SEVENTY-SECOND SESSION

In re BANOTA, BANSAL, HARPALANI, KUMAR, MADAN (Nos. 1 and 2), MARWAH, SAGAR and SETH

Judgment 1160

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr. Kanwal Dev Banota, Mr. Surindar Nath Kumar and Mr. Yoginder Kumar Seth against the World Health Organization (WHO) on or about 24 September 1990 and corrected on 3 December 1990;

Considering that, Mr. Seth having died on 20 October 1990, his widow, Mrs. Satya Seth, informed the Registrar of the Tribunal by a letter dated 29 November that she wished to pursue his complaint;

Considering Mrs. N.G. Menon's application to intervene in the complaint filed by Mr. Banota, Mr. Kumar and Mr. Seth;

Considering the WHO's reply of 8 February 1991 to the complaint and to Mrs. Menon's application, the complainants' rejoinder of 3 May and the Organization's surrejoinder of 25 June 1991;

Considering the further applications to intervene filed by Mr. V.V. Bhotlu, Mr. Mahesh C. Gupta, Mr. Nirmal K. Jagasia, Mr. Jagdish C. Juneja, Mr. Jagdish Lal, Mr. R. Sampathkumaran and Mr. P.S. Thakur and the WHO's observations thereon of 26 April, 20 May and 13 August 1991;

Considering the common complaint filed by Mr. Prem Kumar Bansal, Mr. Mohan Amulrai Harpalani and Mr. Dharam Pal Marwah against the WHO on 11 September 1990 and corrected on 12 October, the Organization's reply of 31 January 1991, the complainants' rejoinder of 10 April and the Organization's surrejoinder of 25 June 1991;

Considering the applications of Mr. Satya Paul Chowdhary and Mr. Ramesh Kumar Malhotra to intervene in the complaint filed by Mr. Bansal, Mr. Harpalani and Mr. Marwah;

Considering the complaint filed by Mr. Rambhaj Madan against the WHO on 7 September 1990, the Organization's reply of 31 January 1991, the complainant's rejoinder of 10 April and the Organization's surrejoinder of 17 June 1991;

Considering the second complaint filed by Mr. Madan against the WHO on 3 December 1990, the Organization's reply of 30 January 1991, the complainant's rejoinder of 10 April and the Organization's surrejoinder of 17 June 1991;

Considering Mr. Ashok Mitra's application to intervene in Mr. Madan's two complaints;

Considering the complaint filed by Mr. Vidya Sagar against the WHO on 10 December 1990 and the Organization's reply of 6 February 1991;

Considering Articles II, paragraphs 5 and 6(a), and VII, paragraph 1, of the Statute of the Tribunal, Article 17 of the Rules of Court, WHO Staff Regulation 3.2, WHO Staff Rules 1230.1, 1230.8 and 1310.3 and WHO Manual paragraph II.1.40;

Having examined the written evidence and decided not to order oral proceedings, 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. WHO Staff Regulation 3.2 reads:

"... The salary and allowance plan shall be determined by the Director-General following basically the scales of salaries and allowances of the United Nations, provided that for staff occupying positions subject to local recruitment the Director-General may establish salaries and allowances in accordance with best prevailing local practices ..."

Rule 1310.3 is similarly worded.

The salary scales that apply to staff in the General Service category, who are locally recruited, are reviewed every few years on the strength of comprehensive surveys of local practice. Interim adjustments are made in between on the strength of "mini-surveys". The International Civil Service Commission approved as from 1 January 1985 a new "general methodology" for making the surveys and the Consultative Committee of the United Nations on Administrative Questions (CCAQ) has published a Manual on how to apply it. Paragraph A.2.2 of the Manual says that at each duty station a body known as the Local Salary Survey Committee should make the arrangements and that if none yet exists the "designated agency" for the duty station should establish one. The WHO is the "designated agency" for New Delhi.

A comprehensive survey of salaries in New Delhi was carried out in 1983, and there was an interim adjustment to the salary scales of General Service category staff there as from October 1985. In August 1985 the WHO headquarters told its Regional Office for South East Asia (SEARO) that another comprehensive survey would be due by early 1986. Convened in November 1985, the Local Committee carried out the survey with the help of a salary survey specialist who went out from headquarters. It recommended applying as from 1 January 1986 new scales to General Service staff serving any of the United Nations organisations in New Delhi.

