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

EIGHTY-FIFTH SESSION

***In re* Dondenne (No. 2), Mossaz (No. 3), Pautasso (No. 3) and Yossifov (No. 3)**

Judgment 1765

The Administrative Tribunal,

Considering the second complaint filed by Mr. Bernard Dondenne against the World Intellectual Property Organization (WIPO) on 6 December 1996, the third complaints filed by Mr. Bernard Mossaz, Mr. Marco Pautasso and Mr. Vladimir Yossifov against the Organization at the same date, the Organization's single reply of 14 July 1997, the complainants' common rejoinder of 24 July, WIPO's letter of 5 September informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder, the comments submitted by the International Civil Service Commission (ICSC) on 13 October, the complainants' observations on those comments of 7 November and the ICSC's final brief of 5 December 1997;

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

Having examined the written submissions and decided not to order hearings, which 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, whom WIPO employs at its headquarters in Geneva, belong to the Professional and higher categories of staff. Under the common system of the United Nations officials in that category are paid a post adjustment allowance over and above basic salary. The allowance is intended to ensure, for one thing, that the pay of Professional staff has equal purchasing power whatever their duty station and, for another, that it keeps its purchasing power despite variations in the cost of living. What is called the "post-adjustment index" reflects differences in the cost of living between New York, which serves as the "base" of the system, and other duty stations. A "multiplier" is used to work out the post adjustment. It is obtained by subtracting 100 from the figure of the index. Applying the multiplier to the figure of 1 per cent of the basic yearly salary in United States dollars for each employee's grade and step, divided by 12, yields the amount payable by way of monthly post adjustment. At Geneva the post adjustment index is adapted at 1 July every year to any variations in the cost of living. It is also adjusted each month to movements in prices and in the rate of exchange.

To work out the index the International Civil Service Commission makes from time to time surveys of the cost of living at the duty stations of the common system. As a gauge of consumer prices in Geneva, other than housing and kindred expenses, it uses the index issued by the statistics office of the canton of Geneva, whose French acronym is OCSTAT. The index is subject to "weighting" by the application of coefficients calculated to take account of the pattern of spending of United Nations employees.

In May 1993 OCSTAT amended the local index in several ways. One new feature was an item of expenditure, headed "other goods and services", that covers food and drink served in restaurants. The new local index was relevant for the first time in July 1994, when a periodic review of the post adjustment was made. But in reckoning the adjustment the secretariat of the Commission neglected to change the structure of its own index.

Not until the yearly adjustment for Geneva in July 1995 did the mistake come to light. The Commission had set inflation in Geneva at an appreciably lower rate than OCSTAT had. WIPO pointed the discrepancy out to the secretariat of the Commission in early August 1995, the consequent loss in salary being 0.2 per cent a month from July 1994 to June 1995.

On 23 August 1995 the complainants each sent the Director General of WIPO a letter seeking review of the decision to apply to their pay for July 1995 the multiplier set by the Commission and correction of the figures of pay from July 1994 to June 1995.

By notice 63/1995 of 21 September 1995 the Controller and Director of the Budget and Finance Department informed the staff that the multiplier for that month took account of the right figure for July 1995 and had been corrected as from 1 July 1995.

Having got no answer to their claim of 23 August for correction from July 1994, the complainants went to the Appeal Board on 15 November 1995. They challenged the implied rejection of their claim and cited Staff Regulation 3.19(a), which says:

"Except where otherwise provided for, any entitlement to an allowance, grant, or other payment arising from the Staff Regulations or Staff Rules shall lapse two years after the date on which the staff member would have been entitled to the payment."

In its report of 5 July 1996 the Board declared that time limit irrelevant on the grounds that the material provision was Regulation 3.5(e), which said that "the effective date of any change in the multiplier shall be as fixed" by the Commission. The Board recommended upholding the decision to apply the corrected multiplier as from 1 July 1995. By a memorandum of 9 September 1996 the Director General told the complainants' counsel that he did so. That is the decision under challenge.

B. The complainants submit that the Organization broke Regulation 3.19(a). What they are impugning is not a decision under 3.5(e) but implied rejection of their internal appeal, which they had based on 3.19(a).

