

SIXTY-SECOND ORDINARY SESSION

***In re* RUBENS and VAN DER WEG**

Judgment 828

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Leonard Rubens and Mr. Achim van der Weg against the Universal Postal Union (UPU) on 7 October 1985 and corrected on 10 December, the UPU's replies of 21 April 1986, the complainants' rejoinders of 31 July, the UPU's surrejoinders of 20 August 1986, the telex of 23 April 1987 from the complainants' counsel to the President of the Tribunal about their claim to costs and the UPU's comments thereon of 30 April 1987;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, UPU Regulations 3.5.1 and 3.5.4 of the Staff Regulations and Rule 111.3 of the Staff Rules of the International Bureau of the UPU, staff circular No. 21 of 10 April 1985, Articles 10 and 11 of the Statute and the material provisions of the Rules of Procedure of the International Civil Service Commission;

Having examined the written evidence and heard in public on 4 May 1987 oral submissions from Mr. Jean-Didier Sicault, counsel for the complainants, and from Mr. Claude-Henri Vignes, agent of the World Health Organization (WHO), speaking for the defendant and the other organisations defending similar cases; Mr. Dominick Devlin, agent of the WHO; Mr. Francis Maupain, agent of the International Labour Organisation; and Mr. Gabriel Mpozagara, agent of the United Nations Educational, Scientific and Cultural Organization;

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

A. Post adjustment allowances form part of the pay of staff in the Professional and higher categories in the United Nations, the UPU and the specialised agencies of the UN system. One criterion of pay for such staff is the Noblemaire principle, which says that it should be high enough to attract and keep citizens of the country with the highest-paid civil service. That country is the United States, and the comparison is between the federal civil service in Washington D.C. and the international civil service at UN headquarters in New York. Tradition has it, too, that, since federal civil servants are living in their own country whereas most international ones are not, the latter should be paid more. How much more - what is known as the "margin" - has never been laid down: of late it has ranged from 9 to 20 per cent or over. Another yardstick is that, grade for grade and step for step, purchasing power should be much the same at all duty stations. The post adjustment allowance is a device that has been used since 1957 to meet that purpose. By complex methods and procedures that need not be gone into here each duty station is put on an index which sets the cost of living in New York at a base date at 100. By that means is worked out the amount of the post adjustment allowance to be added to the official's basic salary where the cost of living at his duty station is above 100, or subtracted where it is below. The amount is stated in "classes", each one being 5 per cent - as reckoned in dollars - above the one just below. Thus class 1 starts at 105, class 2 at 110 and class 3 at 116. The difference between 100 and any one class is known as the "multiplier": it is 5 for class 1, 10 for class 2, and 16 for class 3.

The sum due to each official is the product of the multiplier and the amount of the allowance that belongs to his grade and step. Changes brought about by a rise or fall in the cost of living are stated in full classes; changes due to wavering in the rate of exchange between the dollar and the local currency may be in fractions of a class. For duty stations where the currency is not the dollar, for example Geneva, Paris and Rome, changes in the post adjustment may be by full class or by a fraction thereof or, as is common, by both.

To avoid changes in class due to oscillation in the cost of living there has since 1964 been a rule, known as the "four-month rule", which says that the index of a duty station shall reach or exceed, or else fall to or below, the qualifying point for the higher or lower class for four months running before the class may go up or down, and that the change may come into force only as from the fifth month. But changes in class or fraction of class due to shifts in the exchange rate come into effect as from the first day of the following month, so as to make pay less

vulnerable to volatility in that rate.

Since 1975 the International Civil Service Commission (the "Commission") has administered the system of post adjustment in accordance with Article 11(a) and (c) of its Statute, which all the agencies have endorsed. Its task is to see that the classes of the duty stations are kept up to date. For that purpose there is a subsidiary body known as the Advisory Committee on Post Adjustment Questions (ACPAQ), which is made up of experts in cost-of-living statistics and reports once or twice a year to the Commission. The Commission decides on the method of cost-of-living surveys and revises the classes of post adjustment where they have got out of line. It also makes routine decisions altering the classes of the duty stations month by month, and they are issued by its Chairman, to whom it has delegated authority for the purpose. Both sorts of decision are notified to the agencies by circular. The executive head of each organisation then applies the decisions to its staff by the authority vested in him under the staff regulations.

