

**B. and others**

v.

**ILO**

**124th Session**

**Judgment No. 3883**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Miss S. B., Mrs V. C., Miss A. C., Mrs K. H., Mrs W. I., Mrs K. K., Miss J. K., Mrs R. L., Mrs T. L., Miss D. M., Mr A. N., Mrs S. N., M. N. P., Miss P. P., Mr W. P., Miss M. P., Mrs T. P., Miss W. P., Miss S. P., Miss I. R., Mrs S. R., Mrs C. S., Miss K. S., Miss A. S., Mrs M. S., Miss R. T., Miss S. T., Mrs C. U., Mr T. V., Miss C. V., Mrs S. V. and Mrs C. W. against the International Labour Organization (ILO) on 23 January 2014 and corrected on 11 April 2014, the ILO's reply of 18 May 2015, the fact that the complainants did not file a rejoinder as well as the additional documents submitted by the complainants on 14 March 2017 pursuant to the Tribunal's request;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

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

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

The complainants contest the implementation of new salary scales as from March 2012 in Bangkok, Thailand.

In 2011 a local salary survey was conducted in Bangkok in order to determine the salary scales of locally recruited staff in the United Nations (UN) common system, including the ILO. The results of the

survey indicated that UN salaries for the General Service (GS) and National Professional Officer (NO) categories were higher than those of the chosen comparators, by 27.2 per cent and 41.4 per cent respectively. In January 2012 the findings of the survey were presented to the UN Headquarters Salary Steering Committee (HSSC), which unanimously approved the findings and recommended that new reduced salary scales be introduced for staff members recruited on or after 1 March 2012, and that the salaries of staff members already in service at that date be frozen until the gap between the old and new salary scales was closed as a result of periodic adjustments to the new scales. The UN Secretary-General accepted this recommendation and the new salary scales were published on the website of the United Nations Office of Human Resources Management (OHRM) at the beginning of February 2012.

In September 2012 several ILO staff members in the GS category or in the NO category, who were posted in Bangkok, filed a grievance with the Human Resources Management Department (HRD) of the ILO challenging the decision of the UN Secretary-General, posted on the OHRM website in February. Their grievances were rejected and the matter was referred to the Joint Advisory Appeals Board (JAAB) on 26 December 2012.

In its report of 23 August 2013 the JAAB noted that the ILO had not provided any communication showing that the ILO had notified the locally recruited staff in Bangkok of the results of the 2011 local salary survey and of the fact that their salary would be frozen effective 1 March 2012. The JAAB therefore considered that the results of the survey “materialized for the [complainants] by their March 2012 pay slip”, issued towards the end of March. It also found that the complainants had a cause of action given that they alleged that the results of the contested salary survey resulted in a lost opportunity for a salary increase. The JAAB added that it could only note that regardless of the “apparent controversy regarding the manner in which the survey exercise was carried out”, the HSSC had unanimously approved the survey results. It also found that the ILO had violated Article 3.1(e) of the Staff Regulations as it did not consult the Joint Negotiating Committee (JNC) prior to implementing the salary changes. The JAAB recommended that

the Director-General set aside the decision to apply the results of the 2011 salary survey in Bangkok and that he compensate the complainants “as necessary”. It added that there was a need to update the Staff Regulations to take into account the methodology used by the UN common system for surveys of the best prevailing conditions of employment at non-headquarters duty stations and that the need to clarify the composition and mandate of the ILO’s representation in the Local Salary Survey Committee (LSSC) would warrant further attention by the Office.

By a letter of 21 October 2013 each complainant was informed that the Director-General had decided to reject the recommendation to set aside the results of the 2011 survey and to compensate them, as he had found no reasons to question the validity of the salary scales promulgated in 2012 and to depart from the conditions of service applicable to the organisations of the common system. The Director-General explained that the ILO did not have the technical capacity to re-run a salary survey or to determine a new salary scale. He added that he was, however, committed to abide by the outcome of the appeal filed against the validity of those scales within the UN justice system, and would make the necessary salary adjustments and award compensation should that process conclude that the 2011 local salary survey was flawed. Each complainant was also informed that the Director-General had sought guidance as to the necessary measures to update the provisions of the Staff Regulations regarding the application of the common system decisions in the ILO, especially local salary scales. Similarly, he would be seeking the views of the JNC as to the best means to clarify the composition and mandate of ILO representatives in the LSSC. The complainants impugn that decision before the Tribunal.

