

SEVENTIETH SESSION

In re MUNRO

Judgment 1072

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. William Ross Munro against the International Atomic Energy Agency (IAEA) on 13 December 1989, the Agency's reply of 19 February, the complainant's rejoinder of 21 May and the Agency's surrejoinder of 20 June 1990;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Regulations 5.01(a) and (b) of the Agency's Provisional Staff Regulations and Rules 5.03.1(F), 5.03.2(D) and 12.01.1 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. The Board of Governors of the Agency, which is in Vienna, sets the base salary of its staff in the Professional and higher categories in accordance with Regulation 5.01(a) of the Provisional Staff Regulations. The salary scales give two rates of salary for each grade and step, one for staff with a dependent spouse or child and the other for staff without. The schedule of post adjustments provided for in Regulation 5.01(b) also sets different rates for staff with dependants and for staff without.

Rule 5.03.2(D) says:

"The term 'dependent spouse' shall signify a spouse whose gross occupational earnings do not exceed the lesser of the following:

(i) the gross base salary of the staff member; or

(ii) the amount established by the Director General for the purpose with effect from 1 January of each year."

In accordance with a recommendation made in July 1980 by the Consultative Committee on Administrative Questions (CCAQ) of the United Nations common system, the Agency, which belongs to that system, decided on 6 January 1981 to establish as follows the amount provided for in 5.03.2(D):

"For staff in the Professional and higher categories the gross salary of the lowest level of the General Service salary scales applicable to the place of work of the staff member's spouse shall apply. However, in no case shall this amount be less than the gross salary of the lowest level of the General Service salary scales applicable to New York."

The lowest applicable level is step 1 of grade G.2 for New York and step 1 of grade G.3 for Vienna. The figure for G.2, step 1, in New York, which is in United States dollars, is converted into Austrian schillings, the currency of payment in Vienna. For that purpose the Agency applies what is known as the United Nations "operational exchange rate". The United Nations office in Vienna, the Agency and the United Nations Industrial Development Organization together decide on that rate each month in the light of the prevailing market rate and other factors.

The conversion into schillings is made at the operational exchange rate for January of each year. At 1 January 1988 gross yearly salary at G.3, step 1, in Vienna was 240,432 schillings whereas gross yearly salary at G.2, step 1, in New York, converted at the operational rate for January 1988, which was 11.10 to the dollar, came to only 232,467 schillings. So in a circular, SEC/NOT/1207, of 22 February 1988 the Director General set the maximum limit for the dependent spouse's occupational earnings at the higher figure - 240,432 schillings - for 1988.

Rule 5.03.1(F) states:

"Staff members shall be responsible for submitting to the Director of Personnel claims for dependency allowance and providing any documentary evidence deemed necessary to sustain such a claim. They shall further report to the Director of Personnel any change in the status of a dependant affecting the payment of this allowance."

Circular 1207 added that a staff member who claimed dependency benefit for an employed spouse must report by the end of March the spouse's expected gross occupational earnings for the year and actual earnings in the year before.

The complainant is employed by the Agency at headquarters in Vienna. On 21 March 1988 he applied for dependency status for his wife, declaring that her gross earnings had come to 184,783 schillings in 1987 and were expected to total only 190,000 in 1988. Since the estimate fell short of the maximum allowed in 1988 he was paid his salary and post adjustment at the dependency rate throughout that year.

On 31 March 1989 he filed a similar application for 1989 and revealed under the heading "Gross occupational earnings during previous year" that the figure of his wife's actual earnings in 1988 had been over 280,000 schillings.

In a memorandum of 4 April 1989 the Division of Personnel pointed out to him that since that figure was above the allowable maximum for 1988, which was 240,432 schillings, his wife could not be treated as his dependant in that year and the Agency would be deducting the overpayments from his pay. By a letter of 16 May he applied for review under Rule 12.01.1(D)(1), the Director General upheld the decision in a letter of 31 May and he appealed to the Joint Appeals Committee under 12.01.1(D)(2) on 26 June. In its report of 25 August the Committee recommended rejecting the appeal on the grounds that it did not allege, as Regulation 12.01 required, "the non-observance of the terms of his appointment". By a letter of 14 September 1989, the impugned decision, the Director General informed the complainant that he had accepted that recommendation.

