B.

v.

FAO

131st Session **Judgment No. 4380**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. B. against the Food and Agriculture Organization of the United Nations (FAO) on 9 November 2018 and corrected on 22 November 2018, the FAO's reply of 11 March 2019, the complainant's rejoinder of 26 June and the FAO's surrejoinder of 6 September 2019;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the changes made with respect to his salary.

The complainant works for the World Food Programme (WFP), an autonomous joint subsidiary programme of the United Nations (UN) and the FAO. He joined the WFP in 2006 as an international professional staff member, under a fixed-term appointment, and served in several countries before being assigned to Rome (Italy) mid-2017.

In June 2016, December 2016, August 2017 and September 2017 staff members of the WFP were informed of the changes that would be made to the benefits and entitlements of internationally-recruited staff as approved by the UN General Assembly in 2013 following a proposal of the International Civil Service Commission (ICSC). The changes were to be implemented in three phases. Phase I dealt with field-related

allowances from 1 July 2016, phase II would introduce the unified salary scale and dependency-related allowances in 2017 and phase III would concern education grant for the scholastic year in progress on 1 January 2018. They were also reminded that they had been previously advised in March 2016 of the final phase out of the Special Operations Approach (SOA) – including the abolition of the Administrative Place of Assignment.

In September 2017 the complainant received his September payslip. A few days later he filed an appeal with the WFP Executive Director contesting the implemented changes. He stated that the changes resulted in a monthly loss of 922 United States dollars. His payslip showed that he no longer received the mobility allowance, and that he had also lost approximately 9,000 dollars with respect to the settling-in grant. He alleged that these changes in the compensation package had a negative impact on his total compensation and affected his acquired rights. In his view, his salary, benefits and allowances were fundamental conditions of employment which gave rise to acquired rights. He explained that the salary, benefits and allowances staff members received aimed at ensuring that they would accept certain conditions of employment, in particular assignments to different duty stations including hardship assignments. He therefore requested that the decisions taken to implement the changes to the compensation package be reversed and that the previous salary and benefits be restored. He also asked that the FAO Director-General take a final decision on his appeal.

He was informed in November 2017 that his request for a final decision by the Director-General of FAO was granted and, by a letter of 27 August 2018, the Director-General of FAO informed him of his decision to reject his appeal. He held that the appeal purported to challenge the WFP's decisions to implement the three phases of the changes to the compensation package as well as the phase out of the SOA. These decisions were not challengeable unless and until they were applied to the complainant individually in a prejudicial manner. The Director-General noted that, as of the date of his appeal, the complainant had received individual decisions with respect to the following elements of compensation only: mobility-related payments (phase I), relocation-related payments (phase I) and the unified salary scale (phase II). He therefore considered that the appeal was receivable only with respect to these elements. He stressed that, according to the Tribunal's case law, there was no acquired right to particular details of

conditions of service such as eligibility requirements, calculation methods or the actual amount of monetary entitlements. Neither phase I nor phase II abolished any established categories of entitlements; they rather refined the eligibility requirements and basis for calculating the payments to closely align the payments with their intended purposes. The Director-General added that there were legitimate organisational reasons for those changes. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision and to award him costs.

The FAO asks the Tribunal to dismiss the complaint as partially irreceivable, insofar as the complainant had not received individual decisions concerning some of the contested changes, and otherwise unfounded.

CONSIDERATIONS

1. The complainant is employed by the WFP. He has filed a complaint with the Tribunal challenging his September 2017 payslip and indirectly challenging general decisions actually or potentially changing his salary and various benefits payable to him. This broad observation will need to be qualified, as it is shortly.

2. The complainant seeks the joinder of his complaint with a complaint filed by another WFP staff member. This is not opposed by the FAO. However, as will emerge from this judgment and the judgment concerning the other staff member, different aspects of salary and different specific benefits need to be considered in both instances with potentially distinct factual and legal analyses. This results, in part, from the FAO's pleas concerning the receivability of all aspects of the broadly framed complaint of the complainant and also that of the other staff member. Joinder is likely to confuse and obscure the real issues. The complainant appears to assume, as does the other staff member, that he can challenge in his complaint in these proceedings the cumulative effect of all the changes to salary and benefits as can the other staff member in hers. This, as discussed later, is not correct. Accordingly the complaints are not joined though some of the discussion in this judgment repeats what is said in the other.

3. It is convenient, at this point, to summarise in a simplified way the changes to salary and benefits of Professional and higher categories of staff engaged on the WFP (and in the UN common system more generally) that have given rise to these proceedings. The impugned changes mostly arose from a proposal of the ICSC in 2012 to undertake a review of the compensation package of the staff in the UN common system in the Professional and higher categories, a decision of the UN General Assembly in 2013 requesting that the review be undertaken and the 2015 ICSC Annual Report containing a detailed discussion of what emerged from that review and proposals for the future involving changes to salary structures and benefits payable to staff in the UN common system. These proposals were adopted and implemented by the WFP gradually as from 1 July 2016. The following are those changes potentially relevant to these proceedings.

