

SEVENTY-FIFTH SESSION

***In re* JIBAJA and ROTA**

Judgment 1280

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Miss Cecilia Jibaja and Mrs. Adriana Rota against the World Health Organization (WHO) on 24 January 1992 and corrected on 14 April 1992, the WHO's reply of 5 August, the complainants' rejoinder of 29 September and the Organization's surrejoinder of 21 October 1992;

Considering the applications to intervene filed by:

J. Abularach

L. Arevalo

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J.C. Barbosa

E. Barbour

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G. Bohlman

G. Brackett

M.A. Buff

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A.M. Flores

L. Fuller

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K. Gaginis

M.I. Galvis

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P. Luco Devicenti

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M. Mesa

M. Munoz

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C.I. Ochoa

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R. Sanchez

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M. Stenning

M. Stonaker

G. Strittmatter

M. Valdes

P. Vidal

M. Viener

N.I. Vigil

I. Weist

O. Willemstijn

E. Zullo

Considering the WHO's observations of 20 November 1992 on the applications to intervene;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, Article 17 of the Rules of Court, WHO Staff Regulations III, 3.2 and VIII and WHO Staff Rules 580.1, 1230.8 and 1240.2;

Having examined the written submissions and disallowed the complainants' application for hearings;

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 ..."

As was explained in Judgment 1160 (in re Banota and others) under A, the salary scales that apply to staff of the United Nations agencies 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 (ICSC) 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 World Health Organization (WHO) is the "designated agency" for Washington.

Having made a comprehensive survey of salaries in Washington in the second half of 1990, the Local Salary Survey Committee established by the WHO recommended in its report of 14 November 1990 new scales for General Service category staff that showed a weighted average increase in salary of 19.14 per cent.

The Director of the Organization's Regional Office for the Americas (AMRO), which is in Washington, disapproved the recommended scales and explained why at a meeting on 19 December 1990 with staff representatives. The upshot was that he lowered the average increase to 11.25 per cent. He announced the new scales, which took effect as from 1 August 1990, by general information bulletin HQ-91-13 of 11 February 1991. They were first reflected in pay slips dated 27 February and 7 March 1991.

The new scales at once aroused discontent among the staff. In a referendum on 14 February and at an assembly on

19 March they voted strongly in support of their representatives' objections.

The complainants are both officials of the WHO in the General Service category and serve in AMRO. No fewer than 46 staff members, including the complainants, wrote letters dated 10 April 1991 to the Regional Director. They said:

"1. Under WHO Staff Rule 1230.8.2, I have the honour to submit to you a request concerning my appointment status, with a view to obtaining a final action within the meaning of Staff Rule 1230.8.1 or Staff Rule 1230.8.2, which will enable me, if necessary, to have recourse to the means of appeal available to me under Staff Rules 1230.1 and 1240.

2. My normal pay slip for the month of February 1991, combined with the exceptional pay slip for the adjustment paid to me in early March 1991, shows, for the period commencing 1 August 1990 (effective date of the scale) until the month of February 1991 inclusive, a base salary corresponding to the scale appearing in General Information Bulletin No. HQ-91-13.

3. It appears to me that the individual decision to apply to my particular case, as from the month of August 1990, the salary scale mentioned in the preceding paragraph, is illegal since the whole process resulting in the establishment of the above-mentioned salary scale has been conducted in violation of the General methodology for surveys of best prevailing conditions of service at non-headquarters duty stations approved for promulgation, effective 1 January 1985, by ICSC, as well as of the CCAQ Standard methodology.

4. Inter alia, it seems to me that:

- some employers have been substituted,

- some outside working hours, allowances and benefits have not been taken into account (nor even quantified in some instances) for comparison purposes, and

- a method has been used for constructing the scale (i.e. setting the salary at each grade and step), in disregard of all the relevant applicable rules.

[Paragraphs 5 and 6 are about access to background documents]

7. I have obviously suffered prejudice from the decision referred to in paragraph 3 above, since the scale which is applied yields at my grade and step, a lower salary than that which would have resulted from the application of a scale established in compliance with all the relevant applicable rules.

