

EIGHTY-SECOND SESSION

***In re* Bensoussan, Bongiovanni, and Freeman (No. 3)**

Judgment 1603

The Administrative Tribunal,

Considering the complaints filed by Mr. Yves Bensoussan and Mr. Giacomo Bongiovanni and the third complaint filed by Mr. Edward James Freeman against the Food and Agriculture Organization of the United Nations (FAO) on 14 September 1995 and corrected on 27 November 1995, the FAO's single reply of 13 March 1996, the brief submitted by the International Civil Service Commission (ICSC) also on 13 March, the complainants' rejoinder of 17 June, the ICSC's further submissions of 8 August and the Organization's surrejoinder of 5 September 1996;

Considering Article II, paragraph 5, of the Statute and Article 13, paragraph 3, of the Rules of the Tribunal;

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

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

A. The complainants belong to the Professional and higher categories of staff of the FAO and as such are participants in the United Nations Joint Staff Pension Fund. As in the other organisations of the United Nations common system, the base salary of such staff may be put up by an amount, known as "post adjustment" that is calculated to impart the same purchasing power to the pay of staff wherever they may be stationed. Judgment 1457 (*in re* Di Palma and others) explained under 2 to 9 how post adjustment works.

A "post adjustment index" is used to gauge the cost of living at each duty station as against New York, which is the standard of comparison for the whole common system. On 21 December 1989 the General Assembly of the United Nations adopted a resolution, No. 44/198, on a recommendation by the International Civil Service Commission. It thereby did away with what had been called "regressivity" and decided to treat pension contributions as a "separate item" of the 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\$ 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\$) is not included in the cost of living; every staff member, in fact, contributes 7 per cent of pensionable remuneration to the [United Nations Joint Staff] 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" since not only was the post adjustment being

reduced but the deductions made from pay to meet pension contributions were being increased. So the staff were having to contribute more than their prescribed share, which was one-third, of total payments.

By letters of 27 October and 29 December 1994 the complainants, citing FAO Staff Rule 302.3171, asked the Director-General to pay them for each of the last 24 months the difference between the amount of post adjustment they had actually been paid and that which they believed they were entitled to. They also asked to be paid the "correct amount" of the post adjustment for each month thenceforth. By letters of 28 December a personnel officer informed Mr. Bensoussan and Mr. Bongiovanni that their claims had been rejected. The Director of Personnel notified the same decision to Mr. Freeman in a letter of 24 January 1995. By memoranda of 24 March the complainants lodged appeals with the Director-General.

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.

By letters of 22 June 1995 the Deputy Director-General informed the complainants of the Director-General's decision to reject their appeals in part: the Organization would be applying to them the adjusted pay scale as reckoned by the ICSC as from 1 November 1995, the Commission's own date, but would not grant them retroactive compensation. Those are the decisions they are impugning.

B. In the complainants' submission the ICSC's decision of July 1990 was undoubtedly unlawful. The Commission itself eventually admitted to a technical flaw which was adversely affecting staff pay. Besides, it proved dilatory: in 1993 it put to the Advisory Committee on Post Adjustment Questions (ACPAQ) the matter of excluding pension contributions from the post adjustment index, then held over discussion to its 41st Session, in May 1995.

Judgment 1265 (*in re* Berlioz and others), which the complainants cite, recalled "the duty of any organisation that introduces elements of the common system or any other outside system into its own rules to make sure that the texts it thereby imports are lawful". The FAO made a mistake of law by endorsing a decision of the Commission without ascertaining that it was sound in law and in fact.

The complainants ask the Tribunal to quash the Director-General's decisions of 22 June 1995 and to order the FAO: (1) to pay them the difference between the amounts of the post adjustment allowance they should have received from 27 October 1992 up to the date at which the Commission's mistake was put right -- but from January 1993 to December 1994 for Mr. Freeman -- and those they actually got, plus interest at the rate of 10 per cent a year and (2) to refund their costs. Mr. Bensoussan and Mr. Bongiovanni also claim payment of the amounts of post adjustment which they are entitled to as from the date of the correction.

C. In its single reply the FAO submits that, having accepted the Commission's Statute, it was bound to apply the prescribed method for reckoning post adjustment. Though it has a duty to ascertain that the Commission's decisions are lawful, there was nothing unlawful about that method. In 1993 the Commission put the matter to the ACPAQ to sort out, then held over its own discussion to its 41st Session, in May 1995, because the ACPAQ's report was not available in French, one of its two working languages.

Though acknowledging that Rule 302.3171 applies, the FAO submits that, even if the Commission's decision were unlawful, no figure could be put on the injury to staff. The Organization's own rules do not provide for the payment of interest in such circumstances.

D. In its observations the Commission points out that the system of post adjustment and the method of accounting for pension contributions are complex. The mistake in the method it introduced in 1990 went unnoticed for three years; so it was not an obvious one and the FAO did not act unlawfully by falling in line. The Commission denies being unhelpful by asking the ACPAQ in 1993 to look at the matter again or holding over its own decision.

By challenging the rejection of their claim to retroactive correction the complainants are seeking damages for decisions which they have never impugned: "no rule or precedent requires organisations to make retroactive redress for their decisions in such circumstances".

E. In their rejoinder the complainants press their pleas. They maintain that the decision the Commission took in 1990 was unlawful because it rested on a mistake of fact. The FAO had known since 1993 that it was flawed and

was impairing the rights of staff. The Organization has already paid retroactive compensation to staff at least twice, in 1988 and 1992, for mistakes made by the Commission in reckoning post adjustment.

