

SEVENTY-FIFTH SESSION

***In re* CUSSAC, MOYSE
and SCHMITT**

Judgment 1266

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Yolaine Cussac, Mrs. Ellen Moyse and Mrs. Beate Schmitt against the International Union for the Protection of New Varieties of Plants (UPOV) on 26 November 1992 and corrected on 8 December 1992, the Union's single reply of 9 February 1993, the complainants' rejoinder of 9 March and UPOV's letter of 15 March 1993 stating that it had no further comments;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations 3.1(b), 3.5 and 12.1(a) and Rule 11.1.1(b)(1) of the Staff Regulations and Staff Rules of the International Bureau of the World Intellectual Property Organization (WIPO), which apply to UPOV staff members, Articles 1, 9, 12 and 18 of the Statute of the International Civil Service Commission, paragraph 54 of the document "Remuneration of the General Service and related categories: revised general methodology for surveys of best prevailing conditions of service at headquarters duty stations", adopted by the Commission in 1988, and paragraph 1 of Annex IV to that document;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The General Assembly of the United Nations set up an International Civil Service Commission (ICSC) "for the regulation and coordination of the conditions of service of the United Nations common system".

The nature of the Commission's authority varies by subject. As to the salaries of the General Service category of staff, Article 12.1 of its Statute defines its authority as follows:

"At the headquarters duty stations and ... other duty stations ... the Commission shall establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories."

A survey was carried out in Geneva in keeping with what a Commission document of 1988 describes as the "revised general methodology for surveys of best prevailing conditions of service at headquarters duty stations", known below as the "general methodology". The Commission thereupon adopted a new salary scale for the General Service category in March 1991 and recommended that the United Nations and other organisations in the common system apply it to their Geneva staff.

The complainants belong to the General Service category of staff of UPOV. By circular 35/1991 of 6 May 1991 WIPO announced that the Director General, who is also the Secretary-General of UPOV, had provisionally approved and applied a new salary scale for such staff as from 1 January 1991 in accordance with Regulation 12.1(a)(*)(* "The Director General may propose amendments to these Regulations. Such amendments shall enter into force after approval by the Coordination Committee. However, any amendment for the purpose of adapting certain provisions of the Staff Regulations to changes in the provisions concerning the staff of the United Nations or the Specialized Agencies of the United Nations ("common system"), and in particular to any adjustment of salaries and allowances within the common system as applied in Geneva, may be provisionally decreed and applied by the Director General, provided the required amounts can be covered by the budget.") of the applicable Staff Regulations, those of the International Bureau of WIPO. The effect of the general decision on each of the complainants' own position was notified to them in pay slips for June 1991 which went out on 21 June. The Coordination Committee of WIPO approved the scale on 2 October 1991.

On 11 July the complainants submitted to the Secretary-

General under Staff Rule 11.1.1(b)(1) written requests for review of the decision to apply the scale to them.

In support they pleaded that in drawing up the new scale the Commission had acted in breach of the general methodology on two counts. First, so as to convert gross salary paid by an employer to non-Swiss staff whose earnings were exempt from tax and gross salary paid by two other employers who had concluded tax mitigation agreements with the inland revenue, the ICSC applied the standard tax schedule, and that offended both against logic and paragraph 54 of the general methodology.>(* Paragraph 54 says "... In converting from gross to net, deductions, exemptions and rebates should be taken into account in amounts which are typical and appropriate for the category and/or grades of the employees concerned. ..."). Secondly, the ICSC infringed paragraph 1 of Annex IV>(* Paragraph 1 of Annex IV says "... The average salary per grade of United Nations common system staff at the duty station concerned is calculated for each surveyed grade, using data on the number of incumbents at each step (except for longevity or long-service steps) and the related salary amounts. ...") by including for the sake of comparison two steps, 13 and 14, granted by two Geneva-based organisations (the International Labour Organisation (ILO) and the World Health Organization (WHO)).

In memoranda of 19 August the Director of the Personnel Division informed each of the complainants that Article 12.1(a) "did not allow the Secretary-General to issue or apply any other scale".

