Registry's translation, the French text alone being authoritative

NINETY-EIGHTH SESSION

Judgment No. 2422

The Administrative Tribunal,

Considering the complaints filed by Messrs D.A. C. and J.E. R. against the International Atomic Energy Agency (IAEA) on 14 August 2003 and corrected on 7 November 2003, the Agency's reply of 17 February 2004, the complainants' rejoinder of 28 June and the IAEA's surrejoinder of 1 October 2004;

Considering the *amicus curiae* brief submitted by the Staff Association of the IAEA on 1 June 2004;

Considering the letter of 7 July 2004 from the Executive Secretary of the International Civil Service Commission (ICSC) to the Registrar of the Tribunal, declining the Tribunal's invitation to enter a submission in the present case;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Salary scales for staff in the Professional and higher categories (grades P-1 to D-2) in organisations belonging to the United Nations (UN) common system are set by the UN General Assembly in resolutions implemented by the organisations concerned. Pursuant to Article 10(b) of its Statute, the ICSC makes recommendations to the General Assembly on this issue. Salaries in these categories are determined, in accordance with the Noblemaire principle, by reference to those of the highest-paid national civil service, which is referred to in this context as the "comparator". As a general rule, they are maintained at a level slightly higher than those of the comparator, particularly in order to ensure that the organisations are able to attract and retain high quality staff from all countries. Since the establishment of the common system, the comparator has always been the federal civil service of the United States of America.

The ICSC reviews salary levels in the comparator civil service on an ongoing basis and reports annually to the General Assembly. In the light of the ICSC's reports, the General Assembly establishes a salary scale showing the minimum net amounts received by staff in grades P-1 to D-2 throughout the world. This scale is known as the "base/floor salary scale". The average difference in remuneration between UN staff in grades P-1 to D-2 in New York and US federal civil servants in comparable positions in Washington D.C., adjusted for the cost-of-living differentiation between these two cities, is referred to as the "net remuneration margin". It is expressed as a percentage: thus, for example, a margin of 114 indicates that the net salaries of UN staff in the Professional and higher categories are on average 14 per cent higher than those of their counterparts in the comparator civil service.

In resolution 40/244 of 18 December 1985 the General Assembly approved "the range of 110 to 120, with a desirable mid-point of 115", for the net remuneration margin, "on the understanding that the margin would be maintained at a level around the desirable mid-point of 115 over a period of time". Since then, the General Assembly has reaffirmed on several occasions that this range, with its desirable mid-point, should continue to apply. Between 1985 and 2002 the margin nearly always remained within the prescribed range. However, as indicated above, the net remuneration margin represents the average of the margins for grades P-1 to D-2. At individual grades there were in fact substantial differences in margin during that same period. The margin at grades P-1 to P-3 was consistently higher than the desirable mid-point of 115, whilst the margin at grades P-4 to D-2 remained below the mid-point. At grades D-1 and D-2, it was invariably lower than 110.

In resolution 46/191 of 20 December 1991 the General Assembly invited the ICSC to review and report to it on the differences between the net remuneration of UN officials and US federal civil servants at individual grade levels. Two years later, in resolution 48/224, it declared that the imbalance in the margins at individual grades should be

addressed in the context of its overall margin considerations and invited the ICSC to make proposals to that effect. However, although the issue continued to be considered by both the ICSC and the General Assembly, it was not until 2002 that measures were taken to redress the imbalance.

In its report for 2002 the ICSC, having noted that the net remuneration margin for that year was estimated at 109.3, recommended to the General Assembly, for implementation as of 1 March 2003, "a differentiated real increase of the base/floor salary scale to address the low level of the margin at the upper grades of the salary scale and to restore the overall level of the margin to the desirable mid-point of 115". The salary scale which the ICSC submitted to the General Assembly reflected salary increases at all grades, ranging from 0.45 per cent at grade P-1 to 10.7 per cent at grade D-2, and resulted in a net remuneration margin of 115.

By resolution 57/285 of 20 December 2002 the General Assembly, having considered the ICSC's report, approved a revised base/floor salary scale which, though likewise reflecting differentiated real increases in salary, differed from the scale proposed by the ICSC in the following respects: no increase in salary was granted at grades P-1 to P-3; the increases granted at grades P-4 to D-2 were smaller than those recommended by the ICSC; the resulting net remuneration margin was 112.2; and the revised scale was to apply with effect from 1 January 2003. This resolution was duly implemented by the IAEA.