Each complainant asks the Tribunal to set aside the impugned decision with retroactive effect, to cancel the results of the 2011 salary survey and to award them damages. They also claim 2,000 United States dollars each in costs.

The ILO asks the Tribunal to dismiss the complaints as irreceivable for lack of a cause of action and, subsidiarily, as devoid of merit.

## CONSIDERATIONS

1. The ILO employs locally recruited staff either in the GS or in the NO categories in its office in Bangkok, Thailand. Changes were made to the salaries payable to those staff effective 1 March 2012. In relation to locally recruited staff hired after that date, they were to be paid on new salary scales which were less than the salaries payable before that date. The salaries of locally recruited staff employed before 1 March 2012 were frozen until the new salary scales, with periodic adjustments, reached the level of the frozen pre-existing salaries.

2. Thirty-two staff of the ILO locally recruited before 1 March 2012 whose salaries had been frozen, lodged complaints with the Tribunal on 23 January 2014. They challenge the process that had resulted in the freeze and the adoption of the new lower salary scale. Each of these complaints is in a standard form and necessarily raises the same legal issues based on the same facts. Accordingly they are all joined.

3. The background, in outline, leading to the freeze and the adoption of the new lower salary scales was as follows. Some matters of detail are referred to later in this judgment when discussing particular issues raised by the parties.

4. Staff of the ILO are part of the UN common system. The method of determining salaries and other conditions of employment differs between staff whose duty station is at headquarters in Geneva and locally recruited staff at other duty stations. The conditions of locally recruited staff, in relation to salaries, are established through comprehensive salary surveys approximately every five years to ascertain that salaries remain competitive enough amongst the best employers in the local market. This is to ensure adherence to the Flemming principle that requires that the conditions of service for locally recruited staff reflect the best prevailing conditions found locally for similar work. Interim adjustments to salaries, normally annually, occur having regard to wage or consumer price index movements or changes in the salaries of the comparator employers.

5. Between June and December 2011 a comprehensive salary survey was undertaken in Bangkok with a view to reviewing the salaries of locally recruited staff in the UN common system. Aspects of the survey methodology and related events are challenged by the complainants in these proceedings. These matters are referred to later. The survey revealed that then prevailing salary scales for locally recruited staff in the UN common system exceeded the salaries paid to comparator staff. In the result, the HSSC recommended, as reflected in a letter dated 19 January 2012, that secondary salary scales be established (lower than existing scales) from a date yet to be determined and that existing salary scales be frozen for staff employed before that date. Ultimately, these recommendations were acted on and 1 March 2012 became the effective date for these arrangements.

6. On 11 September 2012 the ILO Director of HRD received a grievance lodged under Article 13.2.1 of the Staff Regulations. No issue is raised by the ILO about whether each of the complainants lodged a grievance at that time or, later, referred the matter to the JAAB under Article 13.3.2 of the Staff Regulations. The Tribunal can proceed on the basis that each of them did and thus each has exhausted internal means of redress as required by Article VII, paragraph 1, of the Tribunal's Statute. By email dated 5 December 2012, the complainants were informed that the requests they had made in their grievance lodged with the Director of HRD were not "uph[e]ld", though they were told that HRD "remain[ed] at [their] disposal to continue reviewing the situation".

7. On 26 December 2012 the complainants referred their grievance to the JAAB. In a report dated 23 August 2013, the JAAB recommended to the Director-General "that he set aside the decision to apply the results of the 2011 Bangkok Comprehensive Salary Survey and that he compensate the [complainants], as necessary". It also made a recommendation about updating the Staff Regulations to accommodate, in effect, the processes and survey methodology used to assess conditions of employment for staff in the UN common system at non-headquarters duty stations and create effective consultation with affected staff. In a

letter dated 21 October 2013, the complainants were informed of the decision of the Director-General. The Director-General indicated he was not able to act on the first set of recommendations (setting aside the application of the survey results and paying compensation) but he had sought guidance about updating the Staff Regulations. This is the impugned decision.

