

**EIGHTY-FIRST SESSION**

***In re* PRADOS, RAMALINGAM,  
TANDART and WRIGHT**

**Judgment 1519**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Ana María Prados, Mr. Bala Ramalingam, Miss Françoise Maryvonne Tandart and Mrs. Jane Angela Talbot Wright against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 2 June 1994 and corrected on 12 May 1995, UNESCO's reply of 16 October 1995, the complainants' rejoinder of 19 January 1996 and the Organization's surrejoinder of 28 March 1996;

Considering Articles II, paragraph 5, and VII 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 International Civil Service Commission (ICSC) sets pay scales for staff of organisations in the common system of the United Nations who belong to the General Service category. Its function is described under A in Judgments 1000 (in re Clements and others) and 1265 (in re Berlioz and others), among others. In performing that function it follows what is called a "general methodology" so as to assess the best prevailing conditions of employment at headquarters duty stations. It approved the methodology in 1982, and revised it in 1988 and 1992, in line with the "Flemming principle", which Judgment 1000 explained. In accordance with Article 12.3 of its Statute the Commission carries out salary surveys in consultation with the executive heads and staff representatives.

In its yearly report of 29 September 1992 to the General Assembly of the United Nations the Commission mentioned changes in the methodology while "reaffirming" its commitment to Flemming. By resolution 47/216 of 23 December 1992 the Assembly decided that the changes would enter into force for the survey that the Commission was to make in 1993 of the best prevailing conditions of service in Paris.

In October 1992, while arrangements went ahead for that survey, the staff associations of UNESCO said that they declined to take part on the grounds that the changes in the methodology were bound to have damaging effects on the pay of the General Service staff.

The Commission set out the revised methodology in a report of 14 April 1993 on the work of its 37th Session. From 13 April to 11 May 1993 it gathered data on pay with help from the Administration of UNESCO. It analysed them at its 38th Session, from 15 July to 3 August. In a report dated 17 September 1993 it approved the pay scales based on the Paris survey and recommended applying them at a date which the Director-General might set at discretion.

By administrative circular 1902 of 6 January 1994 the acting Deputy Director-General told the staff that the new scales for the General Service category took effect as from 1 January 1994.

The complainants belong to the General Service category of staff of UNESCO. In letters of 15 February 1994 to the Director-General they protested against both circular 1902 and the individual applications thereof in their pay slips for January. By memoranda of 8 March 1994 the Director of the Bureau of Personnel answered that the Director-General was upholding the disputed decisions and giving them leave to put their case directly to the Tribunal. Those are the decisions they are impugning.

B. The complainants submit that the scales brought in on 1 January 1994 are unlawful because they are at odds with the Flemming principle. They have three pleas.

First, some features of the revised methodology do not square with the principle. For one thing, the new notion of "cost to the employer", introduced so as to put figures on fringe benefits, distorted the results of the Paris survey. By the old method the value of such goods or services was reckoned to be the difference between the price the employer put on them and their value on the open market. For another thing, the Commission left two items out of the comparison of conditions of service: in-service training and merit increments.

Secondly, the complainants contend that the Commission's survey was in breach of two provisions of the revised methodology. Some fringe benefits are to count only if at least half the staff actually draw them. The Commission put an illogical construction on the rule by discounting housing loans on the grounds that few officials applied for one in any given year. Over a longer period many have got such loans. The other breach was the Commission's failure to compare social benefits at and outside UNESCO and to recommend that the Organization bring practice into line with the best prevailing conditions in the locality of the duty station.

Lastly, by refusing to adapt the methodology to local conditions the Commission was again in breach of Flemming. Under the revised methodology the Commission had to choose a suitable number of representative jobs from among all UNESCO posts. So for the survey to be reliable there had to be a system of grading of posts. In October 1992, when jobs were picked for the 1993 survey, UNESCO had not yet completed its grading system. Besides, the Commission failed to compare pay at equivalent levels of seniority.

The complainants say they cannot assess the financial consequences of the repeated breach of Flemming, but the cumulative effects thereof show the Commission's resolve to bring down pay for staff in the General Service category.