8. These, in summary, are the main reasons for my requesting you to review the decision to apply to me as from the month of August 1990 until the month of February 1991 inclusive, the scale appearing in General Information Bulletin No. HQ-91-13, and not a scale established in compliance with all the relevant applicable rules, especially as concern the three issues mentioned in paragraph 4 above. On the assumption that decisions concerning each month following February 1991 will be merely a repetition of the above decision - which was the case in March 1991 - the present request should be construed to cover all such decisions.

9. It is my hope that, in the final action you take within the meaning of Staff Rule 1230.8.1 or of Staff Rule 1230.8.2, you will give favourable consideration to my request, taking into account the arguments set forth above, and that you will thus set the matter back into conformity with the law. However, should you not deem it possible to grant that request, I herewith solicit your agreement to consider the above mentioned final action as a final decision within the meaning of Staff Rule 1240.2, so that I may be entitled to bring my case directly before [the Tribunal] without going through the competent Board of Appeal. ...

10. Finally, if you would have objections with my interpretation of the Staff Regulations and Rules concerning appeals, I would be obliged to you if you could advise me so at your earliest convenience, taking into account any potential deadlines, since it is my definite and irrevocable intention to lodge an appeal and to bring my case eventually before [the Tribunal], unless I obtain total satisfaction through internal appeal."

The president of the executive committee of the PAHO/WHO Staff Association and the chairman of the Washington local organisation forwarded the 46 letters to the Regional Director on 11 April.

In individual replies dated 25 April the Chief of Personnel summed up the "long process" that had led to the announcement of the salary scales on 11 February 1991. He went on:

"We wish to reconfirm that the above actions constitute a final decision, taken in consultation with WHO. It is a matter of record that WHO Headquarters' decision on the Washington survey has been taken in the light of the Survey Committee recommendations and has taken into account the strict application of the Salary Survey Methodology Manual. Furthermore, the scale has already been homologated by the ICSC and distributed to other agencies of the UN System. We see no reason to review the decision ... [or] to provide a waiver of internal means of appeal ..."

By letters of 26 April to the secretary of the Regional Board of Appeal both complainants gave notice of intent to appeal under Rule 1230.8.3 against the "individual decision, reflected on my pay slips dated 27 February and 7 March 1991, to apply to my particular case, as from the month of August 1990, the salary scale appearing in General Information Bulletin No. HQ-91-13 dated 11 February 1991, as confirmed by the letter dated 25 April from the Chief of Personnel rejecting my written request relating to my appointment status, submitted on 10 April 1991 under Staff Rule 1230.8.2".

The complainants filed formal statements of appeal on 14 May 1991.

In a single report dated 1 October 1991 the Board of Appeal unanimously held the two internal appeals to have been filed in time and therefore to be receivable. On the merits it recommended treating the new scales as mere interim adjustments as from 1 August 1990 and having the Local Salary Survey Committee draw up new scales to apply eventually as from the same date.

By letters of 26 November 1991 the Regional Director informed each of the complainants that he rejected the Board's conclusion on receivability and recommendations on the merits. By a letter of 11 December 1991 the complainants' counsel asked the Director-General either to reverse the Regional Director's decisions of 26 November 1991 or else treat them as final in accordance with Staff Rule 1240.2. By a letter of 22 January 1992 the Legal Counsel replied that the Regional Director's decisions were to be treated as final and the complainants might therefore appeal directly to the Tribunal. That is the decision they are impugning.

B. The complainants contend that since they have exhausted the internal means of redress their complaint is receivable under Article VII(1) of the Tribunal's Statute.

On the merits they submit that the new salary scales are flawed in several respects. Their main plea is breach of the methodology approved by the ICSC and of the Manual adopted by the CCAQ that gives effect to it. In their submission the methodology is binding on the WHO. In breach of it two of the five local employers originally taken for the purpose of comparison were later replaced with two that did not grant such good terms of employment to its employees, and the total number of working hours of local employees and some of the benefits and allowances they enjoyed were discounted.

Secondly, they plead breach of their right under Article VIII of the Staff Regulations to take part through representatives in negotiations or at least consultations on the new scales.

