

SEVENTY-NINTH SESSION

***In re* AGONCILLO,
COLATOSTI, GILLAND,
JACOBSEN, PALLUEL
and PAPPALARDO**

Judgment 1446

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed against the World Health Organization (WHO) on 14 July 1994 by Mrs. Rebecca Caseñas Agoncillo, Mrs. Loreta Colatosti, Mrs. Dominique Henriette Gilland, Mr. Henrik Skougaard Jacobsen, Mrs. Martine Alice Daniele Palluel and Mrs. Judith Mary Pappalardo, the WHO's reply of 10 October, the complainants' rejoinder of 21 November 1994, the WHO's surrejoinder of 20 February 1995, the complainants' further brief of 10 March and the Organization's comments thereon of 13 April 1995;

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 case is about the lawfulness of changes in the system of pay of WHO staff that consisted in the removal from salary scales of several additional step increments that used to be granted for merit or for long service, and that the parties' claims are as follows:

The complainants:

1. To quash the decisions applying the amendments of Staff Rules 550.1, 555.1 and 555.2, as notified by memorandum EPA/13/2/18 of 15 February 1994;
2. to order the Organization to pay them 6,000 Swiss francs in costs.

The defendant:

To dismiss the complaint.

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

A. By memorandum EPA/13/2/18 of 15 February 1994 the Director of the Personnel Division informed WHO staff of the Director-General's decision to amend Staff Rules 550.1, 555.1 and 555.2 as from 1 February 1994. Those rules provide for the grant in certain circumstances of additional salary increases on grounds of merit and long service. The amendments were made on the recommendation of the United Nations General Assembly and the International Civil Service Commission (ICSC). Their main purpose was to do away with increases for long service for staff recruited as from 1 March 1993 and to limit increases for merit to the maximum figures of pay allowed in each grade. Many of the staff objected, including four of the complainants, and on 15 April 1994 they lodged appeals. On the grounds that the dispute was confined to an issue of law the Director-General gave the complainants leave to go straight to the Tribunal. He so informed them in letters of 27 April, which are the decisions impugned by Mrs. Agoncillo, Mrs. Gilland, Mrs. Palluel and Mrs. Pappalardo, and in letters of 26 May, the decisions that Mrs. Colatosti and Mr. Jacobsen are challenging.

B. The complainants plead breach of acquired rights as defined in the case law. In their submission the amendments mean big cuts in both pay and pension, i.e. in fundamental terms of service that swayed their decision to join the Organization and to stay with it. As to the reasons for the amendments, the complainants submit that

though the Organization must heed recommendations from the Assembly or the Commission it may not act in breach of contractual commitments.

C. In its reply the Organization submits that the old version of Rules 555.1 and 555.2 conferred no right to step increases. An increase was due for long service only if performance was found satisfactory over such and such a period of time. An official cannot foretell on recruitment how long the appointment will last or how performance will be rated. And the increase for merit is an exceptional benefit.

D. In their rejoinder the complainants object to the construction that the WHO puts on the old text of Rule 555.2 about increases for long service. They contend that, whereas increases for merit are granted at discretion increases for long service are due to any one who meets the requirements of seniority and good performance.

E. In its surrejoinder the Organization repeats that the increments provided for in Rule 555.2 were not awarded ipso jure.

F. In further submissions the complainants cite the General Assembly's resolution 49/224 of 23 December 1994, which says that any increments awarded beyond the top step of the grade shall count in reckoning pension contributions and benefits for anyone on the staff before 1 January 1994.

G. In its last brief the WHO points out that resolution 49/224 merely takes note of the amendments to its Staff Rules.

CONSIDERATIONS:

1. The complainants, who are on the staff of the WHO, challenge the lawfulness of changes that were made as from 1 February 1994 in the system of their pay. The changes took the form of amendments to align Staff Rules 550.1, 555.1 and 555.2 with the rules of other organisations in the common system of the United Nations. The complainants' objection is that the changes have reduced or utterly done away with the within-grade step increases they used to be entitled to on the grounds of merit and long service.

2. It is common knowledge that the WHO has for long been at loggerheads with the General Assembly of the United Nations and its offspring, the International Civil Service Commission, over the step increases paid to WHO staff on top of the ordinary salary scales. Those increases are granted on the strength of 20, 25, 30 and 35 years' "satisfactory" service and, in exceptional cases, of "especially meritorious" performance. The material rules used to read:

"550. WITHIN-GRADE INCREASE

550.1 A staff member whose performance has been certified by his supervisors as being satisfactory shall be entitled to a within-grade salary increase of one step upon completion of each unit of service time as defined in Rule 550.2. ... Increases may be granted up to the maximum for the staff member's grade except that, if Rule 555 applies, the normal maximum may be exceeded accordingly."

