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

EIGHTY-SIXTH SESSION

In re Desbiolles (No. 2), Dourliach, Hamel, Hernández, Le Dantec and Seiler

Judgment 1840

The Administrative Tribunal,

Considering the complaints filed by Mr. Joël Desbiolles - his second - by Mr. Hervé Dourliach, Mr. Alain Hamel, Mr. Rufino Hernández, Mr. Georges Le Dantec and Mr. Gérald Seiler against the International Telecommunication Union (ITU) on 13 September 1996 and corrected on 8 September 1997, the comments by the International Civil Service Commission (ICSC) of 22 January 1998, the single reply filed by the ITU on 26 February 1998, the complainants' comments thereon of 29 March and their rejoinder, the Commission's further brief of 17 July on the comments and on the Union's reply, the Union's letter of 30 September telling the Registrar that it did not wish to enter a surrejoinder, the complainants' further brief of 24 September and the Commission's final comments thereon of 4 November 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 6(1)(b), 9 and 13(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. What is known as the "Flemming" principle governs the pay of staff in the General Service category in organisations that belong to the common system of the United Nations. It calls for alignment with the best terms of employment at each duty station. Every five years the International Civil Service Commission carries out surveys to find out what the best terms are at headquarters duty stations. It has what it calls a "general methodology" for such surveys. As was explained in Judgments 1519 (*in re* Prados and others), 1641 (*in re* Berlioz No. 2 and others) and 1713 (*in re* Carretta and others) in A, the Commission revised its methodology in 1992.

In June to August 1995 it carried out a salary survey in Geneva according to the new methodology, the findings to afford the basis for new scales of pay for General Service category staff stationed there. At its 42nd Session (24 July-14 August 1995) it commended the new scales to the organisations with headquarters in Geneva. The upshot was that for General Service staff in Geneva the old scales would not be adjusted at 1 January 1995. The World Intellectual Property Organisation (WIPO) so decided, and in Judgment 1641 of 10 July 1997 the Tribunal ruled on complaints that challenged that decision.

By service order 16 of 28 September 1995 the Secretary-General of the ITU issued new scales of pay for General Service staff as from 1 October 1995. Those scales set pay on the average 7.4 per cent lower than in September 1995, but the order explained that they would apply only to staff recruited on or after 1 October; besides giving, as before, gross and net rates of pay it set out scales of gross pensionable remuneration.

The complainants are members of the General Service category of the Union's staff and are employed at its headquarters in Geneva. By memoranda of 8 November 1995 they asked the Secretary-General of the Union to reverse service order 16 and grant each of them due redress. In memoranda of 20 December 1995 the Secretary-General refused on the grounds that he had to abide by the instructions he had had from the Council of the Union to bring in the new scales; but he gave them leave to go straight to the Tribunal. Not but what they went first, on 18 March 1996, to the Appeal Board. In its report of 30 May the Board held that the Secretary-General had acted *intra vires* and it "could not" recommend reversing his decisions of 20 December 1995. By memoranda of 17 June 1996 - the decisions under challenge - the Secretary-General told the complainants that he was upholding those decisions.

B. The complainants contend that the amendments that the Commission made to the methodology in 1992 were

unlawful. Of some fifty amendments they see only one as in the staff's favour and nine as blatantly not. Surveys that the Commission has done by the amended methodology have meant a drop in staff pay at all headquarters duty stations but New York. In Geneva it came to 7.4 per cent. By rigging its methodology for that purpose the Commission offended against both Flemming and Regulation 4.1 of the ITU Staff Regulations, which sets the criteria for recruitment. The complainants put the amendments down to the eagerness of some of the Commission's members to pander to a coterie of powerful nations by cutting costs to the staff's detriment, and at a time, to boot, when the Union's budget was not even tight. Taken all together, the amendments undermine the whole purpose of the methodology.

The complainants' second plea is that arrangements for the 1995 survey were deeply flawed, and so was the conduct of it. It was sheer misuse of authority for the Commission to exploit the new "six-month rule" by making June 1995 the reference date for the survey and to refuse adjournment when it knew full well that the survey could not be properly done so soon. Flawed, too, were the proceedings at its 41st Session, which it held from 1 to 19 May 1995. For one thing, it missed the deadline in Rule 8 of its Rules of Procedure for letting members and observers have "documentation" relating to the survey. For another, that documentation had "serious shortcomings" that its secretariat never made a clean breast of. Again, under Rule 18 of the Rules of Procedure a French version ought to have gone out before the session, but none did. The Commission's Chairman showed bad faith: by a letter of 14 November 1994 he told the Under Secretary-General of the United Nations for Administration and Management that the matter of adjournment would be put to the Commission at its 41st Session; yet the last section of the preparatory document for the session said nothing of the kind. There were formal and procedural flaws in the contacts between the secretariat and the comparator employers.

As for the flaws in the conduct of the survey in Geneva, paragraph 15 of the methodology puts the "reasonable number" of comparator employers at "approximately twenty". Only 16 were sent questionnaires and of those two or four failed to meet the criteria. Paragraph 22 states that "the typical number of jobs to be surveyed should be between 14 and 20" and paragraph 40 that, when there are "approximately 20 employers", "at least one quarter of the surveyed employers should provide data for a particular job in order to retain it for the analysis". Had that criterion been met, 10 of the 22 jobs picked would have been dropped; but the Commission preferred to keep them so as to have the minimum required. The complainants go in detail into the sample jobs. They find much wrong with the data. They point out that the Local Salary Survey Committee said in a report dated 2 August 1995 that despite insistent demands the ICSC's secretariat had failed to let it know just how AIRINC (Associates for International Research), a firm of consultants, had worked out the tax deductions relevant for Geneva. That is why the Committee felt unable to check the figures. Yet the secretariat was not shy of firm figures in its main report on the survey: allowable deductions from Swiss federal tax for professional expenses came, it said, to 700 Swiss francs. The right figure is 3 per cent of net earnings, within a range from 1,700 francs to 3,400.

