

EIGHTY-THIRD SESSION

***In re* Berlioz (No. 2), Cussac,
Heitz (No. 2), Moyse, Schmitt,
and Slater (No. 2)**

Judgment 1641

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Jean-Pierre Berlioz (No. 2), Mrs. Yolaine Cussac, Mrs. Gisèle Heitz (No. 2), Mrs. Ellen Moyse, Mrs. Beate Schmitt and Mrs. Mary Slater (No. 2) against the World Intellectual Property Organization (WIPO) on 22 November 1995 and corrected on 20 February 1996, the observations submitted by the International Civil Service Commission (ICSC) on 19 July 1996, WIPO's single reply of 19 August, the complainants' rejoinder of 2 September, the observations submitted on 16 September by the United Nations, the Commission's comments of 20 November on the complainants' rejoinder, the letter of 29 November from the Registrar of the Tribunal inviting WIPO to submit a surrejoinder, to which the Organization did not reply, and the complainants' comments of 16 December 1996 on the observations of the United Nations;

Considering Article II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Article 13, paragraph 3, of its Rules;

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. The complainants belonged at the material time to the General Service category of staff of WIPO, which has its headquarters in Geneva. In accordance with the "Flemming principle", the pay of such staff in the common system of the United Nations is reckoned according to the best conditions of employment at the duty station. To draft pay scales the International Civil Service Commission carries out every five years a survey of local pay. For the purpose it follows what it calls a "general methodology", which it adopts and amends under Article 11(a) of its Statute.

In between surveys the general methodology allows for interim adjustment to the scales to take account of trends in local pay at the duty station. In recommending such adjustment the Commission relies for the most part on the local wages index or the cost-of-living index, or both, and does not itself collect data about local employers. According to paragraph 81(e) and (f) of the methodology, pay is to be so adjusted whenever the relevant index has moved by 5 per cent or more and in any case within 12 months of the last adjustment. Until 1994 adjustments for Geneva depended on shifts in the local index of consumer prices.

As is explained in Judgment 1519 (*in re* Prados and others) under A, the Commission revised the methodology in 1992. The amendment which has led to this case is in paragraph 82 of the new version and reads:

"Interim adjustments should not take place for a six-month period prior to the reference date of the survey. Any payments due to staff as a result of this postponement would be applicable retroactively if this was justified by the survey results." On getting their pay slips for January 1995 the complainants found that they did not reflect the increase in the cost of living at Geneva between November 1993 and October 1994.

According to a schedule drawn up by the Commission in 1992 the next salary survey at Geneva was to start in the spring of 1995 and the findings were to be issued some time in the summer. For reasons on which the parties disagree it did not start until June. The Commission approved the findings at its 42nd Session, which

it held from 24 July to 11 August 1995. It then recommended that the executive heads of organisations with headquarters in Geneva apply as from 1 June 1995 the new scales based on those findings.

By letters of 27 February 1995 the complainants asked the Director General to review his decision, which he had applied to each of them individually, not to adjust pay as at 1 January 1995. The Director General did not answer. On 18 May they went to the Appeal Board. In its report of 19 July the Board recommended upholding the decision. By a memorandum of 24 August 1995, the decision which each of the complainants is impugning, the Director General told them that he did so.

B. The complainants submit that applying the new so-called "six-month rule" so as to delay alignment of their pay was a breach of Regulation 4.1 of the Staff Regulations which sets out the conditions for recruitment, and of the Flemming principle. The purpose of interim adjustment is to keep pay at WIPO competitive on the local market. Although paragraph 82 of the methodology allows retroactive payment to staff where the findings of a survey so warrant, that is no remedy for the Organization's breach of the rules. Besides, no provision is made for the payment of interest. The six-month rule is inconsistent: retroactive payment, where "justified by the survey results", makes no sense since comparison between the organisations and local employers is based only on conditions at the date taken for the purpose of the survey. The rule is arbitrary because the grounds on which it was introduced are inadequate. It shows abuse of authority.