The Organization having approved the scales as from 1 January 1986, a personnel officer so informed the General Service staff of SEARO by a memorandum of 8 October 1986. It is known as revision 27. Salaries held good for grades ND.1 to ND.3 and ND.5 to ND.8 but were raised for ND.4. For ND.1 to ND.4 the number of steps was increased from 15 to 19. For grades ND.5 to 8 and ND.X there was to be "negative indexation" - a form of "freeze" on future increases - ranging from 2 to 16 per cent. A spouse allowance was introduced and the child allowance put up.

Many New Delhi staff resented features of the 1986 scales.

In December 1986 headquarters asked for interim adjustment of the scales as from 1 January 1987. The Local Committee made a mini-survey and submitted a report, which SEARO sent to headquarters on 28 August 1987. The Organization having approved the Committee's recommendations, increases in salary as from 1 January 1987 were announced to the General Service staff of SEARO by a memorandum dated 27 November 1987. They make up revision 28. Salaries went up by 10.6 per cent for grades ND.1 to ND.4, by 8.9 for ND.5, by 5.1 for ND.6, by 3 for ND.7 and ND.8 and by a lump sum for step 1 in ND.X. The indexing was dropped for ND.5 and ND.6.

Yet staff discontent did not abate. Mr. Sagar, who retired on 1 February 1989, and Mrs. Seth's late husband were and the other complainants are in the General Service category of SEARO's staff. On 26 February 1988 42 such staff, including Mr. Banota, Mr. Bansal, Mr. Harpalani, Mr. Kumar, Mr. Madan, Mr. Marwah, Mr. Sagar and Mr. Seth, lodged appeals with the Regional Board of Appeal against the 1987 scales. On 31 March 1988 34 staff members, including Mr. Bansal, Mr. Harpalani, Mr. Kumar, Mr. Madan, Mr. Marwah, Mr. Sagar and Mr. Seth, appealed to the Regional Board against the 1986 scales.

The appeals against the 1986 scales sought, among other things, the quashing of the "comprehensive salary survey of 1 January 1986 in all its aspects as well as the illegal interim adjustment of 1 January 1987", one 20 per cent increase in salaries as from 1 October 1986 and another as from 1 October 1987 pending a new survey, lump-sum damages for moral injury and costs.

The appeals against the 1987 scales claimed the quashing of "the results of the illegal interim adjustment (mini-survey) of 1 January 1987 as well as those of comprehensive survey of 1 January 1986" and the making of a new comprehensive survey, an "across-the-board enhancement of pay at the rate of 20 per cent ... from 1 January 1987 and 1 January 1986 subject to adjustment", the grant of the spouse allowance at "the same level as admissible to staff of the professional category" and costs.

The Regional Board signed two reports on 12 May 1989: one on the appeals against the 1986 scales and the other on the appeals against the 1987 ones. In the former it recommended leaving the 1986 scales as they were but doing away with the "negative indexation" and granting grades ND.5 to ND.8 and ND.X in 1987 and 1988 "increases based on the results of the interim adjustments and as given to other grades". In its report on the 1987 scales the Board confirmed its recommendations.

By a memorandum of 24 May 1989 SEARO announced ex gratia lump-sum payments to staff in grades ND.5 and above as a "gesture of goodwill intended to improve their morale and foster good staff-management relations".

The Regional Director having rejected the Regional Board's recommendations on 30 May 1989, Mr. Seth and the other complainants appealed against his decision on 29 August to the headquarters Board of Appeal.

In its report of 18 April 1990 the headquarters Board held that the WHO had failed to follow the methodology properly, that the two revisions had an "obscure" rationale, increased the risk of "anomalies ... between level of pay and grade and length of service" and had aroused staff discontent, which the lack of explanation had aggravated, and that there was no telling whether they reflected the best local practice or had caused the complainants financial injury. The Board recommended, among other things, carrying out a new comprehensive survey as soon as possible and awarding reasonable amounts in costs.

By a letter of 31 May 1990 the Director-General informed the complainants that he endorsed the headquarters Board's recommendations. There followed correspondence about the new survey. The Director-General concluded it with a letter of 23 August 1990 which he described as his final decision and which is the one under challenge.

Mr. Madan in his first complaint impugns the letter of 31 May whereas Mr. Madan in his second complaint and all the other complainants impugn the letter of 23 August 1990.

A mini-survey led to further interim adjustments in 1988.