They seek the quashing of the decisions of 8 March 1994; referral of their case to the Organization for recalculation in compliance with Flemming of the pay scales applicable at 1 January 1994; and payment as from that date of the difference between the figures of pay due according to the new scales and the sums already paid under the ones they challenge, plus interest at the rate of 10 per cent a year since 1 January 1994. They seek costs.

C. In its reply UNESCO cites Judgment 1265, which says that the Tribunal will not interfere with the exercise of discretion inherent in drawing up pay scales. In any event pay fell because the conditions of comparable service in Paris declined and because the survey counted pay of UNESCO General Service staff who were above step 11 of their grade.

As for the evaluation of fringe benefits, UNESCO points out that even the methodology of 1982 had included references to the notion of cost to the employer and that in any event such benefits had precious little effect on the results of the survey. In-service training is too abstract an idea to be treated as reward for services rendered. There is no breach of Flemming in discounting merit increments because they are exceptional and by their very nature cannot form part of standard conditions of service.

There were several reasons for discounting housing loans. For one thing, wage earners in like jobs outside UNESCO did not qualify for such loans partly on account of the level of their pay. For another, even over five years, fewer than half the staff got loans. As for social benefits, the data the Commission garnered covered social security and health insurance. The methodology does not require of it any recommendation on such items but leaves each organisation free to align policy as it sees fit with the best prevailing outside conditions.

As to the Commission's not limiting the number of jobs covered by the survey, the methodology requires taking fourteen to twenty. The survey took account of the full range of duties of General Service staff provided that the posts were not untypical of the grade they bore. Since the grading of posts goes on all the time, completing the exercise cannot be made a condition for carrying out a survey.

The adoption of the new scales that were the outcome of the survey caused the complainants no injury. The Organization took several measures to safeguard pay, one being the introduction of a temporary personal allowance to make up the difference between what staff would have got at 1 January 1994 on the old scales and the payments made to them according to the new ones.

D. The complainants press their pleas in their rejoinder. In their submission the evaluation of fringe benefits according to cost to the employer has become the rule whereas under the former methodology it was the exception. That makes a great difference.

E. In its surrejoinder UNESCO maintains that the new scales are fully in line with Flemming.

#### CONSIDERATIONS:

1. The complainants, who belong to the General Service category of staff at UNESCO, are challenging pay scales for 1994 which the Director-General adopted on a recommendation from the International Civil Service Commission (ICSC) and which were reflected in their pay slips for January 1994. The Commission drew up the new scales after carrying out a survey into general conditions of service in Paris in 1993. Their effect was to freeze the pay of staff in the General Service and related categories. In the complainants' submission some features of the "methodology" of the survey were at odds with the "Flemming principle", and actually applying the methodology resulted in breaches of the principle. They further charge the Organization with failing to cooperate properly with the staff representatives and causing the complainants actionable injury.

2. Before taking up those pleas some explanation is required of the rules for setting pay in organisations like UNESCO that belong to the "common system" served by the Commission.

(a) At its 15th and 37th sessions the Commission reaffirmed the Flemming principle, which dates back to 1949. The principle requires organisations to offer staff in the General Service category conditions of employment on a par with "the best prevailing conditions of employment in the locality" - i.e. salary and other basic components of pay - "without being necessarily the best local conditions". UNESCO's rules embody the principle. Thus Staff Rule 103.1(b) reads:

"The annual salaries of staff members in the General Service category ... shall be established, in accordance with the decisions of the General Conference, in order to maintain conformity between them and the best prevailing rates for comparable employment in the Paris area."

(b) To assess conditions of employment at headquarters - and elsewhere if need be - the Commission carries out thorough surveys of representative employers in the area of the duty station comparing like outside jobs with like posts in the organisation. Surveys are not confined to actual take-home pay but take also into account benefits in cash or in kind, working hours and so forth. The Commission first laid down the "methodology" in 1982 and revised it in 1988 and 1992.

3. It was in April 1993, i.e. after the revision of 1992, that in the teeth of protest from the staff associations the secretariat of the Commission and UNESCO together began a general survey of conditions in Paris. The staff representatives, who ordinarily took part in such surveys, declined to do so this time on the grounds that the whole point of the revision had been to lower pay at UNESCO by reference to the best prevailing rates of outside pay.

