Registry's translation, the French text alone being authoritative.

SEVENTIETH SESSION

In re GRUENZWEIG, RIBICHINI and ZALAUDEK

Judgment 1086

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Käthe Grünzweig, Mrs. Olivera Ribichini and Mrs. Stefanie Zalaudek against the International Atomic Energy Agency (IAEA) on 22 January 1990, the IAEA's single reply of 27 April, the complainants' rejoinder of 26 July and the Agency's surrejoinder of 1 October 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations 5.01(a) and Annex II of the Agency's Provisional Staff Regulations, Rules 4.06.5(B), 4.06.6, 10.02.1 and 12.01.1(B) and (D)(1) of the Agency's Provisional Staff Rules and Articles 11(a) and 12(1) of the Statute of the International Civil Service Commission;

Having examined the written evidence;

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

A. As was explained in Judgment 1000 (in re Clements, Patak and Rödl), the IAEA, which is in Vienna, accepted the Statute of the International Civil Service Commission in 1979. Article 11(a) of the Statute states that the Commission shall prescribe the "methods by which the principles for determining conditions of service should be applied", and Article 12(1) that "at the headquarters duty stations ... the Commission shall establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories".

To draw and keep the best-qualified people organisations in the United Nations system seek to offer staff in the General Service category conditions that match the best in the public and private sectors at the duty station. Regulation 5.01(a) of the Agency's Provisional Staff Regulations states that "The gross base salary scale applicable at the Agency's headquarters for each grade in the General Service category or any other category which is locally recruited shall be promulgated by the Director General with the approval of the Board of Governors". Paragraph B.1 of Annex II to the Regulations makes similar provision and adds: "The scales shall be determined on the basis of the best prevailing conditions of employment in the locality concerned ...". That is what is known as the "Fleming principle". Surveys are made of local conditions and the Commission has carried them out since 1977 under Article 12(1).

In a report it made at its 14th Session, in July 1981, the Commission approved the findings of a survey on Vienna and accordingly recommended that the General Assembly of the United Nations endorse new salary scales for staff in the General Service category and for manual workers in the Agency and other organisations with headquarters in that city.

Since 1 January 1972 the salary scales of the General Service and manual categories of staff had taken account of the value to local employees of a scheme for the payment of an "end-of-service allowance" that Austrian law had introduced in 1921 in a statute that was amended and supplemented in further statutes from 1971 to 1979. It had done so by raising by 2.85 per cent the scales of pay for the General Service and manual staff in Vienna. One idea the Commission mooted in 1981 was to bring in a similar scheme for such staff, but it decided to come back to the matter later and, at least for the time being, to put up the rate of adjustment from the 2.85 per cent to take account of that item of local pay. It made a 3 per cent increase in the scales to match the value of the item, and the Board of Governors of the Agency approved the scales as so reckoned as from 1 July 1981.

In Annex II to a report dated 15 September 1982 to the General Assembly the Commission set out the "general methodology" to be applied in future to surveys of local conditions of employment in cities where the Agency and other international organisations in the United Nations system had their headquarters.

In 1987 the secretariat of the Commission made another survey on Vienna which purported to follow that methodology. It submitted its findings in June 1987. The Commission approved them in a report it adopted on 17 August 1987. In paragraphs 26 to 30 of its report the Commission dealt with the "Accrued end-of-service allowance", or Abfertigung, which it described as "compulsory under Austrian federal legislation subject to a number of conditions". It explained how the scheme worked and said that the allowance ranged from two months' pay for someone with three years' service to twelve months' pay for someone with 25. It said that its secretariat had been in favour of introducing a scheme similar to the one that applied to local employees, so that United Nations staff would be neither over- nor under-compensated for the Abfertigung, but that the 3 per cent increase would still "adequately reflect the value of this allowance", should the Commission prefer that approach. Paragraphs 95 and 98 of the report recorded the preference both of the Administration and of the staff representative of the Agency for keeping the 3 per cent increase. But in paragraph 108 of its report the Commission recommended instead that "a comparable scheme should be established by the Vienna organizations for eligible staff in the General Service and related categories". So the recommended salary scales that were to take effect as from 1 March 1987 did not include the 3 per cent increase intended until then to cover the value of the allowance.

