivable because the complainants have suffered no prejudice and the decision afford them no grounds for complaint. It is only in regard to promotion or annual increments that they may suffer a slight loss of earnings, or, owing to the rise in the consumer price index, in regard to salary increments. But those considerations were immaterial at the time when they filed their complaints. Moreover, even supposing that the Secretary-General were under a duty to negotiate salary scales for the General Service category, according to the principle of *res inter alios acta* he would owe that duty only to the Staff Committee, not to individual staff members.

I. As to the merits, the WMO endorses the arguments put forward by the representatives of the Secretary-General of the United Nations in a similar case filed with the United Nations Administrative Tribunal. It contends that the present Tribunal is not competent and that the complaints are irreceivable. Subsidiarily, it invites the Tribunal, on the grounds that the matter is *sub judice* elsewhere, to defer judgment until completion of the proceedings in the United Nations case, which might go to the International Court of Justice. Further subsidiarily it asks the Tribunal to declare the complaints unfounded.

J. In their observations on the Belchamber judgment of 20 October 1978 the complainants observe that the United Nations Administrative Tribunal concurs in the opinion given by the members of the Tribunal that the agreement of April 1976 did not qualify the authority of the executive bodies of the organisations. The United Nations Tribunal also agrees that the United Nations Secretary-General was under an implied obligation to consult the staff representatives before revising the salary scale. The complainants take the view, however, that the Belchamber judgment differs from the opinion in that the United Nations Tribunal found that the Secretary-General had sought unsuccessfully to start consultations and held that he was therefore released from the obligation; whereas the opinion appears to make the actual holding of consultations an indispensable condition of the lawfulness of later action. The complainants draw a parallel between collective bargaining governed by labour law and joint consultations held by the organisations: the employer's sole duty is to bargain in good faith. If collective bargaining reaches stalemate, the employer may then act as he pleases. The United Nations Tribunal was mistaken in holding that the staff representatives' "negative" attitude on the ICSC's work and recommendations had discharged the Secretary-General from his obligation to consult them. It was the Secretary-General who wanted to change the results of the 1976 agreement, and so it was he who was under a duty to press for holding consultations in good faith and who showed a negative attitude.

K. In the complainants' view the WMO's arguments imply that the Secretary-General of the WMO agreed to join in inter-agency negotiations with the staff representatives and signed the resulting agreement even though he knew full well that he had no authority to negotiate separately. If the WMO representative was aware of that at the time of signing, then he was acting in bad faith and misleading the staff representatives. Unlike the United Nations staff,

the WMO staff were never invited by the executive head of their organisation to take part in negotiations on the ICSC's recommendations. The complainants reject the WMO's contention that the success of their complaints depends on the judgment given by the United Nations Tribunal in a similar case. If it did, the WMO would not be an independent agency in any real sense, and WMO staff members would have no guarantee of the right to appeal against any decision which the Secretary-General of the WMO based on a similar decision by the Secretary-General of the United Nations. The agreement between the two organisations does not make the WMO in any way subordinate to the United Nations: "The arguments adduced by the defendant organisation tend to transform the common system into an instrument of centralisation under the authority of the United Nations, in defiance of the of the texts that govern that system and in defiance of the rights of the staff of specialised agencies like WMO, whose right of consultation is thus denied and which, by the same token, would likewise lose their means of redress." In particular, the provisions on staff consultation in the WMO Staff Regulations and Staff Rules would become devoid of meaning. As to the question of competence, the complainants point out that, according to Article VII, paragraph 2, of its Statute, the Tribunal is competent to hear decisions "affecting a class of officials". Any other conclusion would be absurd since it would mean that an official would have no legal redress against any decision by the Secretary-General which was not formally notified to him as applying to his particular case, but was applied erga omnes. The complainants further contend that the impugned decision is wrongful in that their salary is reduced by 17 per cent, the transitional allowance not being remuneration in the true sense. As for the WMO's argument that the staff representative refused to negotiate on the ICSC's recommendations, it is at odds with the contention that because the WMO automatically follows the United Nations there could be no negotiation.

