

EIGHTY-SECOND SESSION

In re Heitz (No. 3)

Judgment 1605

The Administrative Tribunal,

Considering the third complaint filed by Mr. André Joseph Léon Heitz against the International Union for the Protection of New Varieties of Plants (UPOV) on 3 October 1995, the brief filed by the International Civil Service Commission (ICSC) on 30 January 1996, the Union's reply of 8 March, the complainant's rejoinder of 11 April, the Commission's comments thereon of 23 May and the letter of 1 July 1996 from the Secretary-General of UPOV informing the Registrar of the Tribunal that the Union did not wish to enter a surrejoinder;

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 neither party has applied for;

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

A. The complainant, a Frenchman, is employed by the Union as a "director-counsellor" at grade D.1 and is a participant in the United Nations Joint Staff Pension Fund. The pay of the Professional and higher categories of staff of the Union as of the other organisations that belong to the common system of the United Nations, may be increased by a "post adjustment" allowance calculated to ensure that it has the same purchasing power, whatever the duty station may be. Judgment 1457 (in re Di Palma and others) explained under 2 to 9 how post adjustment works.

What is known as the post adjustment index serves as a gauge of the cost of living at each duty station against the index for New York, which affords the standard of comparison for the whole common system. On 21 December 1989 the General Assembly of the United Nations adopted resolution 44/198. It thereby endorsed a recommendation by the ICSC for doing away with what had been called "regressivity" and for treating pension contributions as a "separate item" in the post adjustment index.

An old edition of the Commission's booklet "The Post Adjustment System -- What it is, how it works" described "regressivity" in the following terms:

"Post adjustment is not pensionable and is not a full compensation for total cost of living or exchange rate movement in a given location. The compensation covered by post adjustment varies from 4.1% for every 5% change in cost-of-living at the D.2 level to 4.5% for every 5% at P.1, with an average figure of 4.35% in the P.4 grade. Although currency fluctuations are immediately adjusted for, and at times may be implemented along with changes due to cost-of-living, as a general rule, a change of post adjustment is only effected when cost-of-living as measured by the post adjustment has moved a full 5% over its previous level.

The amount of the adjustment is a percentage of net base salary, which varies with grade and step. For example, at P.1 step I it is 0.889% and at P.5 step V it is 0.852% for each 1% increase in the cost of living expressed in US dollar terms. This decreasing rate is known as vertical regressivity, and it accounts for three elements in the total picture of the Professional salary structure. First, it accounts for the fact that the pension contribution of a staff member (which is fixed in US dollars) is not included in the cost of living; every staff member, in fact, contributes 7 per cent of pensionable remuneration to the Pension Fund and this is not affected by the local cost of living. Secondly, the regression in the rates of compensation from the lower to the higher grades is based on the premise that the impact of higher costs is felt more severely by those with lower incomes than by those with higher incomes. Finally, it is an adjustment to net salary levels and therefore has to reflect the fact that other similar adjustments in a national context are usually based on gross income and thus are subject to progressive tax rates."

After consulting the Pension Fund the Commission worked out in July 1990 a method of giving effect to resolution 44/198. Whenever pension contributions went up the amount due in post adjustment was to go down by one-third of the increase. In time it emerged that that entailed "double-counting": not only was the post adjustment allowance being reduced but the deductions made from pay were being increased. So the staff were having to contribute more than their one-third share of total payments into the Fund.

Having noticed that its new method was having unintended and unwanted effects, the Commission decided, at its 41st Session, which it held from 1 to 19 May 1995, that it would take account of "actual" pension contributions in

the post adjustment index as from the date of "the next adjustment of the global scale of pensionable remuneration". That date was 1 November 1995.

