

EIGHTY-FOURTH SESSION

***In re Carretta, Cherubini,
Eldon and Pace***

Judgment 1713

The Administrative Tribunal,

Considering the complaints filed by Mrs. Christina Carretta, Mr. Claudio Cherubini, Mrs. Margaret Eldon and Mr. Mauro Pace against the Food and Agriculture Organization of the United Nations (FAO) on 23 August 1996 and corrected on 6 December, the FAO's single reply of 19 March 1997, the observations of 27 March from the International Civil Service Commission (ICSC), the FAO's letter of 19 June informing the Registrar of the Tribunal that it did not wish to comment on the Commission's observations, the complainants' common rejoinder of 17 July and their comments of even date on the ICSC's observations, the Organization's surrejoinder of 17 September 1997 and the Commission's final brief of 30 September 1997;

Considering Article II, paragraph 5, 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. The complainants are in the General Service category of staff at the FAO in Rome. According to what is known as the Flemming principle, pay of staff in that category is to be aligned with the best conditions prevailing at each duty station. The principle was first stated in 1949 by a body of experts on pay set up by the General Assembly of the United Nations. It is the cornerstone of the general "methodology" that the International Civil Service Commission follows in carrying out surveys of outside pay at the duty station and in setting scales of pay for General Service and other locally recruited staff.

The Commission revised its methodology in 1992 and set out the new version in a paper dated 14 April 1993. The material provisions read:

Paragraph 9:

"... Once the Commission has approved a survey schedule, the Chairman of the Commission notifies the executive heads at the duty station about 10 months prior to the scheduled survey date. ... Some six to nine months prior to the survey date, representatives of the ICSC secretariat will visit the duty station to meet with the members of the Local Salary Survey Committee ..."

Paragraph 38:

"Range minima and maxima, where available, are useful as a check on the consistency of the data on salaries actually paid. There may be situations where employer practices make it difficult to obtain data on the average of salaries actually paid in a form suitable for the analysis, for example, when the data available on actual salaries reflect groups of jobs or grades and can thus not clearly be related to the surveyed jobs. Under such circumstances, data on entry rates for the surveyed jobs should be collected for purposes of the analysis. Information should also be obtained on the maximum salary for each job matched ..."

Paragraph 42:

"Data on the average of salaries actually paid are most appropriate for purposes of the analysis at the majority of headquarters duty stations. Since it would be inappropriate to base the analysis on a combination of actual salary data and minima and maxima, only actual average salary data should normally be used, except where such data cannot be made available in a suitable form, as described in paragraph 38 above."

Paragraph 71:

"In cities where the local language is not a working language of the organizations, an adjustment was made previously to recognize, *inter alia*, that the outside rates relate to outside staff who work only in one language and consequentially the difficulty in recruiting local staff with appropriate language skills. As this difficulty has gradually been diminished, such amendments are no longer to be included. Should this change lead to a freeze of salaries at the two locations (Vienna and Rome) where a 'language factor' is currently granted, the Commission will consider a phased approach to the elimination of this element."

According to a timetable that the Commission approved at its 36th Session, in July and August 1992, there was to be a survey in Rome in the spring of 1994. By a letter of 2 November 1993 to the Chairman of the Commission the Director of the FAO's Personnel Division asked whether it might be held over by about one year for administrative reasons. In a letter dated 6 December 1993 the Executive Secretary of the Commission answered that such delay might upset the timetable and suggested making the survey in March and April 1994. In a letter of 14 February 1994, however, he proposed starting in April and going on until "early fall". In a letter of 6 May the Chairman asked the Director-General to consent to that proposal and announced that if he did not the matter would have to go to the Commission. At its 40th Session, in June and July 1994, the FAO asked the Commission to postpone the collection of data from September 1994 until January 1995. The Commission decided that the reference date of the survey should be no later than November 1994, and most of the data were collected from 3 to 25 November.

In a note of 24 April 1995 to be put to the Commission at its 41st Session, in May 1995, the Organization asked it to do two things. One was to consider keeping the "language factor", which served to reward staff for proficiency in languages. The other was to use minimum and maximum figures of outside pay in setting the new scales. At the same session the Commission had before it a digest of the data for approval. In the event it decided to take average figures of outside pay instead and to phase out the language factor, which it had already reduced by one per cent in the scales in force as from 1 November 1994. On the strength of the findings of the survey it approved new scales to apply to staff in Rome.

By an administrative circular of 1 November 1995 the Assistant Director-General in charge of the Administration and Finance Department announced that as from that date the new scales would apply to the General Service category.