B. The complainants observe that the WHO's Staff Association for South East Asia set up its own group of experts and in a report of December 1986 the group concluded that several features of the 1986 survey had been improper. In February 1987, too, the Federation of Civil Servants' Associations (FICSA) appointed a consultant to review the results of the survey, and in a report of November 1987 he too found breach of the methodology.

The complainants submit that the 1986 and 1987 scales were not properly determined in the light of the best practice in New Delhi.

(1) Staff in all grades of the General Service category were granted percentage increases in salary as from 1 October 1985. Since there ensued no decline in salaries on the local employment market the detrimental features of the 1986 scales were unwarranted: either the 1985 survey or the 1986 one was wrongly done or the requirements of the methodology and the Manual were disregarded. There was therefore breach of Regulation 3.2 and Rule 1310.3, and such breach is actionable under Rule 1230.1.3.

(2) There was further breach of the rules in that the negative indexing was unlawful. Neither the methodology nor the Manual provided for it, and it unduly reduced grade differentials, which paragraph D.1.4(a) of the Manual says should be between 15 and 35 per cent. Mr. Bansal, Mr. Harpalani and Mr. Marwah regard as demoralising and distressing the fact that colleagues with comparable or shorter service and lesser responsibility draw more pay and see that as breach of Regulation 3.2 and WHO Manual paragraph II.1.40.

(3) The headquarters Board was mistaken in saying that the financial injury to the complainants was uncertain. Because of the indexing they stood to lose what they would be entitled to in future. Not only does that constitute breach of their acquired rights, but there was "incomplete consideration of the facts" within the meaning of 1230.1.2.

(4) There were many other flaws in the 1986 and 1987 scales, some of them identified by the expert group and the FICSA consultant and many acknowledged by the Boards of Appeal.

Thus the decision in late 1985 to carry out a comprehensive survey was ill-timed and the methodology and the Manual were disregarded on many important counts. The survey was hurried through because of a misconception at headquarters that it was needed three years after the one done in 1983. The Manual says that the need for a survey

is to be determined after "monitoring" of trends in local pay. There was no such monitoring. A new Local Committee ought to have been set up. The members of the Local Committee were not given proper training and were unfamiliar with the methodology and the Manual. The survey specialist himself analysed the collected data. The data were not properly recorded and checked. He wrongly excluded the job descriptions of programme assistants. The salary scales ought to have been constructed by a group appointed by the Local Committee for the purpose. The spouse allowance ought to have been incorporated in base salary. As the headquarters Board held, the failure to abide by the methodology was "compounded" by an unconscientious attitude on the part of the staff representatives on the Local Committee.

(5) The impugned decision draws mistaken conclusions from the facts. Though the Director-General endorses the headquarters Board's recommendation of a new comprehensive survey, he says that since one was carried out and the results of it were approved as from 1 June 1989 he has already complied. A survey made in 1989 cannot comply with a recommendation made in April 1990: what the Board meant was another survey of salaries as they ought to have been in 1986. The Director-General also says that the recommendation "could only relate to the future": how could the 1989 survey do so when the results of it had already been put into effect?

(6) The 1986 and 1987 scales are tainted with "personal prejudice" within the meaning of Rule 1230.1.1. The Chief of Personnel and the survey specialist, who had both served in SEARO, picked New Delhi for trying out the methodology because they believed the General Service staff there to be "soft" and uncomplaining. The specialist took too much upon himself, acting on his own and without bringing in the staff representatives on the Local Committee. Out of bias against the New Delhi staff the two of them "manipulated the whole exercise to arrive at a pre-conceived negative decision". Evidence of that is the oddly large increases in salaries under the 1989 scales following a survey they played no part in.

(7) There was misapplication of post classification standards within the meaning of 1230.1.4. As the Regional Board observed, one possible explanation of the disparity between the October 1985 scales and the 1986 ones was that "the benchmark job descriptions" used for the purpose of comparison with local jobs in the 1986 survey were wrong and "led to underestimating the different categories of posts in different grades vis-à-vis outside employers".

Mr. Madan, whose post is, and Mr. Sagar, whose post was, at the General Service extended level (ND.X), submit that such posts should be linked to the "National Officer" (NO) level in keeping with the practice of other international organisations in New Delhi. ND.X staff have all the disadvantages, but none of the advantages of General Service employees: they must do Professional category work but may not claim pay for overtime.

(8) Since the 1986 survey was flawed so were the 1987 one, its corollary, and the one carried out in 1988.

