

EIGHTIETH SESSION

In re SCHIFFMANN, SIWY and YOUNG

Judgment 1498

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mrs. Alice Schiffmann, Mr. Peter Siwy and Mr. John Young against the International Atomic Energy Agency (IAEA) on 12 January 1995, the IAEA's reply of 13 April, the complainants' rejoinder of 2 June and the Agency's surrejoinder of 12 September 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, 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. As was explained under A in Judgment 1160 (in re Banota and others), the salary scales that apply to General Service staff in the United Nations system are reviewed every few years on the strength of comprehensive surveys of local practice. Interim adjustments may be made after "mini surveys". In 1985 the International Civil Service Commission (ICSC) approved a new "general methodology" for the surveys and the United Nations Consultative Committee on Administrative Questions (CCAQ) 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", or "lead", agency for the duty station should establish one. The IAEA is the "designated agency" for Vienna.

A comprehensive survey of salaries in Vienna was made in 1991. The upshot was that the executive heads of the organisations with headquarters there - the IAEA, the United Nations Industrial Development Organization (UNIDO) and the United Nations Vienna Office - decided jointly to apply an interim adjustment as from 1 April 1994 to the pay of staff in the General Service category.

By a memorandum of 26 January 1994 the president of the Staff Council of the IAEA drew the Director of Personnel's attention to changes which had come into effect on 1 January 1994 in Austrian tax law on social security contributions: he said that the interim adjustment should take those changes into account. On 1 June the Director of Personnel sent a note to the Agency's Joint Advisory Committee expressing the view that not all the changes in tax law were relevant. In a note of 8 June to the Committee the staff representative repeated the position of the president of the Staff Council. At a meeting of the Committee on 9 June 1994 the Administration expressed the view that granting the staff's demands would set salaries too high. Staff and Administration failed to agree on the matter.

The president of the Staff Council confirmed his views in a letter of 16 June to the Director General. On 29 July the Director of Personnel answered that the Director General was to take account of only some of the changes in Austrian tax law and so the interim adjustment would be an increase of 3.8 per cent. The Agency formally announced that decision to its staff by a notice of 17 August 1994.

The complainants belong to the General Service category of the Agency's staff. On 10 October 1994 they sent the Director General a "complaint" asking him to put the interim adjustment up to 5.32 per cent and applying for leave to go straight to the Tribunal if he refused. By letters of 25 October 1994 - the impugned decisions - he rejected their request and gave them leave to come to the Tribunal.

B. The complainants submit that the Agency ought to have taken account of the changes in Austrian tax law insofar as they related to social security contributions. Citing a document of 14 April 1993 in which the Commission said that interim adjustments "should be automatic", they maintain that what counts in determining the adjustment is not wholly at the Agency's discretion. Besides, when Austrian tax law was last amended in 1989 the Agency promised to take account of the changes made as to social security contributions.

The Organization is wrong to make out that counting those changes would push salaries up too far. The methodology in force holds good until dropped or amended; and even if the next general survey bore out the Administration's view, the staff are entitled to have the existing rules observed until then.

The complainants ask the Tribunal to have their pay revised as from 1 April 1994 by ordering a further increase of 1.52 per cent. They claim 3,000 United States dollars each in costs.

C. In its reply the Agency contends that the complainants have misunderstood the Commission's guidelines and the nature of compulsory social security contributions. It believes that it properly exercised its discretion. Salary scales must take account not just of local conditions but of the organisations' internal needs as well. Besides, the secretariat of the Commission said in a note of 11 February 1992 that it was "not advisable to attempt to reflect precisely through the salary scale every tax modification in all its detail".

There are no grounds for making the further calculations the complainants want in working out the interim adjustment. They are not a determinant of the wages of taxpayers in Austria and they are attributable not to any changes in Austrian tax law but to a desire to refund part of the sums taxpayers spend on social insurance. The Agency's General Service staff come under a different social security scheme.