WIPO is bound to check the lawfulness of any provision it imports from some outside source into its own rules. Once it had found the mistake it should have acted on its own, and quite independently of the Commission, to put things right. In any event it should have responded to the appeal by applying Regulation 3.19(a).

In subsidiary argument the complainants submit that it was arbitrary of the Commission to correct the multiplier only as from 1 July 1995. And for WIPO to plead the Commission's failure to act is sheer bad faith.

They ask the Tribunal to order the Organization to pay each of them the sums due, on correction of the multiplier, from July 1994 to June 1995. They claim interest thereon at the rate of 8 per cent a year and 3,000 Swiss francs each in costs.

C. WIPO replies that the complaints are irreceivable. The complainants missed the six-week deadline in Staff Rule 11.1.1(b) for appeal against the decisions to apply a wrong multiplier to their pay from July 1994 to June 1995. The purpose of time limits is, after all, to make for stability in law.

The complaints are, besides, devoid of merit inasmuch as they are relying on Regulation 3.19(a), which merely sets a time limit. The relevance of that provision hinges on the existence of some right under a quite distinct provision of the Regulations. The material one, 3.5(e), did not allow the Organization to challenge the date set by the Commission for applying the corrected index.

D. In their rejoinder the complainants say they are not questioning the need for WIPO to be sure of the position in law: all they want from it is full observance of its own Staff Regulations. It may not properly shelter behind a ruling of the Commission's. A strong line of precedent makes an organisation liable for any breach of law attributable to its applying rules of the common system to its own staff. So WIPO had the duty of retroactively correcting the multiplier.

E. The Commission comments that its decisions and recommendations are not ordinarily retroactive. Here any retroactive change would force it to recalculate the pay of every official of the common system belonging to the Professional and higher categories and stationed in Geneva, some of whom are no longer international civil servants.

The Commission learned on 3 August 1995 of the change in the reckoning of the consumer price index in Geneva. In keeping with long practice and with what it calls the "four-month rule" the change in the post adjustment index should have taken effect as from four months thereafter, in December 1995 at the earliest. So it was by way of

exception to the rule that its Chairman let staff benefit as early as 1 July 1995 from the new method of reckoning the local index.

Statistics being no exact science, it would be "unreasonable" to make so trifling a correction retroactive when that would mean so much work: *de minimis non curat lex*.

F. In comment on the Commission's brief the complainants submit that it is in bad faith in making out that it did not hear until August 1995 of the change in the local price index. The "four-month rule" is irrelevant in putting a material error right. So is *de minimis*: the effect of the mistake - the loss of 2.4 per cent of "one month's salary" - is not trifling; the precept holds good however hard it may be to work out the sums due; and it does not apply to money anyway.

G. In its final brief the Commission says that it gets data on prices in Geneva from the Bureau of Statistics of the International Labour Office. When the ILO passed on OCSTAT's new index it did not go into enough detail to show how the index had been made up. The Commission rebuts the complainants' other pleas.

CONSIDERATIONS

1. This case is about the reckoning of the "multiplier" which, as is explained in A above, is applied to the pay of the complainants, who belong to the Professional and higher categories of staff at WIPO. There are three issues: one to do with receivability and the other two with the merits.

2. It is common ground that the International Civil Service Commission made a mistake in reckoning the multiplier to be applied to pay in Geneva from July 1994. In May 1993 the statistics office of the canton of Geneva, a body known as OCSTAT, brought into its consumer price index a new head of expenditure, "other goods and services". For one thing, it shifted under that head an item called "food served in restaurants" which had until then come under "food, drink and tobacco". The Commission ought ordinarily to have taken account of that change in reckoning the multiplier for July 1994. In fact it overlooked the new index from OCSTAT until WIPO pointed out the omission in August 1995. It then put things right but applied the correct multiplier only as from July 1995. The complainants asked the Director General to apply it as from July 1994, but he refused and applied it only as from July 1995. That is the decision each of them is impugning.