F. In further submissions the Commission presses its arguments and maintains that the method introduced in May 1995 may not be used to reckon adjustments made before November 1995 and the complainants are therefore not entitled to retroactive post adjustment.

G. In its surrejoinder the FAO again denies having acted unlawfully by applying the Commission's decision of 1990. There was no telling at the time that the decision was fundamentally flawed; so compliance was only reasonable. The Organization was bound by the Commission's decision of May 1995 to apply a new method of reckoning as from November 1995, and had no reason to apply it retroactively.

CONSIDERATIONS

1. The complainants were at the material time all employees of the FAO at its headquarters in Rome. They are challenging decisions by the Director-General of the Organization not to pay them the difference between the amounts they say should have been paid in post adjustment in the twenty-four months preceding the date of making their claims and the amounts they were actually paid. They further claim interest thereon.
2. The International Civil Service Commission defines post adjustment as "an amount paid in addition to net base salary, which is designed to ensure that no matter where United Nations Common System staff work, their take-home pay has a purchasing power equivalent to that at the base of the system, New York". A post adjustment allowance is payable to staff in the Professional and higher categories of staff of the common system of the United Nations, to which the FAO belongs.
3. To ensure that the take-home pay of staff in the common system has the same purchasing power at other duty stations as at New York, account is taken in reckoning post adjustment of the cost of goods and services at duty stations. One material item is the sums deducted from staff pay in contributions to the United Nations Joint Staff Pension Fund. How are such deductions to affect the reckoning of post adjustment? The Commission works out the method of determining post adjustment: see for example Judgments 1265 (*in re* Berlioz and others) and 1266 (*in re* Cussac and others). For the purpose of reckoning the effect of pension contributions it has recently made changes to correct the flaws of the method it introduced in July 1990. It became clear in 1993 that that method was perverse in that, as the FAO points out, it was serving to lower the figure of the post adjustment allowance "by one third of the amount of any increase in pension contributions, while the deductions made from staff pay were increased by the same amount". Though the authorities saw as much as early as 1993, not until 1995 did the Commission, after much shilly-shally, at last do something: it endorsed a recommendation from the Advisory Committee on Post Adjustment Questions (ACPAQ) for counting "actual" pension contributions at each updating of the post adjustment index. But the Commission parted ways with the Committee by deciding that the change would come in as from 1 November 1995 instead of the second quarter of 1996.
4. Mr. Bensoussan and Mr. Bongiovanni had lodged claims on 27 October 1994 and Mr. Freeman on 29 December 1994. Having put the Commission's decisions into effect, the FAO told the complainants that the new method of reckoning the index would apply to them as from 1 November 1995. They are impugning the final decisions that the Director-General took on 22 June 1995 refusing to apply the new method retroactively to their post adjustment allowance. They contend that by condoning a flawed method the Organization acted in bad faith; that its belief that it was bound by the Commission's decision and its refusal to pay interest on arrears amount to mistakes of law; and that it is so doubtful of being in the right that it has made provision in its budget for 1996-97 against the retroactive payments they are claiming.
5. There is one general point worth making before going into those pleas. It is indeed common ground. The Commission may make recommendations for aligning conditions of service in the common system and may decide on the methods of determining them. Yet the staff may still challenge any action by that body, independent though it be of the organisation that employs them. As was said in Judgment 1000 (*in re* Clements, Patak and Rödl), to cite but one --

"... when impugning an individual decision that touches him directly the employee of an international organisation may challenge the lawfulness of any general or prior decision, even by someone outside the organisation, that affords the basis for the individual one."

So the complainants may challenge the lawfulness of the Commission's method up to November 1995 even though

the FAO has done no more than fall in line. On that score the Organization is wrong in pleading that they are out of time: the staff may always challenge in law the rules that are applied to them. In any event the Staff Rules of the FAO allow a claim to payment of amounts due in the immediately preceding twenty-four months.

6. The foremost issue, then, is the lawfulness of the method followed from 1990 to 1995 for reckoning post adjustment. As a matter of fact there is no one method that can be said to pass muster in law, whether it counts pension contributions in full, or only in part, or discounts them altogether, in the tally of expenditure by staff. As the Commission says in its comments on the complaints, such contributions do amount to expenditure in that they reduce take-home pay; yet they are investment too. That they partake of both explains why the ACPAQ faltered and wavered so. There is no faultless method to be found here; the draughtsman's purpose must be to work things out as fairly as he can and, whichever method of reckoning may be followed, check any damage it may cause. The method introduced in 1995 served the purpose better than the one it superseded; but the method in use from 1990 to 1995 was not for all that unlawful.

7. The conclusion is that there is no merit in the complainants' plea that the Commission's decisions up to 1995 and the FAO's applications thereof were unlawful. Nor did the Commission take too long, as they contend, to change the method once its unwanted effects had shown up. As defendant and Commission have alike pointed out, the system of post adjustment is complex. It is plain on the evidence that sure and abiding results are scarcely attainable.

8. Since the method that was dropped in 1995 was not in itself unlawful, the complainants are not entitled to the retroactive correction of pay that each of them claims. The FAO's sensible precaution of putting in its budget the wherewithal to execute a ruling in their favour is obviously no argument in support of their case. In sum, there was neither mistake of law nor bad faith in applying decisions by the Commission that were lawful.

DECISION

For the above reasons,

The complaints are 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.

(Signed)

William Douglas
Michel Gentot
Mella Carroll
A.B. Gardner