Mr. Banota, Mr. Kumar and Mr. Seth each ask the Tribunal "To quash the outcome of the comprehensive GS Salary Survey as of 1 January 1986 and the subsequent mini-surveys (interim adjustment) exercises of 1987 and 1988 and order a fresh Survey with a reference date of 1986 strictly in accordance with the ICSC Methodology/CCAQ Manual, which should then form the basis for subsequent mini-surveys"; failing that, to award 10,000 United States dollars in lump-sum compensation for "the financial losses suffered as a result of unlawful conduct of the Surveys and the unlawful structuring of salary scales"; to award $10,000 "as compensation to the complainant for suffering financial hardships/losses during the period January 1986 to May 1989"; and to award $5,000 in costs.

Mr. Bansal, Mr. Harpalani and Mr. Marwah each ask the Tribunal "to quash the conduct/outcome of the Comprehensive GS Salary survey as of 1.1.1986 and the subsequent mini-surveys conducted with 1986 outcome as the basis; and order a fresh survey with a reference date of 1986 strictly in accordance with the ICSC Methodology/Manual, which should then form the basis for subsequent mini-surveys"; failing that, to award 10,000 United States dollars in lump-sum compensation for "the financial losses suffered as a result of the unlawful conduct of the surveys, in particular the unlawful introduction of negative indexation, including the unlawful structuring of salary scales"; to award $10,000 "as compensation for the financial hardship faced by the complainant and his family during the years 1986 until May 1989, the humiliation and distress caused to the complainant for receiving less salary than his juniors ... bias and prejudice of the responsible WHO officials, infringement of acquired rights, etc."; to order "the refixation of complainant's salary through grant of extra within-grade increases to correct the disadvantageous situation retrospectively"; and to award $2,000 in costs.

Mr. Madan and Mr. Sagar each seek the quashing of the decisions to apply the salary survey of 1986 and the mini-survey of 1987. Each also wants the Tribunal to order a fresh survey from "an appropriate date, e.g. October 1986"; to award him, "pending the results of fresh survey/mini-surveys, an across-the-board enhancement of pay" from 1 January 1986 which Mr. Sagar sets at no less than 30 per cent but which Mr. Madan, though giving the same figure, leaves to the Tribunal's discretion; to "review the 'inequities' against the senior GS and EGS (ND.X) levels in WHO vis-à-vis their comparable NO [National Officer]-levels in other UN system agencies and direct the Administration to follow the same 'common grading standards and salary levels'" and to "provide relief to the complainant with retrospective effect vis-à-vis comparable NO-levels"; to "order the WHO Administration that the 'acquired rights' of the complainant to salary/allowances, monthly incremental amounts and pension benefits be maintained without any detrimental effect"; to award him 10,000 United States dollars as compensation for suffering "caused by steeply rising cost of living and the undue delays in handling the appeals"; and to award $5,000 in costs. Mr. Madan asks the Tribunal to "adjudge upon the failure" of the Boards of Appeal "to deal with all issues raised in complainant's Statements of Appeal and to issue appropriate directions to the WHO Administration in the interest of justice" and to "fix responsibility of staff officers ... and to make them pay for their wilful actions of omission and commission ...". Mr. Madan and Mr. Sagar further claim such other relief as the Tribunal thinks fit.

C. In its replies the WHO submits that insofar as they are challenging the 1986 scales the complaints are irreceivable because the complainants failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires. The internal appeals to the Regional Board of Appeal against those scales were not filed until 31 March 1988, outside the time limit of sixty days set in Rule 1230.8.3. Since the personnel officer's memorandum announcing the new scales was notified to the staff of SEARO on 8 October 1986 the time limit for appeal ran out sixty days later. Both the Regional and the headquarters Boards overlooked the failure to meet it.

To get round the difficulty the complainants purported in their appeals to the Regional Board to be challenging a letter which the Director of the Support Programme in SEARO wrote on 7 January 1988 to the President of the Federation of the Staff Associations of the United Nations and its Specialized Agencies in New Delhi (FUNSA). But that letter, which merely refused "further action in regard to this [1986] survey", affords no cause of action.

The challenge to the 1987 scales is, though receivable, devoid of merit. So, even supposing it is receivable, is the appeal against the 1986 scales.

(1) The methodology and the Manual are not binding in law but intended merely to offer guidance. Non-compliance, even supposing there had been any, would not be actionable.