The pay of United States federal civil servants is adjusted, ordinarily once a year, by decision of the President of the United States and is not linked to the cost of living. Since such pay and pay in the international civil service are therefore fixed by different methods the margin between the two may broaden or narrow willy-nilly. In 1976 the Commission sought authority from the General Assembly of the United Nations to recommend to the Assembly measures for checking any big increase in the margin and to take action of its own. The Assembly agreed in resolution 31/141B of 17 December 1976. As it happened pay in the federal civil service was, then and later, keeping up with or outrunning rises in the cost of living and there was little risk of any widening of the margin. Besides, in its report of 1978 to the Assembly the Commission said it believed it already had authority under the post adjustment system to stop any undue increase: it could, for example, check a rise in class for New York, even if one fell due, and hold it up until the danger of a wider margin was over. As for the other duty stations, it said it could either set special restrictions on changes in class there, or lower the indices of all of them to the same extent to which it had held back the New York one, or else put the whole matter in the Assembly's hands. Though the margin grew from 13.9 per cent in 1978-79 to 18.2 in 1981-82, the Commission took no action of the kind it had spoken of.

Applying a new method, the Commission made cost-of-living surveys in 1982-83 in particular in London, Montreal, New York, Paris, Rome and Vienna. In its report of 1983 it told the Assembly that the classes of all but London seemed too high but that it could do nothing until the ACPAQ had looked into the matter. In resolution 38/232 (Section II) of 20 December 1983 the Assembly asked the Commission to sort things out promptly. The ACPAQ met thrice in 1984. It then reported to the Commission its view that because of flaws in the method and for other reasons the cost of living in New York had been underestimated for 25 years. It recommended altering the relation between the index of New York and that of each of the six cities.

In its report to the Assembly for 1984 the Commission stated its conclusion that the New York index was too low by at least 9.6 per cent. It had decided, it said, by virtue of Article 11(c) of its Statute to put the New York index up by that percentage as at October 1982 and use the corrected index to determine as from 1 April 1984 the classes of all the other duty stations for the purpose of reckoning the post adjustment. It had, it went on, conveyed its decisions to the agencies by circular of 24 August 1984 (CIRC/GEN/101), which said that the new "post adjustment indices for New York and the other North American and European duty stations" would take effect, under the four-month rule, as from 1 August 1984. (The classes of duty stations in other regions were to be published in September or later.) Up to 31 July 1984 New York had been at class 10; from 1 August 1984 the class was declared to be 11.

But there was more than that. By 1 August 1984 the New York index reached the qualifying point for class 12, and four months later, on 1 December, New York was to go up to that class. On 30 November 1984 the Assembly adopted a detailed resolution 39/27, on the matter. It was disturbed to see that because the Commission had raised the class of New York to 11 the margin stood at about 24 per cent, a figure it found too high. It asked the Commission to recommend a lower range for the margin and ways of keeping the margin within that range. More important for the present case, it "requested" the Commission to "take the necessary measures to suspend implementation of the increase in post adjustment for New York envisaged for December 1984".