The Agency made a proposal to its Board of Governors in a paper dated 8 September 1987 for introducing a scheme for payment of the end-of-service allowance to General Service category staff: whereas the entire period of the staff member's service would be taken into account for the purpose of determining eligibility for the allowance the actual amount of it would be reckoned on the strength of service only from the date at which the revised salary scales came in, since up to that date the 3 per cent increase in the scales would have covered the value of the allowance.

On 28 September 1987 the Board approved the new scales, asked the Director-General to set up the scheme after consulting the staff representatives and the other organisations in Vienna on the arrangements and delegated authority to him to decide when scales and scheme should come into effect.

By a circular, SEC/NOT/1187, of 27 October 1987 the Administration of the Agency informed the staff that, with the Board's approval, the Director-General would apply the new scales of pay to the General Service category and to certain other staff as from 1 October 1987. Because of an interim adjustment the scales were slightly higher than those the Commission had recommended. The scheme was not yet ready, however, being still under study by a "joint working group" which the joint advisory bodies of the organisations in Vienna had set up for the purpose.

In its report of 9 March 1988 the group made proposals both about eligibility for the allowance and about how to reckon the amount due. As to the latter it proposed counting the whole period of service but, for any period after 1972 and before 1 October 1987, the date of entry into force of the new scales, making a percentage deduction to offset the percentage increase - at first 2.85 and later 3 - that had been applied to the pay scales during that period to cover the value of the allowance.

The Administration of the Agency declared that it intended to discount service prior to 1972 and to base the reckoning of the amount due on what it called "inside net salary": the gross base salary less "staff assessment" as defined in Rule 4.06.5(B) of the Provisional Staff Rules.

The Joint Advisory Committee provided for in Rule 10.02.1 took up both matters in September 1988 but failed to reach agreement on either of them. Discussions continued and memoranda were written in the ensuing months by the legal service of the Agency, the chairman of the Staff Council and the Director of Administration and Personnel. On 3 March 1989 the chairman of the Staff Council sent the Director General a memorandum restating the staff's views and wishes and making proposals for amendments to a draft circular setting out the arrangements. But in a reply of 22 March the Director General turned down those proposals.

A circular, SEC/NOT/1260, issued on 11 April 1989 set out the new scheme and published the text of the new provision, Rule 4.06.6. It says, among other things, that the reckoning of the amount of the allowance would be based only on service from 1 October 1987 (though the entire period of service would count to determine eligibility) and on gross base salary less the staff assessment, but plus any language allowance paid.

The Agency employs the complainants in the categories of staff that are entitled to payment of the end-of-service allowance: Mrs. Grünzweig in the Maintenance and Operative Services, and Mrs. Ribichini and Mrs. Zalaudek in grade 6 of the General Service category. Mrs. Grünzweig served from 1961 to 1988, Mrs. Ribichini from 1960 to

1989 and Mrs. Zalaudek from 1963 to 1989. Mrs. Ribichini received a voucher dated 24 October 1989 giving the amount of her end-of-service allowance (17,776 schillings) reckoned according to Rule 4.06.6; Mrs. Zalaudek was given a similar chit dated 20 November 1989 stating the amount of her allowance to be 22,068 schillings; and Mrs. Grünzweig got one dated 4 December 1989 which put the amount at 10,278 schillings. By identical letters each of the complainants submitted to the Director General under Rule 12.01.1(D)(1) a request for review of the decision on her grant.* (*In the reckoning of the amounts a deduction of 42.18 per cent was made to take account of the application from 1 January 1972 of the 2.85 and 3 percentage increases in the pay scales.) Mrs. Ribichini and Mrs. Zalaudek did so on 30 November and Mrs. Grünzweig on 18 December 1989. The gist of their requests was that the Agency had acted in breach of the Fleming principle by reckoning the amounts on the strength of shorter

periods of service and at lower rates than Austrian law ordained. Each of them asked the Director General, if he upheld his decision, to consent under Rule 12.01.1(B) to waiver the Joint Appeals Committee's jurisdiction.