(2) The last comprehensive survey having been made in 1983, there was agreement between headquarters and SEARO to make another one at the end of 1985 or early in 1986. Since the Manual had been approved for use as from 1 July 1985 the new survey was timely. The timing was in line with WHO practice and with the Manual, which in the introduction says surveys are to be held every three to five years. Moreover, monitoring of trends in local pay is not a prerequisite for a comprehensive survey, but a part of the preparations for one already under way.

(3) There was no need to set up a new Local Committee since there was one already in existence. The members of the Committee needed no training since they had taken part in earlier surveys. Besides, the survey specialist from headquarters gave them guidance beforehand and throughout and in particular explained the methodology to them. They were fully involved at every stage. The part the specialist played was well within the terms of reference.

(4) The CCAQ has acknowledged the lawfulness of negative indexation, which is calculated to keep salary scales in line with trends in local pay. The adoption of the 1986 scales was not the first time it was applied in the United Nations system.

It had been applied to General Service staff at WHO headquarters in 1977, to General Service staff in SEARO in 1983, and to Professional category staff throughout the United Nations system in 1985, when a survey showed post adjustment allowances to be too high. It is not the sort of measure to be prescribed in rules anyway but has become custom and usage. The complainants fail to show how it is in breach of their acquired rights or of the Regulations and Rules. It affected grade differentials because it applied only to senior General Service grades. As the headquarters Board realised, there are bound to be discrepancies where grades overlap because the many factors that govern pay differ from one official to another. Since such overlapping of pay is irrelevant to the staff members' functions and responsibilities there was no breach of post classification standards.

(5) The charge of personal prejudice is unsound. There was no question of the WHO's victimising the complainants. On the contrary it treated them well. In 1989 alone their pay rose 61 per cent above the October 1985 figures and the indexing caused them no financial injury.

The Organization rejects Mr. Madan's and Mr. Sagar's charges of unfair treatment of ND.X staff. The Administration has no reason to link the rates of pay of its General Service staff to those that apply to "national officers" in other agencies. Nor is payment of overtime an acquired right; the entitlement of ND.X staff to such payment is a matter of policy at the discretion of the Regional Director.

(6) The Organization discusses the other objections which the complainants raise as to the checking and analysis of the collected data, the job descriptions of programme assistants, the construction of the salary scales and the incorporation of the spouse allowance. It submits that they are of minor importance and in any event are, if not absurd, unfounded.

In conclusion the WHO submits that the surveys were in line with all relevant requirements in the methodology and the Manual. There was full consultation on the comprehensive survey. Though the staff representatives on the Local Committee declined to take part in the mini-survey, that was their own choice: they had every opportunity to do so. The Regional Board held that the scales recommended to headquarters had "properly been arrived at" and recommended upholding them without change; the FICSA consultant, though he found procedural flaws, concluded that they did not "warrant any changes in the results of this survey since they would not affect the results"; and the headquarters Board dismissed as "inconclusive" the evidence the complainants adduced in support of their charges of incomplete consideration of the facts and breach of the rules.

D. In their rejoinders the complainants submit that the WHO's objections to receivability are unsound. The Regional and headquarters Boards of Appeal rightly declared the internal appeals receivable. After the scales had been announced there were consultations and negotiations between the Organization and FUNSA to try to settle the dispute. The FICSA consultant was appointed to look into the matter, and by a letter of 6 January 1988 the President of FUNSA passed on his report to the Regional Director asking him to "take appropriate action to remedy the situation created by the anomalous conduct" of the 1986 survey. That was the request which the Director of the Support Programme in SEARO rejected in his letter of 7 January and, as the President of FUNSA informed the chairmen of staff associations of United Nations organisations in New Delhi, that letter constituted the final decision and was challengeable as such. Being directed against that decision, the internal appeals were in time.

As to the merits the complainants develop their earlier pleas, and seek to refute the defendant's, on the many issues raised in the complaint in support of their view that the Organization failed to abide by the methodology, the Manual and its own rules and practices. They enlarge in particular on their submissions that the 1986 survey was uncalled for and not properly prepared. The staff were never asked to review the agreement between headquarters and SEARO that a survey was due.

No monitoring of local pay was done beforehand. Another Local Committee ought to have been formed because the membership of the existing one did not represent all agencies in New Delhi; only a fortnight, instead of the six to twelve months prescribed in the Manual, was allowed for the preparatory work. The Committee's members were ill-informed and ill-trained. The survey specialist from headquarters played too dominant a part.