"555. MERITORIOUS WITHIN-GRADE INCREASE

555.1 A staff member whose performance has been especially meritorious beyond that which may reasonably be expected of a normally well-qualified staff member, may be granted one, or exceptionally two, extra within-grade steps. Such increase shall not affect the staff member's eligibility for normal within-grade increases, and the normal maximum shall be extended by the equivalent number of steps.

555.2 A staff member who has completed 20, 25 and 30 years of satisfactory service with the Organization qualifies for a meritorious increase under Rule 555.1. ..."

The Rules did not prescribe the increase for 35 years' service: the grant of it was customary.

3. The International Civil Service Commission strongly objected to the additional increments on the grounds that they offended against the uniformity of salary scales in the common system and laid further costs on the United Nations Joint Staff Pension Fund since they counted in reckoning pensionable remuneration. The Commission summed up its objections in its report for 1990 to the General Assembly (Official Records, 45th Session,

Supplement No. 30, A/45/30), and the Assembly cited them in resolution 45/241 of 21 December 1990. In section VI of that resolution it expressed "concern" at "the continuing practice of some organizations to grant additional steps beyond the salary scale" it had approved, and urged the governing body of the WHO, for one, to bring the Organization's "salary scales into line with those of the other organizations of the common system".

4. The Director-General and the Executive Board went into the matter at length. The upshot was that at its 46th Session, on 14 May 1993, the World Health Assembly adopted a resolution, No. 46.38, professing willingness to keep in line with the common system, at least in theory, and instructing the Director-General to amend the Staff Rules accordingly. The resolution reads:

"The Forty-sixth World Health Assembly ...

Recalling the United Nations General Assembly resolutions 44/198 of 21 December 1989 and 45/241 of 21 December 1990 concerning the United Nations Common System, and in particular Section VI of resolution 45/241;

1. COMMENDS the Director-General and endorses his decision to amend the Staff Rules, in accordance with the requirements of the United Nations General Assembly resolution 45/241, so that no new staff joining WHO after 1 March 1993 will be eligible for extra meritorious within-grade steps after twenty, twenty-five, thirty and thirty-five years of service;

2. REQUESTS the Director-General further to amend the Staff Rules in accordance with the Staff Regulations in order that all staff who were working in the Secretariat before 1 March 1993 and who would have been eligible for an increase should, at the time they would have become eligible for that increase, receive one within-grade increase equivalent to the amount which would have been granted as a meritorious increase under the provisions of Staff Rules 555.1 and 555.2, and receive no more such increases thereafter."

5. The Director-General proposed amendments, the Executive Board approved them at its 93rd Session, and the Organization notified them to the staff in a memorandum, EPA/13/2/18, of 15 February 1994. The memorandum explains in 1(e) that at the World Health Assembly's instructions the Staff Rules were to be amended to abolish the grant of within-grade increases for merit to staff recruited on or after 1 March 1993 and make transitional arrangements for the others.

6. The rules which have prompted the dispute now read:

"550. WITHIN-GRADE INCREASE

550.1 A staff member whose performance has been certified by the supervisors as being satisfactory shall be entitled to a within-grade salary increase of one step upon completion of each unit of service time as defined in Rule 550.2. ... Increases may be granted up to the maximum for the staff member's grade except that, if either Rule 555.2 or Rule 1310.9 applies, the normal maximum may be exceeded accordingly."

"555. MERITORIOUS WITHIN-GRADE INCREASE

555.1 A staff member whose performance has been especially meritorious beyond that which may reasonably be expected of a normally well-qualified staff member, may be granted one, or exceptionally two, extra within-grade steps. Such increase shall not affect the staff member's eligibility for normal within-grade increases up to the normal maximum step in the grade.

555.2 A staff member whose service with the Organization commenced prior to 1 March 1993 shall qualify, with effect from 1 February 1994, for only one increase under Rule 555.1 during the remaining service in the Organization. Such increase shall be granted upon completion of either 20 or 25 or 30 years of satisfactory service, whichever occurs first after 1 February 1994. ..."

Rule 1310.9, to which 550.1 refers, is about staff in the General Service category who joined the WHO on or after 1 March 1993, who are not at issue in this case.

7. In its reply to the complaint the Organization sums up as follows the difference between old rules and new:

(a) No-one recruited on or after 1 March 1993 will qualify for the grant of a within-grade increase for "long

satisfactory service".