By identical letters the Director General told the complainants that he rejected their requests but gave them leave to appeal directly to the Tribunal. The letters to Mrs. Ribichini and to Mrs. Zalaudek were dated 15 December 1989 and the one to Mrs. Grünzweig 27 December, and those are the three individual decisions under challenge.

B. The complainants allege breach of the Fleming principle as embodied in paragraph B of Annex II of the Agency's Provisional Staff Regulations. That paragraph is headed "General Service category or other categories which are mainly recruited locally in the area of the office concerned" and in B.l reads:

"The salary scales for staff in these categories shall be set by the Director General, with the approval of the Board of Governors in the case of staff serving at the Agency's headquarters .... The scales shall be determined on the basis of the best prevailing conditions of employment in the locality concerned ...".

Not only is that principle binding on the Agency, as indeed the Director General acknowledged in the text of the impugned decisions, but the Agency may not construe the principle as it pleases since under Article 11(a) of its Statute the International Civil Service Commission is competent to determine how to apply the principle and so to take decisions in the matter.

The Commission's statement of the principle in Annex II to its report of 1982 to the General Assembly on the "general methodology" is that conditions of service "are to be among the best in the locality, without being the absolute best". The complainants reject the Agency's inference therefrom, stated in the impugned decisions, that pay is not to be determined "by reference to specific provisions of Austrian labour law, nor by any 'mathematical comparison' to benefits granted by Austrian employers". There were, as the Commission saw, two acceptable ways of applying the principle: one - the old solution - was to estimate the value of the Abfertigung as accurately as possible and match it in the salary scales by making a comprehensive percentage increase; the alternative was to introduce into the rules of the United Nations organisations in Vienna a scheme as close as possible to the Austrian one. Having switched to the second alternative, the Agency should have taken into account the minimum requirements of Austrian law for Austrian employers. Though the Agency's scheme may depart from the Austrian one it may do so only to the advantage of its staff, just as some Austrian employers discharge more than their minimum statutory obligations.

The Agency's scheme is in two main points less favourable to the employee than the Austrian one. One point is that it does not, as Austrian law does, take account of service up to 1972 for the purpose of reckoning the amount due, and that restriction bears heavily on staff with a long record of service. The other point is that the Agency takes net base salary plus any language and non-resident's allowances, whereas the Austrian scheme takes the much bigger sum of gross salary plus any bonuses and overtime payments, taxed at degressive rates of 6 to 0 per cent (though the complainants postulate the application of a uniform rate of 6 per cent). Mrs. Grünzweig puts at 139,817 schillings the amount of her loss caused by those two discrepancies; Mrs. Ribichini estimates her loss at 369,708; and the figure of Mrs. Zalaudek's loss is 354,815.

Besides, the Agency's refusal to take account of service prior to 1972 is at odds with the Commission's report on the 1987 survey of Vienna, which recommended counting the entire period of service in reckoning the amount due: the only period it meant to exclude was from 1972 to 1987, when the pay scales were subject to the percentage increases. That view draws support from a letter which the Commission's Executive Secretary wrote to the organisations in Vienna on 10 August 1987 and which its Chairman confirmed in a telex of 12 August. Moreover, that is the view taken by the other two organisations in Vienna, the Office of the United Nations and the United

Nations Industrial Development Organization (UNIDO).

Each of the complainants seeks the quashing of the decision impugned, the award of an end-of-service allowance lawfully reckoned less the amount already paid to her, and an award of 30,000 French francs in costs.