The Staff Regulations of the World Intellectual Property Organization (WIPO) apply to the staff of the Union as well. By a circular of 18 July 1994, No. 41/1994, WIPO informed its own staff of the post adjustment multiplier⁽¹⁾ it was applying to their pay for July 1994. The same multiplier was to apply to the pay of UPOV's staff. By a letter of 23 August 1994 the complainant asked the Secretary-General of the Union to review his pay slip for July on the ground, among others, of miscalculation of the post adjustment. Having got no answer he went on 7 November 1994 to the Appeal Board of WIPO, to which the staff of the Union have access. In its report of 23 May 1995 the Board recommended informing the Union's "governing bodies" of the injury caused by counting pension contributions in working out the multiplier. It further recommended granting suitable means of redress as from August 1992. By a memorandum of 6 July 1995, the final decision that the complainant is impugning, the Secretary-General told him he was rejecting the Board's recommendations.

B. The complainant objects to the "double-counting" inherent in the method of reckoning post adjustment. Though he welcomes the Commission's acknowledgment of what was wrong, he submits that it took too long to bring its method into line with the ban on "regressivity", with the rule that the staff pay one-third of pension contributions and the Union two-thirds, and with the principle of equal treatment of staff.

He asks the Tribunal to quash the decision reflected in his pay slip for July 1994 and order the Secretary-General (1) to recalculate his pay for that month by the method the Commission applied in November 1995 and make good the difference; (2) to do so for the preceding months from July 1991 and for the following months "starting with August 1994"; (3) to grant him compound interest at 10 per cent a year on the sums due; and (4) to award him 3,000 Swiss francs in costs.

C. In submissions invited in accordance with Article 13(3) of the Tribunal's Rules and with the procedure set out in Judgment 1417 (*in re Damond and others*) the Commission contends that the complainant is mistaken in claiming retroactive application of the new method. Post adjustment being a complex matter, it could not reasonably have been expected to detect and correct the flaw any sooner. In any event its decisions never apply retroactively: correcting the pay of some 18,000 serving and former officials retroactively would be "onerous and unreasonable". Besides, the case law treats as irreceivable any claim made outside the time limit for appeal to the payment of sums due.

D. In its reply UPOV says that it may not challenge the Commission's methods. But it acknowledges the complainant's right to impugn any decision of the Union's that he says is the outcome of an unlawful method. In the Union's submission only claims to review of pay during the two years before the impugned decision are receivable.

E. In his rejoinder the complainant enlarges on his pleas and rebuts remarks made by the Commission. He maintains that it could have corrected the flaw in the method in "days or at most weeks" and that its bad faith warrants retroactive redress.

F. In final submissions the Commission answers issues raised in the rejoinder which, it says, rest largely on misunderstanding of the system.

CONSIDERATIONS

1. The complainant is challenging the amount of his pay for July 1994. He is pleading a flaw in the method that the International Civil Service Commission followed in taking account of his contributions to the United Nations Joint Staff Pension Fund in working out the post adjustment. Post adjustment is an allowance which depends on what is known as a multiplier. The multiplier is applied to the net base salary of staff so as to ensure that their earnings have the same purchasing power as those of staff of the United Nations stationed at New York. The Commission itself sets the methods of determining the post adjustment index.

2. Judgments 1457 (*in re Di Palma, Mossaz and Zotin*), 1458 (*in re Damond, Pautasso and Royles*), 1459 (*in re Hoebreck, Schwarz and Yossifov*) and 1460 (*in re Derqué, Hansson No. 2, Ilardi, Makádi and Seinet*) have already dealt with the reckoning of the "in-area", the "rental/housing" and the "out-of-area" components of the post adjustment index. Another item that counts in working out the index is the contributions that staff make to the

Pension Fund and which are automatically deducted from monthly pay. They are a percentage of "pensionable remuneration", of which the scale is set out in an appendix to the Fund's Regulations. That percentage stands at 23.7, of which the Union pays two-thirds and each participating staff member the remaining one-third.

