Registry's translation, the French text alone being authoritative.

EIGHTY-SIXTH SESSION

In re Baron, Damond (No. 4), Di Palma (No. 4), Dondenne (No. 4), Hutchins, Kopp and Vitte

Judgment 1800

The Administrative Tribunal,

Considering the complaints filed by Mr. Jean-Luc Baron, Mr. Keith Hutchins, Mr. Norbert Kopp and Miss Claire Vitte against the World Intellectual Property Organization (WIPO) on 9 June 1997 and the fourth complaints filed against the same Organization at the same date by Mrs. Andrée Damond, Mr. Salvatore Di Palma and Mr. Bernard Dondenne and corrected on 22 July, WIPO's single reply of 19 September, the complainants' rejoinder of 6 October, the observations filed by the International Civil Service Commission (ICSC) on 26 November 1997, the complainants' comments thereon of 6 January 1998, the Organization's letter of 9 February informing the Registrar of the Tribunal that it did not wish to file a surrejoinder, the Commission's further brief of 13 February and the Organization's letter of 19 March informing the Registrar that it had no comments to make on that further brief;

Considering Article II, paragraph 5, 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. As was explained in Judgment 1776 (*in re* Damond No. 3 and others), under A, post adjustment allowance forms part of the pay of officials in the Professional and higher categories of staff of organisations that belong, as WIPO does, to the common system of the United Nations. Their pay is determined in part according to what is known as the Noblemaire principle, which Judgment 825 (*in re* Beattie and Sheeran) explained under 1 to 5. The post adjustment index has four main components: "in-area" expenditures, "rental/housing" costs, "out-of-area" expenditures and contributions to the United Nations Joint Staff Pension Fund. The International Civil Service Commission explained in a brochure it put out in May 1994 about post adjustment that out-of-area expenditures are those which, "although incurred while the staff member is at the duty station, are disbursed outside the country, generally in another currency".

At its 42nd Session, in July and August 1995, the Commission decided for the purpose of reckoning the post adjustment index to add to out-of-area expenditure a sum corresponding to 5 per cent of net basic salary. The Commission said that the purpose was to take account of financial commitments other than expenditure on consumption, such as investments and savings, which the staff entered into outside the duty station. The change was to take effect at 1 January 1996. Like action had been taken in 1986 but - so said the Commission - had been suspended *de facto* by the introduction in 1990 of the system of "bands" which is described in Judgment 1776.

The Commission explains in its booklet that "a place-to-place survey is carried out at least once every four years in all locations where UN system staff are stationed", the purpose being to garner the basic data for working out the post adjustment index. That allows comparison of living costs between New York, the "base of the system", and a particular duty station. The survey to be done in New York in 1994 was held over to mid-1995, and so the survey in Geneva took place in November 1995. The Commission approved the findings of those surveys at its 43rd Session in April and May 1996 and decided that the one for Geneva should count in setting the post adjustment for that duty station as from 1 June 1996.

The effect of adding 5 per cent of basic salary to out-of-area expenditure and of the findings of the place-to-place survey in 1995 was to lower the post adjustment index by 5.1 per cent and to "freeze" pay in Geneva.

WIPO employs the complainants at its headquarters in Geneva. In the working week that started on 22 July 1996 it sent them their pay slips for that month. By a letter of 2 September 1996 they asked the Director-General to review

his decision to maintain for July the post adjustment index that had applied in June. They argued that according to what is known as the "twelve-month rule" a rise in the cost of living warranted a rise in pay. Having got no answer, they filed an internal appeal on 25 November 1996. On 7 February 1997 the Appeal Board submitted a single report on the appeal and on the identical one brought against the International Union for the Protection of New Varieties of Plants by Mr. André Heitz, who was also stationed in Geneva. Mr. Heitz had put his appeal to the Director-General of WIPO in his capacity as Secretary-General of the Union: see Judgment 1801, also delivered this day. The Appeal Board felt unable to comment on most of the complainants' objections because it did not know how the Commission had come to make its recommendation. It saw no point in trying to find out because the Commission had only recently declined to explain: see Judgment 1776. It recommended upholding the decision "so as to allow prompt referral [to the Tribunal] and so objective review of the lawfulness of the Commission's recommendations". By memoranda of 4 March 1997, the decisions impugned, the Director-General told the complainants that he was endorsing the Board's recommendations.

B. The complainants submit that it was unlawful to incorporate the equivalent of 5 per cent of basic salary into out-of-area expenditure.