B. The complainant observes that the rate of exchange applied for the purpose of converting into schillings the amount of the New York dollar figure for 1988 - the January 1988 operational rate - was just over 11 schillings to the dollar. Yet because of the fall in the value of the dollar the Agency has set minimum rates of exchange for the conversion into schillings of every other item of pay stated in that currency. In 1988 the minimum rates ran from 14.20 to 17.63 to the dollar. If the Director General had taken even the least favourable of them for the purpose of setting the maximum under Rule 5.03.2(D)(ii) the figure would have come to 297,390 schillings and his wife's earnings - 284,132 - would have been below the maximum. The Director General omitted to take that material factor into account, his decision was mistaken and the complainant's wife should have been treated as his dependant in 1988.

C. The Agency observes that according to Article II, paragraph 5, of its Statute the Tribunal may hear only complaints alleging breach of the terms of appointment of officials and of the Staff Regulations. The complainant cannot bring his complaint within II(5) since the Agency has quite plainly complied with the terms of his appointment and with its Staff Regulations and Rules.

Besides, the complaint is irreceivable under Article VII(1) of the Statute because the complainant has failed to exhaust the internal means of redress. He knew by the end of 1988 that his wife's earnings would exceed the limit and he should therefore have lodged an internal appeal within two months objecting to that limit. That he did not reveal the actual figure until March 1989 is no reason for extending the deadline for appeal.

In any event his complaint is of no merit. He shows no right to the application of a minimum rate of exchange. No such rate applies to base salary, assignment allowance, separation pay or compensation for service-incurred injury or illness. The United Nations system affords no general safeguard against currency fluctuation. The Agency explains how the method of setting the maximum limit nevertheless does protect the staff member's interests whether the dollar is weak or strong against the local currency.

D. The complainant rejoins that the Tribunal does have competence. He is alleging non-observance of the Staff Regulations and Staff Rules in that the Director General failed to take account of shifts in the exchange rate in exercising his discretion under Rule 5.03.2(D)(ii).

His complaint is receivable in that he met the deadlines for internal appeal in Rules 12.01.1(D)(1) and (2). The Director General and the Joint Appeals Committee treated his appeals as receivable, and the Agency has not

objected to receivability before. According to circular 1207 and Rule 5.03.1(F) the staff member does not have to report every change in the spouse's earnings but only changes in dependency status and actual earnings. Whether a change occurred in 1988 in the status of the complainant's wife is the moot issue. He could not appeal until the Agency turned down his claim, and it did not do so until 4 April 1989.

As to the merits, he explains that he is not objecting to the procedure for setting the operational rate of exchange. In setting the limit for 1988 the Director General overlooked the decline in the rate of exchange: he should have exercised his discretion under the material rule by establishing a minimum rate of the kind that applies to other items of pay. What the complainant is seeking from the Tribunal is a ruling, not on what the rate should be, but that it should not be below 14.20 schillings to the dollar, the lowest figure taken for the purpose of converting other items of pay. If that rate had been applied the earnings of the complainant's wife would have been below the maximum limit and she would have kept her status as his dependant in 1988. He explains why the formula used fails to afford the guarantees the Agency says it does.

E. In its surrejoinder the Agency develops its pleas about the Tribunal's competence, receivability and the merits. It maintains in particular that there is no basis in law for granting the complainant's request for application to dependency benefit of the lowest minimum rate of exchange for the purpose of converting to schillings other elements of salary and allowances. The income limit for the spouse of an official in the Professional category is not set in the rules, but is at the Director General's discretion. In setting the limit for 1988 he applied the two-tier formula, recommended by the CCAQ, and there was no cogent reason to set a minimum rate of exchange for the purpose.

CONSIDERATIONS:

1. Salary scales for the Professional and higher categories at the Agency set two rates for each grade and step, one - the "dependency rate" - for staff with a dependent spouse or child and the other - the "single rate" - for staff with no dependant. The schedule of post adjustments likewise sets dependency and single rates for each grade and step.

2. Rule 5.03.2(D) of the Agency's Provisional Staff Rules defines the term "dependent spouse" as:

"... a spouse whose gross occupational earnings do not exceed the lesser of the following:

(i) the gross base salary of the staff member; or

(ii) the amount established by the Director General for the purpose with effect from 1 January of each year."

3. In March 1988 the complainant submitted an application form claiming entitlement to have his wife treated as his dependant for 1988 and estimating her occupational earnings for that year at 190,000 Austrian schillings. Since the figure fell short of the maximum limit set for 1988, the complainant had his salary and post adjustment paid at the dependency rate in 1988. As it happened, his wife's gross occupational earnings in 1988 exceeded the limit, though not until March 1989 did he so inform the Agency, reporting an actual figure 43,700 schillings above the limit. He was therefore informed on 4 April 1989 that his wife was not to be treated as his dependant in 1988. He sought review of that decision by the Director General, who upheld it on 31 May 1989. He appealed on 26 June to the Joint Appeals Committee, but the Committee recommended against entertaining his appeal on the grounds that it did not allege non-observance of the terms of his appointment. The Director General accepted that view and upheld the decision.