The data were not properly recorded and checked. It is wrong to say that it is immaterial whether negative indexing is provided for in the methodology and the Manual because those texts are not binding: if that were so the surveys would have no basis in law. It is also untrue that the purpose was to keep salaries in line with local pay: the true aim was to achieve predetermined results and deny the staff the advantage of counting all benefits paid by local employers. The indexing did offend against acquired rights because when an organisation has reckoned salaries and announced them the staff acquire a right to them which it may not impair. It was wrong to exclude spouse allowance in reckoning basic salary.

The complainants enlarge on their allegations of personal prejudice and of breach of grading standards and press their claims for redress.

E. In its surrejoinders the Organization submits that the complainants' rejoinders raise no new issue of fact or of law but largely dwell on irrelevant or gratuitous allegations it has already addressed in its replies.

As to receivability it denies that there were consultations and negotiations about the outcome of the survey. What was there left to negotiate when a decision had been announced on 8 October 1986 with effect from 1 January 1986? True, in a letter of 24 April 1987 FICSA did ask the WHO's Director of Personnel to let its consultant see material relating to the survey, and he agreed; but that did not mean that the decision was under review, else it would have been suspended. So the Regional Director's reply of 7 January 1988 to the President of FUNSA's letter of 6 January forwarding the consultant's report cannot be represented as a final decision. The material date for reckoning the time limit for internal appeal was 8 October 1986.

As to the merits the Organization develops its contention that there was proper staff involvement in the survey and no breach of the methodology, the Manual or its own rules. If the survey was untimely, why did the staff not object at the outset and why did they brand it as "uncalled for" only when the results of it were known? SEARO was under no duty to ask the staff to "review" its agreement with headquarters that a survey was due: to say that it was is absurd. The existing Local Committee was representative of the staff of all the UN organisations in New Delhi. The complainants' objections to the exclusion of spouse allowance from the reckoning of basic salary are unsound in law. There was no breach of their acquired rights as such rights are defined in the case law. It is illogical to argue that, just because the methodology and the Manual do not speak of negative indexing, the Organization may not draw guidance from those texts. In any event the complainants suffered no financial injury on account of the surveys.1160

CONSIDERATIONS:

Joinder

1. The complaints to which this judgment relates raise the same issues of fact and of law and, although the claims vary slightly from one complaint to another, are all based on the same cause of action. The Tribunal therefore joins them for the purpose of delivering a single judgment.

Receivability

2. The WHO's Regional Office for South East Asia (SEARO) began in November 1985 carrying out on the Organization's behalf a salary survey applicable to General Service staff in New Delhi. It completed the survey in June 1986, and the decision to give effect to the findings was communicated to the General Service staff on 8 October 1986. Not until 31 March 1988 did the complainants lodge internal appeals against that decision. A decision by the Director-General to make an interim adjustment in 1987 was notified by the Personnel Department to the General Service staff in New Delhi on 27 November 1987, and the complainants lodged further appeals against that decision on 26 February 1988.

3. According to WHO Staff Rule 1230.8.3 a staff member who wishes to appeal against a final decision must do so within sixty calendar days after receiving notification of the decision. If the decision notified to the complainants on 8 October 1986 was a final one, their internal appeals of 31 March 1988 were out of time. But they argue that time did not begin to run until they received the text of a letter which the Director of the Support Programme of SEARO wrote on 7 January 1988 to the President of the Federation of the Staff Associations of the United Nations and its Specialized Agencies in New Delhi (FUNSA).

4. The letter was written in the following circumstances. The General Secretary of the Federation of International Civil Servants' Associations (FICSA) wrote to the Director of Personnel and General Services at Geneva on 24 April 1987 asking WHO to make documents available to a consultant whom FICSA's executive committee had appointed to review the findings of the General Service salary survey in New Delhi. The Organization did so and the consultant's report was available by 27 November 1987 for circulation to the Federation's members. The President of FUNSA sent the Regional Director a copy on 6 January 1988. In a letter dated 7 January the Director of the Support Programme, answering on the Regional Director's behalf, said that SEARO had given effect to the results of the salary survey of 1986 and found no basis for further action in regard to the survey.

5. The letter of 7 January 1988 may not be treated as the final decision. The Organization's consent to showing documents to the consultant did not imply agreement to review its decision on receipt of his report. The decision notified on 8 October 1986 was the final one, and the internal appeals against that decision were time-barred and irreceivable. Insofar as the complaints challenge the outcome of the 1986 survey they too are irreceivable under Article VII(1) of the Tribunal's Statute because, not having followed properly the internal appeal procedure, the

complainants have failed to exhaust the internal means of redress.