When seen in the context of the revision of the methodology, the six-month rule appears unlawful: the sole aim of the many amendments was to cut costs at the staff's expense. They run counter to the whole spirit of the methodology, which no longer abides by Flemming. The complainants also plead breach of their right to be consulted.

They have two subsidiary pleas. The first is that the Commission decided on the procedure for interim adjustment unilaterally and in between the 1991 survey and the June 1995 one at Geneva. Though it amended the methodology, it did not expressly make any corrective amendment in that procedure.

Their second plea is that holding over the adjustment is unlawful because the decision setting the reference date of the survey is unlawful. That decision was an abuse of authority in that the Commission took June 1995 as the date so as to make the most of the six-month rule. Furthermore, it rushed through the June 1995 survey in just two months instead of changing its schedule so as to make a proper enquiry.

The complainants contend that the survey carried out in Geneva in 1995 shows formal and procedural flaws. The findings show bias on the part of the Commission and are obviously wrong. For those reasons too, suspending the adjustment was unlawful.

The complainants ask the Tribunal to quash the Director General's decision not to adjust their pay as at 1 January 1995, to order WIPO to recalculate their past and future pay in line with the material rules and to pay the amounts due to them plus interest at the rate of 8 per cent a year. They each seek 5,000 Swiss francs in costs.

C. The Commission rebuts the complainants' pleas. First, it denies that the amendments made in 1992 in the methodology are damaging to the staff's interests. In defence of the six-month rule it explains that interim adjustment would sometimes put pay up to a point that the findings of the next comprehensive survey do not warrant. To apply the new adjustment in such circumstances would increase the gap between the interim scale and the new one, and the new one would have to be correspondingly lowered. Since actually lowering pay is undesirable, it has to be "frozen" at the figure of the last interim adjustment. That in turn means excessive costs for the organisation, which will be paying out more than is due. The complainants are wrong to think that applying Flemming entails automatic interim adjustment. It is the comprehensive surveys that give substance to the principle.

The Commission submits that it had no grounds for not applying the six-month rule from 1992. The reason why the survey was held up until June 1995 was that the staff representatives refused to do what the general methodology required of them. The only difficulty in conducting the survey was to find enough suitable local employers. The staff representatives made things worse by trying to dissuade employers from giving the data. The Commission sees no reason to answer the complainants' other objections to the 1995 survey.

D. In its reply WIPO says that it has nothing to add to the Director General's reply to the complainants' appeal to the Appeal Board and to the Commission's submissions to the Tribunal.

E. In their rejoinder the complainants press their pleas and claims in full. They observe that the Commission is refusing to answer their objections to the Geneva survey and fails to name any local employer that staff representatives deterred from helping with the survey. They challenge the Commission's defence of the six-month rule.

F. The Tribunal having granted the United Nations' application for leave to comment, that Organization states that it shares the Commission's view that the six-month rule was properly established and applied. Freezing pay rather than reducing it when a new survey means lower pay than the interim adjustment warranted requires the Organization to go on paying undue amounts to its staff, to its own financial detriment. It is not the interim adjustments that give body to Flemming but the comprehensive surveys, which are the surest gauge of the best local conditions of employment.

There was nothing wrong with the Geneva survey. Though it came late, that was because staff representatives in Geneva refused to take part and that was a breach of the standards of conduct required of international civil servants. The shortage of local employers taking part was again the fault of those staff representatives, who tried to dissuade some from being helpful.

G. In a further brief the Commission submits that interim adjustment is just an "accessory means" of applying Flemming without making constant comprehensive surveys. The survey could have begun in April or May had the staff representatives done what they ought.

H. In comments on the United Nations' brief the complainants submit that there was no call for it. They say that the rules do not require staff representatives to take part in surveys and that those representatives were not in breach of the standards of conduct required of international civil servants.

CONSIDERATIONS

1. At the material time the complainants were in the General Service category of staff of the World Intellectual Property Organization (WIPO). WIPO belongs to the "common system" of the United Nations that the International Civil Service Commission serves.

