

## SEVENTY-NINTH SESSION

### *In re* HOEBRECK, SCHWARZ and YOSSIFOV

#### Judgment 1459

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr. Jean-Paul Hoebreck, Miss Linda Schwarz and Mr. Vladimir Yossifov against the World Intellectual Property Organization (WIPO) on 24 February 1994;

Considering the interlocutory order in Judgment 1417 of 1 February 1995 and the submissions by the complainants, the Organization and the International Civil Service Commission (ICSC) that are cited in the third paragraph of the preamble to that order;

Considering the further submissions filed, in accordance with points 1 and 2 of the decision in Judgment 1417, by the Commission on 6 March 1995 and by the complainants on 12 April, and WIPO's letter of 1 May 1995 informing the Registrar that it did not wish to submit a final brief;

Considering Articles II, paragraph 5, and VII, paragraph 3, 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. Facts relevant to this case appear in Judgment 1417 under 1 and 2. The complainants belong to the Professional category of staff of WIPO. According to WIPO Staff Regulation 3.5(a) base salaries of staff of the Organization in the Professional and higher categories are "adjusted" to variations in the cost of living at Geneva. That is done by reference to a "post adjustment index" and by payment to the staff of a non-pensionable allowance known as "post adjustment". The index for Geneva serves as a measure of the cost of living there as against New York, the duty station that the common system of the United Nations takes for the sake of comparison.

Regulation 3.5(e) reads:

"The multiplier applied for calculating the post adjustment shall be that established for Geneva by the International Civil Service Commission, and the effective date of any change in the multiplier shall be as fixed by the said Commission."

To calculate the post adjustment index, of which "rental/ housing" costs are a main component, the Commission carries out periodic surveys of the cost of living at duty stations in the common system of United Nations organisations. Subtracting 100 from the post adjustment index gives the figure known as the "multiplier" which is multiplied by 1 per cent of base salary to yield the amount of the post adjustment allowance.

By circular 45/1992 of 23 July 1992 the Organization announced the multiplier which it was applying to pay as from July 1992. The multiplier was to be 92.2 because of changes in the rate of exchange between the Swiss franc and the United States dollar as well as the results of a so-called "time-to-time" adjustment. The increase in net pay since the last such adjustment in July 1991 was - said the circular - to be "about 2.0 per cent".

On 14 September 1992 the Director of the Personnel Division sent staff in the Professional and higher categories a memorandum in answer to queries about pay. He said that the Chairman of the Commission had not answered a request he had made on 10 July 1992 for a "detailed explanation" of the multiplier for July 1992. Failing such information, he appended a copy of a memorandum which a senior officer of the Commission's secretariat had sent on 16 July to the chief of the Financial Resources Management Service of the United Nations Office at Geneva. The conclusions of the memorandum were (1) that the "out-of-area component" had raised the post adjustment allowance pertaining to the middle of grade P.4 in Geneva by 1.2 per cent between July 1991 and June 1992 and by 0.1 per cent in July 1992; and (2) that although the rise in net pay between July 1991 and July 1992 had been

"substantially lower" than the local rate of inflation that difference became "negligible" when spread over the full two years since the Commission's last comparative survey of living costs in New York and Geneva.

By letters of 26 October 1992 the complainants submitted to the Director General under Staff Rule 11.1.1(b)(1) requests for review of the decision to apply the new multiplier to their pay for July 1992. They claimed an increase of 2.9 per cent in pay for that month and proportionate increases for any later months in which the multiplier might be tainted with "the same errors" in the housing and out-of-area components. They asked the Director General, if he refused, to relieve them of the obligation to go to the Appeal Board.

In the absence of a reply from the Director General within the six-week time limit in Rule 11.1.1(b)(2) they submitted appeals to the chairman of the Appeal Board in letters of 15 January 1993.

The Board invited but did not receive comment on the cases from the Commission. In its report of 11 October 1993 it recommended that the Director General should revise the multiplier using the proper rate of exchange to determine the out-of-area component and pay the complainants the amounts due as from August 1992. The Director General having taken no further decisions, the complainants are impugning the rejection which they infer under Article VII(3) of the Tribunal's Statute.

B. The complainants submit that both the housing and out-of- area components of the post adjustment index for July 1992 were flawed and therefore the multiplier applied to their pay was unlawful.

Four of their pleas challenge the housing component.