6. Since the internal appeals against the decision to put into effect the findings of the salary survey of 1987 were in time they were receivable, and so too are the complaints insofar as they impugn that decision.

The merits

7. The Director-General's letter of 23 August 1990 is clarification of the decision in his letter of 31 May 1990, and the Tribunal holds that the decision under challenge consists of the two letters taken together.

Mr. Madan has filed two complaints, one impugning the letter of 31 May and the other the one of 23 August 1990. Since they do not show separate causes of action the Tribunal will take them together and treat them as constituting a single complaint.

8. The complainants' internal appeals were directed against the outcome of the 1986 and 1987 surveys. In its report dated 18 April 1990 the headquarters Board of Appeal summed up as follows its conclusions on the appeals:

"- The Administration failed to follow scrupulously the prescribed methodology when undertaking the 1986 and 1987 salary surveys, a failure that was compounded by the lack of a conscientious attitude on the part of the staff representatives in the LSSC.

- The rationale underlying the construction of salary revisions 27 [1986] and 28 [1987] remains obscure, and their effect was to increase the possibility, already marked in the SEARO general service scales, of anomalies occurring as regards the relationship between level of pay and grade and length of service.

- The outcome of the surveys, coupled with the staff's awareness of some irregularities in the survey procedure and the knowledge of the anomalies produced by the new salary scales, caused disappointment and resentment among the staff.

- The staff's resentment was intensified and prolonged by the Administration's failure to provide explanations and clarifications concerning the new pay scales.

- It is not now possible to determine with any certainty whether the outcome of the 1986 and 1987 salary surveys reflected the best prevailing local practices, or whether the Appellants suffered any financial disadvantage as a result of the implementation of salary revisions 27 and 28."

The Board made the following recommendations to the Director-General:

"1. The LSSC should be reconstituted with new members.

2. Each new member should be given a complete set of the documentation (LSS Manual) relating to the regulations, procedures and methodology for salary surveys and their responsibilities and should receive training in how to undertake the surveys.

3. A new comprehensive salary survey should be carried out as soon as possible in respect of the SEARO general service staff, with the full participation of the newly formed LSSC in accordance with the prescribed methodology.

4. The staff should be kept fully informed in writing of the rationale for any new salary scales promulgated as a result of the survey.

5. The above consideration should apply also to any new members appointed to the LSSC at a later date; and to any subsequent salary surveys and salary scale revisions.

6. On production of written proof, the Appellants should be granted reasonable legal costs in respect of their appeal to the Headquarters Board of Appeal.

7. No other relief should be granted to the Appellants."

9. In his letter of 31 May 1990 the Director-General set out the Board's recommendations in full. Though he said

that he was not convinced that any failure to follow the prescribed methodology affected the validity of the surveys, he stated that he accepted the recommendations. He went on: "As a new comprehensive salary survey was successfully completed and the results implemented effective 1 June 1989, the intent and spirit of recommendations 1 to 4 have already been fully met".

10. In his letter of 23 August 1990 the Director-General said by way of explanation:

"You will note several references in the report of the Headquarters Board of Appeal which indicate its view that no reliable survey for 1986 and 1987 was possible. The Board in its final conclusion said: 'It is not now possible to determine with any certainty whether the outcome of the 1986 and 1987 salary surveys reflected the best prevailing local practices, or whether the Appellants suffered any financial disadvantage as a result of the implementation of salary revisions 27 and 28'.

I therefore understood that the new survey that the Board was recommending could only relate to the future. It was on the basis of this understanding that I accepted the recommendation of the Board and took my decision."

11. In support of its contention that there was nothing wrong with the 1987 survey the Organization submits that the methodology was not binding in law. It cites Judgment 830 (in re Kossovsky and Shafner-Cherney) as authority for that and in particular the passage that described the Post Adjustment Manual of the International Civil Service Commission (ICSC) as "a purely informative text that is not binding in law".

That judgment has no application to this case. The Commission approved as from 1 January 1985 the new methodology for carrying out surveys of best-prevailing conditions with regard to General Service category staff at duty stations in the field. On 16 August 1985 the WHO informed SEARO that a full-scale salary survey would be due late in 1985 or early in 1986, that it would be carried out in accordance with the Commission's new methodology for surveys at field duty stations and that the methodology would be set out in the relevant Manual published by the Consultative Committee of the United Nations on Administrative Questions (CCAQ). Although the methodology was not binding on the Organization merely by virtue of the Commission's approval of it, the Organization's decision to apply it is one that it is not free afterwards to disclaim.