4. Subject to what is said in 14 below there is no objection to receivability. The Tribunal's power of review over the setting of pay has been defined in, for example, Judgments 1000 (in re Clements and others), 1265 (in re Berlioz and others), 1498 (in re Schiffmann and others) and 1499 (in re Berger and others). Thus Judgment 1265 says that the Tribunal will review both the validity of the criteria on which the methodology rests and the Commission's compliance with the methodology.

5. As was said in 1 above, the complainants' prime objection is to what they see as essential features of the methodology: fringe benefits must since 1992 be reckoned according to cost to the employer instead of market value; the sums the outside employers spend on training are overlooked; and bonuses for merit and output no longer count.

6. The fringe benefits that count in any proper assessment of conditions are "tangible non-cash goods and services, usually of a non-social nature, provided by employers". Up to 1992 the usual gauge of such benefits was the market value, i.e. the net gain to the employee. But even before that year the methodology did speak of "quantification of a benefit on the cost to the employer" in some cases, for example where the employer supplied "free or discounted company products". The working paper on the 1988 methodology also said that "recreation facilities, vacation packages, employer-sponsored events" and airline tickets might all be reckoned according to cost to the employer. No doubt, as the complainants contend, the revision of 1992 did result in a reduction of outside employees' fringe benefits. But the change was not as bad as they make out since some such benefits were already being evaluated in terms of cost to the employer. Besides, according to the survey, which covered 17 employers, the goods and services taken into account were such that the effect of the change was slight. So the

revision is not to be deemed unlawful on that score: the Commission exercised its discretion to count the cost of all fringe benefits to employers, and there was nothing inherently wrong about that.

7.As for the exclusion of the costs of training, the complainants submit that training is a material component of conditions of service and that the Commission was not free to discount the benefit of such training. In any event - they argue - whatever the methodology followed and despite the Commission's own recommendations, the training UNESCO gives is not enough. On that point UNESCO appears in its reply to acknowledge shortcomings by promising to "look into any possible ways of increasing its training budget"; but the subject obviously has no bearing on the dispute over pay. The complainants' plea that the method of comparison with outside pay should not have disregarded training would carry weight if it had any merit. In fact, whatever place personnel policy may give to training, it is hard to evaluate the benefits of it to staff. Any attempt to do so may end in approximation or error because those benefits are not a reward for services rendered and depend on each staff member's duties, experience and career prospects. Though comparison of such benefits might have proved possible, the methodology did not have to take account of them.

8.In the complainants' submission the revised methodology discounted bonuses for merit and so made for serious distortion. They explain that the effect was to continue a reduction in the figures of outside pay as against pay at UNESCO, where such bonuses are granted in the form of extra step increments. On the evidence, however, the methodology discounted only "performance payments made to individuals that are of an exceptional nature based on the merit or productivity of individuals and would not be paid as a part of salary". The survey did take account of any salary increments and bonuses, other than "exceptional" ones, paid to outside employees for merit. Both the methodology and the application of it are unimpeachable on that score.

9.The complainants say that UNESCO neglected the provisions of the methodology on housing benefits and on supplementary health insurance.

10.The Commission's survey of 1988 did take account of low-interest housing loans. The one of 1993 did not, on the grounds that but few wage earners got them; indeed few in like jobs managed even to qualify, so tight were the conditions for getting them. Contrary to what the complainants make out, those grounds are not wrong in fact. They are quite in keeping with the material provisions of the methodology, which say that a benefit involving a financial contribution from the employee shall be "quantified and added to salary" only if two conditions are met:

"(a)The benefit must be offered across the board to all employees and under similar conditions;

(b)The benefit must be taken advantage of by the large majority of employees."

The survey did take account of the low-interest loans granted by some employers provided that the employees who got them accounted for over half the staff on the payroll.

11.Although all the employers covered by the survey of 1993 offered supplementary health insurance for staff, the Commission neither gave further information nor compared UNESCO policy nor made any particular recommendation to the Organization. In the complainants' submission it was thereby in breach of the revised methodology, which requires comparison of social benefits and says that, "Where possible and appropriate, however, organizations should attempt to align their practices with the best prevailing outside conditions on a benefit-by-benefit basis". The complainants contend that outside employers ordinarily pay two-thirds of the premiums of supplementary health insurance of their staff, whereas UNESCO staff have to pay the premiums in full; so comparison would have shown that on that score outside staff fare better; and the Commission ought at least to have recommended bringing practice at UNESCO into line with the best conditions prevailing outside.