On 15 November 1991 they appealed to the Organization's Appeal Board. In order to reply to their appeals, and at a request from the Board, WIPO sought information from the secretariat of the Commission on the methodology it had followed in drawing up the disputed scale. In its report of 17 June 1992 the Board said that though it held the complainants' grievances to be sound the Secretary-General could not but apply the Commission's scale and so it recommended no change in his position. On 9 September 1992 the Secretary-General sent the complainants memoranda saying that he upheld the challenged decision. Those memoranda are the decisions now impugned.

B. The complainants contend that the impugned individual decisions are unlawful because they apply a prior general decision that is in itself unlawful.

According to the case law the Secretary-General has a duty to determine whether any text he bases his decisions on is lawful. He may not escape review by the Tribunal by pleading his duty under Staff Regulation 12.1(a) to decree and apply provisionally "any adjustment of salaries and allowances within the common system as applied in Geneva". However awkward his posture may be he is bound by the law, and the Coordination Committee's approval of the amendment is immaterial.

In the complainants' submission the Commission's decisions are in breach of two principles. One is the Fleming principle, which says that salary and other basic items of the remuneration of the General Service category "shall be based on the best prevailing conditions of employment in the locality". The Commission's decisions meant that the complainants' conditions of employment were no longer among the best in Geneva. The other principle is *paterem legem quam ipse fecisti*, which the Commission infringed by failing to abide by the criteria in its own general methodology.

The Commission committed two mistakes of fact in respect of exemption from tax. One was to think it reasonable to dock Swiss income tax from salaries that were exempt or to subtract the full amount of such tax from the salary of an employee entitled to rebate. The other mistake was its misreading of the employment market in Geneva.

As to the extra steps that the ILO and the WHO may grant to their General Service staff the complainants allege three mistakes of law by the Commission. First, by resolution 45/241 of December 1990 the General Assembly of the United Nations, acting on a recommendation from the Commission itself, declared such steps to be unlawful, and the Commission was therefore wrong to count them. A second mistake was to assume that only step 12 was excluded under the general methodology. And thirdly, even supposing that step 12 be the only explicit exclusion in the methodology, the Commission ought to have construed the material text as excluding a fortiori any higher step.

The complainants further submit on that score that the Commission's taking account of the ILO and WHO staff who had been granted extra steps above step 12 discriminates against staff of organisations that do not grant them. That was an act of reprisal on the Commission's part against the ILO and the WHO and other organisations in Geneva that had been critical of it. It has taken out on the staff its quarrel with what it sees as rebel organisations.

Its behaviour is so grave as to warrant an award of special damages.

Lastly, the complainants deplore the attempts by its secretariat to thwart their desire to settle out of court.

They seek (a) the quashing of the Secretary-General's decision to reckon their salary as from June 1991 on the strength of the Commission's unlawful decisions, the effect to be retroactive to 1 January 1991; (b) an award to each of them of the difference between the wrongfully reduced figure and the figure that would have applied had the Union discounted the Commission's decisions, plus interest at the rate of 8 per cent a year; (c) an award to each of them of damages for the breach of basic rights in an amount to be set by the Tribunal; and (d) 5,000 Swiss francs each in costs.

C. In its reply UPOV submits that it had nothing to do with the Commission's choice of the method of drawing up the disputed scale; that was a matter for the Commission alone. All the information the International Bureau of WIPO forwarded to the Appeal Board came from the secretariat of the Commission. The Organization neither confirms nor denies the complainants' allegations.

D. In their rejoinder the complainants point out that little or nothing in the Union's reply is at odds with their own position. They press their claims.

CONSIDERATIONS:

1. The complainants, who belong to the General Service category of staff of the International Union for the Protection of New Varieties of Plants, which is in Geneva, are asking the Tribunal:

- to set aside the Secretary-General's decision to reckon salary as from June 1991 - and with retroactive effect from 1 January 1991 - on the strength of what they see as unlawful decisions by the International Civil Service Commission;

- to order the Secretary-General to pay each of them the difference between the wrongfully reduced figure and the properly recalculated one, plus interest at the rate of 8 per cent a year; and

- to order the Secretary-General to pay each of them damages for breach of basic rights and 5,000 Swiss francs in costs.