On 26 February 1996 the complainants lodged appeals with the Director-General against their pay slips for November 1995. They pleaded breach of Flemming and pointed out that the survey had not complied with the timetable provided for in paragraph 9 of the revised methodology. They objected to the phasing out of the language factor and to the taking of average rather than minimum and maximum figures of pay for the purposes of the survey. They asked for a final decision. By letters of 27 May 1996 the Deputy Director-General gave them notice of the Director-General's decisions, which were final, to reject their appeals. Those are the impugned decisions.

B. The complainants challenge the lawfulness of the rule in paragraph 71 of the methodology. They observe that the surveys made in Rome in 1979, 1984 and 1990 applied an adjustment on account of the language factor that added 4 per cent to General Service pay. The FAO's note of 24 April 1995 to the Commission said -- they point out -- that the reason for that factor was that the Organization needed staff with the additional qualification of proficiency in languages, not that it had to lure recruits with the higher pay.

The complainants challenge on two counts the Commission's manner of applying the methodology. First, they plead gross breach of the timetable in paragraph 9. Keeping to the timetable matters, they say, because surveys are complex and call for a great deal of preparation. So any lapse is an offence against Flemming.

Secondly, they submit that the employment market in Rome is such that, in keeping with paragraph 38 of the methodology, the survey ought to have taken minimum and maximum figures of pay, not average ones, which are not trustworthy. It was "perhaps" because of the tight schedule that there was time to get minimum and maximum figures from just two employers, and that was in breach of the methodology. In any event the Commission has not explained what the point is of taking the average figures. Nor did it comply with paragraph 65, which says that "the outside matching salaries should be determined on a job-by-job basis". What the FAO said in its note of 24 April 1995 was sound.

Though unable to say just how much the Commission's decisions have cost them, they plead that those decisions, when their effects are reckoned together, transgress Flemming.

They seek the quashing of the Director-General's decisions notified in the letters of 27 May 1996 and ask the Tribunal to send the case back to the Organization for the reckoning of new scales and for payment of the sums due. They claim costs.

C. In its reply the FAO submits that the reasoning that underlies paragraph 71 of the methodology is quite in line with Flemming. Though it does not agree with the Commission that finding local staff proficient in the right languages has become any easier, it sees no mistake of fact in the Commission's position.

As to the timetable, it observes that staff of the Commission came to Rome in May 1994, six months before the survey began. Besides, paragraph 9 does not require strict adherence to the timetable. Nor for that matter have the complainants shown how the Commission's timing of the survey affected the outcome.

According to paragraph 42 of the methodology the rule about taking minimum and maximum figures of pay comes into play only in exceptional circumstances. Though the Organization does not challenge the use of average figures, it says that it may for the purpose of future surveys ask the Commission to think again.

The only figure the complainants offer shows the effect of dropping the language factor. They cannot put any figure on the cumulative effect of the Commission's decisions.

D. The Commission observes that its sole purpose in applying the language factor was to make it easier for organisations with headquarters in Rome and Vienna to find staff proficient in languages other than Italian and German. The FAO failed to offer the Commission at its 41st Session any evidence in support of the view that finding such staff was still a problem.

"Resistance" by the FAO was to blame for the delay in the preparations for the survey. Besides, the complainants adduce no evidence to suggest that the delay, or for that matter the abridgment of the preparations, marred the survey.

In taking the average figures of pay it merely exercised the discretion that Article 12(1) of its Statute vests in it for making surveys.

E. In their rejoinder the complainants press their pleas. They see inconsistencies between the Organization's reply and its note of 24 April 1995 and describe its reasoning as "sophistical and dishonest".

Dropping the language factor, or even phasing it out, is a breach of Flemming and therefore unlawful. It is essential to keep to the timetable throughout.

The reason why they cannot work out the cost to them of taking average figures instead of minimum and maximum ones is that with but few exceptions the Commission took only data on average pay.

F. In comment on the Commission's brief the complainants observe that Rome differs from the headquarters of other organisations in the United Nations common system. Italian is not a working language for any of the organisations there, and the local employment market makes it hard to match jobs. The Commission is trying to iron out the differences for Rome and to bring pay down by dropping the language factor, scorning the timetable and leaving out minimum and maximum figures of pay. The whole purpose of the language factor was to make jobs comparable, not to make pay more attractive. That is why earlier surveys did not apply the language factor when bilingual jobs were matched.

G. In its surrejoinder the FAO says there is "nothing odd" about its defending its decision to act on the Commission's recommendations, whatever its earlier criticisms of them may have been. As for dropping the language factor, the General Assembly gave its approval. The Commission held to its own timetable, which in any case did not affect the findings of the survey. The view that the data on average pay were usable is one that the Commission was "at liberty to take".

