SEVENTY-NINTH SESSION

In re DERQUE, HANSSON (No. 2), ILARDI, MAKADI and SEINET

Judgment 1460

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mrs. Raymonde Derqué, Mr. Alfredo Ilardi, Mr. András Makádi, Mrs. Eliane Seinet and the second complaint filed by Mr. Bo Alfred Hansson against the World Intellectual Property Organization (WIPO) on 31 March 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 fourth 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 further brief;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. WIPO Staff Regulation 3.5 reads:

"(a) The base salaries of staff members in the Professional and higher categories shall be adjusted by the application of non-pensionable post adjustments, the amount of which shall be determined by multiplying one per cent of the corresponding base salary at the dependency or single rate by a multiplier reflecting the post adjustment classification of the duty station.

...

(e) 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."

Regulation 1.3 reads:

"While the whole time of staff members is at the disposal of the International Bureau [of WIPO], the normal working week, for staff members in full-time employment, shall be 40 hours, not including time for meals. ..."

At its 28th Session (23 September-2 October 1991) the Coordination Committee of WIPO, which has its headquarters in Geneva, set up a Working Group on Professional Remuneration. The group was to "establish the facts", among other matters, about "the alleged inequality of treatment between staff serving in Geneva and those serving at the base of the common system (New York)". In a memorandum of 20 January 1992 the Director General informed the group that "Professional staff members in Geneva are required to work 11.8 per cent more hours per year than Professional staff members in New York".

At its 30th Session (21-29 September 1992) the Committee examined a report from the group and approved a statement by the Director General that he intended to ask the International Civil Service Commission to review "the working hours question".

The Commission considered the matter at its 38th Session (15 July-3 August 1993) and decided to "maintain the current common system practices" and so to inform the General Assembly of the United Nations. By resolution 48/224 of 23 December 1993 the Assembly endorsed the Commission's decision.

By circular 47/1992 of 10 August 1992 the Organization announced the multiplier (for an explanation of the multiplier, see Judgment 1457 (in re Di Palma and others) under A and 8.) which it was applying as from August 1992 to the pay of staff in the Professional and higher categories. The multiplier was to be 99.

The complainants belong to the Professional and higher categories of staff of WIPO. In letters dated 1 October 1992 they submitted to the Director General under Staff Rule 11.1.1(b)(1) requests for review of their pay for August 1992, which they said was based on an unlawful multiplier. They asked him to treat their requests as claims to payment due under Regulation 3.19(a) and, 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 18 December 1992.

In its report of 5 November 1993 the Board recommended that the Director General make good their loss of 11.8 per cent in pay as from 1 August 1992, if necessary in two or three instalments.

Failing a decision by the Director General within sixty days of the date of the Board's recommendation they are impugning the implied rejection of their claims.

B. The complainants submit that the multiplier applied to their pay for August 1992 is tainted with mistakes of fact and law. They have four main pleas.

The first is that WIPO acted in breach of the principle of equal pay for work of equal value, as set out in Article 23(2) of the Universal Declaration of Human Rights: it overlooked the essential fact that the working week of staff belonging to the common system of the United Nations is on average 11.8 per cent longer in Geneva than in New York.

Secondly, the complainants plead breach of the basic principles of the common system, which is supposed to provide "uniform" standards of employment at all duty stations. Though the Commission takes a firm stand when it believes that a specialised agency of the United Nations has departed from the rules of the system it sees nothing wrong with treating staff better at New York than at Geneva.

The complainants' third argument is that there are no "objective" reasons for giving them different treatment, be it working conditions in New York or some special feature of the work assigned to Professional category staff. The Commission is wrong to rely, as it did in its annual report for 1993 to the General Assembly, on the difficulty of correcting defects in the methodology.

Lastly, the complainants charge the Commission with failing to discharge the duty of care it owed to staff throughout the common system. Maintaining the current practice constituted a breach of the basic rights of staff as construed in the case law.

They seek the quashing of decisions setting their pay for August 1992 and any months thereafter. They claim payment of the further amounts due, plus interest at the rate of 8 per cent a year. They ask the Tribunal to send their case back to the Organization for a "new decision in respect of the period following the date of the judgment" and to award them 5,000 Swiss francs each in costs.