According to the Commission's methodology any interim adjustment should have effects likely to be confirmed by later salary surveys. So it would have been ill-advised to raise salaries only to have to "freeze" them after the next salary survey because of the revised methodology the Commission approved in 1992.

The Agency alleges, lastly, that what it calls the "ad hoc" agreement of 1989 did not establish a practice, especially since the tax reforms of 1989 and 1994 were different.

D. In their rejoinder the complainants argue that, though not a determinant of the wages of Austrian taxpayers, social security contributions do have an impact on their net income. Besides, the Administration cannot consistently contend that contributions are small but that taking account of them would make salaries too high. There are no grounds for expecting a freeze in General Service pay after the next general survey.

E. In its surrejoinder the Agency presses its pleas about the differences between the 1989 and 1994 tax reforms and repeats that it did exercise its discretion lawfully.

CONSIDERATIONS:

1. The complainants, who are members of the General Service category of the IAEA's staff at headquarters in Vienna, are challenging the rate of the interim adjustment that the Agency made as from 1 April 1994 in the pay of such staff.

2. The general considerations which are applicable to the determination of General Service staff pay, and which are not in dispute, may be summed up as follows.

(a) In accordance with what is known as the Fleming principle the salaries of the General Service staff of organisations, like the IAEA, that belong to the common system of the United Nations must match the best prevailing conditions of service that other employers in the locality of the duty station grant to similar categories of employees.

(b) The International Civil Service Commission shall, according to Article 12 of its Statute, establish at headquarters duty stations and in some circumstances for other duty stations "the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories".

(c) Determining the best prevailing rates of pay of similar local employees at a duty station is a long and complicated process, requiring as it does the selection and survey of "comparator employers" and of comparable jobs in the locality. A general survey is carried out for the purpose only once every five years. It seeks to establish the gross pay of comparable "outside" employees in the locality, allowance being made for cash benefits and others and for deductions, exemptions and rebates in amounts which are typical and appropriate for each category of employee. Net levels of pay for outside employees are ascertained by subtracting taxes and other compulsory payments, and it is by reference to those levels that the net rates of pay for General Service staff in the United

Nations common system are worked out. Gross rates are then calculated from the net figures, additions being made to take account of "staff assessment" and other payments.

(d) Since in the years between general surveys there may occur appreciable changes in rates of gross and net pay for outside employees yearly interim adjustments may be required. To determine whether they are, interim surveys are carried out.

3. The "methodology" followed in carrying out surveys and relevant to this case is the one that the Commission approved and set out in a report dated 14 April 1993 (ICSC/37/R.18/Add.1) on the remuneration of staff in the General Service and related categories. As to interim adjustment the report says in paragraph 81:

"(a) The adjustment should be based on an appropriate wage or price index or a combination of indexes;

(b) Indexes selected should be shown to produce salary movements that tend to be confirmed by successive salary surveys;

...

(f) ... Changes in local taxation should be accounted for at the time that such adjustments are made;

(g) The percentage adjustment to the net salary scale should be uniform at all levels, thereby leaving the structure of the salary scale intact ..."

4. The upshot of one interim survey was an interim adjustment as from 1 April 1994 in the pay of General Service staff at the Agency's headquarters in Vienna. The adjustment consisted in a 3.8 per cent rise in such pay which, among other things, the Agency announced to its staff in a notice, SEC/NOT/1542, dated 17 August 1994. Of that figure 3.06 per cent was accounted for by changes in indices of consumer prices and wages since 1 April 1993, when the last interim adjustment had been made. The remaining 0.74 per cent was due because of "certain changes in the local tax legislation". The general credit available to all taxpayers in Austria in the form of a direct deduction from income tax had been increased as from 1 January 1994 from 5,000 to 8,840 schillings a year. There is no dispute over these figures, nor over the 0.74 per cent increase that they accounted for.