The first is breach of *patere legem quam ipse fecisti*. On 21 December 1990 the General Assembly of the United Nations approved a methodology which the Commission had proposed and which required (1) place-to-place comparison of housing costs, (2) assessment of housing costs based not on net but on gross rent or, in the case of home-owners, imputed gross rent and (3) "time-to-time adjustment" of the housing component of the post adjustment index using such "external data" as type of neighbourhood, distance from work and size of dwelling. But the Commission failed to apply its own methodology.

The complainants' second plea is that the method the Commission followed was on its own admission "inequitable" and "imprecise". The General Assembly acknowledged as much by calling on the Commission "as a matter of urgency ... to improve the measurement of the housing element in the remuneration package". But the Commission held to its old methods, which underestimated actual housing costs.

Thirdly, they allege breach of equal treatment. The Commission has a duty under the *Noblemaire* principle (for an explanation of this principle, see Judgment 825 (in re Beattie and Sheeran) under 1 to 5.) to see that pay at different duty stations has uniform purchasing power. Though it took account of the housing component of the consumer price index for New York, it did not do so for Geneva. If it had taken account of the increase in rents in the consumer price index for Geneva, the post adjustment index for July 1992 would have been 2 per cent higher.

The complainants contend that because of the acknowledged flaws in the old methodology reliance on it was improper insofar as an "improved" methodology had been "proposed and accepted".

Lastly, they charge the Organization with breach of the duty of care it owes them. Three years had passed and still the promised changes tarried. Instead of applying the Commission's dictates without "much further" ado WIPO should have tried to put the adjustment right.

As to the out-of-area component the complainants allege three flaws.

The first is a defect in the applicable methodology. The so-called "four-month waiting period" gives the Commission time in which to gather and analyse data on the cost of living before adjusting pay. It meant that post adjustment for July 1992 reflected changes in the cost of living up to March. But when reckoning the out-of-area component, in which costs are expressed in dollars, the Commission used the rate of exchange for July 1992, when the dollar stood at only 1.37 Swiss francs as against 1.49 in March 1992. That alone meant that their pay for July 1992 was 9.37 francs lower than it should have been.

Secondly, they plead that the method by which the Commission determined the rate of exchange for July 1992 is at odds with the standard of "reasonableness". The levels of pay at Geneva depend "for a whole year" on the value of

the dollar in terms of the Swiss franc on the last-but-one working day of June. Any fall in that value on that one day will mean lower pay for the next twelve months.

Thirdly, they allege breach of equal treatment. By measuring out-of-area costs up to March by reference to the rate of exchange for July 1992 the Commission discriminated against staff at Geneva: the pay of staff in New York is not subject to variation in any rate of exchange.

They seek the quashing of the decisions setting their pay for July 1992 and any months thereafter. They claim payment of the further amounts due, plus interest at the rate of 8 per cent a year, and awards of 3,000 Swiss francs each in costs.

C. In its reply of 14 April 1994 WIPO concedes that the complaint is receivable under Regulation 3.19(a), which gives staff members two years in which to claim any payment due under the Staff Regulations or Rules.

On the merits the Organization submits that it had nothing to do with the Commission's choice of the method of determining the multiplier: that was a matter for the Commission alone. The Organization neither confirms nor denies the complainants' allegations.

D. In their rejoinder of 10 May 1994 the complainants contend that WIPO is yet again in breach of its duty, stated in Judgment 1265 (in re Berlioz and others), to see that any "elements of the common system or any other outside system" which it puts in its own rules are lawful. At least one other organisation that belongs to the common system has refused to apply a multiplier from the ICSC which it thought flawed.

E. The Commission sent WIPO on 13 May 1994 a letter and observations which the Organization filed on its behalf on 13 June. Commenting on issues the complainants raised in their letters of 26 October 1992 to the Director General about "methodology", the Commission acknowledges the value of data from outside sources but observes that no deadline was set for "the implementation of external data", which it was "always recognized" would take a long time. Although the Commission has used the rent component of the consumer price indices at New York and Washington D.C. it was not bound to do so elsewhere; its decision to use the component of the Geneva index took effect only as from August 1993. As to the response to its questionnaire about housing, an "accurate calculation" would have required replies from staff stationed at Geneva but living just over the Swiss border, in France; but such staff did not fill up the questionnaire. One reason for the "discrepancy" between the rate of inflation at Geneva and the steep rise in mortgage rates there is that mortgage rates affect new rents more than older ones; so it takes time for them to push up the consumer price index.

Had the Commission reckoned the out-of-area component according to the rate of exchange in force four months before it made the adjustment it would have had to convert back into the dollar at the date of implementation. That would have produced different results for each duty station and cause successive gains and losses that would "in the long run" cancel each other out. It therefore helps to avoid penalising staff at duty stations where the proportion of out-of-area costs is higher than at Geneva. The present method is based on measurements of the cost of living in 21 countries.