They seek the quashing of the decisions they impugn; the application to them as from 1 August 1990 of the salary scales recommended by the Local Salary Survey Committee in its report of 14 November 1990; the carrying out of a new survey with particular regard to the provisions of the methodology they contend have been disregarded; the application to them of the resulting new scales as from 1 August 1990; and awards of 40,000 French francs each in costs.

C. In its reply the Organization argues that the complaint is irreceivable. Under Staff Rule 1230.8 an official must submit a written statement of his intention to appeal to the Board of Appeal within sixty calendar days of notification of the action he objects to. In the instant case that time limit ran from the publication in the General Information Bulletin on 11 February 1991 of the Regional Director's decision on the new salary scales. The decision was final and notified to all General Service staff at Washington in writing. Though the last day on which an appeal against that decision would have been receivable was 12 April the complainants did not go to the Board until 26 April 1991.

The Board's position was unclear: it acknowledged that the Chief of Personnel's letter of 25 April 1991 confirmed the general decision of 11 February, yet it overlooked the mandatory character of the sixty-day limit. The WHO describes the complainants' internal appeal against the letter of 25 April as an "ingenious device" to mask their failure to act in time. Judgment 1160 is about a similar case in which the complainants also tried - to no avail - to get round the time bar by asking for a "final action" when one had already been notified.

In subsidiary pleas on the merits the Organization denies breach of the rules and methodology in making the 1990 salary survey. The substitution of two employers was dictated by the methodology to ensure that the comparators included a reasonable cross-section of economic sectors without excluding other organisations that AMRO competes with for staff. It was proper for the survey to omit such entitlements as home leave and the education grant since they are not ordinarily extended to locally-recruited staff.

The complainants' allegation of breach of Article VIII of the Staff Regulations is "absurd". That article provides for participation by the staff in discussion on relations with management. Salary matters come under Article III, which makes no provision for staff consultation. In any event the staff have their own representatives on the Local Salary Survey Committee and so amply voiced their views.

D. In their rejoinder the complainants comment on the appeal procedure. As the case law requires, they had to wait for individual decisions - their pay slips - applying the general decision of 11 February 1991. It was to ensure that they had exhausted the administrative channels open to them that they asked on 10 April 1991 for review of the individual decisions announced in their February pay slips. Not until 25 April did they have an assurance - from the Chief of Personnel - that they had exhausted the available channels, and they lodged their appeals the next day. Whatever the final decision may have been - whether it was the individual decision notified in their pay slips dated 27 February, the Chief of Personnel's letter of 25 April or even the bulletin of 11 February - their complaint is receivable. Precedent has it that even a misdirected appeal is receivable if filed before expiry of the time limit. That would make timely appeals of their letters of 10 April. Besides, the Administration was bound in good faith to tell them at once, as they asked, that it rejected their interpretation of the appeals procedure so that they might appeal in time. In any event their complaint is not time-barred as to salary payments for March and later months since application of the offending scale recurs monthly.

Their case was unlike those the Tribunal ruled on in Judgment 1160. It was illogical of the WHO to describe their letters of 10 April 1991 as an ingenious device while alleging that they recognised as final the general decision of 11 February. Had they done so, all they had to do was file a statement of appeal, which would have been easier than drafting the letters to the Regional Director. In any event those letters stated their irrevocable intention of appealing and did so in time.

On the merits they observe that the defendant drew a wrong conclusion from the evidence in assuming that the new scale complied with the prescribed methodology and the Fleming principle. They reject the reasons given for the choice of comparators: the overriding consideration was to choose employers who offered less favourable conditions than others in the same category. As to the breach of Article VIII of the Staff Regulations they reject the WHO's arguments: the staff had a right to be heard after the Organization decided to reject the Local Salary Survey Committee's recommendations; being undeniably a matter of concern to staff, salaries obviously come under "policies relating to staff questions".

They press their claims and increase the amounts they seek in costs to 50,000 French francs for each of them.

E. In its surrejoinder the Organization submits that the complainants raise no new issues of fact or law in the rejoinder. The final decision within the meaning of Staff Rule 580.1 was that of 11 February 1991. Since the complainants addressed their letters of 10 April to the Regional Director rather than to the Board of Appeal those letters do not qualify under the rules as appeals. The Organization presses its pleas on the merits.