5. By a letter dated 10 October 1994 the three complainants addressed to the Director General a request under Staff Rule 12.01.1(D)(1) for review of the figure of the 3.8 per cent increase. They said:

"... under the interim adjustment procedure prevailing in Vienna, it is necessary to take into account all, and not just 'certain', changes in local tax legislation. Specifically, instead of merely taking into account taxation changes amounting to 0.74%, leading to the announced interim adjustment of 3.8%, account should have been taken of taxation changes totalling 2.26%, leading to an interim adjustment of 5.32%."

They asked the Director General, if he refused to grant the further 1.52 per cent increase that they were accordingly claiming in General Service pay, to let them make a direct appeal to the Tribunal instead of going through the Joint Appeals Board. By a letter of 25 October 1994 the Director General informed them that he was upholding his decision but consented to direct appeal. That is the decision that they are impugning in their common complaint, which is receivable under Article VII(1) of the Tribunal's Statute, the internal means of redress being exhausted.

6. It is not in dispute that under Austrian law outside employees in the locality of the complainants' duty station are entitled to deductions from taxable income on account of compulsory contributions to social security schemes, premiums paid towards old-age and disability pensions and medical or unemployment insurance, dues to professional bodies, payments to building societies and the like. The amounts of such deductions from taxable income increased in the period at issue in this case because the percentage rates of such payments, or the maximum amounts to which such rates applied, or both, were increased under Austrian law. The result was a reduction in the income tax payable by "outside" employees in Vienna.

7. The Head of the Staff Administration Section of the Agency's Division of Personnel sent the secretariat of the Commission a letter by fax on 22 April 1994 asking it to assess separately the impact on the results of the survey of changes in the general tax credit and in tax rules as to social security contributions in Austria. The Chief of the Salaries and Allowances Division of the Commission answered the Agency in a minute of 27 April:

"... The overall survey results before and after the tax changes are as follows:

Before tax changes: -2.8%

After tax changes

- general tax credit only: -2.2%

- social security contributions only: -1.3%."

He added:

"... the results of these calculations were indicative rather than definitive ... I urge you to exercise caution in interpreting these results ..."

The Director of the Division of Personnel of the Agency concluded in a fax of 3 May to the Commission:

"I understand that your calculations which take into account both the tax changes which took effect on 1 January 1994 and the combined index movement for the period March 1993 - March 1994 result in a salary increase of 2.4% in the current General Service salary scale ..."

The Chief of the Commission's Salaries and Allowances Division confirmed that understanding in a minute of the same date and added:

"... the tax impact of the change in social security contributions was included in our calculations resulting in the 2.4% increase."

8. The Tribunal observes that the calculations provided by the Commission on the strength of all the factors at issue would have warranted a total increase of only 2.4 per cent. Since that figure is lower than that of the increase which the Agency actually applied the Commission's calculations do not help the complainants' case.

9. The complainants contend that the reduction in the income tax payable by outside employees in the locality of their duty station, though it was attributable to amendments to social security legislation, amounted to a "change in local taxation"; that according to the methodology the Director-General had no discretion to discount that change in determining the interim adjustment for 1994; and that "any tax reduction increases the net incomes of employees, including those of the comparator employers".

10. The complainants do not, however, go on to show that the actual effect of the increase in social security contributions and of the reduction in income tax was to increase the net pay of outside employees. The Agency states in its reply that the increases in deductions from taxable income had two purposes. One was -

"... to partly reimburse the tax payer for increased costs in this particular case in relation to social security and other payments. Were these tax deductions 'blueprinted' on the salaries of GS [General Service] staff, they would lead to a direct increase in GS salaries, as GS staff are notably subject to a different social security regime and/or do not necessarily incur the same expenses as their counterparts in the 'outside world'."

The other purpose, says the Agency, was -

"... primarily to assist employees in the lowest income brackets who cannot be compared to Agency staff members."

The complainants do not take issue with those pleas in their rejoinder: they still maintain that all the changes should have been taken into account in determining the 1994 adjustment simply because they reduced the tax burden of such employees. For want of proof of any actual increase in the net incomes of outside employees the complainants' plea cannot be sustained.