The Chairman of the Commission sent the agencies a telegram on 12 December 1984 saying it would be looking at the whole matter at its next meeting in March 1985. In the exercise of his delegated authority he was blocking New York at 11 and refusing any changes in class which were due to rises in the cost of living at the other duty stations and which would make purchasing power there higher than that of the pay corresponding to New York class 11. At

its March meeting the Commission confirmed the blocking of New York at 11 - not letting it rise to 12 on 1 December 1984 - pending further study by the Assembly in September-December, and it took immediate measures to "ensure equivalence of purchasing power between New York and other duty stations". It set out those measures in a circular it sent the agencies on 18 April 1985 (SEC/PAC/157). What it did was to establish a new "notional" index for New York and a corresponding notional index for each of the other duty stations as from October 1982. According to the old index Geneva would by 1 April 1985 have been in class 5, with a multiplier of 28. But the Director-General of the International Bureau of the UPU informed the staff by a circular of 10 April 1985 of his decision to give effect as from 1 April to the new notional index applied to Geneva by the Commission - which applies also to the UPU staff in Bern - and Geneva was not in class 5 but in class "4/+5", with a multiplier of only 27. The lowering of the multiplier from 28 to 27 reduced the amount of the post adjustment for all UPU officials holding posts in the Professional and higher categories in Bern.

The complainants are officials of the Universal Postal Union, hold Professional category posts and are stationed in Bern. In keeping with the staff circular of 10 April 1985 their post adjustment allowances for April 1985 were reckoned on the strength of class 4/+5. On 17 June they addressed to the Director-General under Rule 111.3 of the UPU Staff Rules requests for review of the Director-General's decision to apply to them, as from 1 April 1985, a multiplier calculated in a way that failed to observe the rules of the post adjustment system.

The Director-General wrote letters on 9 July 1985 rejecting their requests for review and explaining why. Those are the final decisions impugned.

B. The complainants submit that the Tribunal is competent to entertain their complaints under Article II(5) of its Statute because they are challenging non-observance of the Staff Regulations of the UPU and other texts and principles that govern their conditions of service. They rely on the impropriety of a general decision only insofar as it has been applied to them as individual officials.

They further contend that their complaints are receivable in that they have exhausted the internal means of redress as Article VII(1) of the Statute requires and have observed the time limit in Article VII(2).

As to the merits they observe that there are many texts that govern their conditions of service as they relate to post adjustment. Regulation 3.5.1 of the UPU Staff Regulations reads:

"The basic salaries of staff members in the Senior and Professional categories may be adjusted by the application of non-pensionable post adjustments, the amounts of which shall be determined by reference to the level of the cost of living of international officials in Geneva in accordance with the classification established by the International Civil Service Commission and applicable to the United Nations Office at Geneva."

And Regulation 3.5.4 says:

"The Director-General shall be empowered to adjust the post adjustments paid to staff members up to grade D.2 (Assistant Director-General), in accordance with the relevant decisions of the United Nations in regard to the staff of the UN Office at Geneva and with effect from the same dates."

That means that all rules that make up the post adjustment system form part of the UPU Staff Regulations and officials of the International Bureau may demand compliance with them. They include Article 11 of the Commission's Statute, which confers authority on it with regard to the post adjustment system; the internal rules of the Commission, which lay down the procedures it must follow; and all rules and methods for determining indices, classes and multipliers, which are to be found in the "Guidelines for the determination of post adjustment classification" of 5 May 1982 issued by the Commission's secretariat and the "Post Adjustment Manual" published on 26 May 1983.

Under the terms of their appointment the complainants are entitled to a post adjustment allowance of which the yearly amount depends on the multiplier and the index. For the decision on post adjustment to be lawful both the index for the duty station and its class must have been lawfully determined. The index is not at issue: the dispute turns on the determination of the class of the complainants' duty station - and the multiplier - which they believe to be wrong, for four reasons.

(1) Their first plea is that the decision conveyed by the Chairman of the Commission on 12 December 1984 showed a formal flaw in that there had been no compliance with the provision in the Commission's Rules of Procedure that

required the holding of a special session in such circumstances.

(2) In deciding on 12 December 1984 to block New York at class 11 the Chairman misread the Commission's authority, a mistake of law that the Commission also committed in March 1985 in upholding that decision: it was mistaken in believing it was bound by what the Assembly said in resolution 39/27 on a matter in which it had full competence to take decisions of its own. What led it to change its mind suddenly on a matter it had had under review for years was a wish to win back the Assembly's trust. Even supposing that the Commission did have power to tamper with the class of Geneva so as to reduce the margin, its decisions are exclusively its own and not the Assembly's. Its purpose was not to correct any error it had made, but to please the Assembly, and it rested on misconceptions of its relation in law to the Assembly and its competence.