F. In their further submissions of 14 July 1994 the complainants contend that the Commission has ignored their whole complaint by confining comment to their letters of 26 October 1992 to the Director General.

They accuse it of dilatoriness in using external data. By failing to make the introduction of such data retroactive it ensured that earlier underestimates of housing costs would hold good.

They observe that neither the Organization nor the Commission disputes the soundness of their claims. All that the Commission challenges is the reasoning which they developed in their letters of 26 October 1992, and that is now immaterial. They nevertheless contest some of the Commission's statements in its brief. The purpose of the questionnaire being to gather data on costs in Geneva, the Commission did not invite staff living in France to fill it up; in the absence of data on housing costs in France any references to them are speculative.

The Commission failed to grasp the effect of rates of exchange on pay, not just on the post adjustment index. Its task is to see that the figure of pay is right at all times, not sometimes too low and sometimes too high.

The complainants claim further amounts in costs.

G. Further observations which the Commission made on 14 October 1994 and which WIPO filed on its behalf on 18 October address the complainants' brief of 14 July 1994.

H. In the further submissions which the Tribunal invited in point 1 of its decision in Judgment 1417 the Commission makes comments on the rental/housing component of the post adjustment index which are summed up in Judgment 1458 (in re Damond and others), delivered this day, under H. As to the out-of-area component it observes that the method the complainants prefer would make for anomalies: it would have lowered the post adjustment allowance for Geneva by 1.2 per cent from July 1991 to June 1992.

I. In the final submissions which the Tribunal invited in point 2 of its decision in Judgment 1417 the complainants enlarge on their arguments on the rental/housing component. They point out that the Commission has changed its method of reckoning the out-of-area component.

They claim yet further amounts in costs.

#### CONSIDERATIONS:

1. The complainants are challenging the amount of their pay for July 1992 and in particular the calculation of the "out-of-area component" and the "rental/housing component" of the post adjustment index.
2. There is a general description of the system of post adjustment in Judgment 1457 (in re Di Palma and others), delivered this day, under 2 to 9.
3. In its reply the Organization stated that it and its Director General "neither affirm nor deny the information contained, or the statements set forth, or the allegations made by the complainants" and suggested that any additional information or commentary on the methodology involved or on the decisions challenged or any views on the merits of the complaint would have to come from the Commission. Judgment 1417 accordingly invited the Commission to file further submissions and the parties to file final briefs.
4. In its latest brief the Commission devotes a chapter to the out-of-area component of the post adjustment index. Under the heading "Technical and Historical Background" it explains that 85 per cent of staff in the Professional and higher categories in the common system of the United Nations are expatriates. They incur some of their expenditure elsewhere than in the country of their duty station and in the currencies of other countries. For staff at headquarters duty stations the proportion of such expenditure is estimated at 10 per cent on the average. Since it is hard to obtain data on actual expenditure of that kind there is resort to what is known as an "out-of-area index". It reflects prices in 21 countries and they are converted into United States dollars. Between the dollar and the currency of the country of the duty station the rate of exchange will of course vary. So the problem is, in the Commission's words, to determine -

"the relationship among the dates as to which the out-of-area price data for a particular [post adjustment index] is valid; as of which the exchange rate of US dollars to local currency should be used; and as of which the new [index] becomes effective."

For all calculations of the index there has since 1964 been a rule requiring a "four-month waiting period". The Commission's Advisory Committee on Post Adjustment Questions (ACPAQ) and the Commission itself review the working of the rule from time to time. The Commission confirmed it at its 35th Session in March 1992 (ICSC/35/R.17, paragraph 61(a)). In its brief the Commission accounts for it in the following language:

"The delay rule is necessitated by the fact that because of the inherent cumbersomeness in making the extensive and complicated [post adjustment index] calculations and then announcing them in time to permit prompt implementation by the organizations, there must be some time-lag between [the date] of the data used and the date of implementation. For this purpose, four months is considered the minimum practicable delay period."

5. The Commission carried out in 1989 a comprehensive review of the conditions of service of the Professional and higher categories of staff, including pay. It did not eliminate the effects of currency fluctuation. It maintained what it calls the "zero point five per cent rule", which is designed to stabilise pay between cost-of-living adjustments and which limits to plus or minus 0.5 per cent any changes in local currency pay that are due to currency fluctuation. The out-of-area component of the index reflects the cost in dollars of purchasing similar goods and services in various countries. When currencies fluctuate considerably the movement of the out-of-area index from

one month to the next depends almost entirely upon variations in rates of exchange between the dollar and other currencies or groups of currencies.