2. On account of its administrative connection with the World Intellectual Property Organization (WIPO) the defendant organisation belongs to the "common system" administered by the Commission. It amended in 1991 the salaries of staff in the General Service category in line with the scale drawn up by the Commission for organisations with headquarters in Geneva. Although the review entailed a nominal increase in salary, the complainants submit that the increase would have been bigger had the "methodology" which the Commission has adopted and WIPO has accepted for analysis of data on local terms of employment been properly applied.

3. The methodology is based on the Fleming principle, which the Tribunal explained in Judgment 1000 (in re Clements, Patak and Rödl). It consists in aligning the salary of staff in the General Service category with the salaries paid by the most representative local employers so as to enable international organisations to recruit in the locality staff who fully meet the requirements of their staff regulations. The Commission carried out a survey of several representative employers in Geneva covering the period from November 1990 to January 1991 and set out its findings in a report numbered ICSC/33/R.17. The report affords the basis of the salary scales for the General Service category staff of organisations in Geneva that belong to the common system.

4. The complainants raise objections to two particular features of the report. First, as to the data obtained from local employers they submit that the Commission ought, in reckoning net pay, to have taken account of the tax mitigation the Swiss Government grants to the staff of some such employers. Secondly, they object to the comparison with the pay of General Service category staff on the grounds that the Commission ought not to have counted within-grade steps - a thirteenth and a fourteenth - granted by the International Labour Organisation and the World Health Organization, the rules of the common system requiring that there should be no more than eleven or, according to a different method, twelve. The complainants argue that those two flaws in the Commission's applying its general methodology lowered by 2 per cent the amounts of the increase in salary that UPOV staff were entitled to.

5. In order to answer to those objections WIPO urged the secretariat of the Commission to give more details. The replies it got show that:

(a) The tax exemptions some local employers have secured from the Swiss Government for their staff are granted to non-

resident staff and the Commission therefore saw it as untypical of the terms of appointment of local employees.

(b) The Commission did take the extra within-grade steps into account because the ILO and the WHO had declined to fall in line with the rules of the common system and drop them.

6. The secretariat of the Commission explained in its replies that counting the tax rebates would have put salaries up by 1.06 per cent and discounting the extra steps would have put them up by 0.93 or 0.47 per cent, depending on the final step taken as the basis of reckoning.

7. The secretariat further warned against forgetting that those factors formed part of a complex comprehensive decision of which the components were interdependent and matter for appraisal.

8. In accordance with the Staff Regulations the complainants went to the Appeal Board of WIPO. In its report of 17 June 1992 the Board was fairly critical of what the Commission had done. It thought that the replies from the secretariat of the Commission were dilatory and partial. On the subject of the tax rebates it took the view that the influx of workers from across the border with France was a feature of the employment market in Geneva and ought therefore to have been taken into account in the comparison with local conditions. As for the extra within-grade steps, it observed that the General Assembly of the United Nations had demanded as early as 1990 that they be abolished and that the Commission's decision was therefore a sort of "collective retaliation" that UPOV, which abided by the rules of the common system on staff matters, ought not to have suffered.

9. The Board concluded that the Commission's scale was to the detriment of UPOV staff and it reckoned the loss to them at 1.99 per cent. But it acknowledged that the Secretary-

General had had no choice but to acquiesce and to put the Commission's scale to the Coordination Committee for approval. The Committee gave such approval on 2 October 1991.

10. The Secretary-General endorsed the latter conclusion: he took the view that he had had no choice but to put the Commission's scale into effect and he rejected the appeals by individual decisions of 9 September 1992.

11. Those are the decisions now impugned, and the complainants develop the two pleas that the Board sustained. They also put forward the third and more general plea that there was breach of their basic rights. The plea is in two parts: first, they plead breach of their honour as international officials; secondly, they plead breach of their right to actual effective appeal. The first is addressed to the Commission alone, the second to Commission and UPOV alike.