CONSIDERATIONS:

1. The complainants belong to the General Service category of staff of the World Health Organization and are stationed at its Regional Office for the Americas in Washington (AMRO). They want the quashing of decisions applying to them a new salary scale that came in as from 1 August 1990 and was published in a General Information Bulletin, No. HQ-91-13, of 11 February 1991.

2. After publication of the scale the staff were first paid the adjusted sums in salary for March 1991 as shown in pay slips dated 27 February. Arrears for the earlier period were reflected in pay slips dated 7 March.

3. On 10 April 1991 the complainants sent the Regional Director identical letters challenging the new scale. They asked him to review the matter before taking a final decision within the meaning of the Staff Rules and, if he refused, to waive the requirement of internal proceedings so that they might go straight to the Tribunal. They concluded:

"Finally, if you would have objections with my interpretation of the Staff Regulations and Rules concerning appeals, I would be obliged to you if you could advise me so at your earliest convenience, taking into account any potential deadlines, since it is my definite and irrevocable intention to lodge an appeal and to bring my case eventually before the ILO Administrative Tribunal, unless I obtain total satisfaction through internal appeal."

4. The Chief of Personnel answered in letters of 25 April 1991 that the scale published on 11 February 1991 was the final decision, that the Administration had no intention of reviewing the matter and refused to waive the internal appeal procedure, and that the report on the salary survey had already been communicated to the staff representatives and "any other correspondence could be made available to the Board of Appeal, as necessary".

5. On getting those letters the complainants filed suit with the Regional Board of Appeal on 26 April. In the ensuing proceedings the defendant Organization objected that the final decision within the meaning of the Staff Rules had been the bulletin of 11 February 1991, the time limit set in Rule 580.1 had expired at 12 April and the appeals were out of time and therefore irreceivable.

6. The Board reported on 1 October 1991. In the introduction it said that it had given "careful attention" to the issue of receivability. It went over the features of the case set out above and unanimously held that, the appeals being receivable, it must go into the merits.

7. The Regional Director having rejected the Board's recommendations on 26 November 1991 and the Legal Counsel having confirmed the rejection on the Organization's behalf on 22 January 1992, the complainants came to the Tribunal, on 24 January. The Organization has raised the preliminary objection that their complaint is irreceivable on the grounds that the Board of Appeal was wrong to declare their internal appeals receivable.

Receivability

8. In their rejoinder the complainants maintain that their complaint is receivable and put forward three main pleas in reply on that score.

The first is that the scale in the bulletin of 11 February 1991, since it affects the provisions of the Staff Rules, was not challengeable anyway. Such a general measure must ordinarily be followed by individual decisions. In this instance they took the form of the pay slips, and the first of them did not go out until 27 February. So the time limit cannot have started to run before the date of receipt of the pay slips and the internal appeals were in time. In Judgment 624 (in re Giroud No. 2 and Lovrecich), say the complainants, the Tribunal held that appeals lodged against a salary scale before it had prompted individual decisions had been premature. And in many other judgments the Tribunal treated pay slips as challengeable administrative decisions.

Secondly, the complainants argue that even if the publication of the scale on 11 February 1991 set off the time limit for appeal it did not expire until 12 April, and good faith requires treating their appeals as receivable in that their letters of 10 April 1991 gave clear notice of their intention of appealing to the competent body.

Their third plea is that, even if the first two fail, they may in any event rely on Judgments 323 (in re Connolly-Battisti No. 5) and 978 (in re Meyler), in which the Tribunal held that recurring decisions set off a new time limit where the general decision they were based on was in itself unlawful. And in this case it was.

9. The Tribunal's first comment on those pleas is that the purpose of time limits is to make for the stability in law that both sides require. Management has an interest in knowing that the decisions it takes are beyond challenge; and the staff too need to know, especially when administrative action is taken at successive stages from the general to the particular, just when they may act without fear of having their suit rejected as premature or time-barred.

10. The rules on the internal appeal procedure are:

Rule 1230.8.1:

"No staff member shall bring an appeal before a Board until all the existing administrative channels have been tried and the action complained of has become final. An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action."