12.On the evidence the Commission did gather data on health insurance, including supplementary coverage. Though the rules may indeed alter by-and-by, they did not then require the Commission to evaluate and add to pay any benefits that outside employers provided for staff in the form of subsidised health insurance. Nor was it bound to recommend that UNESCO fall in line with the practice of outside employers, or at least most of them. In respect of compulsory insurance premiums and the refund of expenses incurred, UNESCO's scheme of staff health insurance and the social security system in France are not closely comparable; indeed they are quite different. So matching the best prevailing conditions in Paris is not just a matter of taking into account the better terms on which wage earners outside UNESCO get supplementary insurance. The Commission abided by the applicable methodology - for all its flaws on that count - and UNESCO made no mistake of fact or of law.

13. The complainants plead that the arrangements for making the survey ignored some special features of employment at UNESCO. The choice of UNESCO posts made for poor comparison, and there was further distortion in that most General Service staff are at the top of their grade and so too low a figure was put on outside pay for comparable jobs.

14. UNESCO objects that the complainants' plea about the choice of posts is irreceivable because they did not put it forward in support of their original claim. The objection is mistaken: receivability depends on the making of prior claims, not of prior pleas. Inasmuch as the complainants may challenge pay - and that is not in dispute - they may enter whatever pleas they like, including any they did not make in support of their internal appeal.

15. Though admissible, the plea is devoid of merit. As the complainants point out, the choice of posts in UNESCO to be compared with outside jobs is decisive. But there is no question of having a survey cover every grade and post in an organisation. As the revised methodology puts it, "The effectiveness and reliability of any salary survey are largely determined by the way in which jobs are selected, described and then matched". Here the survey ran to fourteen jobs in six grades and of the main sorts of work. The complainants think that the fourteen were ill-chosen and made for poor comparison with outside jobs; better, say they, to have kept the seven covered in the survey of 1988-89, since UNESCO had not finished the exercise of grading it had started in 1991.

16. Yet the survey was not to be baulked or held up just for want of a new grading of posts. The methodology said that a survey should ordinarily cover fourteen to twenty posts; the survey of 1993 did so; and there is no evidence to suggest either that the chosen posts were untypical of the duties of General Service staff - even though the choice cannot but be somewhat arbitrary - or that UNESCO wanted its choice to foil comparison with outside jobs.

17. The complainants argue that the survey ought to have compared jobs at like levels of seniority inside and outside UNESCO and not ignored the inverted "pyramid" of the age structure of UNESCO staff. There is merit in the criticism. Yet to whichever side one may tend on that point, the comparison is fated to go awry. In any event there was nothing unlawful in the approach the survey took. Neither Commission nor Organization went beyond the bounds of the discretion that the case law allow them in assembling data on pay from the full gamut of UNESCO posts and drawing comparison with pay and long-service bonuses of outside wage earners. They thereby complied with the rule in the revised methodology that average pay for staff in each group should be worked out from data on the pay of staff "at their actual step", even if it was beyond the range of steps that had the Commission's blessing.

18. The complainants' last plea is that UNESCO refused to cooperate with the staff representatives and acknowledge their function as such: it would not let them have details of the survey as required. It is of course important to have qualified representatives take part in a process that matters a great deal to the staff, culminating as it does in the setting and review of pay scales. But it was the staff representatives themselves who announced that they would have nothing to do with the survey of 1993. There is a more particular issue as to whether they saw the texts that were used or drafted in or after the survey. But on that score the Tribunal is satisfied that all the information they wanted they got, though not always in good time, and it finds no evidence to bear out their "feeling that there were some documents, which they could not identify, that they never saw".

19. For the foregoing reasons the complainants' claim to the quashing of the impugned decisions must fail. So too do their claims to damages for the breach of Fleming in the pay freeze that followed the survey.

#### 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. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas

Michel Gentot  
Egli  
A.B. Gardner

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