The complainants have a subsidiary argument: the decision rests on considerations that are extraneous to the post adjustment system and therefore amounts to abuse of process. The Commission may not make use of the post adjustment system save for the purposes for which it is intended. The procedure for classifying duty stations for the purpose of post adjustment is not intended to fix the margin. In accepting the Commission's Statute the UPU and the specialised agencies consented to a notion of the post adjustment system which did not comprise the fixing of the margin. It is immaterial whether the Assembly may alter the Commission's Statute since it did not. It is no defence in law to say that the Assembly's resolution of 1976 enlarged the Commission's powers to cover the fixing of the margin.

(3) The complainants' third plea is breach both of (a) the rule against retroactivity and of (b) the four-month rule.

(a) The case law of the Tribunal and of other tribunals condemns the retroactive application of a decision adverse to a staff member. Being monthly, pay must be set before the month begins. Although the Assembly resolution was passed on 30 November 1984, the decision was not notified to the agencies until 12 December 1984, or after the start of the month in which it altered the classes of New York and of the other duty stations.

(b) The four-month rule, which has been in force since 1964, has been taken over by the Commission. The index of Geneva reached the qualifying point for class 5 on 1 December 1984 and since it stayed above that point for four months running the class of Geneva should have risen to 5 on 1 April 1985. Even if the Commission's decision to introduce a new notional index and so a new class for Geneva as from April 1985 was lawful, the lowering of the post adjustment ought not to have come into effect until four months later, either on 1 September 1985, or, assuming that the introduction of a notional index was not a new decision but just the application of the one taken on 12 December 1984, not earlier than 1 May 1985 (four months after the 1st of the following month, January 1985).

Even supposing the Commission amended the four-month rule - *quod non* - it was bound under the rule against retroactivity to apply the four-month rule until the month in which it made the amendment.

(4) The fourth plea is breach of the rule that an authority is bound by the rules it has itself laid down until it repeals or amends them: *patere legem quam fecisti*. It is no answer to say that the Commission merely suspended the application of certain rules. The rules, including the four-month one, are still in force and unchanged.

The complainants seek the quashing of the Director-

General's decision not to pay them, as from 1 April 1985, the post adjustment corresponding to the class of Geneva as determined in proper application of the rules; an order for payment of the sums due as from that date, less the sums actually paid to them as post adjustment; and an award of costs.

C. In its replies the Union observes that in determining the post adjustment allowances for April 1985 the Director-General acted under Articles 3.5.1 and 3.5.4 of the Staff Regulations, which require him to set the amounts at the levels that apply to officials of the United Nations in Geneva. The UPU has to pay its staff the same amounts as such officials are paid, whether in basic salary or in post adjustment. There is therefore no incompatibility between what was announced in the staff circular of 10 April 1985 and the material provisions of the Staff Regulations, which prescribe parity of terms of appointment with United Nations officials in Geneva.

It is mistaken to contend that all the rules on post adjustment form part of the Staff Regulations, including the rules and methods applied to determine indices, classes and multipliers. The Staff Regulations refer only to the salaries and allowances actually paid to UN staff in Geneva and say nothing of the methods, procedures and criteria the

competent UN bodies apply in determining them. So only the basic salary scales, the post adjustments and the amounts of the various other allowances paid to UN staff in Geneva may be treated as forming part of the UPU Staff Regulations, not the rules and methods. All the UPU does is carry out UN decisions on the matter: it may not play any direct part in determining the rates of post adjustment at different duty stations, and it is to the United Nations that the complaints should be addressed.

The Union invites the Tribunal to reject the complaints as devoid of merit.