On 28 March 2003 the complainants, who are staff members of the Agency, individually challenged the application of resolution 57/285 as reflected in their payslips. By individual decisions dated 15 July 2003, which the complainants now impugn in identical complaints, the Director General rejected their appeals and allowed the case to be brought directly before the Tribunal. Similar complaints, supported by identical submissions, have been filed by staff members of two other organisations and are the subject of Judgments 2420, 2421 and 2423, also delivered this day.

B. The complainants put forward four main arguments in support of their complaints. They submit, firstly, that the General Assembly failed to comply with the *patere legem quam ipse fecisti* principle according to which "[a]ny authority is bound by its own rules for so long as such rules have not been amended or abrogated", as the Tribunal recalled in Judgment 51. The complainants point out that, having reaffirmed that the range of 110 to 120 should continue to apply and that the margin should be "maintained at a level around the desirable mid-point of 115 over a period of time", the General Assembly breached its own rule by adopting a base/floor salary scale in which the margin for grade P-1 is outside the range, at 120.5, whilst the overall level of the margin is 112.2, which in their view cannot be said to be "around the desirable mid-point of 115". Similarly, by adopting a scale in which the margins range from 115.4 at grade P-2 to 111 at grade D-2, the General Assembly did not properly address the margin imbalance at individual grade levels, despite having repeatedly asked the ICSC to make proposals to that effect.

Secondly, referring to Judgment 1821, the complainants recall that the methodology used to determine salary adjustments must ensure that the results are "stable, foreseeable and clearly understood". They submit that whereas the ICSC's recommendation for the 2003 base/floor salary scale was based on a detailed methodology approved by the General Assembly, there is no evidence that in deciding to adopt a different scale the General Assembly applied any methodology whatsoever.

Thirdly, they contend that no reasons have been given to support the decision of the General Assembly, which appears to have been motivated solely by the desire to save money at the staff's expense. By contrast, the reasons underpinning the ICSC's recommendation were well known and reflected a consensus, amongst the ICSC and the representatives of both the organisations and the staff, in favour of restoring the net remuneration margin to 115.

Lastly, they argue that the General Assembly's decision was arbitrary, being neither fair, nor "technically grounded", nor properly motivated.

The complainants ask the Tribunal to annul the impugned decisions insofar as they amount to a rejection of their appeals, and to draw all legal consequences from such annulment, particularly by referring the cases back to the Agency "so that the proper procedure can be followed with a view to awarding the complainant[s] the sums to which [they are] legally entitled". They also claim costs.

C. In its reply the IAEA raises no formal objection to receivability, but it expresses doubts as to whether the Tribunal has jurisdiction to rule on the lawfulness of General Assembly resolutions. It points out that, although the

complaints are directed against the implementation of the disputed salary scale by the Agency, they imply a challenge of the established procedure for setting pay levels in the common system.

Referring to the Tribunal's case law, and more particularly to Judgment 2252, the defendant recalls that inasmuch as decisions regarding the levels of salary adjustments "lie within the discretionary authority of the organisation, they cannot be reviewed by the Tribunal unless they show an error of fact or of law, overlook essential facts, show abuse of authority or draw clearly mistaken conclusions from the evidence". It argues that, notwithstanding the case law to the effect that organisations must verify that decisions or recommendations of the ICSC are lawful prior to implementing them, decisions by the General Assembly can be reviewed by organisations of the common system only on the limited grounds specified in Judgment 2252. In implementing the disputed salary scale, the Director General had no reason to believe that it was flawed on any of those grounds and he fulfilled his obligations under the Statute of the ICSC and the Agency's Staff Regulations and Rules.

According to the defendant, management of the net remuneration margin is not a simple arithmetical exercise, and decisions on corrective action require a degree of judgement on the part of the General Assembly. It argues that the margins at individual grade levels have only an indicative value and serve solely for the purpose of calculating the overall level of the margin. As for the desirable mid-point of 115, it is merely a guideline around which the margin should be maintained over a period of time. There are valid explanations for the different margins at different grades, which are due partly to the methodology used to calculate them, but partly also to human resources policy considerations. In accordance with the rules it had established for the management of the margin, the General Assembly had to bring UN remuneration back into the margin range, but it was under no obligation to restore the margin to 115 or to adopt the margins recommended by the ICSC for the various grades.