H. In its final brief the Commission contends that its aim in taking the average figures was uniform application of the methodology at headquarters duty stations. Whatever injury the General Service staff may have sustained, the FAO would have been hard put to it to keep people from leaving had the loss been as serious as the complainants make out. The purpose of the language factor was to keep pay attractive.

CONSIDERATIONS

1. The Food and Agriculture Organization of the United Nations employs the complainants in the General Service category of staff at its headquarters in Rome. What they seek is the quashing of decisions taken on the Director-General's behalf rejecting their appeals against the reckoning of their pay as from November 1995.

The reckoning was based on scales that the International Civil Service Commission recommended on the strength of a survey of pay done in Rome in November 1994.

The complainants submit that the method of survey was flawed. To their mind it wrongly discounted a "language factor", worth 4 per cent of pay, that General Service staff used to get on the grounds that the language current in Rome was not one of the FAO's official languages. In the complainants' submission the method was misapplied too in that the Commission did not keep to the set timetable and took average figures of pay instead of minimum and maximum ones.

2. The canons for determining whether the Organization's decisions were lawful are common knowledge: both parties acknowledge them, and so does the Commission in its own pleadings. Precedents are to be found, to cite but four, in Judgments 1000 (*in re* Clements and others), 1265 (*in re* Berlioz and others), 1519 (*in re* Prados and others), 1641 (*in re* Berlioz No. 2 and others). What they convey is that organisations in the "common system" of the United Nations, which the Commission is in charge of, must offer General Service staff the equivalent of the best terms of employment on offer from other employers at the duty station. The sole rider is that those terms, which include salary and other basic items of pay, need be merely "among the best in the locality without being the absolute best".

To find out what the terms of employment may be at headquarters duty stations painstaking surveys are carried out of jobs, akin to those of the organisations' own staff, that are offered by typical local employers. The Commission lays down the method of survey, and the Tribunal will say both whether the rules it sets are lawful and whether they have been complied with.

3. As the FAO acknowledges in its reply, "when it gets notice of the Commission's recommendations on salary scales it has a duty to analyse them and to give effect to them only if satisfied that they are lawful and that doing so would not impair the rights of its staff".

4. It has endorsed the Commission's stance on the procedural and substantive issues arising out of the survey of November 1994, and it is issues to do with the preparation and carrying out of the survey that have led to the present dispute. The Commission decided in 1992 that data on pay in Rome were to be garnered in the spring of 1994. But the FAO asked for a postponement of at least a year. After much keen debate the Commission consented to some postponement, but it would not go beyond November 1994, even though the FAO wanted more time both to get in touch with local employers and for reasons it said had to do with staff relations. The Commission so decreed at its 40th Session, in June and July 1994, and the survey was done from 3 to 25 November, though more data came in by the end of the year.

5. For all the urging of the Director of Personnel the staff representatives would have none of the actual survey. But they did sit on a joint advisory working group the Organization set up in November 1994. The group's terms of reference were -

"to examine the results of the salary survey and the relevant ICSC recommendations thereon before they are submitted to the Finance Committee and, in particular, to advise the Director-General on their compatibility with Council Resolution 1/102 and, in particular, whether they would result in an erosion of current conditions in the light of operative paragraph 3 of the above-mentioned Council Resolution".

The group met from time to time in March and April 1995. Most of its recommendations found their way into a note of 24 April 1995 that the FAO put to the Commission at a session, its 41st, that it held in Montreal in May 1995. The note argued that, the employment market in Rome being what it was, the Commission ought in its surveys to go on taking the minimum and maximum figures of pay, instead of average ones, for comparable jobs. It ought, too, to continue to apply the "language factor" to the pay of General Service staff at Rome and other duty stations where the local language was not one that the Organization used. The Commission yielded on neither point. It took average figures of pay in working out

the new scales, and it started, as it had already decided, to phase out the language factor by cutting the 4 per cent adjustment for that factor by one per cent, the other three to go at the rate of one a year.

6. The group's final report said how unhappy both management and staff were at the Commission's approach. But the Council of the FAO eventually let the scales through, and the Director of Personnel sent out a staff circular on 1 November 1995 announcing them. Each of the complainants protested on 26 February 1996 in an appeal against the amount of pay as from November 1995 and is now impugning the Director-General's decision of 27 May 1996 to reject that appeal.