Their first plea is abuse of authority. In their view the Commission made no objective assessment of the purchasing power of staff pay at various duty stations. It obviously prejudged the matter. It so applied its "methodology" as to bring about the findings its members wanted. It did things in a rush, did not bother about technical justification, "belittled" the effects of the new scales and broke with custom by failing to report to the General Assembly of the United Nations.

Secondly, there was misuse of authority. The Commission's true purpose was to save money, not to iron out disparities between duty stations. Its decision and two more recent ones mean a fall of nearly 6 per cent in the post adjustment index for Geneva whereas the index for New York, where it has its secretariat, has hardly budged.

Thirdly, the complainants contend that the decision was retroactive because the 5 per cent cut was added to the figure of out-of-area expenditure for May 1990.

They have objections, too, to the place-to-place survey.

First, inasmuch as the index derived from the latest findings is adjusted every month, they are wary of the 5.1 per cent difference between the "existing" index - the one adjusted each month - and the new one. By their reckoning the purchasing power of staff pay in Geneva has dropped by some 25 to 30 per cent since 1975.

Secondly, there was a procedural flaw. It was the Commission's own secretariat that got the data, not, as its booklet on post adjustment says, "an independent person". Its secretariat was too small to muster the dozen properly qualified people - six teams of two - needed to do the job of "pricing agents" in New York. The secretariat had a direct interest, too, in inflating prices in New York so as to play down the cost of living at other duty stations. General Assembly and Commission alike were pushing to get expenditure on staff down elsewhere than in New York.

Thirdly, the complainants see another procedural flaw in the secrecy wrapping the surveys. Deadlines for sending off Commission papers were missed; there were differences between New York and Geneva in the manner of gathering data; and the representatives of management and the members of the Advisory Committee on Post Adjustment Questions (ACPAQ) were unable to check the data for New York. WIPO pointed out to the Chairman of the Commission that the procedure had not allowed it, as the Tribunal's rulings required, to check the lawfulness of the post adjustment index.

The complainants charge the Commission with interference and bad faith.

They have a subsidiary plea that the Chairman failed to make known the effect given to the findings of the place-to-place survey, and the Director-General of WIPO to inform the staff.

The complainants claim the quashing of the Director-General's decision to apply the post adjustment index reckoned by the Commission and to pay interest at the rate of 8 per cent a year on the sums due. They further claim 3,000 Swiss francs each in costs.

C. As to the addition of 5 per cent of basic salary to out-of-area expenditure, WIPO explains in its reply that for

want of information from the Commission, and because the staff had not challenged a similar decision taken in 1986, it could not refuse to put the Commission's decision into effect.

As for the findings of the place-to-place survey, the defendant says that it tried to do what precedent requires, but on the strength of the information vouchsafed by the Commission it could challenge neither methodology nor findings.

D. The complainants rejoin that the failure of the staff to challenge a decision back in 1986 does not make it, let alone a later one, quite lawful. Besides, the system of adjustment and the whole context have since changed.

They point out that, like WIPO, they lack the information they need to prove beyond doubt what they are saying, and that the Organization itself has not denied that the findings of the place-to-place survey are suspect.

E. The Commission admits to an "oversight" in failing to incorporate the 5 per cent of basic salary in out-of-area expenditure after the old system of "bands" had been dropped. The upshot was that the index was too high at duty stations where the cost of living was high and too low where it was low. The purpose in adding the 5 per cent was to restore parity of purchasing power throughout the common system. The Commission explains that its Statute empowers it to amend the system of adjustment without referral to the General Assembly. Its decision was not retroactive but took effect only for the future, though based on the findings of the place-to-place survey done in 1990.

As for the survey, its own staff were fully qualified to get the data, have always taken part in surveys, and work independently and evenhandedly. The post adjustment index for New York hinged on the consumer price index provided by the Government of the United States, not on the findings of the survey, which served merely as a standard of comparison for other duty stations. The Commission's secretariat stood to gain nothing from exaggerating prices in New York. Its booklet is not binding in law. It denies the charges of interference and bad faith and points out that the whole system calls for some secrecy. It argues that the decision to apply the findings of the survey was notified to organisations and staff by a circular signed by its Chairman.

F. In comments on the Commission's brief the complainants challenge the explanations it offers. They maintain that it made mistakes of fact. It erred, for example, in taking the view that the system of bands had superseded the decision to add 5 per cent of basic salary to out-of-area expenditure and that that figure had to be incorporated when the system of bands was dropped. They are "flabbergasted" at the Commission's imagining it had no duty to inform the General Assembly. Its reckoning of the new indices is wrong.