C. In its replies the Agency addresses the merits of the three complaints.

It observes that from 1972 until 1 October 1987, when the new scales of pay were introduced, the complainants got compensation for the Abfertigung in the form of the percentage increases in the pay scales. Those increases, which the Commission determined on the strength of estimates of the average value of the allowance, were not only paid to the complainants as part of their monthly salaries but also taken into account in reckoning their pensionable remuneration. For many years the staff accepted them as a fair method of compensation.

When the Commission decided instead on a scheme of paying end-of-service allowances its intention was that the new method of compensation should simply replace the old one of percentage increases, not that the staff should be entitled to demand review of the adequacy and fairness of the old method. In keeping with the Commission's recommendation Rule 4.06.6 correctly distinguishes between eligibility for the allowance and the reckoning of the actual amount due: whereas there are no restrictions on counting service for the purpose of eligibility, allowing the complainants' argument that neither should there be any on the reckoning of the amount would have an absurd result: a staff member who left before the scheme came in would be deemed properly compensated by the percentage increases in pay, whereas one who left afterwards would get further compensation for service prior to 1972.

The complainants draw no support for their case from their subsidiary plea that the Commission's secretariat suggested counting such service for the purpose of reckoning the amount due. That approach did not find favour with the Agency because it would have meant basing the entire reckoning on percentages of salary, which the Austrian system does not.

The complainants are further mistaken in contending that the allowance ought, on the grounds that Austrian law takes gross salary plus bonuses and benefits, to be based on the "outside" gross salary at the date of their departure, as obtained by applying a formula inverse to the one used in salary surveys for converting gross to net salary. Since the Commission did not say what the basis of the reckoning should be, it cannot have contemplated any salary scales but those provided for in the Staff Regulations and Rules. Why should the Commission recommend applying scales not of its own making? The Agency applies various other end-of-service entitlements - commutation of leave credit, repatriation grant and the like - the scales of gross base salary, less staff assessment, plus any language and non-resident's allowances, and it is only reasonable to apply those scales also in reckoning the end-of-service allowance, as indeed do the United Nations office in Vienna and UNIDO.

The complainants' eligibility for the allowance was established under Rule 4.06.6, paragraph (A)(2), and the actual amounts of their allowances were reckoned according to paragraph (C) and the transitional paragraph (E). Thus their whole periods of service were taken into account to determine their eligibility, and the amounts were correctly based on periods of service from 1 October 1987 up to the date of their separation from service. The impugned decisions complied with the requirements of the material rules and with the Fleming principle.

Lastly, the calculations which the complainants found on a hypothetical scale of "outside" gross salary and on the application of a hypothetical rate of tax in Austria are irrelevant, as are the amounts which they work out on the strength of those calculations.

D. In their rejoinders the complainants press their claims, seek to refute the arguments in the Agency's replies and develop their own pleas. They dwell further on several issues of fact which they believe to be material and correct some points which they believe the Agency misrepresents. They submit that the Agency distorts, so as to weaken, the structure of their own reasoning. They reaffirm in particular that by virtue of the Fleming principle the Agency was under a duty to introduce an end-of-service allowance that afforded the staff at least the minimum benefits provided for in Austrian law and that bringing in a scheme comparable to the Abfertigung meant making as few exceptions as possible to the provisions of that law. The complainants are not seeking to have the Agency treat Austrian law as binding in itself but rather incorporate its provisions in Agency rules. They develop at length their submissions on the Agency's obligation to take account of the full periods of their service: in their view either the Agency's replies to their pleas on that issue are unsound or the Agency has failed to answer, merely trying instead

to show that it has complied with the Commission's recommendations. Lastly, they reaffirm, for reasons they go into, that the Agency has failed to establish that their own method of reckoning the actual amounts due to them is unacceptable either in law or because it would be administratively impractical: on the contrary, it is the right method because it reproduces the essential features of the method applied under Austrian law.

E. In its surrejoinders the Agency develops its pleas on what it regards as the two main issues the case raises, namely the complainants' contention that according to the Fleming principle their whole period of service should count towards the end-of-service allowances and the amount of salary to serve as the basis for reckoning the allowance.