12. The Director-General having accepted the recommendations by the headquarters Board, the submissions by the parties as to whether the survey was properly carried out or not are immaterial. It is inconsistent for the Organization to argue before the Tribunal that there was nothing wrong with the surveys when the methodology was not strictly followed. So the Tribunal will proceed on the assumption that the 1987 survey was not properly carried out.

13. One of the recommendations by the Board that the Director-General endorsed in the impugned decision was that a survey should be carried out as soon as possible; but the Director-General said that he took the view that effect had been given to that recommendation by the survey of which the findings were already operative. That interpretation of the Board's recommendation is mistaken. What the Board meant may be seen from the terms of the internal appeals before it. The relief sought in those appeals was the quashing of the results of the two surveys and the carrying out of a survey in line with the methodology. The only meaning that that can bear is that there should be a new survey and that the findings were to replace those of the surveys that had already been carried out. Reporting on 18 April 1990, the Board accordingly recommended holding a new survey as soon as possible. Had the Board intended that the survey of which the findings had already been operative for nearly a year should suffice it would surely have said so.

14. In his further letter of 23 August 1990 the Director-General explained that it was on the understanding that the new survey recommended by the Board could relate only to the future that he had accepted its recommendation and taken his decision of 31 May. He referred to "several references" in its report to the effect that no reliable survey was possible for 1986 and 1987 and he quoted its final conclusion that it was not now possible to determine with any certainty whether the 1986 and 1987 surveys reflected the best-prevailing local practices or whether any financial disadvantage resulted.

15. Apart from the final conclusion quoted by the Director-General, there are no references in the Board's report as to whether a reliable survey for the material period would be possible. Nor is it clear on what basis the Board reached its final conclusion, or why it would have been impossible to carry out an inquiry into what had been the best-prevailing local conditions in 1987. If such conditions were ascertained it would be possible to calculate the

financial disadvantages, if any, to the complainants by comparison with the 1987 salary scale.

16. To sum up, there are two flaws in the impugned decision. One is that the Director-General drew an unwarranted conclusion from the facts in taking the view that the 1989 survey satisfied the headquarters Board's recommendation. The other flaw is that he based the decision on supposed references which do not in fact appear in the Board's report and on a conclusion by the Board which is not based on any facts or evidence. The decision must therefore be set aside.

17. One of the claims made by Mr. Banota, Mr. Kumar and Mr. Seth in their common complaint, and by Mr. Bansal, Mr. Harpalani and Mr. Marwah in theirs, is that as an alternative to the quashing of the salary scales they should be paid lump-sum compensation if a new survey is administratively impossible. Since the Tribunal is not satisfied that a new survey is administratively impossible that claim fails. Because the survey was not carried out in accordance with the approved methodology the case must be sent back to the Director-General for a new decision relating only to the period during which the results of the 1987 survey were put into effect.

18. The claim relating to the results of the 1988 survey is irreceivable because the impugned decision concerns only the 1986 and 1987 surveys.

19. The Tribunal makes no award of damages for financial loss whether in the form of a lump sum or by interim "enhancement of pay". Those are issues that will be dealt with in the decision the Director-General is to take in execution of this judgment.

20. All other claims are dismissed. In particular the additional relief sought by Mr. Madan and Mr. Sagar in the form of review of "inequities ... vis-à-vis" other United Nations agencies in New Delhi and maintenance of acquired rights does not arise directly from the impugned decision. Mr. Madan's further claims to a ruling on the Organization's alleged failure to deal with the issues in his statements of appeal and to "directions" to the Administration "in the interest of justice" do not constitute proper forms of relief and therefore will not be entertained.

The applications to intervene

21. The applications to intervene, which are receivable under Article 17 of the Rules of Court, are allowed: the interveners shall have the same rights as the complainants themselves insofar as they are in like case in law.

DECISION:

For the above reasons,

1. The decisions of 31 May 1990 and 23 August 1990 are quashed insofar as they apply to the complainants the findings of the 1987 survey.

2. The case is sent back to the Director-General and he shall take a new decision in the light of this judgment.

3. The complainants are each awarded 250 United States dollars in costs.

4. All the complainants' other claims are dismissed.

5. The interveners shall have the same rights as the complainants insofar as they are in like case in law.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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