

SEVENTY-THIRD SESSION

***In re* ANDREWS, BARTELS,
DONDENNE and MACHADO**

Judgment 1196

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Patrick Julian Andrews, Mr. Busso Bartels, Mr. Bernard Dondenne and Mr. Bruno Machado against the World Intellectual Property Organization (WIPO) on 6 June 1990;

Considering the interlocutory order in Judgment 1087 of 29 January 1991;

Considering the Organization's submissions of 5 April 1991 in answer to the questions the Tribunal put to it in that judgment and the letter of 26 April from Mr. Bartels and the one of 11 June 1991 from Mr. Andrews to the Registrar stating that they did not wish to comment;

Having examined the written evidence;

A. The complainants' dispute with WIPO is recounted in Judgment 1087.

B. The Organization submits detailed replies to the questions put in that judgment under 8 on (1) how the "differential" prescribed in former Regulation 3.1 bis worked in practice and was financed; (2) how the transitional rules brought in by the decision of 3 October 1988 work in practice; (3) how pay is to be reckoned after the transitional rules lapse; and (4) the complainants' arguments as summed up in that judgment under 5.

CONSIDERATIONS:

1. The background to this case is set out in detail in Judgment 1087. The complainants object to the World Intellectual Property Organization's repealing a provision of the Staff Regulations. That provision, Regulation 3.1 bis, used to grant them a "take-home pay differential" to offset any fall in the value of the United States dollar, the currency in which salary is stated, against the Swiss franc, the currency of the host country.

2. Judgment 1087 observed that as the defendant's representative the Director General had offered no more than a perfunctory reply, the gist of it being that he backed the complainants' objections to the action taken by WIPO's Coordination Committee, the body empowered to amend its Staff Regulations. The judgment therefore put questions so as to elicit explanation of the rules at issue and invited the complainants too to comment.

3. The Organization appends to its reply a memorandum of 24 August 1987 from the Chairman of the International Civil Service Commission which the Coordination Committee had had before it when debating repeal of 3.1 bis. Appended in turn to the memorandum are comments which the Director General put to the Committee in an attempt to counter the Chairman's point of view.

4. The complainants having declined to rejoin, a ruling has to be made on the strength of WIPO's reply, which fully maintains the Director General's earlier stand.

5. The memorandum from the Chairman of the Commission does, however, report facts and bring out issues which, though they are of decisive moment, the defendant passed over before. The material points are set out below.

6. The Chairman's memorandum first observed that the competent international bodies of the so-called United Nations "common system" had acknowledged the undesirable consequences of variation in the dollar exchange rate for international civil servants employed in countries using other currencies and that to cope the Commission had decided to try a method of compensation known as the "remuneration correction factor" (RCF). The Chairman's

memorandum comments in paragraph 2:

"The main purpose of the RCF is to protect the remuneration of staff in the Professional and higher categories expressed in local currency from falling below an appropriate floor and prevent it from rising above a similarly appropriate ceiling."

7. The memorandum then takes the Director General to task in fairly strong language for having failed to act properly at the proper time to align WIPO pay with pay in the common system. It says that WIPO has thus privileged its staff over the staff of the other international organisations, which are abiding by the common system's rules.

8. The Chairman observes that since the rules in force in WIPO at the time took account only of loss of pay due to a fall in the dollar the staff derived unjust enrichment in the reverse contingency, when the dollar rose. He states in paragraph 6(b):

"... if the net take-home pay differential is itself to be viewed as non-discriminatory and equitable then its application should work in both directions, i.e., both losses and gains to staff resulting from currency fluctuations should be treated equally. Since only losses are addressed by the staff regulation of WIPO, this provision is not in tune with the basic policy of the Commission, which is designed to be balanced and even-handed as between losses and gains. The Commission considers that if staff are to be protected against substantial losses then equity would require that Member States should also be protected against substantial gains that accrue to staff members."

9. In his comments to the Coordination Committee the Director General did not challenge what the Chairman had said on that score. He merely remarked that whether gain and loss set each other off depended in the last resort on "the vagaries of exchange rates", over which the agencies have no control, and that the RCF prescribed in the Staff Regulations was therefore still warranted.

10. The foregoing supplements the parties' submissions and affords a basis for ruling on the complainants' two material pleas, which Judgment 1087 set out in detail under 5. One is that the procedure followed in amending the Staff Regulations was flawed, and the other that there was breach of principles of the international civil service such as the doctrine of acquired rights.