12. The gist of the second part of the plea is that UPOV staff have lost their right to effective appeal because the Commission, though empowered to bind their organisation, is not itself subject to judicial review. They suggest asking it to state its case to the Tribunal.

13. The Union's reply is perfunctory. In his brief the Secretary-General merely explains that the methodology for determining General Service salary scales is not the Union's own doing but entirely within the Commission's competence. UPOV says it therefore cannot comment in any way on the process of salary adjustment, on the information supplied by the Commission, or on the complainants' pleas. The Secretary-General points out that it is clear from comments which the Secretary of the Commission made on 3 September 1992 on receipt of the Board's report that the Commission would, if the Tribunal so wished, appear before it.

14. Before going into the merits some preliminary comments are called for on the purpose and context of the dispute.

(a) Although the Tribunal respects the discretion of the Appeal Board and the complainants' freedom to plead as they wish it must keep aloof from gratuitous and even hostile strictures about the Commission. It therefore refuses outright to entertain the complainants' plea that the Commission's approach was a slight on the staff's honour.

(b) There is no denying that the Commission's answers to WIPO's inquiries give objective information and useful explanation of its methods of reckoning. The Commission says that it would be willing if need be to make submissions, and indeed a co-operative approach of that kind, which the Rules of Court allow, may assist in hearing a case. But in this instance the information that the secretariat of the Commission supplied at the earlier stages of the dispute suffice to shed light on the Commission's intentions and resolve the matters at issue.

(c) With due regard to the complainants' pleas, the defendant's reply and the information supplied by the Commission the Tribunal will begin by taking up the issues relating to its own competence. Those are the complainants' plea of breach of their basic right to appeal against decisions of the Commission, and the Commission's warning that drawing up the salary scale and seeing how the various relevant factors relate to one another in the reckoning are matters of discretion.

(d) It is in the light of its rulings on those issues that the Tribunal will look at the two specific issues that the complaints raise: the discounting of tax mitigation in assessing net pay on the Geneva employment market, and the reckoning of extra within-grade steps in determining the comparable figures of pay in the organisations of the common system.

The Tribunal's competence and the right of international officials to effective appeal

15. The complainants object that it is difficult, if not impossible, for them to challenge the measures that affect the level of their pay insofar as such measures are not determined in full autonomy by their own organisation but imposed on it in the name of the "common system" by the International Civil Service Commission, a body that is not subject to the Tribunal's jurisdiction. They believe that there has therefore been breach of their fundamental right of effective appeal to an independent tribunal.

16. Before taking up the plea the Tribunal must determine the nature of relations between the Union and the "common system".

17. By resolution 3357 of 18 December 1974 the United Nations General Assembly approved the Statute of the Commission. The Statute includes the following passages of direct relevance to this case.

As regards the organisations that belong to the common system the Commission exercises the authority which is defined by its Statute and is as follows:

- in general, "regulation and coordination of the conditions of service" in the affiliate organisations (Article 1, paragraph 1);
- "the development of a single unified international civil service through the application of common personnel standards, methods and arrangements" (Article 9);
- for each locality, establishing "the relevant facts for, and [making] recommendations as to, the salary scales of staff in the General Service and other locally recruited categories" (Article 12, paragraph 1).

In its relations with the affiliate organisations the Commission's action generally consists in formulating guidelines, policies and recommendations (Article 18).

18. WIPO joined the common system by virtue of an agreement with the United Nations that came into force on 17 December 1974 and it applies by virtue of UPOV's links with WIPO to the Union as well. Article 15 of the agreement, which is about staffing arrangements, reads:

"(a) The United Nations and the Organization agree to develop, in the interests of uniform standards of international employment and to the extent feasible, common personnel standards, methods and arrangements designed to avoid unjustified differences in terms and conditions of employment, to avoid competition in recruitment of personnel, and to facilitate any mutually desirable and beneficial interchange of personnel.