8. The ILO challenges the receivability of the complaints in its reply. There was no rejoinder and thus no surrejoinder. Before dealing with this issue of receivability, two matters should be noted. The first is that nowhere in the pleas do either the complainants or the ILO provide evidence that establishes, as a matter of fact, that a decision of the Director-General was made agreeing to or deciding to implement the arrangements to introduce new salary scales and freeze existing salary scales for locally recruited staff of the ILO in Bangkok. Yet the pleas of both parties expressly proceed on the clear assumption that such a decision was made and probably also notified to staff before 1 March 2012. The same clear assumption underlies the recommendations of the JAAB and the letter of 21 October 2013 containing the impugned decision. The Tribunal concludes that there was necessarily at least an implicit decision of the Director-General to adopt the new salary arrangements.

9. The second and related matter to be noted is that the complainants do not in their pleas in these proceedings address, with any precision or clarity, the question of whether there was a final administrative decision directly affecting them which was amenable to internal appeal and complaint to the Tribunal. However the JAAB, when addressing an argument of the ILO that the complainants' challenge to the new salary scales was not made within the time specified by the Staff Regulations, expressly proceeded on the basis that what, in substance, the complainants were challenging was their March 2012 payslip which they would have received towards the end of the month of March 2012. While this approach involved some generosity towards the complainants having regard to the way their grievance had been originally framed, it was an approach open to the JAAB. Accordingly the Tribunal can also proceed on the basis that the legal foundation for the internal appeal

and the challenge in this Tribunal to the impugned decision was the complainants' March 2012 payslip that was the first payslip after the freeze had been introduced.

10. The ILO's challenge to the receivability of the complaints is based, in substantial part, on judgments of the United Nations Dispute Tribunal (UNDT) of 5 March 2014 in *Tintukasiri et al. v. Secretary-General of the United Nations* (Judgment UNDT/2014/026) and, on appeal, the United Nations Appeals Tribunal (UNAT) (Judgment No. 2015-UNAT-526), dealing with an application by UN staff based in Bangkok challenging the 2011 salary survey and the adoption of its results. The UNDT judge hearing the case raised, of his own motion, the receivability of the application. He decided, having regard to the provisions of the Statute regulating UNDT's jurisdiction and the jurisprudence of the UNAT, that neither the issuance of the secondary salary scales nor the freeze of existing salary scales constituted an administrative decision for the purposes of Article 2.1(a) of that Tribunal's Statute. Accordingly the application was irreceivable in all respects. However the judgment noted that "[i]t is only on the occasion of individual applications against the monthly salary/payslip of a staff member that the latter may sustain the illegality of the decision by the Secretary-General to fix and apply specific salary scale to him/her in which case the Tribunal could examine the legality of that salary scale without rescinding it".

11. The question of whether a complaint, based on a payslip, challenging a general decision to freeze salaries is receivable was recently addressed by the Tribunal in Judgment 3740. The Tribunal concluded in consideration 11 that:

"Although the [paysheets immediately following the freeze] did not reflect any change in [the complainants'] salaries, nor would any change be reflected in subsequent paysheets while the freeze was in effect, at that point in time it was evident that the salary freeze was liable to cause [the complainants] financial injury. As the Tribunal explained in Judgment 3168, under 9, for there to be a cause of action a complainant must demonstrate that the contested administrative action caused injury to the complainant's

health, finances or otherwise or that it is liable to cause injury. Accordingly the complaints are receivable.”

12. The general circumstances of the present case are indistinguishable. Accordingly the complaints are receivable. However it should be noted that reliance on payslips does not create an open-ended opportunity to challenge a general decision on which the payslips are based (see Judgment 3614, considerations 12 and 13).

13. The complainants’ arguments fall essentially into two categories. The first concerns unlawful or unacceptable features of the methodology used in the survey together with events of the same character surrounding the survey. The second concerns an alleged failure on the part of the Director-General to consult with the JNC that constituted a breach of Article 3.1(e) of the Staff Regulations.

14. The facts underpinning these arguments are, in the main, not controversial. Surveys of the type under consideration are conducted in accordance with a methodology adopted by the International Civil Service Commission (ICSC) and also by reference to a salary survey manual issued by the OHRM. The outcome of these surveys is submitted to the HSSC for review and final approval.