D. The complainants' rejoinders seek to refute the Union's arguments in its replies and enlarge on the pleas in their original briefs, which they believe the Union has failed to answer.

In their submission the complaints do have substance: they demand payment of the difference between rates of post adjustment reckoned by applying different multipliers, and the quashing of individual decisions that are in breach of the terms of their appointment and cause them injury.

The Union has failed to show that the post adjustment rules fall outside the ambit of those terms.

It is quite mistaken to say that the executive heads of the organisations have no choice but to carry out the Commission's decisions. For one thing, where called upon to apply a decision he deems unlawful the Director-General of the International Bureau may seek an advisory opinion from the International Court of Justice. For another, a decision by the Commission holds good only insofar as it respects acquired rights. Thirdly, any action the UPU takes must be lawful, and there is nothing about that that is incompatible with applying the rule of parity with the terms of appointment of United Nations staff in Geneva.

The review the Director-General must exercise goes beyond the class of Geneva to that of the base city since the two are linked.

There is no provision in the Commission's Statute that suggests decisions it is empowered to take are subject to review by the Assembly. The Assembly's evident intent is to abide by decisions which the Commission takes on certain strictly defined matters and which include decisions under Article 11 of its Statute on the classification of duty stations for the purpose of post adjustment. The system the Commission administers has two purposes: to make for parity of purchasing power between the base city and other duty stations, and to index each duty station to the cost of living. Although the Assembly has the power to amend the Commission's Statute, it did not do so in this instance, and the Commission committed an error of law by acting on the Assembly's request in resolution 39/27 in disregard of the bounds of its own competence.

The complainants enlarge on their subsidiary plea that there was abuse of process. They point out that the Commission's guidelines and the post adjustment manual say nothing of using the system to control the margin and that there are no rules on how to put it to that purpose, nor even any on what the margin should be.

The complainants develop their arguments about the breach of the transitional rules - the rule against retroactivity and the four-month rule - and challenge the construction the Organisation puts on those rules.

They press their plea that there was breach of the principle *patere legem quam fecisti*, observing that the material rules were neither repealed nor amended, at least until the Assembly adopted amendments in resolution 40/244, which took effect only as from 1 January 1986.

They observe that the Union has failed to answer their plea as to the formal flaw: the Commission's Rules of Procedure were not complied with, as the United Nations Administrative Tribunal held in Judgment 370 on 6 June 1986.

Lastly, they contend that their claims are sound in equity. International civil servants are faring steadily worse in other duty stations than in New York, where they do badly anyway. Shifts in exchange rates are only partly offset and staff who are not paid in dollars are suffering from the fall of that currency.

E. In its surrejoinders the UPU reaffirms that the principle of the parity of UPU with UN officials in Geneva forms part of the terms of appointment of UPU staff: that is why the Director-General is bound to set post adjustment at the level that applies to such officials, in keeping with Articles 3.5.1 and 3.5.4 of the Staff Regulations.

The United Nations Administrative Tribunal confirmed in Judgment 370 the lawfulness of the decision taken by the Chairman of the Commission: it merely found a procedural flaw that affects the period from 1 December 1984 to 31 March 1985.

The Union maintains that the complainants' other submissions are immaterial.

CONSIDERATIONS:

The system of pay

1. The Noblemaire principle, which dates back to the days of the League of Nations and which the United Nations took over, embodies two rules. One is that, to keep the international civil service as one, its employees shall get equal pay for work of equal value, whatever their nationality or the salaries earned in their own country. The other rule is that in recruiting staff from their full membership international organisations shall offer pay that will draw and keep citizens of countries where salaries are highest.

Several measures have been taken to give effect to the two rules.

2. Ever since the United Nations was founded the United States has been the country deemed to have the highest salaries. Thus the pay of international civil servants is

set against the pay of United States federal civil servants stationed in Washington D.C., or rather the comparison is between international civil servants in New York, the base city, and national civil servants in Washington, one factor of disparity being the cost of living.