C. In its reply of 14 April 1994 WIPO cites Regulation 3.19(a), which gives staff two years in which to claim any payment due under the Staff Regulations or Rules. It therefore raises no objection to the receivability of the complainants' challenge to their pay as from August 1992.

On the merits the Organization agrees that there was breach of equal treatment. Since the complainants have to work 11.8 per cent longer than officials in the Professional and higher categories in New York they should have their pay adjusted accordingly.

D. In their rejoinder of 4 August 1994 the complainants contend that since WIPO agrees with them their claims

must succeed.

E. Observations which the International Civil Service Commission made on 14 October 1994 and which WIPO filed on its behalf on 18 October address the complainants' brief of 4 August 1994. The Commission points out that the "sole purpose" of the post adjustment system is to make for parity of purchasing power between duty stations. So it cannot, as the complainants wish, "equalize pay per hour of scheduled work". Since the whole of a staff member's time is at the Director General's disposal office hours are "irrelevant" to the determination of pay.

F. In the further submissions which the Tribunal invited in point 1 of its decision in Judgment 1417 the Commission maintains that the post adjustment system is supposed to safeguard the parity of the purchasing power of staff in the Professional and higher categories at all duty stations and that the complainants are wrong to expect the system to ensure equal pay for equal hours of work. It is a "mathematical" impossibility to achieve both purposes.

The rules allow working hours to vary from place to place and make no provision for the payment of overtime work done by staff in the Professional and higher categories. Comparison between pay in the common system and pay in the United States federal civil service - the employer of reference or "comparator" - discounts any differences in the working week. The General Assembly has often endorsed the Commission's practice of dissociating hours of work from pay.

G. In the final submissions which the Tribunal invited in point 2 of its decision in Judgment 1417 the complainants say that the Commission has failed to answer their main objection. On the pretext of replying to their contention that the rules and practice of the common system infringe "fundamental" principles of law the Commission merely professes to have complied with the material rules.

They claim further amounts in costs.

CONSIDERATIONS:

1. The system of post adjustment in the common system of the United Nations, to which WIPO belongs, is explained in Judgment 1457 (in re Di Palma and others) under 2 to 9.

2. The complainants are challenging the amounts of their pay for August 1992. They say that in Geneva the working week is 40 hours as against an average figure of 35.625 hours in New York. They calculate on the strength of those figures that their pay should have been 11.8 per cent higher. They contend that the multiplier which the International Civil Service Commission established for Geneva and which WIPO used in reckoning the figures of pay of staff in the Professional and higher categories for August 1992 overlooked that fact; that the multiplier was therefore determined in disregard of the principle of equal pay for work of equal value; and that the amounts of pay were too low.

3. The gist of the Organization's reply was that it and its Director General agreed with the complainants' submissions. Judgment 1417 accordingly invited the International Civil Service Commission to file further submissions and the parties to file final briefs.

4. Regulation 1.3 of the Staff Regulations of WIPO, which is set out under A above, says that the normal working week is forty hours. Rule 101.2(a) of the Staff Rules of the United Nations provides that the Secretary-General shall set the normal working hours for each duty station.

5. In its latest brief the Commission argues that the consistent interpretation put on the rules is that different hours of work are set for each duty station according to different local requirements.

6. A note by the secretariat of the Commission was submitted to the Commission at its 38th Session (July/August 1993) under the heading "Relationship between hours of work and remuneration" (ICSC/38/R.15). The note explains in paragraphs 17 to 20 how "local practice" may affect the working week. It says:

"... the work schedule is an element of remuneration that is taken into account at the time of General Service salary surveys. Not only is an adjustment made to surveyed salaries on an employer-by-employer basis for differences in internal/external work schedules, but also organizations are encouraged to maintain a work schedule that, as far as possible, is in accord with local practice. The Commission has, on occasions, made recommendations to the

executive heads for a change in the internal work schedule, when it was noted, in reviewing General Service results, that there was a significant difference between internal/external work schedules. Accordingly, the General Service survey process influences the work schedules of the organizations and thereby the work schedule of the Professional and higher categories. The organizations' work schedules are therefore often a reflection of local practice as related to the General Service category."