4. Firstly, a unified salary scale was introduced eliminating the distinction between staff who were single and those with dependents. For those staff with dependents that would suffer significant reductions in their salary as a result of the introduction of the unified salary scale, transitional allowances were introduced. Secondly, the frequency of salary steps was changed from annually for all to annually for some and biennially for others. Thirdly, the basis on which a mobility allowance (renamed mobility incentive) was paid was altered as were the grounds for eligibility. It was no longer to be calculated having regard to the past number of geographical moves but was payable as a flat amount according to grade. Service in some duty stations no longer attracted the incentive and relevantly, this included "H" duty stations (headquarters).

5. Fourthly, relocation entitlements were altered. The possibility of payment for household goods left behind was eliminated. Payment was to be made for the real cost of removal of household goods (with a possibility of a lump sum payment). The former assignment grant, potentially payable in two instalments (after two years of service in a hardship duty station) was replaced with a one-off settling-in grant. Fifthly, the education grant was streamlined and payment ceased for some non-tuition costs. Sixthly, the basis on which a staff member could access home leave travel entitlements was altered. Also, and seventhly, the basis on which compensatory payments were paid for staff at non-family duty stations was altered and the method of calculating the

payments by reference to grade was abandoned. Eighthly, the method of calculating a hardship allowance was altered focusing only on the hardship of the station as an effect on the staff member but not her or his dependents.

6. It is appropriate first to consider the issue of receivability. Mid-2017 the complainant was transferred from Tanzania to Rome. On 19 September 2017 the complainant received his September payslip. On 28 September 2017 he lodged an appeal to the WFP Executive Director against this payslip. The complainant identified two specific matters involved in his grievance. The first was that, upon his transfer to Rome, he was not being paid the mobility allowance, renamed the mobility incentive. Rome was an "H" category duty station. The second was that he would not be paid, in the context of this transfer, a second instalment of the assignment grant, then recast as a settling-in grant. In his 28 September 2017 letter of appeal, the complainant challenged more generally the changes to the salary structure and benefits arising from the adoption of the ICSC proposals by the Executive Director of the WFP but did not identify any application of those changes (apart from the two specified matters) to him at that time in a prejudicial manner. The FAO accepts that the complainant can lawfully challenge, in these proceedings in the Tribunal, these two specific matters as well as the new salary scale as it affected him reflected in his September 2017 payslip. But what the complainant challenged in relation to earnings was only the non-inclusion in his earnings of the former mobility allowance, so in substance the FAO accepts the complainant can challenge the non-payment of the former mobility allowance as part of earnings. There was no change, other than in this respect, between his salary in his July 2017 payslip and his September 2017 payslip.

7. The FAO disputes that the complainant can challenge other aspects of the changes described in considerations 4 and 5 in these proceedings having regard to the scope of his internal appeal.

8. The FAO's argument on receivability attracts two principles. The first is that a complainant cannot challenge a rule of general application unless and until it is applied in a manner prejudicial to her or him (see, for example, Judgment 4075, consideration 4). The second is that a complainant must have exhausted internal means of redress to

render a complaint receivable in the Tribunal (as required by Article VII, paragraph 1, of the Tribunal's Statute). The Tribunal accepts that the general claims of the complainant, beyond the three matters conceded to be receivable by the FAO, are irreceivable. They were the only elements of the changes prejudicially affecting the complainant as reflected in his payslip. That is so notwithstanding the complainant was, it appears, prejudicially affected by the application of at least some aspects of the changed regime of benefits upon his subsequent transfer from Rome to Panama mid-2018, which plainly enough were not addressed in his appeal of 28 September 2017. Nor had there been, at the time of that appeal, a prejudicial administrative decision applying the new regime concerning the education grant for the complainant's children for education in Rome.

9. Returning to the merits of the complainant's complaint, there is one central issue. It is whether the changes the complainant can lawfully impugn in these proceedings involved a breach of acquired rights.

The concept of breach of acquired rights has its genesis in the first decision given on 15 January 1929 of this Tribunal then called the Administrative Tribunal of the League of Nations. *In re di Palma Castiglione v. International Labour Office*, the Tribunal held: "The Administration is at liberty to establish for its staff such regulations as it may see fit, provided that it does not in any way infringe the acquired rights of any staff member." Over the decades since, the basis for recognising and protecting acquired rights has evolved and, in particular, principles developed for demarking what are and are not such rights[*].