6. In accordance with the "four-month rule" the post adjustment index for July 1992 was based on the out-of-area index established four months earlier, in March 1992, when the Swiss franc - the currency of the country of the complainants' duty station - had stood at 1.49 to the dollar. The calculations were as follows:

(1) At the "base date", which was in May 1990, out of every 1000 Swiss francs of pay 100 were taken to cover out-of-area expenditure. At the time the rate of exchange stood at 1.46 Swiss francs to the dollar; so 100 francs came to \$68.49.

(2) The out-of-area index at the base date stood at 170.68, and by March 1992 had risen to 194.75. The ratio of 194.75 to 170.68 was 1.141. Applying that ratio to \$68.49 gave a figure of \$78.15.

(3) By March 1992 the rate of exchange was 1.49 Swiss francs to the dollar.

(4) By July 1992 it was 1.37. That being the rate used according to the methodology to work out pay for July 1992, the figure came to \$78.15 x 1.37, or 107.07 Swiss francs, for each original unit of 100 Swiss francs, and the complainants were paid accordingly for that month.

7. The complainants plead a flaw in the methodology that the Commission used. They contend that the methodology should have provided for application of the rate of exchange for March 1992 so as to yield a figure of  $78.15 \times 1.49$ , or 116.44 Swiss francs for each original unit of 100 Swiss francs. They further contend that the method of determining the rate of exchange is unreasonable in that levels of pay for staff stationed at Geneva depend for a whole year on the value of the dollar on the last-but-one working day of June each year. They observe that, supposing that the dollar fell against the Swiss franc by 10 per cent on that day the level of pay would as a result be one per cent lower throughout the following twelve months even if the dollar recovered the 10 per cent loss the very next day. They observe that residents in New York do not have to cope with the consequences of currency fluctuation.

8. One preliminary comment is that in a system that is based on the dollar residents in New York are quite obviously unaffected by fluctuation in the rates of exchange of the dollar: according to the system of post adjustment New York sets the norm, and there can be no inequality of treatment as long as the system achieves parity in the purchasing power of pay.

9. The Commission argues in its latest brief that if the complainants' suggestion were followed it would make for anomalies. It says:

"If, as suggested by Complainants, the out-of-area index four months prior to the implementation date were converted into local currency at the exchange rate of that month and then converted back to dollars at the exchange rate of the implementation date, there would be a different out-of-area index for each duty station, which would depend more on the currency fluctuation of the duty station rather than on the 21 countries used in the calculation of the index (even if prices at that duty station was [sic] not considered in the calculation of the out-of- area index)."

The Commission observes that, even if the index had been calculated as the complainants suggest, the post adjustment for Geneva would have been "1.2 per cent lower from July 1991 to July 1992". The Commission concedes that its method is imperfect and observes that ACPAQ took up the issue at a recent session and has submitted a detailed report. But the Commission maintains that pending change it is entitled to use the old long-established method of calculating the post adjustment index.

10. The complainants are not alleging that the Commission has misapplied its own methodology, but want it to follow a different one. They would also like different application of the "four-month" and "twelve-month" rules. Even if the Commission is reviewing and reforming points of its methodology it does not thereby invalidate what has gone before. Nor can its acknowledgement of the need for constant review be seen as an admission that the methodology is totally flawed. The whole subject of post adjustment is of great complexity and that, and the constant changes in the factors that are considered relevant, mean that the methodology will probably never attain perfection. Though the complainants' objections to the current methodology reflect concerns which arise when the dollar is in decline in terms of the local currency, and though the Commission failed to eliminate the effects of

currency fluctuation in 1989, it has kept the matter under constant review. The objections are not sustained.

11. As to the variation in the housing component of the index the complainants put forward the same arguments as do the complainants in the case on which the Tribunal rules this day in Judgment 1458 (in re Damond and others). For the reasons set out in that judgment their pleas fail.

12. The complainants make the further plea of breach of the duty of care on the grounds that three years had passed and the promised changes were yet to come. For the reasons stated in Judgment 1458 under 13 to 17 the Tribunal holds that the Commission merely drew up a programme of goals that were to be achieved. For that purpose it is still working out the details. In those circumstances the Tribunal rejects the plea.

13. In its latest brief the Commission raises a procedural objection set out under H in Judgment 1458. But since the complaint fails on the merits there is no need to entertain that objection.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss. Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas  
Mella Carroll  
Mark Fernando  
A.B. Gardner