It goes on:

"The work schedule of the United Nations common system in New York is no exception in this regard. ... [It] generally reflects the fact that in New York the working hours of the local labour market are shorter than in almost any other city in the United States.

...

The question may arise as to why New York, when compared to all other cities in the United States, has such a significantly lower average work schedule ... The limited evidence the secretariat has been able to obtain ... suggests that the lower working hours in New York are a direct consequence of the longer commuting time ... Statistics on working hours ... show that New York has one of the shortest work schedules in the United States and the longest average commuting schedules. ..."

Hours of work vary between headquarters duty stations in the common system: thus in Montreal they are 34.7, in New York 35.625, in Rome 37.5, in Vienna 39.3, and in Geneva and Paris 40. The issue in this case is whether Professional and higher categories of staff employed at Geneva by an organisation that belongs to the common system ought to be compensated because their working week is longer than that of such staff in New York. The complainants submit that there are no objective grounds for the difference in hours between New York and Geneva and that the Commission has failed in the duty of care it owes to staff stationed in cities other than New York. The Commission answers that the sole purpose of the system of post adjustment is to ensure parity in the purchasing power of pay for staff in the Professional and higher categories between different duty stations; that the number of hours actually worked at any particular duty station has no bearing on post adjustment; and that the system of post adjustment is not a proper means of having differences in such hours taken into account.

7. The Commission took up the question of working hours at its 38th Session. Its conclusions appear in the report it submitted for 1993 to the General Assembly of the United Nations at its 48th Session (February 1994) (Report of the Commission for the year 1993, General Assembly, Official Records, 48th Session, Supplement No. 30, A 48/30.). The relevant passage is in paragraph 181 of that report and reads:

"The Commission considered that the nature of Professional-level work was such that it did not lend itself to strict adherence to work schedule parameters. Furthermore, no overtime was paid to Professional staff in the common system. Some members of the Commission expressed the view that the consideration of work schedule parameters for Professional staff was demeaning. In that regard, the Commission did not consider it possible to circumscribe Professional work activities by a time element as was done for production workers on piece-work or clerical workers subject to overtime payments. The Commission considered that it was expected that Professional staff would complete a task or project without strict concern for the schedule of working hours and without expectation of a salary adjustment to account for the extra hours worked, or compensatory time off. It was noted, in that regard, that the work schedules applicable at common system duty stations were based largely on local practice as determined at the time of local General Service salaries surveys."

8. In resolution 48/224, adopted at its 48th Session, the General Assembly declared in a section headed "Relationship between hours of work and remuneration" that it concurred fully with the views expressed by the Commission on the subject and endorsed its decision to "maintain the current common system practice with regard to working hours".

9. The Commission points out that under the current application of the so-called "Noblemaire principle" (For an explanation of the principle, see Judgment 825 (in re Beattie and Sheeran), under 1 to 5.) comparison is made between the pay of Professional category staff in the common system and that of their counterparts in the "comparator" service, which is the federal civil service of the United States; that such comparison takes into account the difference in the cost of living between New York, the "base" city of the common system, and Washington D.C., the base city of the comparator civil service; but that no adjustment is made on account of the

difference in the length of the working week between those two cities, though similar staff in the United States federal civil service have a 40-hour week. Indeed the system of pay for staff in the Professional and higher categories makes no adjustment on account of any differences in hours of work.

10. The Commission's plea is upheld. The system of post adjustment is of no relevance to differences in working hours, being concerned solely with parity of purchasing power, and is not an appropriate means of securing compensation for differences in working hours between duty stations. The system makes no provision for such equalisation of working hours.

11. The whole time of staff members in the Professional and higher categories is at the Organization's disposal and they are properly expected to complete the work assigned to them without compensation for any overtime. It is therefore permissible to base their working week on the conditions prevailing at their duty station and to make no adjustment in pay to take account of differences in hours of work within the common system.

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

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