7. The first issue is the complainants' plea that the timetable for the survey done in Rome in 1994 was disregarded and that, if so, the whole survey is null and void. They are relying on paragraph 9 of the Commission's "methodology" as revised at its 37th Session in March 1993. The paragraph reads:

"9. An initial preparatory meeting should normally be held several months prior to the survey reference date. Once the Commission has approved a survey schedule, the Chairman of the Commission notifies the executive heads at the duty station about 10 months prior to the scheduled survey date. Upon this notification the lead agency at the duty station should establish a local salary survey committee, composed of representatives of administration and staff ... Some six to nine months prior to the survey date, representatives of the ICSC secretariat will visit the duty station to meet with the members of the Local Salary Survey Committee ..."

The preparatory phase, which the text of the methodology calls "essential", did fall short of the Commission's own "survey schedule". The Chairman of the Commission was supposed to give the FAO ten months' notice of the start of the survey, and six to nine months were to go by between the meetings of representatives of the Commission's secretariat with members of the Local Salary Survey Committee and the start of the survey. The complainants have no trouble in showing that neither requirement was met.

Though a great pity, those lapses scarcely seem fatal. For one thing, the time limits in the schedule were not binding. For another, there is no evidence to suggest that the survey suffered for any haste in the orchestration of it. Though it would no doubt have been better had the staff joined in, neither Organization nor Commission was to blame for their refusing to be represented on the Local Salary Survey Committee unless the dates were changed. Besides, everyone had long known there was to be a survey in Rome in 1994, and the delay in setting the exact date was attributable to discussions and the raising of objections by the Organization and its staff. Yet members of the Commission's secretariat had started the preliminaries as early as May 1994, even before it had given notice of the chosen date. The conclusion is that the scheduling of the survey shows no fatal flaw.

8. The complainants' second plea about breach of the methodology is that the scales were based on average figures of pay of categories of employees in Rome: the survey should, they say, have taken minimum and maximum figures instead. The FAO is no longer challenging the Commission's stance on the issue. But its note of 24 April 1995 stated serious misgivings. It argued that one peculiarity of the employment market in Rome was that employers ordinarily promoted staff, sometimes as a matter of course, even if their duties did not change, whereas the United Nations system preferred the grading of posts. The effect was, said the FAO, that the average figures are meaningless; taking the figures of starting pay and maximum pay would give a more objective standard of comparison for the purpose of setting the FAO's scales.

What makes the argument the more compelling is that the Commission had taken minimum and maximum figures in earlier surveys. But the Organization does not press the point and the Commission strongly demurs. It concedes that the employment market in Rome does make comparison harder, but it maintains that the average figures are the best ones and observes that the local employers it approached were able to give them. The methodology as revised in 1992 says that minimum and maximum figures shall be taken only where that is "necessitated by local conditions", and the Commission contends that at the time of the survey in Rome it was not.

In choosing figures of local pay for the purpose of applying Flemming there can be no single hard-and-fast approach. As was held in Judgment 1265, the Commission must be allowed some discretion over method, even though the Tribunal will still review the exercise of it. The decision impugned may not stand if, say, it overlooks or misconstrues some particular factor, or if some method is applied for the wilful contrivance of lower figures of local pay, or if corners are cut for the sake of saving time, but to the detriment of staff interests.

The complainants do not contend, let alone prove, that the purpose of taking average figures was to contrive any cut in pay for FAO staff and there is no circumstantial evidence to suggest that the choice of method was the outcome of haste in carrying out the survey. Indeed the evidence is that the Commission was in doubt until the eleventh hour about the sort of figures to take. Though it eventually went against the Organization's wishes it did so in the belief that "the use of data on remuneration actually paid to staff, i.e. average salary data, although not perfect, was more objective than using constructed minima and maxima which required making several assumptions". There was nothing obviously wrong with that exercise of its discretion.

9. The complainants' third plea is not about the Commission's manner of applying the revised methodology of 1992 but about the lawfulness of a provision thereof that it applied.

For years the methodology called for an adjustment to pay in recognition of proficiency in languages. The Commission explained why in a statement that dates back to 1984:

"The Commission is aware that Rome is one of the headquarters locations where the local language is not one of the official working languages of FAO and IFAD [International Fund for Agricultural Development]. As a result, most of the locally recruited staff members working for these organizations have to learn an additional language, i.e. English or French. The Commission has recognized that this is an additional qualification which is required to obtain employment with FAO and IFAD but is not a requirement, in general, in the Rome labour market and should, therefore, be compensated for in some way."

Likewise the methodology the Commission approved in 1988 said under 64:

"In cities where the local language is not a working language of the organizations, it would be reasonable to fix the United Nations pay scales at a level slightly higher than best prevailing rates outside, on the understanding that most United Nations staff in the relevant categories are in fact required to use a non-local language and in so far as the outside rates relate to outside staff who work only in the local language".