L. In its surrejoinder the WMO discusses Regulation 3.1 and Rule 181.1. It contends that those provisions make it clear that the Secretary-General of the WMO has authority to take unilateral decisions determining salaries. Although that authority is autonomous, the substance of the Secretary-General's decisions is determined by those of the United Nations. According to the spirit of those rules, remuneration should be identical in all the organisations in Geneva. Under the system which is applied to achieve that purpose the organisations co-ordinate their action, jointly consult the staff associations and together work out a common scale, but each of them separately incorporates that scale into its own rules. The staff representatives' participation in the consultations which precede United Nations decisions meets the requirement of staff consultation in the WMO Staff Rules. The WMO was unable to negotiate separately with its staff on the ICSC' recommendations but would have taken part in general consultations had they proved possible. Lastly, the WMO contends that the Tribunal may not review a provision of the rules: it may review only decisions which apply rules to individual staff members, and in doing so considers whether the rule infringes the complainant's rights. Its judgment is binding only on the parties. The complainants' argument based on Article VII, paragraph 2, of the Statute of the Tribunal is unfounded. Moreover, a provision of the rules may be challenged only when it is first put into effect since subsequent decisions applying it merely confirm the original one. The WMO also continues so maintain that the complainants have suffered no wrong.

CONSIDERATIONS:

As to jurisdiction:

1. These complaints are against the Secretary-General's decision contained in an information circular dated 19 January 1978 by which he introduced a new salary scale for staff of the General Service category. The relief sought by the complainants in its first two paragraphs requests the Tribunal to make certain findings concerning an agreement of 23 April 1976 (hereinafter called "the April Agreement") made between the representative of the executive heads of the international organisations based in Geneva (hereinafter called "the Geneva organisations") of the one part and the representatives of the staffs of the Geneva organisations of the other part; in its third paragraph the relief requests that the decision of 18 January 1978 be quashed; in its fourth and fifth paragraphs it requests certain consequential orders. The Tribunal is competent to quash any decision of the Secretary-General which does not observe the terms of appointment of officials of the Organization or of the provisions of its Staff Regulations and to make the appropriate consequential orders. When considering whether or not to quash such a decision it may or may not be relevant for the Tribunal to reach conclusions about the meaning and effect of an agreement such as the April Agreement and to make findings about whether there has been a breach of it; if so, such conclusions may be expressed in the considerations leading to the order which the Tribunal makes. But they will not be part of the order and the Tribunal will not attend to requests for specific declarations. The first two paragraphs of the relief sought are therefore rejected.

2. As to the third paragraph of the relief, it would manifestly be convenient, having regard to the competence of the Tribunal as defined in Article II, paragraph 5, of its Statute, if the complaints specified the terms or regulations

which allegedly have not been observed and the respects in which they have not been complied with. The complaints do not contain any precise allegation of this character. A perusal of the dossiers has led the Tribunal to conclude that the complaint is what by the decision impugned the Secretary-General ignored, first, the limits imposed on his authority to fix salary scales, by certain contractual terms described as "qualifications", and secondly, the terms of certain regulations and rules which require him to consult the Staff Committee.

3. Since the complaints so construed allege breaches of contract or of staff regulations they are prima facie within the jurisdiction of the Tribunal. The Organization objects to the jurisdiction on the ground that, if the complaints are established, the Tribunal is not competent to grant the relief sought. Since however it is not disputed that the Tribunal would, if the facts justify it, be competent to grant relief in some other appropriate form, the preliminary objection fails.

As to receivability:

4. The Organization objects also to the receivability of the complaints on the ground that the complainants will, by reason of transitory measures to which the decision impugned gives effect, continue to receive the same monthly salary as they were getting before the decision took effect and therefore have no personal interest in quashing it. The complainants however contend that they have suffered or may suffer material damage in other respects which they have specified. This issue will not arise unless the complaints succeed on the merits and it cannot be conveniently considered until after the merits have been determined.