Receivability

4. The Agency pleads that the Tribunal is not competent to hear the complaint on the grounds that it does not allege, as Article II(5) of the Tribunal's Statute requires, non-observance in substance or in form of the terms of the complainant's appointment or of the provisions of the Staff Regulations. His answer is that the Director General's decision on the amount of the limit set under Rule 5.03.2(D)(ii) was wrong because it failed to take certain matters into account. That is the case he made out in detail in the Appeals Committee.

5. Since his objections are to a discretionary decision of the Director General's, the Tribunal is competent to entertain them and the Agency's plea fails.

6. The Agency objects to receivability on the grounds that the complainant failed to appeal against the loss of his

wife's status as his dependant within two months of the end of 1988, the latest date by which he knew that her income in that year exceeded the limit, and that by virtue of Rule 5.03.1(F) he was under an obligation to inform the Agency as soon as he knew that figure.

What the complainant is contesting is an administrative decision in a memorandum dated 4 April 1989 to withdraw his wife's dependent status for 1988. Until that decision had been made and notified to him he was not adversely affected by the Director General's decision on the amount of the limit. The time limit for his internal appeal therefore ran from the date at which he had notice of the decision of 4 April 1989. Since he filed his application for review on 16 May 1989 he respected that time limit, he therefore exhausted the internal means of redress, and his complaint is receivable.

The merits

7. The complainant alleges that in establishing the amount referred to in Rule 5.03.2(D)(ii) the Director General failed to take into account exceptional circumstances affecting the relationship of that amount to Professional category salary. He submits that the Director General should have taken the decline in the rate of exchange of the United States dollar into account in setting the limit in schillings on the income of a dependent spouse in 1988 and so exercised his discretion as to maintain the relationship between Professional category salaries and that limit. He should have done so by establishing a "floor" rate of exchange between dollar and schilling such as applies to other elements of salary and allowances. He is not, he explains, seeking the introduction of such a floor rate as a matter of right, but that the Director General should exercise judgment in determining the limit rather than blindly adhere to a rate he regards as unreal.

8. The Agency explains how the Director General reached his decision. The definition of a dependent spouse which the Consultative Committee on Administrative Questions recommended in July 1980 was a spouse -

"... whose occupational earnings do not exceed the lowest entry level of the United Nations General Services gross salary scales applicable to the place of work of the staff member's spouse which were in force on 1 January of the year concerned, provided that, in the case of staff in the Professional category or above, the amount shall not be less than the lowest entry level at the base of the salary system (i.e. G-2 step I in New York)."

Following that recommendation, the Acting Director General decided on 6 January 1981 that the income limit for spouses of staff members in the Professional and higher categories should be determined under Rule 5.03.2(D)(ii) as "the gross salary of the lowest level of the General Service salary scales applicable to the place of work of the staff member's spouse", provided that "in no case shall this amount be less than the gross salary of the lowest level of the General Service salary scales applicable to New York". He further decided that the "date of reference" would be 1 January each year.

The scales of salary for staff in the General Service category in Vienna are set and stated in schillings. The "lowest entry level" of General Service gross salary scales applicable to Vienna is step 1 of grade G.3, as against step 1 of grade G.2 in New York. In order to determine which gives the lower figure the amount in dollars has to be converted into schillings, and the conversion is made by applying the United Nations "operational exchange rate" that comes into effect at 1 January. The rate is determined each month by means of consultation.

According to the operational exchange rate of 11.10 schillings to the dollar the gross salary corresponding to G.2, step 1, in New York came to 232,467 schillings in 1988; the gross salary corresponding to G.3, step 1, in Vienna was 240,432 schillings in the same year. By a decision of 22 February 1988 the Director General accordingly set the maximum limit for 1988 at the latter figure 240,432 schillings.

9. The Tribunal has limited power to review a discretionary decision by the Director General, one of the admissible grounds being the disregard of essential facts. Although the complainant does present his complaint as being based on failure by the Director General to take relevant facts into consideration, that is not so: his real case is that the Director General ought to have made a different decision on the strength of different considerations, by making a different calculation and by applying a different rate of exchange.

10. The Director General has discretion to decide on the income limit in accordance with Rule 5.03.2(D)(ii) and in doing so has followed the practice established since 1981. He is not obliged to apply "floor" rates of exchange, even though they may be applied to other elements of salary and allowances, and he is empowered, in the exercise

of his judgment, to make the calculation in the same way as in former years. There are therefore no grounds for setting the decision aside.

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