15. Before a survey of a non-headquarters duty station is undertaken, it is informed that this is to occur and the common system organisations involved are invited to appoint individuals to constitute a LSSC. Amongst other things, the LSSC updates information on leading employers to be surveyed and compiles statistics on job and grade distribution of all local common system staff at the duty station. The LSSC is guided by salary survey specialists of the Compensation and Classification Section (CCS) within the OHRM. A salary survey specialist undertaking a survey, collates data on salaries, allowances and other conditions of service offered by survey employers derived from interviews and questionnaires. The specialist prepares a report for the LSSC containing an analysis and comparison of the data with the conditions of service of UN organisations. The analysis may point to an upward revision of salary scales, a downward revision or their

maintenance. The HSSC gives final approval to the process including the proposed salary scales.

16. It is to be recalled that the contentious Bangkok survey was undertaken between June and December 2011. In their pleas, the complainants rely on remarks of the Chief of CCS at a meeting on 26 April 2011 in Bangkok of the UN Operations Management Team (OMT). The remarks were made by the Chief of CCS in a presentation on the salary survey methodology including lessons learned from the local salary survey methodology followed in Bangkok. The minutes of the meeting are annexed to the ILO's reply. The Chief of CCS observed that the NO scale appeared to be on the high side and that the GS scale also appeared high but that was not as obvious as the NO scale. He gave reasons why that might have been so having regard to the way the 2006 salary survey was conducted. He noted that the United States (US) Embassy had been missing as a comparator employer in that survey and that this was unusual as US embassies are regarded as a good comparator employer. The complainants rely on these and other observations at this meeting, together with the selection of the US Embassy as a comparator for the 2011 survey (it was not in the 2006 survey) to argue that there was "a predetermined agenda to reduce salaries" and there was a "preconceived notion that salaries were too high".

17. However these and related arguments would rise to a level which might call into question the entire survey if it was demonstrated by probative evidence, directly or by inference, that, for example, the Chief of CCS or someone acting on his behalf took steps to influence the methodology actually adopted and its application with a view to skewing the results. There is no such evidence. What was said at the meeting of 26 April 2011 reflects nothing more than a view about existing salary levels. The Chief of CCS was entitled to have a view, though it would not have been open to him to influence the methodology and its application. Insofar as the inclusion of the US Embassy is concerned, there is no evidence that its inclusion was demonstrably inappropriate nor is there probative evidence that its inclusion inappropriately distorted the results. It must be borne in mind, that the

Tribunal's role is not to evaluate independently itself the methodology and its application. These are technical issues beyond the remit of the Tribunal and its role is more limited (see Judgment 3360, consideration 4). There is no single hard and fast approach to the application of the Flemming principle and some discretion must be afforded over method (Judgment 1713, consideration 8).

18. In a similar vein to the argument summarised above, the complainants referred to the job matching having been completed in New York in contravention of the established ICSC methodology and that the data collection analysis took almost 6 months rather than, so it is said, the normal one month. The complainants assert that there was a predisposition to conduct job matching in a way that would lower the overall result and that one of the specialists changed certain job matchings that he himself agreed to in 2006. They also point to a reference, at a meeting of the LSSC on 10 January 2012, to financial pressures. However these, in the main, are speculation, assertion or both. The complainants have not demonstrated any reviewable error. Similar arguments did not affirmatively satisfy the JAAB that the survey was flawed. It observed:

“Since no proper fact-finding exercise regarding the concerns raised by some members of the LSSC ever took place, the [JAAB] can at this stage do nothing more than note that regardless of the apparent controversy regarding the manner in which the survey exercise was carried out, the UN Headquarters Steering Committee unanimously approved the survey results.”

19. However the JAAB was satisfied that there had been a material procedural deficiency in the entire process which is an issue the Tribunal now addresses. It is the alleged failure on the part of the Director-General to consult with the JNC in contravention of Article 3.1(e) of the Staff Regulations, which provides:

“The gross and net salary scales of the National Professional Officers category and those of the General Service category at duty stations other than Geneva shall be determined by the Director-General after consulting the Joint Negotiating Committee.”