Rule 1230.8.2:

"If the staff member has submitted a written request relating to his appointment status, the request shall be deemed to have been rejected and such rejection shall be subject to appeal as if final action had been taken on it as in Rule 1230.8.1 above if no definite reply to that request has been made within:

- (1) two months for staff at Headquarters;
- 2) three months for staff assigned to other duty stations."

and Rule 1230.8.3:

"A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal, specifying the action against which appeal is made ..."

11. It is plain from those provisions that appeal will lie to a Board of Appeal only on two conditions: one is that all the "existing administrative channels have been tried", and the other that the action complained of has become final, which presupposes that the staff member has received written notification of it.

12. On the facts as set out above the complainants strictly complied with those requirements. They were told of the new salary scale by the bulletin of 11 February 1991 and got individual decisions of 27 February and 7 March 1991 in their pay slips. On 10 April they wrote to management citing Rules 1230.8.1 and 1230.8.2 and seeking review of the individual decisions or else an assurance that they had exhausted "all the existing administrative channels". Their letters evinced their intention of lodging an appeal with the competent Board of Appeal as soon as possible.

13. According to the replies of 25 April from the Chief of Personnel he regarded the publication of the new scale as management's last word on the subject and expected the dispute to go to the Regional Board of Appeal. Only after referral to the Board did the Organization first raise objections to receivability on the grounds that the appeals had been filed after the time limit set off by the general decision of 11 February.

14. The complainants did indeed have to write to the Administration before they might go to the Board since according to Rule 1230.8.1 no-one may appeal to a Board until "all the existing administrative channels have been tried". But that provision is inherently unclear in that it requires exhaustion of prior remedies without saying what they are. So the complainants were at pains to warn of their intention of going to the Board as soon as they had the assurance that they had exhausted such remedies.

15. The defendant was therefore not free in good faith to treat the complainants' internal appeals to the Board as being out of time by taking a date that made it impossible for them to satisfy the prior condition set in Rule 1230.8.1.

16. The conclusion is that the complaint is receivable.

The merits

17. The complainants put forward two main arguments on the merits:

- (a) failure to observe the approved methodology of the International Civil Service Commission and the Manual of the Consultative Committee on Administrative Questions, and
- (b) failure to consult the staff on a matter which concerned them, in breach of Article VIII of the Staff Regulations.

18. The binding nature of the methodology and Manual, though discussed by the Organization, is not at issue in this

case. It decided to apply them in carrying out the survey and it is bound by its own decisions. In any event, it maintains that it applied both correctly.

19. Under the head of breach of the Commission's methodology the complainants raise two issues:

- (1) the substitution of two comparator local employers for two chosen by the Local Salary Survey Committee; and
- (2) failure to take into account for the sake of comparison the total hours of work of local employees and certain allowances and benefits such employees enjoy.

The substitution of local employers

20. The CCAQ's Manual prescribes a step-by-step plan to be followed by the Local Salary Survey Committee in application of the Commission's methodology. The selection of "comparator" local employers belongs to the first phase. The Manual states that the salary survey should where possible cover six to nine local employers. Five of them are to be chosen for the purposes of analysis - step C - and the initial construction of the salary scale - step D. The criteria to be met by each of those employers are set out at step A.5 as follows:

"(a) Employers selected should represent a reasonable cross-section of competitive economic sectors (including the public service or parastatal institutions) with no one sector unduly dominating the sample;

(b) The employers to be surveyed should have been established in the locality for several years;

(c) There should be a considerable degree of continuity in the employers surveyed from one survey to the next, with a majority of employers from the previous survey normally being retained for the analysis and salary scale construction;

(d) The employers chosen should have both an established salary structure and a personnel system, and should preferably have at least 20 employees engaged in office work;

(e) An employer who uses the United Nations salary scales as the primary basis for setting salaries should not be selected for comparison."

The Manual says that the search for suitable employers should begin by considering employers already used in previous or similar local salary surveys. Step A.5 ends with the "finalization of a list of six to nine employers to be surveyed" as well as a few names which the Manual says are useful to have in reserve.