(b) Anyone recruited before 1 March 1993 will qualify for the grant of one more increase for "long satisfactory service" on completing 20, 25 or 30 years' service, whichever period is first completed.

(c) An increase may still be granted for merit to exemplary staff, but not so as to carry the figure above the maximum allowed in each grade.

8. The effect of the above provisions is that the case turns not on two but on three successive sets of rules: the old ones, the transitional ones for serving staff, and the ones that apply to new staff.

9. The new rules prompted a great many appeals from staff. Two things emerge from the correspondence between them and the Director-General: one, the parties agreed that since the issue was purely one of law the internal appeal procedure might be waived; the other, that if complaints to the Tribunal succeeded the Administration would apply the ruling to everyone on the staff.

10. The complainants accordingly filed their common complaint on 14 July 1994, receivability is not at issue, and the proceedings went ahead in the normal way.

11. The complainants have a single plea: the amendments in memorandum EPA/13/2/18 impair fundamental terms of their contracts and so offend against their acquired rights. They cite the case law, including Judgments 61 (in re Lindsey) and 832 (in re Ayoub and others), which rule that an acquired right is any that influences an official's decision to enter, or to remain in, the organisation's service. They further plead that according to precedent monetary rights come foremost, viz. rights to the level of pay and pension: Judgment 426 (in re Settino). The transitional arrangements preserve at least some of the former entitlements of serving staff, whereas new staff are differently treated; that - they argue - is tantamount to acknowledging that those entitlements were indeed acquired rights.

12. The Organization replies on the same issue: whether or not there was breach of acquired rights. In its view no fundamental term of employment was affected. The increases that the complainants claim are just remote contingencies that turn on how they each fare in their career. Besides, whether they will get an increase will depend on the WHO's assessment since service in the period completed must be rated "satisfactory" or else performance must be "especially meritorious".

13. The precedents have it that a right is "acquired" when someone who has it may, because of its fundamental importance to the balance of rights and duties that define the relationship of employment, demand that it be respected notwithstanding any amendment to the rules: see Judgments 61, 368 (in re Elsen and Elsen-Drouot), 832, 986 (in re Ayoub No. 2 and others) and, under 6, 1330 (in re Bangasser and others). The case law also says that no benefit - not even a long-standing one - may be treated as an acquired right if it has no logical basis: see Judgment 1241 (in re Barton and others) under 24. And a last point worth recalling is that the increases at issue here offend against the norms of the "common system", which are binding on any organisation that belongs: see Judgments 1239 (in re Baeumer and others) under 7 and 8 and 1265 (in re Berlioz and others) under 36.

14. The conclusion from the foregoing is that the amendments the WHO made to bring Rules 550.1, 555.1 and 555.2 into line with the norms of the common system are not in breach of any acquired rights.

15. The grant of an increase for merit was discretionary under the old version of 555.1 and still is under the new. By its very nature such a provision cannot confer an acquired right. So the only issue that remains is the grant of an increase for long service.

16. The complainants contend that, unlike the grant under 555.1 of an increase for merit, the grant under 555.2 of an increase for long service was not discretionary, but depended solely on the completion of the required number of years of satisfactory service. They cite WHO Manual paragraph II.5.300, which provides that such increases:

"... are not submitted to a meritorious increase committee as they are contractually due on fulfilment of two conditions, length of service and satisfactory service ...".

In this context the use of the word "contractually" means nothing more than in accordance with 555.2. True, the Organization argues that the assessment of performance during the periods specified in former Rule 555.2 was

conditional because it depended on the regular appraisal reports by supervisors. But the Tribunal is satisfied that no exercise of discretion was called for because the rule merely required the completion of a number of years and the absence during the period of any appraisal that was less than satisfactory. So the material issue is whether the amendment of 555.2 amounted to breach of an acquired right by interfering with a fundamental term of service that inclined the complainants to accept appointment.

17. For one thing, the amendment does not abolish all entitlements to increases for long service for staff recruited before 1 March 1993, but allows henceforth a single increase for each staff member. But on the broad issue as to whether such entitlements constituted a fundamental term of the complainants' appointment the Tribunal holds that the prospect of increases in emoluments after 20, 25, 30 and 35 years of satisfactory service was too remote to influence seriously the mind of the ordinary applicant in deciding to accept appointment at the WHO.

18. The conclusion from the foregoing is that the complaint is unfounded in that it seeks to perpetuate advantages which the complainants believe they are entitled to under the old rules over and above those they keep under the transitional arrangements. The complaint therefore fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas
Michel Gentot
P. Pescatore
A.B. Gardner