As to the former it explains why in its view the allowance as prescribed in Rule 4.06.6 complies both with the Commission's recommendation and with the Fleming principle. It states that it declined to follow the approach the Executive Secretary of the Commission suggested because that approach confused the issue of eligibility with that of the reckoning of the amount due and failed to reflect the essential features of the Austrian scheme. The complainants' reference to the minimum benefits prescribed under Austrian law obscures the fact that from 1972 to October 1987 the allowance was reflected in the percentage increases in salary and has since been compensated by the grant of a lump sum on termination. Besides, the method of reckoning the amount is the same under Rule 4.06.6(D) as under Austrian law.

As to the basis of the reckoning, the Agency submits that the allowance is correctly reckoned according to monthly net base salary, plus any language and non-resident's allowances. The Commission did not call for any special scales distinct from those that applied to entitlements already prescribed in the Agency's rules. The United Nations Office in Vienna and UNIDO have decided that the generally applicable scales should serve as the basis for reckoning the allowance as well. To draw up special scales just for the purpose of reckoning the allowance would be in breach of the United Nations common system.

CONSIDERATIONS:

1. As in other international organisations so in the International Atomic Energy Agency in Vienna the pay of the staff is set out in a salary scale that forms part of the Staff Regulations. Pay of the staff in the General Service and Maintenance and Operative Service categories, who are locally recruited, is governed by the "Fleming principle". That principle, named after the chairman of the United Nations working party that first stated it in 1949, says that the pay of such staff shall be determined on the basis of the best prevailing conditions of service in the locality of their duty station.

Since it was founded in 1957 the Agency has carried out surveys for the purpose of complying with that principle. Though not dependent on any other body, it has constantly been in touch with the United Nations so as to keep in line with the other organisations in Austria.

Venturing beyond the context of salary as such, the Agency resolved in 1971 to see how much it should pay its staff to take account of the end-of-service allowances that some employees of Austrian firms got on retirement. At the time it came to the view that for several reasons it would be awkward to bring in a similar allowance for its own staff and so it decided instead to adjust their salaries to offset the benefit granted to employees in the private sector in Austria. Starting in 1972, it applied a 2.85 per cent increase for that purpose to the gross monthly salary of all staff in the General Service and other locally recruited categories. Everyone in those categories, no matter when he had been appointed, was thereby granted the estimated average value of the end-of-

service allowance.

In 1979 the Agency adopted the Statute of the International Civil Service Commission. The Statute provides, among other things, that the Commission "shall establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories". For some years the Commission continued to apply the salary increase to take account of the value of the end-of-service allowance in Austria. But in 1987, after carrying out a new survey, it decided to recommend that the organisations in Vienna introduce a scheme similar to the one in force in Austrian firms and replace the salary increase with an allowance granted to the official in the form of a single payment when he left the organisation.

The Agency thereupon adopted Rule 4.06.6 of the Provisional Staff Rules, which introduced an "End-of-service

allowance for staff members in the General Service and Maintenance and Operative Service categories at the headquarters".

2. The complainants were all on the Agency staff. Mrs. Grünzweig was in the Maintenance and Operative Service category and Mrs. Ribichini and Mrs. Zalaudek in the General Service category: Mrs. Grünzweig took up duty on 4 April 1961 and retired on 31 December 1988; Mrs. Ribichini joined on 1 January 1960 and left on 31 January 1989; and Mrs. Zalaudek was recruited on 17 June 1963 and went on 31 March 1989. On departure they were paid the end-of-service allowance: Mrs. Grünzweig got 10,278 Austrian schillings, Mrs. Ribichini 17,776 and Mrs. Zalaudek 22,068. But they find the amounts insufficient and are asking the Tribunal to set aside the Director-General's decisions to reject their requests for review of the determination of those amounts.

There is no difficulty over the receivability of their complaints.