On the merits:

5. As to the first contention set out in paragraph 2 above, Staff Regulation 3.1 provides that the rate of pay for staff in the General Service category shall be determined by the Secretary-General "in accordance with the equivalent scales for the office of the United Nations in Geneva". Under this regulation the authority of the Secretary-General is very strictly limited. True, it is not necessary that his decision should be an exact copy of the decision of the Secretary-General of the United Nations; salary scales embodying minor differences to suit special circumstances may nevertheless be in accord with United Nations scales. It is not, however, contended that the very narrow discretion which the Secretary-General of the defendant organisation has under this regulation could be stretched to accommodate the qualifications which the complainants contend ought to be implied. If the contention ended there, it must fail, since qualifications which would contradict the express words of the regular or cannot be implied.

6. But the complainants further contend that the Secretary-General of the United Nations is bound by the same qualifications. It is not disputed that in the decision impugned the Secretary-General of the defendant organisation made a determination in accordance with the equivalent scales de facto in force in the office of the United Nations in Geneva, but it is denied that they are in force de jure. The Tribunal agrees that, if the determination of the Secretary-General of the United Nations can be shown to be invalid, the complainants would be no more bound by the corresponding determination of the Secretary-General of the defendant organisation than an official of the United Nations would be bound by the decision of his Secretary-General. So it is necessary for this Tribunal to consider whether the decision of the Secretary-General of the United Nations was a valid decision. This Tribunal has jurisdiction to hear and determine all questions of law and fact which may have to be determined before it can give judgment in a suit that is properly before it. This is so even though the process may require the Tribunal to consider the legality of acts by persons who are not subject to its jurisdiction or to interpret the rules of organisations which are not parties to the dispute before it. But this does not mean that it is bound in all circumstances to exercise its jurisdiction to the full, any more than a national court is always obliged to entertain all disputes within its jurisdiction even though they may also be within the jurisdiction of the courts of another nation. Private international law has evolved rules and principles, such as the principle of forum conveniens and the principle of comity, for application to this situation. Under the latter principle a court, though having power and authority to determine a matter according to its own judgment of the issue, may to avoid conflict and if it considers that the matter is peculiarly within the jurisdiction of another court, accept and apply the decision of that other court. In the opinion of this Tribunal such principles are as applicable to the proceedings of international tribunals with separate jurisdictions as they are to the courts of different nations.

7. The decision of the Secretary-General of the United Nations to apply the scales which are now in force in its Geneva office was challenged by an official of the United Nations in Case No. 225 (Belchamber) before the Administrative Tribunal of the United Nations. This Tribunal is satisfied that the United Nations Tribunal is the

proper forum for the determination of the issue. That Tribunal upheld as valid the decision of the Secretary-General of the United Nations. Consequently the contention that the Secretary-General of the defendant organisation is in this respect in breach of Regulation 3.1 fails.

8. The second ground for contending that the decision impugned is invalid is that the Secretary-General of the defendant organisation failed before making it to consult the Staff Committee. Staff Regulation 8.1 requires the Secretary-General to make provisions for staff participation in the discussion of policies relating to staff questions; and Staff Rule 1831.1(b) requires that "general administrative instructions or directions" on inter alia "salaries and related allowances" shall be "transmitted in advance to the Staff Committee for consideration and comment before being placed in effect". The rule must be read and construed in the light of the general purpose stated in the regulation. Where there cannot possibly be any question of policy to be discussed, the rule does not apply. In the present case the policy was settled both for the Secretary-General and the staff by the terms of Staff Regulation 3.1. This contention fails.

9. The complainants point out that the conclusions reached in the two preceding paragraphs mean that, since they have no access to the Administrative Tribunal of the United Nations they have no form of redress; and that likewise their staff association loses its right to be consulted. It is difficult to believe that the complainants could have added anything to the arguments presented to the United Nations Tribunal or that, if their staff association had any independent views, they would not be adequately conveyed through the staff association of the United Nations. At any rate, this is the inevitable result of Staff Regulation 3.1, whose validity is not challenged. It is moreover a reasonable regulation. The defendant organisation is comparatively small and the reason why the regulation is worded as it is is that the Organization did not consider that it had the facilities to investigate on its own the level of salaries in Geneva.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 June 1979.

M. Letourneur
André Grisel
Devlin

A.B. Gardner