3. Another measure is that since most international civil servants are not living in their own country their pay shall ordinarily be higher than that of American federal civil servants. The difference is known as the "margin", and it is variable.

4. The purpose of a third measure is to make the pay of international civil servants equivalent by making its real value, or purchasing power, as uniform as possible from one duty station to another. For that purpose account has to be taken of variations in the cost of living and the value of the local currency in terms of the United States dollar, the currency in which international civil servants' salaries and allowances are reckoned, and in 1957 the United Nations introduced what are known as "post adjustment" allowances. These are the sums added to or subtracted from the base salary according as the purchasing power of the dollar is higher or lower in another duty station than in New York.

There is an index for each duty station which is geared to the New York index and determines the amount of the adjustment to be added or subtracted. The adjustments are reckoned by class or "multiplier".

5. Lastly, there is the "four-month rule". It says that a duty station will change classes when its index stays for four months above or below the qualifying point for the class at which it stands. The change comes about only as from the first day of the fifth month.

When the change is triggered by a shift in the currency exchange rate it comes into effect as from the first day of the following month.

The International Civil Service Commission

6. By resolution 3042 of 18 December 1972 the General Assembly of the United Nations set up the International Civil Service Commission. It has a Statute and Rules of Procedure and there is a subsidiary body known as the Advisory Committee on Post Adjustment Questions (ACPAQ).

7. The Commission's functions come under two heads, recommendations and decisions.

Article 10 of its Statute says that it shall make recommendations to the General Assembly on:

"(a) The broad principles for the determination of the conditions of service of the staff;

- (b) The scales of salaries and post adjustments for staff in the Professional and higher categories;
- (c) Allowances and benefits of staff which are determined by the General Assembly;
- (d) Staff assessment."

Article 11 says that the Commission shall decide on:

- "(a) The methods by which the principles for determining conditions of service should be applied;
- (b) Rates of allowances and benefits, other than pensions and those referred to in article 10(c), the conditions of entitlement thereto and standards of travel;
- (c) The classification of duty stations for the purpose of applying post adjustments."

Articles 13 to 18 confer on the Commission other responsibilities that are not material to this case.

Decisions by the General Assembly and the Commission

8. The ACPAQ reported that by October 1982 the New York index was 9.6 per cent too low. On its recommendation the Commission raised the index accordingly so that New York rose to class 11, and the consequent rise in the post adjustment took effect on 1 August 1984.

9. The New York index had by then already gone above 180, the qualifying point for class 12 and it did not fall below 180 in the next four months.

The Fifth Committee of the General Assembly objected to New York's rise to class 12 and on 30 November 1984, on its recommendation, the Assembly adopted resolution 39/27. The Assembly:

"Considers that a margin of 24 per cent is too high in relation to past levels of the margin and, consequently, requests the International Civil Service Commission to:

... (c) ... suspend implementation of the increase in post adjustment for New York envisaged for December 1984, pending receipt by the General Assembly at its fortieth session, and action thereon, of the Commission's recommendations regarding the margin and other measures referred to in subparagraphs (a) and (b) above; and take whatever related measures are required in respect of the post adjustment levels at other duty stations to ensure equivalence of purchasing power as soon as possible at all duty stations in relation to the level of net remuneration in New York".

10. By a telegram of 12 December 1984 the Chairman of the Commission informed the executive heads and staff representatives that after consultation and pending full inquiry at its 21st Session in March 1985 the Commission had decided to meet the Assembly's wishes and suspend the rise of New York to class 12 and the changes in the class of other duty stations.

11. A score of post adjustment points having been embodied in base salary, New York changed on 1 January 1985 from class 11 to class "7/+2" and the classes of other duty stations changed in line.

12. At its 21st Session (11-29 March 1985) the Commission upheld the decision in the telegram of 12 December 1984. Its Secretary drew up notional indices for the duty stations in which "inter-city" cost-of-living surveys had been carried out by methods approved in 1981. The Geneva index, which would have reached 127.9 with the rise of New York from class 11 to class 12, was set at 122.5 and Geneva dropped from class 5 to class 4/+5, the multiplier being 27 instead of 28.