The purpose of the Flemming principle is to ensure that the pay of international civil servants matches the best conditions of service at the duty station. To give effect to the principle by adjusting pay general surveys are done from time to time under the Commission's auspices. The procedure for doing such a survey is set out in what is called a "general methodology". The Commission revised the text of it in 1992. The General Assembly of the United Nations adopted the revised methodology in resolution 47/216 of 23 December 1992. In between general surveys interim adjustments may be made in pay: see Judgments 1498 (*in re Schiffmann and others*) and 1499 (*in re Berger and others*). Thus interim adjustments were made in Geneva according to the following criteria:

(a) if, over a twelve-month period, the variation in the consumer price index is less than 5 per cent, salaries are adjusted at the end of the period taking into account the movement in the index and changes in local taxes at Geneva; and

(b) if inflation is over 5 per cent, the adjustment is applied as soon as the 5 per cent threshold is reached.

According to the revised methodology -

(a) there is no interim adjustment in the six months prior to the reference date of the next survey. If justified by the results of the survey, the adjustment is applied retroactively; and

(b) the adjustment due on the basis of the twelve-month rule or the 5 per cent rule is reduced by a factor of 0.1.

There was a general survey done according to the methodology between November 1990 and January 1991 and another in June and July 1995.

In January 1995 WIPO worked out the pay of its General Service staff according to the scales in force at 1 January 1994: in accordance with the revised methodology it did not apply any interim adjustment.

Believing that they were entitled to such adjustment, the complainants lodged a request with the Director General for review of the decision, which was reflected in their pay slips. Having got no answer, they went to the Appeal Board, which recommended rejection. The Director General endorsed the recommendation and that is the decision they are impugning before the Tribunal.

They are challenging the new six-month rule on the grounds that it shows both procedural and substantive flaws. They submit that the application of the rule in January 1995 proved unlawful *ex post facto* in that the inquiry done in June 1995 was invalid, or should be declared so. The starting date for counting the six months retroactively should have been not June 1995 but much later so that the rule did not come into play as from January 1995.

WIPO takes the same stand as in the internal appeal proceedings and asks that the complaints be dismissed.

In briefs which the Tribunal granted them leave to enter the Commission and the United Nations contest the complainants' pleas insofar as the complaints concern them.

The pleadings

2. The Commission was granted such leave as in earlier cases: see Judgments 1457 (*in re Di Palma and others*), 1458 (*in re Damond and others*), 1459 (*in re Hoebreck and others*), 1460 (*in re Derqué and others*), 1603 (*in re Bensoussan and others*), 1604 (*in re Damond No. 2 and others*) and 1605 (*in re Heitz No. 3*). The complainants do not object to that but to the intervention by the United Nations.

Under Article 13, paragraph 3, of the Rules of the Tribunal the President may allow submissions from a third party. Here the President acted under that rule in allowing the United Nations to intervene. The Tribunal sees no grounds for refusing leave to intervene, the aim being to make for uniform application of the rules to the organisations of the United Nations "common system".

Receivability

3. For his complaint to be receivable the staff member must have a cause of action.

Here the complainants do have a cause of action: it is to obtain from the Tribunal a declaration that the rule and the decision they are challenging would still be unlawful even if they had later got the increase that was withheld for the six months prior to the general survey. They would indeed have been slightly better off had they received the increase earlier. They are also entitled to a decision as to whether the rule they are challenging holds good for the future.

4. The complaint is receivable only insofar as it relates to the determination of the complainants' pay for January 1995.

(a) They may not challenge the procedure of the June 1995 survey either on its own merits or on the strength of specific decisions putting the findings into effect. That is because they have failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires. The Appeal Board's ruling that the appeal was irreceivable on that score confirms that they did not exhaust their internal remedies.

(b) The complainants comment on the whole exercise of revision. In their view the amendments -- which they dwell on at length -- and so too the six-month rule were imposed on the staff willy nilly and are largely to their detriment. Since the other amendments have not been challenged either directly or indirectly in the appeal or the complaint, there is no need to go into them here. But if they reflect the current state of the employment market and the financial straits that some organisations are in, the Commission and the Organization may not be held liable on that account.