11. The complainants further contend that, acting on the same principles and on the Commission's advice, the IAEA and the other international organisations in Vienna had taken account of changes in tax law insofar as they related to social security contributions in determining the interim adjustment for 1989, and that the Agency was

therefore wrong to ignore such changes in determining the adjustment for 1994.

12. The Agency's reply on that score may be summed up as follows:

(a) The setting of salary scales after a general survey is at its discretion, and so must be the determination of interim adjustments. Indeed - says the Agency - the complainants themselves acknowledge in their original brief that, although the secretariat of the Commission "may assist in making" calculations for an interim adjustment, "the Commission makes no recommendations concerning them, leaving the matter to the discretion of the organizations concerned". That too is the Commission's own view: in its minute of 27 April 1994, referred to in 7 above, it was also at pains to -

"... emphasize that the power of decision on interim adjustment matters rests with the organizations rather than with the Commission which limits itself in the methodology to making general recommendation as to interim adjustment factors."

(b) Paragraph 81 of the methodology does not require that "all" the changes in local taxation be taken into account. It says "changes in local taxation", and that means changes in tax law as such, not "indirect effects on the local tax situation, which an increase or decrease in certain tax deductions ... may have". Besides, though organisations "should" take such changes into account, they are not bound to do so.

(c) The adjustment was made ad hoc in 1989; there was no such adjustment in any year from 1990 to 1993 and the IAEA was not required to make one in 1994. What happened in 1989, says the Agency, was that comprehensive tax reform in Austria -

"... made it necessary at that time for all the elements in the formula for netting down gross to net salaries to be reviewed, as was done in previous salary surveys. ... the 1994 tax changes, however, were structurally different ... There was therefore, no justification to repeat in 1994 what was done in 1989."

(d) By 1994 the salaries of General Service staff were already on the high side as against those of outside employees in the locality of the duty station, and the next salary survey was likely to show that such staff were being over-compensated.

So any further increase would have offended against the principle that interim adjustments should make for movements in pay that later surveys will tend to confirm.

13. The complainants rejoin that the Agency may not withhold increases that are due at present on the mere grounds that reductions may prove necessary later.

14. As is plain from the case law, the setting of pay scales is at an organisation's discretion. The Tribunal has recognised as much in Judgments 1000 (in re Clements, Patak and Rödl) and 1265 (in re Berlioz and others), where under 26 it said, quite specifically, that it would not interfere in the drafting of the salary policy that the exercise of such discretion was based on, even though it did have a power of review in the area. The discretionary authority of the Agency holds good for interim adjustments as well as for the setting of pay scales on the strength of the five-yearly general surveys.

15. Even supposing that, as the complainants contend, the indirect effects on taxation of the amendments to Austrian social security legislation did amount to "changes in local taxation" within the meaning of the methodology and that such changes should have been taken into account in 1994, as in 1989, the complainants' difficulty is again, as was said in 10 above, that they have not shown that the changes actually resulted in an increase in the net income for outside employees. The higher tax credit of 8,840 schillings did result in such increase and therefore warranted the 0.74 per cent rise in pay referred to in 4 above. But the evidence before the Tribunal is that only partly were the increases in social security contributions offset by tax reductions and that on that count there was no resultant increase in net income for local employees. Since the purpose of interim adjustment is to match any rise in the net incomes of local employees it would not have been proper for the Agency to exercise its discretion in the matter so as to take into account changes in local taxation that did not bring about any rise of that kind. The conclusion is that the grant of the further 1.52 per cent increase in General Service staff pay that the complainants are claiming would have been inconsistent with trends in local pay and would have resulted in salary movements in excess of increases in such pay.

16. The claim being unwarranted on those grounds, it is unnecessary to entertain any of the complainants' other pleas.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas
Michel Gentot
Mark Fernando
A.B. Gardner