21. In the 1990 survey nineteen employers were approached; eleven were chosen, and eight of those were kept for the survey. The list included the five comparators retained for final analysis in the 1986 survey. In the survey made in 1986 twenty employers had been approached and ten of them kept for the sake of comparison. According to the report on the 1986 survey the World Bank, the Inter-American Development Bank, the International Monetary Fund (IMF) and the Organization of American States (OAS) were put in the category of "international organisations" and the Organization for Personnel Management (OPM) and Fairfax County Government came under "Government". In the report on the 1990 survey, however, the comparator employers were not put into categories.

22. Of the eight retained for the survey in 1990 the Local Salary Survey Committee chose the following five for the final analysis and the construction of the salary scale:

Fairfax County Government

Inter-American Development Bank

International Monetary Fund

Washington Gas and Light

World Bank

It did not include the Organization for Personnel Management or the Organization of American States, though they had been included for final analysis in the 1986 survey. The reason it gave in its report for its choice was that after considering different combinations of five comparators it found those five employers to provide the highest overall weighted average increase. It said: "Other combinations of employers would have reflected higher increases; however, the above combination [i.e. the five chosen] was retained in order to comply with the requirement in the salary survey methodology for non-headquarters duty stations that the retained employers should represent a cross section of the economy". The data on that combination, as against United Nations salaries in effect at 1 October 1989, provided an average increase of 18.88 per cent weighted by the number of staff at each grade.

23. The Administration substituted the Organization for Personnel Management for Fairfax County Government and the Organization of American States for the International Monetary Fund so as to yield an overall weighted average increase of only 12.2 per cent.

24. The first reason given by the Organization to justify such substitution is that the substituted employers were used in the last salary survey in Washington in 1986. That is not a valid reason: the Manual does not require that all the previous comparators be kept, but recommends that the majority normally be retained. And the Local Salary Survey Committee had indeed kept the majority.

25. The Organization further relies on the reasons given in the review of the Local Committee's recommendations by headquarters in Geneva as approved by the Director of Personnel on 14 April 1991. The text of that review reads:

"After a thorough review of the LSSC report, it was concluded that the employers recommended for selection and retention closely followed the criteria developed in the local salary survey methodology. However, it was also considered that the employers to be retained should represent a reasonable cross-section of all economic sectors. Consequently, it was agreed to replace Fairfax County with OPM as it is one of the most important employers in Washington and in fact represents the US government as a whole.

The excessive weight of international financial institutions in the survey was also closely examined. In HQ's view the IMF and the World Bank could be considered for purposes of the survey as one employer due to their concerted movement in salaries, the similarity in their salary scales and the fact that both institutions undertake a joint salary survey for salary setting purposes. Consequently, due to its size (more than 6000 staff) and its dynamic hiring policy the World Bank was determined to be the predominant employer and representative of both the Bank and IMF. As a fifth employer, therefore, the OAS was retained as it is the next in rank to those considered to be the best employers in the Washington area. On this basis the data has been recalculated and the results show an overall weighted average increase of 12.2 percent."

26. If the WHO accepts that the employers recommended for selection and retention closely followed the criteria in the methodology, that should put an end to the matter since one of the criteria is that the employers selected should represent a cross-section of the economy. But the Organization contradicts its initial statement by introducing the question of a reasonable cross-section as if that were not already one of the criteria followed.

27. The reason given for replacing Fairfax County Government with the Organization for Personnel Management does not stand up to examination. Since they both belong to the same sector, substituting one for the other does not make for a different cross-section. The comment that the Organization for Personnel Management is "one of the most important employers" and represents the United States Government as a whole affords no sound reason for preferring it to Fairfax County Government. The only reason for such preference to be valid according to the methodology and Staff Regulation 3.2 would be that the Organization for Personnel Management provided the best prevailing conditions in the locality for similar work. But that is not proven. The Organization's decision to prefer it is flawed because the stated reason is not a valid one.

28. The Organization offers two reasons for replacing the International Monetary Fund with the Organization of American States. One is that keeping the Fund would have given one particular economic sector, viz. international financial institutions, undue dominance in the sample; the other is that the Fund and the World Bank may be treated as just one employer because of concerted movement in pay, the similarities in salary scales and the fact that they carry out joint surveys for the purpose of setting salaries.