20. The ILO does not seek to establish that consultation of the type specified in this provision took place before 1 March 2012 when

the Director-General had decided to adopt the new Bangkok salary scales and the freezing, from that date, of the pre-existing Bangkok salary scales. Rather it argues in these proceedings (reflecting reasoning in the letter of 21 October 2013 containing the impugned decision) that Article 3.1(e) had not been given effect to for some years and that this had occurred without complaint by the staff or their representatives. The case law of the Tribunal establishes, relevantly, three related propositions. First, an organisation is bound by the rules it has itself issued until it amends or repeals them (Judgment 963, consideration 5). The second is that a practice cannot become legally binding if it contravenes a written rule that is already in force (see, for example, Judgments 3601, consideration 10, and 3544, consideration 14). The third, concerning consultation, is encapsulated in the following passage from a recent judgment, Judgment 3736, consideration 7:

“The Tribunal recalls, however, that in keeping with the principle *tu patere legem quam ipse fecisti*, when a text provides for the consultation of a body representing the staff before the adoption of a decision, the competent authority must follow that procedure, otherwise its decision will be unlawful (see, for example, Judgments 1488, under 10, and 3671, under 4).”

21. Thus the failure to consult as required by Article 3.1(e) of the Staff Regulations cannot be excused because such consultation had not occurred for some years without complaint.

22. However, more important, is the question of what flows from this unlawful conduct. In Judgment 3736, just cited, which concerned deductions from pension payments to individual former staff members based on a general decision made without appropriate consultation, the Tribunal concluded that the individual decisions to deduct the payments should be set aside and the organisation ordered to reimburse the complainants the amounts deducted.

23. However ultimately what relief can be granted by the Tribunal is governed by Article VIII of the Tribunal’s Statute that confers and defines its jurisdiction. That provision clearly contemplates that if a complainant establishes that a decision was unlawfully made, the decision can be rescinded. Equally, however, it contemplates that if the

rescission of a decision is not “advisable”, then the Tribunal “shall award the complainant compensation for the injury caused to her or him”. Plainly enough following this latter course depends on the opinion and assessment of the Tribunal in the exercise of what, in substance, is a discretionary power (see Judgment 1419, consideration 24).

24. In the present case, while there was no consultation as required by Article 3.1(e) of the Staff Regulations, that happened in circumstances where there had been no practice of consultation for a number of years, apparently without complaint, at least as identified by the complainants in the pleas in these proceedings prepared on their behalf by a lawyer acting for the Staff Union. No rejoinder was filed by the complainants challenging the ILO’s account in its reply concerning the absence of consultation and that this case (being one of hundreds where there had been local salary surveys and no consultation) represents the first occasion on which non-compliance with Article 3.1(e) has been raised.

25. Indeed the JNC met on 16 March 2012 and discussed, amongst other things, the “Bangkok local salary survey”. The minutes record that the Staff Union raised serious concerns about the survey and indicated that the methodology in effect since 1 January 2012 was considered by the Staff Union to be unlawful. The minutes also record that the Staff Union was in the process of coordinating further legal and other action in this respect. What is important, for present purposes, is that there is no recording of complaint by Staff Union representatives on the JNC that there had been no consultation with that body prior to the adoption of the new salary scale and the freezing decision. Whatever vices were apparent to Staff Union representatives in the processes leading to the adoption of the new salary scales and the freezing decision, they did not include, in any practical or real sense, an absence of consultation with the JNC. The Tribunal infers that this failure to consult was focused on later as a legal issue capable of being raised in and sustaining the legal challenge commenced later in the year.

26. The Tribunal is satisfied that, in these circumstances, it is not advisable to set aside the decisions applying the salary freeze to the

complainants. However they are entitled to compensation. That will have two elements. One is the loss sustained by operation of the freeze that sounds in material damages. The other is moral damages. The Tribunal is not in a position to quantify the former in relation to each complainant. The ILO shall determine annual adjustments for the complainants' salaries in the same way as they would have been calculated had the new salary arrangements not been introduced, commencing with the salary on 1 March 2012 and thereafter on the anniversary of 1 March 2012, but only for the period in which each complainant continues working for the ILO. The ILO's future obligation to make these payments ceases at the time the frozen pay scales applicable to the complainants are no longer frozen or when a lawful decision involving consultation with the JNC is made by the Director-General to freeze existing salaries. The Tribunal assesses the moral damages in the sum of 100 euros for each complainant. The complainants should be paid, collectively, 2,000 euros costs.

#### DECISION

For the above reasons,

1. The ILO shall determine the complainants' salaries in accordance with consideration 26, above.
2. The ILO shall pay moral damages in the sum of 100 euros to each complainant.
3. The ILO shall pay the complainants collectively 2,000 euros costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 3 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