10. The applicable legal principles were recently summarised by the Tribunal in Judgment 4195, consideration 7:

> "According to the case law, '[i]n Judgment 61 [...] the Tribunal held that the amendment of a rule to an official's detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment'

[*] See Dr Eva-Maria Gröniger-Voss, A. Kirsten Baxter, Arthur Nguyen dao: "The principle of acquired rights with particular focus on the jurisprudence of the Administrative Tribunal of the International Labour Organization" in *90 years of contribution of the Administrative Tribunal of the International Labour Organization to the creation of international civil service law*, edited by Dražen Petrović (Geneva, 2017), pp. 109-128.

(see Judgment 832, under 13). Judgment 832, under 14 (cited in part, below), poses a three-part test for determining whether the altered term is fundamental and essential. The test is as follows:

(1) What is the nature of the altered term? 'It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.'

(2) What is the reason for the change? 'It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.'

(3) What is the consequence of allowing or disallowing an acquired right and the effect it will have on staff pay and benefits, and how do those who plead an acquired right fare as against others?"

11. Also, as the Tribunal recently discussed in Judgment 4028, consideration 13, international civil servants are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered though, depending on the nature and importance of the provision in question, staff may have an acquired right to its continued application.

12. In the material before the Tribunal is a document entitled "Terms of Employment" signed by the complainant on 11 September 2006 and on behalf of the WFP Executive Director on 17 August 2006. It specified and quantified the salary and post adjustment but also referred to the provisions of the Staff Regulations/Staff Rules upon which those payments were based. Also specified in the document were a range of benefits (including the assignment grant) and the applicable provision in the Staff Regulations/Staff Rules (and, it appears, Manual Sections) conferring the benefit. It is tolerably clear that generally the terms of the complainant's employment were to be derived from and based upon the provisions of the Staff Regulations/Staff Rules.

13. As noted earlier, the contested changes arose from a review by the ICSC of the compensation package of the staff in the UN common system in the Professional and higher categories, the 2015 ICSC Annual

Report containing a detailed discussion of what emerged from that review and proposals for the future. Importantly, the reasons for the proposed alteration to salaries and benefits impugned in these proceedings were rational, logical and credible even if minds could reasonably differ about whether any particular change should occur and, if so, what form the change should take.

14. In the 2015 Annual Report, the ICSC explained in relation to the proposed mobility incentive:

> "The purpose of the mobility allowance scheme is to encourage the movement of internationally recruited staff from one duty station to another, in accordance with organizational needs. An internationally recruited staff member who has completed five consecutive years of service in the United Nations system and is assigned to a duty station for one year or more may qualify for the allowance, depending on the classification of the staff member's duty station (that is, 'H' or field duty stations). Payment amounts vary according to the number of assignments and the grade and dependency status of the staff member.
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> [...] Furthermore, the Commission did not see a reason for considering the number of moves made by staff in setting the allowance. It also considered that there was no need to incentivize staff movement to 'H' duty stations using an allowance. The Commission was of the view that the mobility scheme should be simplified by merging the assignment grant with the mobility allowance into one package to be paid up front. Other possibilities would be to exclude "H" duty stations and establish annual flat amounts based on the degree of hardship and the grade of the staff member, to be paid for a period up to a maximum of five years.
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> [...] Members underscored that the purpose of the mobility incentive should be for organizations to move staff with the right talent to the right place. The incentive was a flexible, discretionary tool that organizations could use to recognize different circumstances and mandates, similar to the relocation bonus in the comparator civil service." (Emphasis added.)

15. In the 2015 Annual Report, the ICSC explained in relation to the proposed settling-in grant (and the discontinuance of the non-removal grant):

> "The Commission considered payments for relocation under the current system. It noted that such payments included both cost-recovery measures and incentives linked to removal entitlements (for 'full removal' and 'non-removal' of household goods) and type of duty station (headquarters and field locations). The Commission concluded that there were too many layers of payments and decided:

(a) To discontinue the additional payment of the equivalent of one month of salary currently paid at the beginning of the third year in field duty stations when staff opted for 'non-removal' (that is, partial removal) under the assignment grant provisions for household goods;

(b) To group the non-removal allowance with relocation-related payments instead of putting the allowance under the mobility and hardship scheme.

[...] Based on the above, the Commission considered an approach in which the new package for relocation for internationally recruited staff would include relocation travel, relocation shipment with a lump-sum optional removal grant, and a settling-in grant. Under the approach, all current payments relating to relocation would be streamlined in order to eliminate overlaps and provide a consolidated payment system reflecting real costs.

[...]