29. Whether the list of local employers makes a reasonable cross-section of economic sectors and whether the

Fund and the World Bank are too closely linked to be taken separately are matters of appreciation that must ultimately be decided by the Director-General in the exercise of his discretion. The Tribunal may not substitute its own opinion for the Director-General's. The conclusion is that this substitution was within the scope of the Director-General's discretionary authority and was a decision he was entitled to make.

Comparison of hours of work, allowances and benefits

30. In the complainants' submission the other breach of the methodology and Manual is the failure to include in the survey working hours, home leave, education grant and indemnities connected with repatriation.

31. The Manual provides that at step C.5.1 adjustment must be made to account for the difference in hours of work - i.e. the length of the working week - between staff of the employers retained and staff of the United Nations organisations in the locality. The report by the Local Salary Survey Committee says that the data obtained from the five employers retained were calculated on the basis of a standard forty-hour working week. In the three international organisations retained, the "official" working week, though stated to be 40 hours, includes a one-hour lunch break in each 8-hour day. The number of working hours in the week being 37, there should have been a proportional adjustment to salaries. None, however, was made.

32. The complainants contend that since the methodology refers to "hours worked" the comparison must relate to hours actually worked. The Organization does not specifically answer the plea: its remarks on entitlements granted to international and not to local staff seem intended to cover it. But the reckoning of working hours is a matter of concern to international and locally recruited officials alike. Since the Organization failed to adjust salaries paid by the comparator employers to allow for the differences in hours worked the complainants' argument succeeds.

33. The Organization observes that home leave, education grant and indemnities on repatriation are granted only to international staff. Since the material rules do not confer those entitlements on locally recruited staff there was no reason for the survey to take account of them. This plea therefore fails.

Breach of Article VIII

34. Lastly, the complainants plead breach of Article VIII of the Staff Regulations. That article stipulates that "The Director-General shall make provision for staff participation in the discussion of policies relating to staff questions". (The French version refers to "discussion des mesures qui les interessent".)

35. The Organization replies that the article relates to general issues and not to the question of salaries because it comes under the section headed "Staff Relations". Salary and allowances are dealt with under Article III and there is neither reference nor cross-reference to consultation. Besides, the Local Salary Survey Committee is composed of representatives of both the staff and the Administration.

36. The Tribunal sees no reason to hold that Article VIII does not cover discussion with the staff on the subject of salaries, one of the questions in which the staff take the greatest interest. The requirement of Article VIII would ordinarily be met by staff participation in the work of the Local Salary Survey Committee. The CCAQ's Manual itself envisages the Committee as having a balanced representation of administration and staff, describes proper staff-management consultation as a vital ingredient of a salary survey and says that as a forum for consultation at the local level the Committee has a central role to play (step A.2.3). The Manual provides, at step F.7, for a "report back to the field office", AMRO in this case, the purpose of which is "to ensure the proper communication to the field of decisions taken at the approval stage and the reasons for those decisions". It says that "Prompt submission is an essential step in the survey process, contributing to better understanding by staff in the field and to more effective surveys in the future".

37. But such reporting occurs after the decisions on the salary scale have been taken and does not serve the purpose of participation. In the present case two of the comparator employers chosen by the Committee as representing, with the other three, the best local employers were discarded by the Organization and replaced with two others, and the result was a drop of over 6 per cent in the recommended increase. In those circumstances there should, if Article VIII was to have any meaning at all, have been a properly informed exchange of views between staff and Administration before the adoption of the final scale. The conclusion is that the Organization failed to satisfy the requirements of Article VIII.

The applications to intervene

38. 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 fact and in law.

DECISION:

For the above reasons,

1. The impugned decision of 22 January 1992 is set aside.
2. The case is sent back to the Director-General for a new decision on the salary scale to be taken in the light of the present judgment.
3. The interveners shall have the same rights as the complainants insofar as they are in like case in fact and in law.
4. The Organization shall pay the complainants a total sum of 50,000 French francs in costs.

DISSENTING OPINION BY MISS MELLA CARROLL

For the reasons stated in Judgment 1279 (in re Almazan-Aguirre and others) I regret I cannot agree with the other members of the Tribunal that this complaint is receivable. The facts and the applicable rules are in substance the same.

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

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda
Mella Carroll
P. Pescatore
A.B. Gardner