It is wrong, too, in making out that its booklet is not binding. That is just the sort of wile that shows up its bad faith. The complainants press their objections to the gathering of data by its own secretariat. The procedure ran counter to its own account of the system of adjustment, and custom, however long, does not make the procedure lawful. The Commission went back on decisions it had taken in June 1995 to see that organisations and staff were given the data and calculations. It is still refusing that information. Sending organisations and staff circulars does not meet the requirement in its Statute that it publish its decisions.

G. In a further brief the Commission presses its pleas. It contends that it got the calculations right. The organisations and staff could, at the preparatory meetings about the survey of 1995, have objected to having its own secretariat get the data. The Advisory Committee on Post Adjustment Questions was satisfied with the findings.

CONSIDERATIONS

1. The complainants belong to the Professional or higher categories of staff of the World Intellectual Property Organization. They are challenging their pay slips for July 1996. Those pay slips showed no increase in pay though the cost of living at Geneva had risen in the preceding twelve months. The figure of the post adjustment index - 91.7 - applied to their pay was the same as the index used in June 1996. The reason was that the International Civil Service Commission (ICSC) had made new rules for working out the index. For one thing, it had decided as from November 1995 to use an "actual" weighting of the "out-of-area" component of expenditure that counted in reckoning the index. For another, it included in that component as from January 1996 five per cent of basic salary, a figure intended to reflect amounts that did not come under expenditure on consumer goods. As from June 1996 it put into effect the findings of the place-to-place survey it had carried out in the second half of 1995.

2. Judgment 1776 (*in re* Damond No. 3 and others) dismissed complaints from staff of WIPO challenging the application of an actual weighting of out-of-area expenditure in determining the post adjustment index as from November 1995. It said:

"Post adjustment has two purposes. One is to ensure that the pay of all staff of the common system of the United Nations, whatever their duty station may be, has the same purchasing power in local currency as pay in New York, which serves as the basis for the whole system. The other purpose is to keep purchasing power broadly steady despite changes in the cost of living at the duty station."

3. The Commission published a booklet in May 1994 about the system of adjustment. It explains that for the purpose of determining the index comparisons are made from time to time by means of place-to-place surveys between the base city, New York, and other duty stations. The post adjustment index determines the amount to be paid to staff in the Professional and higher categories. It includes several weighted items such as "in-area" expenditure, mainly accounted for by consumer goods in the country of the duty station; "rental/housing" expenses, which cover the cost of lodging and kindred charges; "out-of-area" expenditure, such as a staff member stationed in one country incurs in another, usually in a currency other than the local one; and contributions to the United Nations Joint Staff Pension Fund. What the complainants are objecting to is that their pay for July 1996 was held down or, more properly, failed to go up, because of the Commission's method of reckoning out-of-area expenditure and the findings of the survey done in 1995, which, in their submission, is flawed in many respects.

4. The case went to the Appeal Board of WIPO. The Board recommended upholding the impugned decisions, but pointed out that it was unable to confirm or reject the complainants' objections "because it did not know how the Commission had come to make its recommendations, which were indirectly under challenge". The sole purpose of its recommendation was to "allow prompt referral" to the Tribunal.

5. So the case has come to the Tribunal, and there is no difficulty over receivability. In its reply the Organization contends that it did what was required of it to put the Commission's decisions into effect and that the information it got from the Commission did not allow it to question the methodology or the findings of the survey. Actually it has simply left the Commission to defend its own case. What is at stake - the pay of its own staff - matters: yet the Organization is just not acting as any defendant ought.

6. The complainants put forward three pleas in support of their challenge to the inclusion of the equivalent of 5 per cent of basic pay in out-of-area expenditure in reckoning the index. First, the decision the Commission took on that score at its 42nd Session had no objective basis, but was rushed through on the strength of postulates calculated to bear out a foregone conclusion. The Commission's own working party had not recommended it, and the Commission never reported it to the General Assembly of the United Nations. Secondly, the sole purpose of that decision and of the corollary ones was to bring down the index for Geneva and so save huge sums on staffing in expensive cities other than New York. Thirdly, the Commission's methodology broke the rule against retroactivity because it meant adding the equivalent of 5 per cent of basic salary to the figure of out-of-area expenditure taken for May 1990.