3. Since rates of pensionable remuneration are the same at all duty stations, such expenditure by the staff on pension contributions requires special treatment in the post adjustment system. Account must be taken, too, of the fact that from time to time -- ordinarily once a year -- the Commission adjusts the scale of pensionable remuneration for Professional and higher categories to take account of the weighted average of changes in net pay at New York. Over the years various methods have been proposed and followed for taking account of pension contributions in the index. Save an interval in 1987-88, for many years until July 1990 the method did not treat them as an item of expenditure. Instead, whenever changes in local costs amounted to a certain percentage, the index was adjusted by only a part of that percentage. The Commission made a comprehensive review of the system in 1989. In a report to the General Assembly of the United Nations it recommended treating pension contributions as a separate item in the index so as to avoid a shift from staff to organisation of the share of expenditure on pension contributions.

4. By resolution 44/198 of 21 December 1989 the General Assembly endorsed as from 1 July 1990 recommendations for removing what had been called "regressivity"⁽²⁾ from the system and for including pension contributions as a separate item in the index. To give effect to that resolution the Commission decided that pension contributions should be included in the index with an appropriate weighting to be calculated separately for each duty station, but that their value would -- to quote the Commission's own brief -- "be frozen with an index of 100 in time-to-time updatings despite any increases that might occur in the level of pension contributions".

5. Yet by 1993 it appeared that the method was having what the Commission calls

"the unintended effect of both reducing the post adjustment that staff members received by one-third of the amount of any increase in pension fund contributions while the deductions from salaries were also increased by the same amount; this meant that staff members in effect were charged twice the increase in any pension contributions, resulting in an over-all burden on them of somewhat over one-third of the total contributions paid by organizations and staff to the Pension Fund."

The secretariat of the Commission thereupon put the matter to the Advisory Committee on Post Adjustment Questions (ACPAQ). That Committee met in May 1993 and in its report to the Commission recommended removing the staff member's pension contributions altogether from the post adjustment index. The Commission debated that recommendation at its 38th Session, in July-August 1993. The upshot was that it asked the ACPAQ to show how its recommendation would affect "time-to-time adjustment" and "place-to-place comparison".

6. The ACPAQ returned to the matter in May-June 1994 and came up with another solution. It recommended -- in its own words --

"effective with the next round of place-to-place surveys, the use of actual pension contributions in time-to-time adjustments of the post adjustment index so long as staff pension contributions remained at 7.9 per cent of pensionable remuneration."

The Commission took up the Advisory Committee's report at its 40th Session, in June-July 1994, but did not discuss it in detail because the text was not yet out in French. It came back to the matter at its 41st Session, in May 1995. It then approved in substance the new recommendation for including actual pension contributions in reckoning the index: the new method was to apply to the next adjustment, in November 1995, of the scale of pensionable remuneration.

7. The complainant is claiming recalculation of his pay for July 1994 by the method thus adopted for use as from November 1995. He also claims recalculation of his pay for the preceding months since July 1991 and for later months, starting in August 1994, and payment of the difference. He claims interest at the rate of 10 per cent a year and costs. The decision he is impugning is one the Secretary-General took on 6 July 1995 not to recalculate staff pay for July 1994 or for the other months.

8. As was held in Judgment 1265 (*in re* Berlioz and others) under 22, staff may challenge the lawfulness of any measure taken by the Commission that serves as the basis for the decisions they are impugning. And the main issue this complaint raises is whether to make retroactive the revised method by which staff contributions to the Pension Fund were to be reckoned in the index as from November 1995, the date of adjustment of the scale of pensionable remuneration.

9. It is common ground that the method was technically flawed in that, as the Commission itself acknowledged in May 1993, it resulted in the "double-counting". But the complainant says that the Commission should not have made the mistake in the first place; that, having found the flaw, the secretariat should itself have made the correction instead of raising the matter with the ACPAQ and the Commission; that, failing that, the Commission ought to have seen the flaw -- in particular that the index had not been quite purged of "regressivity" -- after just a few instances of application; and that it should have made the correction by August or September 1993. To make things worse, he goes on, there were the two further delays, first in the referral of the matter to the ACPAQ and then in the Commission's failing to take it up at all because the French version was missing, so that it was not until May 1995 that the new method was adopted.