(b) The United Nations and the Organization agree:

- i. 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; ..."

19. Although the Commission's Statute is somewhat flexible in defining its means of action, membership of the common system lays on organisations an obligation to do their utmost in good faith to import into their own internal rules the Commission's guidelines, policies and recommendations and to take proper action on the findings of fact which the Commission is called upon to make in accordance with Article 12 of its Statute.

20. WIPO has ensured the discharge of its commitments by introducing into its Staff Regulations provisions which recognise in advance the scales and multipliers determined by the Commission. Examples of such action are:

Regulation 3.1(b), which is about the amount of pay;

Regulation 3.5, which is about post adjustment allowance: see Judgment 1239 (in re Baeumer, Claus and Hansson); and

Regulation 12.1(a), which empowers the Director General to take any necessary provisional action to ensure the immediate concordance of the provisions of the Staff Regulations with the common system.

21. The Organization has thus fully complied with the obligations it derives from its membership of the common system. But it may not in that way decline or limit its own responsibility towards the members of its staff or lessen the degree of judicial protection it owes them. The Tribunal has already had occasion to speak of that responsibility and to stress the duty of any organisation that introduces elements of the common system or any other outside system into its own rules to make sure that the texts it thereby imports are lawful: see Judgment 825 (in re Beattie and Sheeran), under 18, which in turn refers to Judgment 382 (in re Hatt and Leuba), under 6.

22. In Judgment 1000, mentioned above, the Tribunal held, under 12, that "when impugning an individual decision that touches him directly the employee of an international organisation may challenge the lawfulness of any general or prior decision, even by someone outside the organisation, that affords the basis for the individual one". The complainants may therefore challenge in their present suit the lawfulness of any measure taken by the Commission that serves as the basis for the decisions affecting them, whatever method may have been adopted to import it into their organisation's own rules.

23. It is plain from the foregoing that the complainants' difficulty is due not to the taking of action by a body outside the Tribunal's jurisdiction but to the Secretary-General's shifts of attitude. First the Secretary-General did what was required to import the challenged scale in full into the rules and thereby endorsed the Commission's decisions without qualification. But then he took up an unhelpful posture and thereby prevented before the Tribunal the adversarial pleadings that are an essential feature of judicial process and, besides, indispensable for providing the Tribunal with adequate information: see Judgment 1197 (in re Baeumer, Claus and Hansson), under 13 and 14. The criticism holds good for the Appeal Board of WIPO: after explaining why it thought the Commission's scale unlawful it recommended that the Secretary-General apply it nevertheless on the grounds that he had no choice but to do so.

24. The conclusion is that by incorporating the standards of the common system in its own rules the Union has assumed responsibility towards its staff for any unlawful elements that those standards may contain or entail. Insofar as such standards are found to be flawed they may not be imposed on the staff and UPOV must if need be replace them with provisions that comply with the law of the international civil service. That is an essential feature of the principles governing the international legal system the Tribunal is called upon to safeguard. It is therefore plain that the complainants' rights to judicial process are safeguarded by the defendant organisation's recognition of the Tribunal's jurisdiction. Such jurisdiction may not be restricted by the introduction into the Staff Regulations of rules adopted by bodies outside the Tribunal's competence.

Judicial review of the Commission's exercise of discretion in determining salaries

25. In its communications to WIPO the Commission points out that the factors which serve in determining levels of staff pay are complex and that the whole operation that consists in drawing up the salary scales calls for the exercise of discretion.

26. Of course the Tribunal may not interfere in the exercise of such discretion or in the drafting of the salary policy

it is based on. But it does have a power of review in this area which is clearly defined and of which three features are relevant here.

27. First, it will consider in the event of dispute whether the Commission's methodology has been properly observed. The methodology is an important factor in ensuring that the results are stable, foreseeable and clearly understood. And though the Commission is free to choose its methods, once it has chosen them the staff may expect them to be followed in all circumstances.