7. The pleas fail. For one thing, it cannot be seriously argued that the Commission acted - to quote the complainants - "in haste, en passant". Some of the money paid to staff is not spent in the area of the duty station, or is not spent at all. How was that to be taken into account in reckoning the index? For over ten years thorough discussion had been going on about that question in the Commission itself and in the Advisory Committee on Post Adjustment Questions (ACPAQ). Sometimes the debate drifted. In May 1995 the Commission decided to reckon out-of-area expenditure by applying an "actual coefficient" instead of the fixed one peculiar to the old system of splitting duty stations into "bands". That obviously meant taking a figure corresponding to moneys not spent at the duty station. The expedient that in the end went through was to take instead the round figure of 5 per cent of basic salary that had been used in 1986-89. It seems reasonable. In any event it shows no mistake of fact or any obvious misappraisal of the evidence. It may have incurred criticism, and discussion in the ACPAQ's working party did suggest more than one approach. But the Commission had to take the decision, and promptly. That was because discussion at its 41st Session had brought about changes in the manner of reckoning out-of-area expenditure, and there was a risk of disparities in pay between duty stations if the index discounted unspent moneys. What the Commission calls "equitable treatment of staff at all duty stations" is an aim not inherently at odds with that of the post adjustment. In acting as it did the Commission was exercising its authority under Article 11 of its Statute. Keeping the General Assembly abreast of action it has taken is desirable - and it ordinarily does so - but even if it does not the omission is not a fatal flaw.

8. The complainants' second plea is that the sole purpose of the change in the rules on the index was to save money. The Tribunal need only quote the reply it gave to that argument in Judgment 1776:

"If the new method is lawful the fact that applying it saves member States money cannot in itself be a flaw."

And the evidence suggests no misuse of authority by the Commission, which, against the odds, tries to find from time to time objective criteria for reckoning post adjustment throughout the common system.

9. The third plea - breach of the rule against retroactivity - was rejected in Judgment 1776. It fails again here. For statistical reasons the figures used to reckon the index in 1990 had to be recalculated, and it was done by adding the equivalent of 5 per cent of basic salary to the "out-of-area" component. But taking that fictitious figure was necessary so as to draw comparisons for the purpose of reckoning the index in 1996. There was no flaw in the method just because the figure taken for that purpose was 5 per cent of basic salary for January 1996. The long and the short of it is that the new index had no retroactive effect on pay.

10. The complainants raise objections to the way in which the survey was done in 1995. In their submission the "pricing agents" were neither independent nor competent; both in New York and Geneva the whole process was secretive; and the data were not notified in time to the organisations and to the members of the ACPAQ. To their mind those flaws were deliberate and betray the Commission's bad faith. Furthermore, its Chairman failed to notify the use made of the findings to management or staff representatives.

11. The first argument rests on the text of the Commission's booklet about post adjustment. Paragraph 1.10.1 says that a "pricing agent" is an "independent person appointed by ICSC to collect prices in retail outlets patronized by the staff", who must, to boot, "be sufficiently experienced and qualified to recognise local shopping conditions as they relate to staff at the duty station, and conversant with the specification of items on the pricing list". The complainants say that here the agents were just the Commission's own people and that, its secretariat being small, they could not have been properly qualified. Nor were they properly objective, the Commission's aim being to lower costs at duty stations other than New York.

12. There is no evidence to bear out the charges. The Commission's booklet is not a binding text, and in any event the requirement of independence does not disqualify its own staff provided they act objectively. The charge that they were unfit for the task rests on no specific allegation of fact but on the mere supposition that it could not muster among its own staff people qualified to get the data. The evidence bears out neither that apprehension nor the much graver charge of coercion to come up with figures that would exaggerate the cost of living in New York.

13. The findings of the survey were not conveyed to the agencies in time to allow any real scrutiny. The timetable shows as much, and indeed the defendant said so in strong language in a letter of 21 October 1996 to the Chairman of the Commission. It is a pity that action of such moment to organisations and staff was not brought to everyone's notice soon enough for comment. But the delay was not wholly the Commission's fault, and the complainants do not explain to the Tribunal just how its collection of data was defective. Nor was there anything secretive about the exercise: organisations and staff alike were free to name independent observers.

14. The complainants' charge of bad faith fails too, being founded on mere allegation, not on any cogent evidence. In offering general strictures about the arrangements for the survey and the findings, they are merely venting suspicion. They have failed to discharge the burden of proof of bad faith.

15. No more telling is the plea that the Chairman of the Commission failed to announce the findings of the survey. On 6 June 1996 he sent the organisations and staff representatives a circular telling them of the new post adjustment index for each duty station. In the circumstances that circular is to be treated as meeting the requirements of Article 25(1) of the Commission's Statute for the application of its decisions.

16. Since none of the complainants' pleas succeeds, their complaints must fail, including their claims to costs.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner

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