The Commission's decision went into effect on 1 April 1985.

13. By resolution 40/244 of 18 December 1985 the Assembly approved the Commission's recommendations on the margin, which was to be somewhere between 110 and 120, with the midpoint at 115. It asked the Commission to make arrangements for keeping post adjustments inside that range, which took effect on 1 January 1986.

Judgment 370 of the United Nations Administrative Tribunal

14. Several complaints filed with the United Nations Administrative Tribunal asked it to quash the decision by the Secretary-General of the United Nations to reckon post adjustment on the strength of New York class 11 and claimed the post adjustment that went with class 12 as from 1 December 1984 or, failing that, damages for the injury alleged.

15. In Judgment 370 of 6 June 1986 the United Nations Tribunal found before deciding against a special session the Chairman of the Commission did hold a vote by telegram on that and two other options, but that the Executive Secretary of the Commission failed to record the results of the vote and to inform the members. Though it doubted whether such breaches of form avoided the decision of 12 December 1984, the Tribunal held that the procedural requirements of the Commission's Rules of Procedure had not been complied with.

It therefore allowed the claims for four months from 1 December 1984, or until the Commission's own decision of March 1985 came into effect, but it held the decision to be lawful.

The impugned decisions

16. In accordance with circular No. 21 of 10 April 1985 the complainants' post adjustments for April 1985 were based on Geneva class 4/+5 and a multiplier of 27.

They asked the Director-General to review the reckoning of their post adjustments from 1 April 1985 on the grounds that the class should have been 5.

The Director-General rejected their requests and authorised them to treat the decisions, which they now impugn, as final.

Joinder

17. Complaints against a single organisation may be taken together provided the substance of the claims and the facts they rest on are the same.

The present complaints meet both requirements. The claims are the same in substance - indeed they are word for word identical - and the facts relied on - how the challenged decisions came about - are the same too.

The substance of the complaints

18. The UPU pleads that it merely acts on the decisions the United Nations takes about post adjustment and may not itself play a direct part in determining adjustments. It therefore invites the complainants to address the United Nations as the only competent body.

The plea fails.

The rule is that an Administration is bound to comply with the law. If its own decision is based on one taken by someone else it is bound to check that the other one is lawful (see Judgment 382, in re Hatt and Leuba), the only exception being where some extraordinary provision debars it expressly or by implication from doing so.

There are no grounds for exception here. Regulation 3.5.1 of the Staff Regulations does say that the basic salaries of staff members in the Senior and Professional categories may be adjusted "in accordance with the classification established by the International Civil Service Commission and applicable to the United Nations Office at Geneva". But that provision, though it speaks of decisions by the Commission, does not relieve the Director-General of the duty to check that the decision is lawful.

Whether or not the decision is put into the Staff Regulations is immaterial: be that as it may it is binding on the Director-General only if lawful.

The complainants' pleas

19. The complainants contend that the decision notified by the Chairman of the Commission on 12 December 1984

is tainted with a formal flaw in that it does not comply with the Commission's Rules of Procedure.

That is beside the point. The decisions impugned rest, not on the telegraphed decision of 12 December 1984, but on the Commission's decision of March 1985, which, though it confirmed the telegram, is a separate one. Any flaw there may have been in the telegraphed decision is immaterial.

20. The complainants further maintain that the Commission acted *ultra vires* in suspending the post adjustments the change of New York from class 11 to class 12 ought to have brought about. Their argument is that it is clauses (a) and (c) of Article 11 of the Statute that empower the Commission to decide on post adjustments but that the clauses do not cover the Commission's decision in this case and are binding on the Assembly until amended.

That is to misread resolution 39/27.