[...] Under the proposed package, a settling-in grant would be provided to staff to assist with the expenses for temporary accommodation and other incidental settling-in expenses associated with the relocation of staff and accompanying family members at the beginning of an assignment. The proposed settling-in grant would consist of two portions: (a) a daily subsistence allowance portion to assist with the expenses for temporary accommodation and other incidentals associated with the move, through 30 days of the allowance at the new duty station for the staff member and 30 days of the allowance at 50 per cent for each eligible family member; and (b) a global lump-sum portion to cover direct and indirect miscellaneous expenses associated with the move, including departure and arrival expenses, through a payment equivalent to $6,500 for all staff. The accommodation portion of the allowance would not be granted when accommodation was provided by the organization. Further, in cases in which eligible family members arrived after the staff member had settled into permanent accommodation at the new duty station, the daily subsistence allowance portion for the family members would not be granted.

[...]

[...] The Commission recognized that the purpose of all payments related to relocation, such as the assignment grant, relocation grant, shipment entitlement and non-removal allowance, was to cover the costs borne by staff members when moving to a new duty station. It noted that the current relocation grant (non-removal lump sum of $10,000 for single staff and $15,000 for staff with eligible family members) had not been established by the Commission, but by certain organizations. The Commission wished to differentiate between measures and allowances aimed at cost recovery, and monetary incentives, which already existed in the hardship allowance through both hardship and mobility incentives. The Commission further noted that the current system was overly complicated, with too many layers of payments for the same purpose, and the conditions and criteria further complicated the system.

> [...] The Commission concurred with the pure cost recovery approach, which in its view was a sound concept, and with the proposed ceilings for the optional removal grant based on actual shipment cost data. It considered that the proposed relocation package covered all aspects of relocation and provided an appropriate rationale for each element. Under the proposal, all payments related to relocation would be streamlined in order to eliminate overlaps and provide a consolidated payment system."

16. Importantly, the complainant does not directly challenge the expressed rationale for the benefits and the changes contested in these proceedings but rather their effect, particularly having regard to the cumulative effect of all the changes referred to in considerations 4 and 5, viewed in the context of the regular transfer of WFP staff to varying duty stations flowing from the terms of their employment. The document referred to in consideration 12 above contained a provision entitled "Mobility Clause" declaring "a staff member is required to serve wherever assigned by the Executive Director". The complainant contends in his pleas that staff in the WFP are regularly required to serve at various duty stations and this is not contested by the Organization. Indeed it is manifest by the fact that the complainant, in the space of a little over 12 months, served in Tanzania, Italy and Panama.

17. A central part of the complainant's arguments is the adverse cumulative financial effect of all the changes to the "package" of salary and benefits agreed to at the time of his initial engagement. He cites Judgment 986 and particularly the observations of the Tribunal in consideration 16 about the effect of "[a] run of small amendments" and the materiality of a "full set of decisions". But this case concerned only one matter, namely pensionable remuneration, and the Tribunal was discussing amendments to that which had earlier been considered by the Tribunal in a judgment already given.

18. This argument confronts several difficulties. The first is the scope of this complaint as discussed earlier when considering receivability. But importantly the Tribunal's case law does not support an approach to determining whether an acquired right has been breached which entails the examination of an altered "package" of salary and benefits to justify a conclusion that the alteration of any given element of the package involved a violation or breach of an acquired right. The logical consequences of this approach would be that even though such an

alteration to a given element may be minimal or entirely justified or both, because other changes are made to other elements of the "package" the minimal or justified alteration can be characterised as a breach of an acquired right. There is no principled basis for taking this approach though the Tribunal cannot discount the possibility that situations may arise where the effect of the alteration of a limited number of related benefits might be viewed as relevant to the characterisation of one alteration as being a breach of an acquired right.

19. As the Tribunal noted earlier, the ICSC's reasons for the proposed changes to salaries and benefits impugned in these proceedings were rational, logical and credible. They did not involve an elimination of the benefit but the modification of how, why and in what circumstances the benefit would be paid. Their adoption by the WFP (notwithstanding opposition when being originally proposed) was in conformity with obligations arising from membership of the UN common system. This is a valid reason for change (see Judgment 1446, consideration 14), at least in the absence of any apparent unlawfulness attending the change either procedurally or substantively.

20. The Tribunal's case law recognises that the alteration of a benefit can operate to the detriment of staff and this, of itself, does not constitute the breach of an acquired right. A further element was needed, as discussed in the opening paragraph of the quotation in consideration 10: the complainant should have demonstrated that the structure of the employment contract was disturbed and that the modifications impaired a fundamental term of appointment in consideration of which he accepted employment. The complainant has not demonstrated, to the Tribunal's satisfaction, that this further element exists in the present case in relation to the changes impugned in these proceedings.

21. In the result, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 December 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 18 February 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