5. The Tribunal has already explained the rules on how to set staff pay in the organisations of the United Nations "common system" administered by the Commission and its own competence in the matter: see

Judgments 1265 (*in re* Berlioz and others), 1266 (*in re* Cussac and others), 1457 to 1460, 1519 (*in re* Prados and others) and 1603 to 1605 and the precedents cited therein.

In challenging an individual decision the staff member may challenge the general decision on which it was based, even if that decision was taken by some other body such as the Commission.

Objections to the revised methodology

6. The complainants submit that there were flaws in the procedure whereby the Commission adopted the six-month rule. After inviting observations from the organisations and staff representatives the Commission "ignored the views of the representatives of administration and staff". Although the staff have no right to co-management of WIPO, they do have a right to be consulted, and that right was disregarded. Citing Judgment 1200 (*in re* Kheir and others) under 2, they assert that that right means -

"cooperation between staff and management. Though it is not to take the form of bargaining, there must be a real exchange of views, and if it is to work both sides must show good faith."

What is at issue here is a procedure for adopting a rule in which the right to a hearing does not have the same function as in a decision-making process. For one thing, the law-maker does not have to account for the action taken unless there is some express provision to the contrary.

The complainants do not deny that the staff representatives were allowed to enter observations. So the right to a hearing that the Commission's Statute confers on them was observed.

What the complainants are in effect challenging is the rule that the Commission made. So their objections are substantive and the Tribunal will treat them as such.

In any case their procedural objections are too vague for the Tribunal to entertain and must fail.

7. (a) The complainants plead that the six-month rule is in breach of Flemming.

That principle is embodied in Article 4.1 of the WIPO Staff Regulations, which corresponds to Article 101, paragraph 3, of the Charter of the United Nations. Its purpose is to ensure parity of pay between international civil servants in the General Service category and the best-paid local workers in comparable jobs.

The sole material issue is whether the right to such parity is infringed when an interim pay increase required by indexing is held over for the six months preceding a new general survey that is intended to afford an analytical basis for alignment. By indexing is meant adjustment to trends in the cost of living or in local pay.

The first question to be answered is how the difference is to be made up when the general survey indicates that adjustment was warranted when the six-month suspension began. The rule says that "Any payments due ... would be applicable retroactively if this were justified by the survey results". What it does not say is whether the adjustment should depend on the indexing of the interim procedure or on the criteria that a general survey applies. That question would arise if the general survey showed that interim adjustment fell short of the parity required by Flemming. Adjustment must be due by objective criteria which hold good for both sides. So if an organisation does not apply the method of indexing in the six months prior to the survey -- which is to its own interest in hard times -- it will also have to bear the consequences in full when "flat-rate" adjustment proves insufficient. In that event the amount of the "payments ... applicable retroactively" depends on the findings of the survey. In such instances the new rule works to the staff's benefit. It dispenses with application of the rules on interim adjustment in the six months prior to the general survey.

The staff do not lose any right that they had before if the general survey shows that an increase was due. In that event the Organization must pay them the increase retroactively. Withholding interest scarcely matters because the amounts at stake are tiny and any delay in paying the increase is short. It is a matter within WIPO's discretion: see Judgments 1265 under 26 and 1457 under 18. But when a survey later shows that conditions warranted no increase there is no breach of Flemming.

To judge from the employment market in Europe nowadays, further general surveys may suggest that the

parity that Flemming ordains would not bar a fall in General Service category pay in the international civil service. If fall there were, the organisations, though not themselves immune to financial strain, might be loth to cut pay for fear of some later shift warranting an increase, for example a rise in the cost-of-living index. By holding over the latest increase for the last six months WIPO can better keep pace with trends in Geneva. Flemming goes no further than that.

To be sure, the new rule may sometimes favour the staff by preserving their accrued benefits less well than before. But those are not the sort of benefits that Flemming protects: it requires no more than alignment with the best conditions at the duty station.