The decision-making procedure

11. The complainants rely first on Article 9(7) of the Convention Establishing WIPO, which says:

"The conditions of employment shall be fixed by the staff regulations to be approved by the Coordination Committee on the proposal of the Director General."

In their submission the Director General put to the Coordination Committee no proposal to repeal the provision they want to have restored, Regulation 3.1 bis: repeal was on the Committee's own initiative and therefore offended against Article 9(7).

12. It is true that the Director General's right to propose under that article is a worthwhile safeguard of the stability of the staff's rights and bars the Coordination Committee from amending the Regulations on its own motion. Moreover, where the Director General has taken the initiative and made a proposal he remains free to take it off the Committee's agenda by withdrawing it. Yet his prerogative may not be so construed as to prevent the Committee from taking, if it so wishes, and even in the teeth of his objections, a decision on a matter that forms the subject of a proposal he has put to it and not withdrawn.

13. The procedure which culminated in the repeal of 3.1 bis is set out in the Organization's further submissions. The complainants do not challenge its account; indeed they have declined to comment further.

At the April 1987 session of the Organization's Budget Committee the International Bureau undertook to provide for the session that the Coordination Committee was to hold in September 1987 information on 3.1 bis and "its relation to the practices of other common system organizations". When it met in September 1987 the Coordination Committee decided that the Director General should convene a working group to examine 3.1 bis in all its aspects and that its report should be submitted to the Committee and consideration of 3.1 bis put on the Committee's agenda at its session in September 1988. In its report the working group recommended deleting 3.1 bis and

applying a transitional provision to staff in service at 1 October 1988. At its session in September 1988 the Committee had before it the group's report and a memorandum from the Director General disagreeing with it as well as a proposal from him to the effect that if 3.1 bis were repealed it should still apply to staff in service at 1 October 1988. The Committee also had before it a proposal by several delegations of member States for amendment of 3.1 bis and in the discussion a further amendment was proposed to the text recommended by the working group. It was that last amendment that went through.

It is clear from the foregoing that the Director General was involved from an early stage in the whole matter. Although the proposal he had put to the Committee was not accepted and another text was adopted, the Committee has since the very beginning of the Organization's existence sometimes declined to approve proposals by the Director General for amending the Staff Regulations. This is but another example. In the circumstances set out above the Director General's right to propose may not be deemed to have been overlooked.

14. The conclusion is that the Committee did not act ultra vires in replacing 3.1 bis with a new provision in the period of transition pending alignment of the Regulations with the common system and that the complainants' plea must therefore fail.

The general principles of the international civil service

15. The complainants' plea on the merits is in two parts. One branch of their argument is that the repeal of 3.1 bis impaired their acquired rights and the stability of their conditions of pay in breach of the guarantee in Regulation 12.1, the text of which appeared in Judgment 1087 under A. The other branch is that they fared worse than local staff, whose pay, being in Swiss francs, is sheltered from the ebb and flow of exchange rates.

16. In point of principle a rule calculated to achieve stability, like 3.1 bis, serves the lawful purpose of protecting against the erosion of pay by monetary trends, a factor extraneous to the contract of employment, and once the staff have been granted such a safeguard the rule-making authority may not arbitrarily do away with it.

17. But the parties' submissions show that there was objective cause to repeal 3.1 bis in that it had entailed adjusting pay only when the dollar fell on the exchange market but not when it rose above any given point. There was potential - depending on currency fluctuation - for an undue increase in pay constituting a lasting charge to WIPO's budget which was no more warranted than it would have been for the Organization to make savings if the dollar fell.

18. The conclusion is that because of the untoward effects the old rule might have the Coordination Committee was right to repeal it. Repeal was not in breach of the staff's acquired rights since the old rule made way for a new one that fully safeguarded their rightful interests, at least in the period of transition. It did so by maintaining the "differential" if the dollar fell but, if it rose, making pay level off at the point reached at 1 October 1988, the date of repeal. The first part of the complainants' plea therefore fails.

19. As for the second part - the argument about discrimination in favour of local staff - all that need be said is that according to consistent precedent the distinction between international and local staff is a fundamental one inherent in the very nature of an international organisation. It is due to the peculiar circumstances in which such organisations work and it is concurred in, with both its advantages and its drawbacks, by anyone who seeks employment with them, be it in one category of staff or in the other. Each category of staff offers career prospects and conditions of recruitment and pay that differ according to its own requirements, and a staff member may not plead breach of equal treatment if treated differently because he belongs to one category rather than to the other. This argument also fails.

DECISION:

For the above reasons,

The complaints are dismissed.

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

Delivered in public in Geneva on 15 July 1992.

(Signed)

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

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