The Assembly asked the Commission to stop the adjustments until its 40th Session. But the Tribunal is not competent to rule on the lawfulness of Assembly resolutions, and so it will not state whether the Assembly would have done better to amend what its Statute says about post adjustment than to adopt the resolution. Besides, in Judgment 370 the United Nations Tribunal held that the Assembly "had unquestionable power to regulate in this way emoluments not yet earned, if it regarded suspensory action as necessary in the circumstances".

What resolution 39/27 means is admittedly not beyond dispute. Is it issuing an invitation or an order when it "requests" the Commission to make arrangements? But whichever it is does not matter: the Assembly empowered the Commission to act and delegated authority to it for the purpose.

The Commission did not pass the bounds of that authority but strictly respected it in its decision of March 1985. Since it was exercising authority vested in it by a text the Tribunal may not review there is no question of its having acted *ultra vires*.

Whether it is for the United Nations Tribunal rather than this one to rule on the exercise of the delegated authority is a point that need not be settled. In Judgment 370 that Tribunal said: "In any event, the ICSC accepted and complied with the expressed wishes of the General Assembly ...". Thus it has already come to the conclusion which this Tribunal has set forth above, and even if the United Nations Tribunal were exclusively competent this Tribunal would have no grounds for adjournment.

All this makes it immaterial whether the decision of March 1985 may, if need be, rest on an extensive construction of clause (a) or clause (c). In any event it is neither here nor there that the Post Adjustment Manual, a purely informative text that is not binding in law, does not provide for the suspension of post adjustment.

21. Another plea of the complainants' is that the Commission misused its authority by availing itself of the post adjustment with the improper intent of checking an allegedly undue widening of the margin.

One reason why the plea fails is that, as has been seen, the Commission acted *intra vires*. In authorising the Commission to suspend the increase in the post adjustment the Assembly also authorised the purpose of doing so. It vested in the Commission power to take action that would stop the widening of the margin and in pursuing that purpose the Commission did not obey considerations it ought to have discounted: indeed its decision of March 1985 served the very purpose it was intended for.

Besides, the complainants have failed to show that the post adjustment system discounted the size of the margin until 1985. What makes that the less certain is the Assembly's asking the Commission in resolution 31/141B of 17 December 1976 to take urgent action *proprio motu* and in the context of the post adjustment system to prevent widening.

22. The complainants further submit that the Commission broke the rule against retroactivity in stopping the adjustment regardless of the rise of New York from class 11 to class 12.

The answer to that may be short. It was in March 1985 that the Commission took the decision that affords the basis of the ones impugned and that decision came into effect on 1 April 1985. Since that date is later than the date of adoption there was no breach of the rule.

It is immaterial whether the change in the class of New York was automatic or came about only after the

Commission had formally decided it: what matters is that the decision of March 1985 did not take effect until the next month. Besides, whether a rise is automatic is not beyond doubt.

The decision in the telegram of 12 December 1984 is not under challenge, and whether it was retroactive is immaterial.

23. Another plea is breach of the rule that the class changes when for four months the cost-of-living index has stayed constantly above or below the qualifying point for the change.

It is moot whether the conditions for bringing the rule into play were fulfilled. The decision was not to change the class of New York from 11 to 12 but - and it is not perforce the same thing - to hold over the effects of the change until the Assembly's 40th Session.

Moreover, even if the Commission broke the four-month rule its decision was covered by the authority vested in it. Insofar as the rule was at odds with resolution 39/27 it was not binding on the Commission.

24. Lastly, the complainants contend that the Commission was in breach of the principle *patere legem quam fecisti*.

But the principle applies only to the maker of the broken rule. Since it was not the Commission that laid down the salary and post adjustment scales and the rule about changes

in class, the Commission did not break any rule of its own in suspending the change in the class of New York.

Nor, since it had a mandate from the Assembly, was it bound to follow its own earlier arrangements.

25. The conclusion is that none of the complainants' pleas is sound and that their complaints must fail.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1987.

(Signed)

André Grisel
Jacques Ducoux
Mohamed Suffian
A.B. Gardner