The principle demands that, so far as can be, pay in the international civil service should stay on a par with the best pay on the local market. Since for the time being there is neither a continuing survey nor a new one interim adjustment answers the purpose of Flemming. Yet, for the reasons stated above, it is not at odds with that purpose to make the adjustment for the last period retroactive in the light of the findings of the general survey. During that period, which is short, the idea of interim adjustment is not discarded but the grant of it simply made subject to other conditions. Suspension might indeed be inadvisable if the period were long, inasmuch as it may mean withholding from someone the higher pay he is entitled to under Flemming for services already rendered. But the six-month rule is a tenable compromise between two requirements of Flemming: interim indexing of pay to the local market and the closest possible match between international and local pay on the strength of general surveys.

(b) The six-month rule is no breach of the staff's acquired rights as defined in the case law: see Judgments 1514 (*in re* Aymon No. 2 and others) under 12, 1515 (*in re* Antoinet No. 3 and others) under 6, 1618 (*in re* Baillet No. 2 and others) under 21 and 22, and the precedents they cite.

(c) The complainants put forward a set of pleas which postulate that the sole purpose of the six-month rule - none other striking them as adequate -- must be to help the organisations and harm their staff.

Those pleas are unconvincing. Though an organisation must observe acquired rights and keep binding promises, it has broad discretion to amend its staff regulations either directly or by incorporating the rules of the common system. In the present economic context and if, like many others, it is in financial straits, it may want to cut costs. There is nothing wrong with the common system's having rules that enable it to do so. The complainants have obviously misread the precedent they cite in support of the opposite view: Judgment 990 (*in re* Cuvillier No. 3). Besides, an organisation may have the authority to make savings and yet not use it.

(d) The complainants object to the method of compensation followed when an increase later proves to have been due. They see it as inconsistent and hard to apply.

There is nothing inconsistent about using an index to reckon an interim increase and applying the other criteria that a general survey uses to work out whether an increase is due for the periods following and immediately preceding the survey.

The difficulties of applying the rule are not at all insuperable and may be sorted out as they arise.

8. The complainants contend that the rule had not come into effect when WIPO applied it; that the Commission had entered into a unilateral implied commitment to the staff to keep to the old rule pending the new survey; and that WIPO too should have abided by that commitment.

The evidence does not bear out those contentions. The Commission did say in its report for 1992 (paragraph 232) that the revision would go through at its 37th Session and the current method would be used in the meantime for doing surveys. But in its report on that session (paragraph 80) it said that each organisation would be deciding the date at which the new pay scales were to take effect. It was in that report (paragraph 82) that it introduced the six-month rule. Staff associations too got that report. It was under this rule that the Commission set the date of the survey and hence the dates of the six-month period.

A decision or a rule may not be applied retroactively to the detriment of staff: see Judgment 1589 (*in re* de Assis) and the case law it cites. But here the rule was applied not retroactively but to the interim adjustment for a period following its entry into force.

Although the Commission may for a time have thought of applying the former methodology to the next survey, that did not amount to a binding promise to staff or bar its making and applying the revised one. That there was any specific such promise is not alleged, let alone proved.

Objections to the decision applying the rule

9. (a) If the complainants' method were followed for reckoning the six-month period, the lawfulness of a decision supposed to come into effect at once would depend on the later fulfilment of several conditions. That is plainly not the purpose of the rule. The application of the rule must be lawful at the time when it takes effect. So the start of the six months is the date scheduled as the reference one for the next survey. That is hardly likely to give rise to any difficulties of application.

Here the scheduled date was June 1995; so on that score the impugned decision was in keeping with the prescribed six-month period.

(b) The complainants argue that the choice of June 1995 was arbitrary and calculated solely to cause detriment to the staff; that WIPO therefore had no reason to abide by it; and that the rule did not apply in January 1995.

Periodical surveys are part of the procedure adopted to put Flemming into effect. Setting the date for the survey was therefore not in itself contrary to the Organization's interests and no abuse of authority. Nor was the survey set at a date when it could not be carried out.

The plea fails.

Consequently, on that score too WIPO observed the six-month period, which was to run until the date anticipated for the next survey.

10. The conclusion is that the complaints are devoid of merit.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

Michel Gentot
E. Razafindralambo
Egli
A.B. Gardner