3. The Organization contends that their complaints are irreceivable because they failed to comply with Staff Rule 11.1.1(b)(1):

"A staff member who, pursuant to Regulation 11.1, wishes to appeal against an administrative decision, shall as a first step address a letter to the Director General requesting that the administrative decision be reviewed. Such a letter must be sent within six weeks of the date on which the staff member received written notification of the decision."

4. That plea will not square with Regulation 3.19(a), which reads:

"Except where otherwise provided for, any entitlement to an allowance, grant or other payment arising from the Staff Regulations or Staff Rules shall lapse two years after the date on which the staff member would have been entitled to the payment."

5. The wording of 3.19(a) is abundantly clear: it applies beyond doubt to the complainants' claim to the quashing of the decision refusing the retroactive correction of their pay. Since the particular displaces the general, the time limit of two years in Regulation 3.19(a) must prevail over the one of six weeks that the Organization is pleading.

6. The complaints are therefore receivable.

7. The first issue that goes to the merits is the defendant's liability. It is the Commission alone that works out the multiplier. WIPO has no part in that exercise but must fall in line with what the Commission says and give effect to the Commission's multiplier: so indeed says Regulation 3.5(e). The Organization contends that it should not be held liable for the Commission's decision, once the mistake had come to light, to apply the right multiplier only as from July 1995.

8. WIPO has the duty of checking the lawfulness of any decision by another body on which it bases its own

decision. So too must it check the adequacy of action by that other body to correct any mistake it may have made, and make sure that such corrective action respects the rights of staff. Authority for that is in Judgment 826 (*in re* Araman and Sala) under 18. If the Commission's original reckoning was unlawful, so is a second one that fails to redress fully the wrong.

9. As the complainants contend, the multiplier applied before 1995 was unlawful even though the Organization was bound to abide by the Commission's methodology.

10. The second issue of substance is whether, once the Commission had found the mistake in the multiplier applied from July 1994, it was bound to apply the correct multiplier as from that date.

11. It is plain on the evidence that the Commission's mistake and, on the rebound, the Organization's were not imputable to a mere lapse of judgment or an error of law. That is what distinguishes this case from those that the Tribunal ruled on in Judgments 1603 (*in re* Bensoussan and others) and 1604 (*in re* Damond No. 2 and others). The Commission's mistake here is starkly straightforward: it took a wrong figure from the wrong head of OCSTAT's statistical tables. Since the postulate was wrong, so of course was the outcome. This is not at all a case in which the Commission was just exercising its discretion to opt for one method of reckoning instead of another: it is a case in which it made a mistake that - to quote Judgment 1604 under 10 - "should not have occurred in the first place".

12. There is no merit to the Commission's plea that, not having got word of the mistake until August 1995, it need not apply the proper multiplier until four months later. For one thing, though the mistake did not emerge until August 1995, the data needed to put it right had been readily at hand for well over a year. It was for want, not of information, but of care on the part of the Commission or its secretariat that the mistake came about. For another thing, the plea betrays an utter failure to grasp what the four-month rule means. That rule applies only to adjustment of the multiplier and requires adjustment to figures pertaining to a date four months before it is put into effect. It has no bearing whatever on the Commission's correction of any mistake of its own making. And the Commission may scarcely plead that it was free to wait even until December to put things right when it has actually acknowledged that the correct multiplier should have applied earlier.

13. Lastly, it pleads *de minimis non curat lex*. The plea fails. The courts will apply *de minimis* only at discretion and seldom where the claim is to payment of cash due under some written provision. What is more, though small, the amounts in dispute are not paltry: even for someone who is fairly well off they come to much more than a trifle.

14. The conclusion is that the impugned decisions cannot stand. The cases must be sent back to the Organization for a new reckoning of the pay due to the complainants as from July 1994 on the strength of the correct multiplier for Geneva. The complainants are also entitled to costs, and the Tribunal sets the amount at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decisions are set aside.

2. The cases are sent back to the Organization for a new reckoning of the sums due to the complainants as from July 1994 in the light of this judgment.

3. The Organization shall pay the complainants a total of 5,000 Swiss francs in costs.

In witness of this judgment, adopted on 15 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Julio Barberis

James K. Hugessen

A.B. Gardner

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