10. So the material issues are whether the flaw should not have occurred in the first place; whether, being discovered in May 1993, it should have been corrected by August or September 1993; whether the secretariat could itself have dealt with the matter without referring it to the ACPAQ and the Commission; and whether there was culpable delay by the Commission in changing the method.

11. Whereas the complainant makes out that the method of taking account of pension contributions in the index is fairly simple, the Commission retorts that it is inherently complex, and it cites the papers which the secretariat put to the ACPAQ and the reports the ACPAQ in turn submitted. It points out that three years went by and no-one, not even the staff associations, detected the error; that once it was detected and analysed by statistical experts the solution the ACPAQ recommended had to go back for further consideration, and that the Advisory Committee thereupon changed its mind and recommended another. The Commission explains that the reason why the system is so complex a matter is that the situations it has to deal with are themselves complex. It has to ensure the equivalence of purchasing power at some two hundred duty stations, whatever the changes in the local cost of living or fluctuations in the value of the local currency against the United States dollar. Change is swift at some duty stations, at others slow; some local currencies rise against the dollar, others fall. At some duty stations the pension contribution amounts to over 12 per cent of take-home pay; at Geneva and others it comes to only five or six. The system must use a single set of formulas to take account of all such changes and fluctuations as well as the relative weighting of manifold items of expenditure. Such formulas cannot be simple. Adjusting them calls for much thought to ensure that "correction" does not have unintended and unwanted effects in some circumstances. As for pension contributions, the Commission says that an error may become apparent only after some years have gone by, since changes in pensionable remuneration come ordinarily but once a year and it is they that set off a new bout of calculations.

12. The Tribunal acknowledges that the method of counting pension contributions is anything but simple. Even the ACPAQ, the advisory body of experts, changed recommendations. The Tribunal further accepts that because of the complexity of the matter the Commission could not have seen the flaw at the outset or even soon afterwards, and that when it did it at once set about finding a solution.

13. The Tribunal holds it unreasonable to suggest that the secretariat ought to have made the correction of its own accord. The secretariat has no authority to make such a radical change without consulting the ACPAQ and the Commission. Again, the complainant's plea is devoid of merit.

14. The examination of the matter by the ACPAQ and the Commission proved to be fraught with difficulty. They had to ensure that the burden of increases in pension contributions was shifted neither from staff to organisation nor from organisation to staff. Sending the matter back to the ACPAQ was necessary to shed light on the effects of the recommendation. In the event the recommendation was changed. It is true that there was unfortunate delay in 1994, when the Commission postponed its decision because the French text was not yet ready. It explains that that was due to lack of funds. No member of the Commission could be reasonably expected to take up such a technical subject without fully understanding the recommendation: any change in the method called for great care. There is no evidence to suggest any ulterior motive for the failure to provide the French text. The conclusion is that, all things considered, the Commission was not guilty of any culpable delay.

15. The Commission submits that it keeps various aspects of the common system under constant review. As it makes changes it may find afterwards that some prove to the benefit and some to the detriment of staff. It cites another decision it took in May 1995, to adjust the weighting of the "out-of- area" component of the index. That change was to go into effect as from 1 November 1995, and the delay was to the benefit of staff. If the Commission had taken earlier both that decision and the one at issue in this case staff stationed in Geneva would have suffered a

net reduction in post adjustment as from that date.

16. Making a decision retroactive would require the calculation of the past pay of all the staff concerned, including those who have since left. The Commission's practice is to have its decisions take effect only in a few months' time so that the secretariat and the organisations may make the calculations. The Tribunal concludes that it is neither necessary nor even reasonable to require retroactive application of the revised method. A balance must be struck between many elements in working out the index. All the Commission can do is to keep them under review and, when defects do emerge, revise the method so as to make the correction reasonably soon. Though the system will never be perfect, the Commission can correct flaws only as they appear.

17. Since the Commission's decisions were lawful no vicarious liability may be imputed to the defendant.

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 Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

William Douglas
Michel Gentot
Mella Carroll
A.B. Gardner

1. For an explanation of the term "multiplier" see Judgment 1457 under A and 8.
2. See A above.