3. Since the complaints raise the same issues they are joined to form the subject of a single ruling.

4. The complainants' case is that the decisions they impugn are in breach of the Commission's rule about the best prevailing local rates.

As both parties acknowledge, since the Agency accepted its Statute the Commission has had authority to take decisions on the matter, and Article 11 of its Statute, which empowers it to establish the "methods by which the principles for determining conditions of service should be applied", covers the end-of-service allowance.

The complainants argue that although the Fleming principle allows the discounting of the very best conditions of service prevailing at the duty station, "it is unlawful that the conditions of the General Service and related categories of staff should be worse than the compulsory minimum the law of the host country prescribes". In the complainants' submission the Agency's scheme is inferior to the Austrian one in two main respects.

The complainants' first main plea

5. One is that for the purpose of reckoning the amount of the allowance Austrian law counts the whole period of service whereas the impugned decisions count only service from 1 October 1987, the date at which the allowance was brought in.

The complainants concede that from 1972 to 1987 they got a salary increase and that that period is correctly discounted, else it would count twice over. But they submit that their periods of service from recruitment up to 1972 ought not to have been discounted. Each of them has lost ten years' service in the reckoning of their salary and so also of their allowance. To discount service up to 1972 was therefore in breach of the Commission's recommendation.

In recommending a scheme similar to the Austrian one the Commission said that while the whole period of service should count in determining whether someone qualified for the allowance, the actual amount should be based only on service from the date at which the new salary scales took effect, its idea being that staff should not be paid twice over for the same period.

In the complainants' view the text of the Commission's recommendation is unclear: it says that account is to be taken of the whole period of service; yet it seems to be discounting service prior to the entry into force in 1987 of the new salary scales. It is therefore to be construed in the light of the circumstances.

They point out, first, that the recommendation cites double payment as grounds for discounting some periods of service and that that argument does not hold water for any period up to 1972.

Secondly, they seek support for their contention in a memorandum the Commission's Executive Secretary wrote to the heads of personnel of the organisations in Vienna. He proposed several steps for reckoning the allowance. The first was to "Calculate as a percentage of annual salary the grant which would have been due for the staff member's total period of service had the organizations' scheme been in effect from the date of entry on duty". Then he suggested two further calculations of percentage. The percentage thus obtained was to be applied to "the staff member's annual salary upon separation" to yield the amount of the allowance due. The complainants produce a telex from the Chairman of the Commission stating that the Executive Secretary's memorandum conveyed the Commission's "intent with regard to certain transitional procedures" on which the Commission had made no explicit

recommendation.

Lastly, the complainants point out that the two other organisations in Vienna, the Office of the United Nations and the United Nations Industrial Development Organization, acted on the Executive Secretary's interpretation.

6. As was said in 4 above, the parties quite rightly treat the Commission's recommendations as binding, and with one reservation that is dealt with below the Agency was bound to apply the Commission's recommendation insofar as it was not in doubt. The Executive Secretary, however, has no authority of his own and his interpretations are not binding. Only where a recommendation reveals a lacuna, or is unclear, or empowers the Executive Secretary to make arrangements of detail, may he say how to construe or apply the text. But even then his opinion will not be binding. Indeed the memorandum of his that the complainants are relying on is in line with that view since it says that it is addressed to the organisations "for consideration". It is only one material text which, important though it is as coming from the Executive Secretary, is not binding on the organisations.

There are two main ideas underlying the Commission's recommendation. One is that the old system, which consisted in a percentage increase of actual salary, is replaced by a single payment of the allowance at the end of service. The other is that the amount depends on length of service from the date at which the new salary scales take effect.

Those two ideas are quite clear and call for no interpretation. The complainants do point out that the recommendation says that though all service counts staff are not to be paid twice over for the same period. But there is nothing ambiguous about that: one idea is about the period of service, not the amount of the allowance, and the second idea is just a comment on the policy adopted.