The Agency rejects the argument that the General Assembly's decision was not based on a methodology that ensures that the results are stable, foreseeable and clearly understood. It emphasises that the methodology established for margin management was applied not only by the ICSC, but also by the Fifth Committee, which advised the General Assembly on the technical and policy aspects of the proposed salary increase, and the Advisory Committee on Administrative and Budgetary Questions, which reviewed its financial implications. As for the allegation that no reasons for the decision were given, the Agency refers to Judgments 751 and 1329 and points out that the views expressed during the debate on the ICSC's report appear in the official records, which are readily available.

Lastly, the IAEA submits that the disputed salary scale, which was established by the General Assembly in the exercise of its discretionary power and in accordance with the above-mentioned methodology, did not result from an arbitrary decision.

D. In the rejoinder submitted on behalf of both complainants, the pleas presented in their complaints are maintained. In addition, the complainants argue that the scale adopted by the General Assembly failed to set salaries at a competitive level enabling the organisations to address the widely-acknowledged need to offer better conditions of pay to managers at senior levels. In that respect, the scale did not comply with the Noblemaire principle, the ultimate goal of which, according to the complainants, is set forth in Article 101, paragraph 3, of the Charter of the United Nations in the following terms:

"The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

E. In its *amicus curiae* brief the Staff Association fully agrees with the arguments put forward by the complainants.

F. In its surrejoinder the Agency maintains its position, noting that the complainants' rejoinder adds no new arguments or facts. On the issue of competitiveness, it points out that the recruitment difficulties which it faces are attributable to the highly specialised nature of its work rather than to salary levels.

CONSIDERATIONS

1. The complainants are staff members of the IAEA holding grades P-2 and P-4, respectively, who, on 28

March 2003, lodged appeals against the determination, on the basis of a circular of 30 January 2003 implementing the United Nations General Assembly's resolution 57/285 of 20 December 2002, of their respective salaries for January 2003. The Director General having rejected their appeals by decisions of 15 July 2003 and allowed them to bring their case directly before the Tribunal, they filed separate complaints, which the Tribunal has joined, seeking the annulment of those decisions.

2. The Staff Association has submitted an *amicus curiae* brief. The defendant is not opposed to an examination of those submissions by the Tribunal, but it points out that the staff representatives raised no objection to the implementation of the new salary scale at the IAEA when they were consulted on the matter. That of course does not prevent the Staff Association from expressing different views, which the Tribunal agrees to take into consideration for the reasons set forth in Judgment 2420, also delivered this day, whilst emphasising that these submissions are not to be regarded as the brief of an intervener.

3. The arguments exchanged between the complainants and the Agency, though expressed in slightly different terms by the defendant, are for the most part similar to those examined in the above-mentioned judgment and, *mutatis mutandis*, call for the same replies.

4. In addition to the foregoing reference to Judgment 2420, the Tribunal notes that although the Agency argues that organisations belonging to the common system cannot challenge the "unquestionable" power of the UN General Assembly to determine salary scales, it acknowledges that, in accordance with Judgment 2252, decisions taken by an organisation in the exercise of its discretionary authority cannot be reviewed by the Tribunal unless they show an error of fact or of law, overlook essential facts, show abuse of authority or draw clearly mistaken conclusions from the evidence. The Tribunal in fact took care to point out in that judgment that "[i]f the level of salary adjustments is set by a body external to an international organisation, the latter must ensure that the figures proposed comply with the law". The same can be said in reply to the argument that organisations belonging to the common system are bound by the decisions taken by the UN General Assembly on the basis of recommendations of the ICSC.

5. In its surrejoinder the defendant emphasises at length the specific difficulties it faces in recruitment matters, given the nature of its activity. However, it asserts – and there is no reason to doubt its statements – that it would have faced the same difficulties had the scale recommended by the ICSC been adopted and, conversely, that it cannot claim that the scale adopted by the General Assembly has hampered its efforts to recruit. It rightly draws attention to the fact that the difference between the two salary scales, that is to say the scale proposed by the ICSC and that adopted by the General Assembly, is relatively small, and states that it is unlikely that the adoption of the more favourable scale would have significantly improved the competitiveness of the IAEA as an employer vis-à-vis the nuclear industry. Be that as it may, the Tribunal finds nothing in the file to support the view that the setting of the salary scale at the disputed level prevents the defendant from recruiting high quality managerial staff, particularly since it indicates that it recruits primarily at grade P-4 and above.

6. In view of the considerations set forth in Judgment 2420 and the additional observations made in the present judgment, the Tribunal considers that the complaints cannot be allowed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.