10. But the methodology of 1992 changed tack as to the application of the language factor in Rome and other duty stations where the local language is not one of the working languages. Paragraph 71 of it reads:

"In cities where the local language is not a working language of the organizations an adjustment was made previously to recognize, *inter alia*, that the outside rates relate to outside staff who work only in one language and consequentially the difficulty in recruiting local staff with appropriate language skills. As this difficulty has gradually been diminished, such amendments are no longer to be included."

11. In keeping with the new rules the Commission decided, after spirited discussion with the Organization, to "phase out" the extra 4 per cent of pay granted to General Service staff for proficiency in languages. It said:

"The scale with an effective date of November 1994 already included a deduction of one percentage point from this factor. A similar one percentage point deduction should be made from future interim adjustments, so as to ensure that the four percentage point language factor was eliminated by the time of the next survey."

12. The complainants see that change as unlawful. They argue that greater ease in recruitment, which experience did not bear out, was a bad reason for it. In any event, they say, the purpose of Flemming as applied in earlier versions of the methodology was not to attract bilingual staff and keep them in the Organization's employ but to ensure that they were paid at least as much as local employees in like jobs with due regard to such qualifications as proficiency in languages.

13. The Commission and the FAO, again in tandem, retort that the whole point of Flemming is that international organisations need to find, and to keep, people who meet the highest standards of efficiency, competence and integrity. The Commission adds, however, that the FAO "had not proved that posts requiring special language skills on which it had appointed non-local officials might have been filled locally by means of the language adjustment". It concludes that there are no objections to the rule, which it has made in the exercise of its discretion.

14. First and foremost, the manner of applying Flemming does not turn on such variables as the desire of staff to keep their jobs or the ease or difficulty of finding good local recruits. What Flemming ordains is that General Service staff shall have pay and other terms of employment that match the best on offer at their

duty station. The FAO's note of 24 April 1995 failed to persuade the Commission. Yet it made a telling point. It is right to adjust pay by a language factor when jobs that do not require proficiency in a second language are matched with jobs that do. But it is wrong so to adjust pay when the matching is with outside posts that do require proficiency in a second language and that requirement is not compensated. "In other words", as the FAO put it at the time, "it is the practice prevailing in the local market that determines whether this adjustment should be made or not".

Here there is a second point to be made. The FAO and Commission alike make out that it has become easier to find in Rome staff proficient in one of the Organization's working languages. The contention is gratuitous. There was no obvious change in that regard between 1988, when the methodology did prescribe the language factor -- and gave good reasons for it, to boot -- and 1992, when it was dropped. All that is to be discerned is a mounting desire in the Commission to purge the system of what it saw as local oddities. In this case it could scarcely have proved a poser for the survey to determine whether working proficiency in a language other than Italian earned local employees a bonus. Actually one of the local employers reported that any of its employees who needed such proficiency got a bonus worth 3 per cent of pay. In Rome the only language that outside employers ordinarily demand is Italian. For want of methodical collection of data on bonuses it would -- to borrow a term from the 1988 methodology -- have been "reasonable" to keep a small adjustment to account for that fact.

The upshot is that the dropping, and even the phasing out, of the language factor is a decision that ignores the peculiarities of the employment market in Rome. It therefore amounts to breach of the right of General Service staff to one of the terms of employment -- namely pay -- that must, as was said above, be "among the best in the locality without being the absolute best". The Tribunal therefore sets aside the Director-General's decisions to reject the complainants' appeals against the reckoning of pay as from 1 November 1995 insofar as those decisions confirmed a reduction in the language factor. On all other counts, however, the decisions pass muster.

15. The complainants claim awards of damages for what they see as a steady erosion of pay and the safeguards of pay levels. They want new scales as from 1 November 1994. The claim fails. The Tribunal will not entertain any general challenge to the policies of the Commission or of the FAO: it will rule only on particular pleas from the parties. In any event it will not go into the rights and wrongs of the pay that staff got before 1 November 1995: the internal appeals and the decisions impugned in this case were about pay slips for November 1995 and the reckoning of pay since then.

16. Since the complainants succeed in part they are entitled to costs, and the Tribunal sets the amount at 50,000 French francs.

DECISION

For the above reasons,

1. The Director-General's decisions of 27 May 1996 rejecting the complainants' appeals against the reckoning of pay as from 1 November 1995 are set aside insofar as they reduce the language factor.
2. The cases are sent back for the Organization to reckon the complainants' pay in line with this judgment.
3. The FAO shall pay them a total of 50,000 French francs in costs.
4. Their other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

Michel Gentot
Julio Barberis

Jean-François Egli

A.B. Gardner

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