The text being clear, the Agency was not bound to adopt a method of reckoning that did not form part of the actual decision it was putting into effect and that the Commission's Executive Secretary had merely suggested. The Tribunal's finding that he spoke, not of length of service, but of percentages - a point on which the recommendation is silent - is therefore obiter dictum.

The complainants' plea that the other organisations in Vienna took a more favourable line has no bearing on the correctness of the impugned decisions: there is no text requiring co-ordination between the organisations.

Also immaterial are the examples the complainants cite of what happens in countries other than Austria.

The conclusion is that the objections to the manner of applying the recommendation are unsound.

7. As the complainants ask, however, the Tribunal will look beyond the purely legal issue of how to construe the text and will consider whether the Agency acted in breach of the rule about the best prevailing conditions of service.

The Fleming principle does not require the Agency to reconstitute the career of every single staff member. The purpose of the system the Agency introduced in 1972 was to take account by its own method of the benefit of the end-of-service allowance to employees in the private sector in Austria. The method it followed was to grant an increase in salary without retroactive effect and it thereby took a decision that is now unchallengeable. Although an organisation may make a decision retroactive if that is to the staff member's advantage, there is no right to retroactivity.

Actually the Agency contends that the increase it made in 1972 was based on the assumption that the staff member had ten years' service, however long he might actually have served before that date. The complainants therefore got compensation from the outset in the form of the salary increase and their plea that the Agency discounted the period up to 1972 is mistaken in fact. But there is no need to take that point any further since in any event the plea fails by general principles of law.

Replacing the system in force from 1972 with another one that was closer to the statutory scheme in Austria was not in breach of any acquired right. The complainants got an increase in pay from 1972 to 1987 and then they were each awarded a lump-sum allowance. No matter what method has been followed, the Fleming principle has been complied with.

The decision to bring in the allowance afforded no reason for review of the earlier system of compensation by

means of the salary increase.

The complainants' first plea fails.

The complainants' second main plea

8. The complainant's other main objection is to the method of reckoning their allowances. The Agency decided to base the reckoning on the net pay of staff in the General Service and related categories, plus any language allowance and non-resident's allowance, whereas the Commission discovered from the survey that in Austria the relevant figure was gross pay, plus any bonus and overtime payment, but less tax levied at rates not exceeding 6 per cent, the average being 3. The complainants again argue that the difference in method is in breach of the rule about the best prevailing local conditions of service.

There is no explanation of the basis of the reckoning either in the Commission's recommendation for establishing the allowance or in the records of the preparatory work. So the Agency was free to decide what method to apply; it was not bound by any instructions from the Commission; and in adopting Rule 4.06.6 of the Provisional Staff Rules, which refers to "monthly net base salary plus language allowance and non-resident's allowance, if applicable", it was acting intra vires: it was bound to comply with the Fleming principle only to the extent set out in 4 above in fine.

The complainants submit that because of the lacuna the Agency ought to have adopted special scales for the purpose of determining the end-of-service allowance and applied adjustment factors thereto. But that would be a complex exercise and, because of disparity between systems of pay in the organisations and in the private sector in Austria, would not necessarily make for a fair outcome.

The Agency infers that because of the omission it was empowered to follow the same method for determining the amount of the allowance as for determining actual salary. But, although there is room for doubt about what the omission means, no conclusions may be drawn therefrom in law.

The material issue is whether the Agency acted ultra vires in using the salary scales in force for the purpose of reckoning the allowance. Those scales were worked out, as the rules require, on the strength of the findings of a survey on the best prevailing local conditions of service, and the complainants do not challenge the lawfulness of the survey. So the scheme that the Agency has introduced is a coherent one in that it takes the same approach to issues that show the same essential features. That approach would be objectionable only if the outcome were in breach of Fleming. The Tribunal is satisfied that it is not and that since the Agency committed no abuse of its discretionary authority the complaints must fail.

Lastly, there is no need to grant the complainants' application for oral proceedings, which would serve no purpose.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner