SEVENTIETH SESSION

In re MUNRO (No. 2)

Judgment 1073

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. William Ross Munro against the International Atomic Energy Agency (IAEA) on 25 June 1990, the Agency's reply of 17 July, the complainant's rejoinder of 12 September and the Agency's surrejoinder of 25 September 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article XVIII.2(A) of the Agreement dated 29 September 1958 governing the relationship between the United Nations and the Agency, Regulation 10.02 of the Agency's Provisional Staff Regulations and Rules 5.03.2(D), 10.02.1 and 12.01.1(D)(1) and (2) of the Agency's Provisional Staff Rules;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. As is explained under A in Judgment 1072, in which the Tribunal rules this day on the complainant's first complaint, the Agency's salary scales prescribe higher rates of salary and post adjustment allowance for staff members with a "dependent spouse".

Rule 5.03.2(D) of the Provisional Staff Rules defines a dependent spouse as one whose occupational earnings do not exceed the staff member's gross salary or the amount the Director General sets for the purpose each year, whichever is the lesser. In accordance with a decision the Agency took on 6 January 1981 the latter amount shall, in the case of staff in the Professional category, be the gross salary of the lowest level of the General Service salary scales applicable to the spouse's place of work, provided that it is not lower than the amount applicable to New York. For Vienna the relevant level is step 1 of grade G.3. According to a circular, No. SEC/NOT/1207, of 22 February 1988, the figure of gross yearly salary at that level was 240,432 Austrian schillings for 1988, and anyone claiming dependency benefit for an employed spouse must report by the end of March of that year the spouse's expected gross occupational earnings for the year and actual earnings in 1987.

The Agency employs the complainant in Vienna, and his wife had remunerative employment at the material time. On 31 March 1989 he filed an application for dependency benefit for 1989, giving a figure of 284,132 schillings for his wife's earnings in 1988. In a memorandum of 4 April 1989 the Division of Personnel told him that since that figure was above the allowable maximum for 1988 his wife could not be treated as his dependant in that year and he must pay back the full amount of the benefits he had received. The amount came to 75,803 schillings. He applied on 16 May for review under Rule 12.01.1(D)(1), had his application rejected, and appealed on 26 June under 12.01.1(D)(2) to the Joint Appeals Committee. In a report of 25 August 1989 the Committee said:

"The matter of dependency entitlement is currently under active consideration by the Joint Advisory Committee (JAC)(The Committee is a body set up under Rule 10.02.1 to advise the Director General, as Regulation 10.02 prescribes, on "personnel policies and general questions of staff welfare"). The Joint Appeals Committee understands that in the JAC, the Administration is likely to recommend that, in the event that a spouse's income exceeds the annual limit for dependency entitlement, the dependency allowance be reduced only by the excess. If this recommendation were to be approved, the appellant presumably could request retroactive application of the amended rule at that time."

The Appeals Committee recommended rejecting the complainant's appeal, and his first complaint impugns the Director General's decision of 14 September 1989 to reject it.

In a report of 24 October 1989 to the Director General the Joint Advisory Committee recommended that "Any disallowance of dependency benefits should be limited to the amount by which the spouse's income exceeds the income limit". In a circular, SEC/NOT/1311, of 5 February 1990 the Director General announced that "To bring the

Agency's practice in line with that of other common system organizations ... any discontinuation of dependency benefits shall be limited to the amount by which the spouse's income exceeds the income limit". For that purpose the Director General approved an amendment to Rule 5.03.2(D) and put the change into effect as at 1 January 1990.

On 4 December 1989 the complainant had written to the Director General seeking the retroactive application to him of the Advisory Committee's recommendation. The Director General's reply of 29 December 1989 was that the Committee had not recommended retroactive application. On 28 February 1990 the complainant submitted to the Director General a request for review under Rule 12.01.1(D)(1) and, failing review, for waiver of the Joint Appeals Committee's jurisdiction. By a letter of 27 March 1990, the decision impugned in this case, the Director General rejected his request and waived the Committee's jurisdiction.

B. The complainant asks the Tribunal - if, in its ruling on his first complaint, it upholds the Director General's determination of the limit on the spouse's income in 1988 - to rule that the amount of his loss, the 75,803 schillings, be reduced to the 43,700 schillings by which his wife's gross earnings were above that limit.

In his submission such ruling would be in line with decisions which the Consultative Committee on Administrative Questions (CCAQ) of the United Nations common system took as long ago as 1968, with longstanding practice in other United Nations organisations, with the Joint Appeals Committee's recommendation and with the provisions the Agency itself adopted as from 1 January 1990. The repayment by him of the full amount of his benefit in 1988 reduced his and his wife's combined incomes to a sum 32,103 schillings below the allowable limit. It is absurd and unfair that had his wife's earnings been 43,700 schillings less their net earnings would have been 32,103 more.

The Appeals Committee declined to go into the merits because the matter was before the Advisory Committee; indeed it was his own case that had prompted referral to the Advisory Committee. Yet he has not himself benefited from the change of policy the latter's recommendation led to. The Agency's failure to follow the same policy as other organisations was just an oversight.

C. In its reply the Agency points out that in its report of 25 August 1989 the Appeals Committee recommended that "the decision to deny dependency status as of 1988-01-01 not be reconsidered". Neither the complainant's appeal nor the Advisory Committee's recommendation addressed the matter of retroactive application of any change the Agency might make in policy or in Rule 5.03.2(D). The Appeals Committee's remark quoted in A above recognised its lack of competence to deal with that issue and merely said that the complainant was free to apply for retroactive application if the rules were changed, not that he had any right to it.

The Advisory Committee is not competent to take up individual cases and did not consider the complainant's. What prompted it to propose change was neither his appeal nor a conviction that the old rules had been wrongful or wrongly applied. It did not recommend retroactive change, and neither the circular nor the amended rule prescribed it. There is indeed no reason why the improvement in conditions of service should be retroactive.

The CCAQ is just an advisory inter-agency body that makes recommendations, not binding decisions. The Agency need neither comply with its recommendations nor ensure alignment between its own rules and those of other United Nations organisations.

D. The complainant rejoins that he is not seeking retroactive application of Rule 5.03.2(D): his claims should succeed on their own merits. He observes that the whole purpose of the CCAQ's rulings in 1968 was to protect staff against just the sort of policy the Agency followed up to 1989.

He develops his contention that the Appeals Committee deferred to the Advisory Committee, advised him to look to that Committee for satisfaction and even suggested means of applying in his favour the limit on the loss of dependency benefit. He submits that the Agency's referral to the Advisory Committee while his own case was pending was detrimental to his interests and an attempt, made in bad faith, to evade his claim. He reaffirms that the Agency's policy and rules up to 1989 were at odds with decisions of the CCAQ and with practice elsewhere. Though the Agency is free to act at discretion, in practice it has complied with all rulings of the CCAQ save the ones at issue, and it did not tell the Appeals Committee, and has not told the Tribunal, why it made the exception. One reason given for the change was a desire to fall in line: it may not plead both the virtues of uniformity and its own right to diverge.

E. In its surrejoinder the Agency presses the pleas in its reply. It submits that the complainant's rejoinder shows neither any right to retroactive application of the amended Rule 5.03.2(D) nor any other grounds for his claim in law. It rejects his charge of bad faith, pointing out that the matter was referred to the Joint Advisory Committee on 5 May 1989, whereas not until 16 May 1989 did he make his application for review. Besides, it was not the Administration but the staff representatives that proposed putting the matter on the Committee's agenda. The Committee considers only policy proposals, not particular cases.

CONSIDERATIONS:

1. The complainant's second complaint is subject to the Tribunal's ruling on his first one and is to be read in conjunction with it. The Tribunal dismisses his first complaint this day in Judgment 1072. He asks, if it is not successful, that the Tribunal order that his loss of dependency benefit be reduced to the amount by which his spouse's gross income exceeded the limit the Agency set on a dependant's income.

2. The Agency itself has changed the practice with effect from 1 January 1990. On 5 February 1990 it issued a staff circular, SEC/NOT/1311, and paragraph 2 reads:

"To bring the Agency's practice in line with that of other common system organizations, the Director General, in consultation with JAC [the Joint Advisory Committee], has approved that any discontinuation of dependency benefits shall be limited to the amount by which the spouse's income exceeds the income limit".

The Director General approved a corresponding amendment to Rule 5.03.2(D) of the Provisional Staff Rules.

3. In anticipation of the change the complainant had asked on 4 December 1989 for the retroactive application to him of the new rule. The Director General refused his request in a letter of 29 December 1989 on the grounds that neither the Joint Appeals Committee nor the Joint Advisory Committee had recommended retroactivity; the amendment was, he pointed out, "based on a change of policy and not on considerations that the relevant Staff Rules or procedures concerning the determination of dependency status of spouses were inappropriate or have been wrongly applied". The complainant having pressed his claim, the Director General, in a letter of 27 March 1990, refused to reconsider his decision but agreed to waive the jurisdiction of the Joint Appeals Committee and let the complainant appeal directly to the Tribunal.

4. In the complainant's case the loss of the entire dependency benefit reduced the combined family incomes below the maximum limit. The Joint Appeals Committee recommended rejecting his internal appeal against the loss on the grounds that he was not alleging non-observance of a term of his appointment and it referred to the deliberations the Joint Advisory Committee was holding at the time on the matter of dependency benefits. He submits that the decision to refer the matter to the Joint Advisory Committee while his appeal was pending was "a device to provide an advantage to the Administration with respect to [his] appeal" and that the Joint Appeals Committee deferred to the Joint Advisory Committee.

There is no foundation whatever for the complainant's contention that the fact of the Advisory Committee's discussing the matter while his appeal was before the Appeals Committee gave the Administration an advantage or caused him prejudice. The Appeals Committee's recommendation was based on its view that no appeal lay because he had made no allegation of non-observance of a term of his contract. It did not defer to the Joint Advisory Committee, and its reference to the Advisory Committee's deliberations was not recognition of any right to retroactive application of amendments that might result from those deliberations. The complainant's arguments about the Appeals Committee's handling of his internal appeal are therefore irrelevant to this case.

5. He further submits that the Consultative Committee on Administrative Questions (CCAQ) decided as early as 1968 that if the spouse's income exceeded the limit by a sum which was less than the dependency benefit it was only the excess that should be deducted from the amount of the benefit. Such provision has been in effect in the United Nations, the Food and Agriculture Organization of the United Nations and in the International Civil Aviation Organization for many years. Moreover, in line with the terms of reference of the CCAQ, its decisions are binding on institutions in the United Nations common system, including the Agency.

His submissions are mistaken. The Agency's participation in the work of the CCAQ is in line with Article XVIII.2(A) of the Agreement of 1958 on the relationship between the United Nations and the Agency. That article requires the parties merely:

"To consult together from time to time concerning matters of common interest relating to the terms and conditions of employment of the officers and staff with a view to securing as much uniformity in these matters as may be feasible."

The CCAQ consists of heads of administrative and personnel departments of the member organisations and makes recommendations which are not binding on them. The Agency is neither obliged to achieve uniformity with United Nations Staff Regulations nor bound by recommendations of the CCAQ.

6. In his rejoinder the complainant expressly denies seeking retroactive application of the amendment - even though that is what he said he wanted in his letters to the Director General - and he says that his claim stands on its own merits.

There is no basis for the view that the rules that applied before 1 January 1990 must be interpreted as limiting the loss of dependency benefit to the amount by which the spouse's earnings exceed the maximum income limit. The rule is clear and does not permit such interpretation.

That being so, and since the amended rule does not provide for retroactive application, the complaint must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.