28. Secondly, even though various factors have to be considered in taking a comprehensive decision on salary levels, there are specific ones that in this comparative sort of exercise must be taken in isolation from the rest and subject to critical evaluation. Judgment 1000 again illustrates how such a procedure may yield notable results. In this case the information provided by the Commission shows that it is quite possible to isolate the factors at issue and even to put exact figures on the effects they have on the salary scale.

29. Thirdly, the Tribunal has, like other international and national administrative tribunals, set criteria for what may be termed "external" or "marginal" review of discretionary decisions, and again they were set out in detail in Judgment 1000, under 12. Here the gist of the complainants' case is that the scale is arbitrary because the Commission's reckoning counted the extra within-grade steps yet discounted certain tax rebates.

30. Such then is the context in which the Tribunal will take up the complainants' pleas, without detriment to the discretionary authority of the Commission and of the Union's governing bodies.

The discounting of tax rebates for local employees

31. The Tribunal endorses the exercise of its discretion by the Commission in declining to take account of the tax rebates that the Swiss inland revenue grant to some staff of local employers.

32. According to the methodology the Commission has to take the figure of net salary for the sake of comparison, and so it subtracted from the amounts paid by local employers the tax levied by the host country.

33. Since comparison is with staff who in the nature of things are locally recruited the Commission was right to take as typical for the sake of that comparison employees subject to ordinary tax law at the place of their employment. The tax rebates the complainants are referring to are a form of derogation that applies, says the Commission, only to non-resident workers. The complainants and the Appeal Board are mistaken: according to the peculiar circumstances of such workers, that is not a true tax benefit but an exemption granted by way of distribution of tax revenue between the country of residence and the country of employment.

34. The conclusion is that the rebates are irrelevant in determining the figures of local pay and on that score the complaints must fail.

The counting of the extra within-grade steps

35. The complainants are, however, right insofar as they object to the counting of the within-grade step increments that the ILO and the WHO grant to General Service staff.

36. The Commission concedes that the grant of such steps is not in line with the rules of the common system. Although the Tribunal will not endorse the terms the complainants and Appeal Board use to describe the practice, it holds that the figures of pay must be worked out by criteria that apply to all the organisations alike and are in line with the underlying principles of the system. In other words, it is unfair to count benefits improperly granted to the staff of some organisations and so artificially inflate the comparative figures of pay of staff in organisations like UPOV that do abide by the rules of the system. The Tribunal has in the past stressed the importance of strict compliance with those rules in assessing pay in the international civil service: see Judgments 899 and 936 (in re Geisler No. 2 and Wenzel No. 3) and 1000. Under this head the complainants succeed.

37. Yet the Tribunal will refrain from actual amendment of the challenged scale, especially since getting the figures right depends on whether the point of comparison is at step 11 or step 12, and that is uncertain. So the case must be sent back to the Union for review of the scale by the criteria referred to in this judgment. It may thereby reckon the pay due to the complainants, including the arrears consisting in the difference between the sums they were actually paid and the sums they ought to have been paid from 1 January 1991, plus the interest at the rate of 8 per cent a

year that they claim.

38. The complainants claim damages for breach of their basic rights, which the Tribunal has acknowledged. All that need be said is that payment of damages is not a proper means of giving them satisfaction on a matter of principle of that kind. They are, however, entitled to costs, and the Tribunal awards them 5,000 Swiss francs each, the sum they claim.

DECISION:

For the above reasons,

1. The decisions determining the complainants' pay according to the salary scale applicable to the Union's General Service staff are set aside as from 1 January 1991 insofar as the extra within-grade steps granted by other organisations in Geneva to their staff counted in reckoning that scale.
2. The case is sent back to the Union so that it may act on this ruling. In accordance with what is said in 37 above it shall draw up a revised scale that discounts those steps for the sake of comparison and pay the complainants the difference between the present figure and the figure on the revised scale. The Union shall further pay them interest at the rate of 8 per cent a year on the arrears due up to the date of revision of their pay.
3. It shall pay the complainants 5,000 Swiss francs each in costs.
4. Their other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda
P. Pescatore
Michel Gentot
A.B. Gardner