There were breaches of the rules at the Commission's 42nd Session, too, many of them the same as at its 41st.

The complainants' third line of argument is that the findings of the survey were obviously wrong. According to the Swiss federal bureau of statistics average pay in Switzerland went up in real terms by an average of 0.4 per cent a year from 1990 to 1994. Though that figure does not allow of direct comparison with the findings of the survey, the Commission's own reckoning gave a fall of 7.4 per cent. The gap between the two figures is big enough to suggest that the findings about outside pay in Geneva shot wide of the mark. Bent as it was on bringing down General Service pay in Geneva, the Commission was guilty of preconceived opinion and misuse of authority.

Fourthly, the complainants plead that the new pay scales were put into force before the Secretary-General of the United Nations had even been told of them and that, in breach of the procedure laid down in Article 25 of the Commission's Statute, neither the Secretary-General nor, for that matter, the staff representatives were told of them either. In subsidiary argument they contend that the scale of gross pensionable remuneration shows a mistake of law as to the "conversion rate" and one of fact as to the tax rates applied.

They ask the Tribunal to quash the decisions in their pay slips for October 1995 and award them the arrears of pay due and interest thereon at the rate of 8 per cent a year. They claim 3,000 Swiss francs each in costs.

C. The Commission submits that its revision of the methodology in 1992 was quite lawful. Since some of the amendments were more sweeping than others, it will not do for the complainants just to tot up the ones they see as unfavourable against the others. The objections they have to some of them are misconceived. The purpose was not at all to cut pay but to keep more faithfully to Flemming.

As to the arrangements for the survey in Geneva in 1995, the core of the work was the gathering of data. It was, according to the schedule put through at the 36th Session, to be done in the second quarter of 1995. Though it had to be held over until June 1995, that was because the staff representatives had baulked at what the revised methodology required of them. There was nothing wrong with what the Commission did at its 41st Session: it may waive provisions of its own rules of procedure for the sake of its members' convenience. Nor were there any formal or procedural flaws in the contacts between its secretariat and the chosen employers.

The only snag the Commission ran into over carrying out the survey was finding enough outside employers to meet the criteria. What made things harder was that the staff representatives were trying to get the employers to withhold the data needed. The Commission rebuts the complainants' other pleas and answers point by point their objections to the sample of jobs and the soundness of the data. It is ordinarily up to the Local Salary Survey Committee to find out about tax rates and allowable deductions for Geneva and, if it cannot, it is up to the Commission to get the information from AIRINC instead. The secretariat asked the Committee time and again to say whether its figures were right.

The Commission denies breaking any rule of procedure at its 42nd Session.

It had come to no foregone conclusions about the outcome of the survey. Its people put in quite enough time in Geneva in 1995 and went to trouble to get the work done well.

By a letter of 18 August 1995 its Chairman told the Secretary-General of the United Nations of the new scales, and copies of the letter went on 15 September to the executive heads of the specialised agencies with headquarters in Geneva.

There was no mistake of law about the "conversion rate" in the scales of gross pensionable remuneration.

D. In its reply the Union says that a resolution of its Council, No. 647, strictly defines its Secretary-General's powers to bring in new pay scales. It requires him to make any changes in pay that have been adopted for the common system and that apply to Geneva.

On the merits the defendant submits that it cannot itself answer the complainants' pleas and that it is for the Commission to comment on their objections to the lawfulness of the scales and to the soundness of the findings.

So it asks the Tribunal to dismiss the complaints on the grounds that the Secretary-General acted *intra vires* and to entertain the Commission's pleas in ruling on the lawfulness of the scales.

E. The complainants rejoin that the Secretary-General erred in law in doing no more than what resolution 647 demanded of him. When an organisation takes on rules or policies from the common system it must check that they are lawful. The complainants challenge the Commission's explanations and enlarge on their own pleas. They observe that the Commission does not deny its mistake over the tax figures and accuse it of shifting blame to the Local Committee. They press their claims.

F. In a further brief the Commission maintains that the complainants have found not a single new argument to back up their case. It did "let through a mistake in the tax figures" and the deductions from tax for professional expenses should have been 1,700 Swiss francs and not 700. But even if those mistakes had been put right average net pay in Geneva would have gone up by a mere 0.08 per cent a month, or five Swiss francs.

G. In further comments admitted by the President of the Tribunal the complainants submit that the Commission's avowal comes late in the day. It is still wrong to give only the figure of 1,700 Swiss francs: the right one is - they repeat - 3 per cent of net earnings, and not less than 1,700 Swiss francs or more than 3,400. The mistake means a loss in pay of some 12.50 francs a month. It affects, too, the reckoning of allowances for a spouse or dependent child and of pensionable remuneration. And it was not the only mistake.

H. In final comment the Commission maintains that the mistake made no immediate impact on the complainants' earnings. The survey gave warrant that the old scales of pay for staff in the General Service category at the time of the survey were 7.42 per cent too high. If the Commission had taken 1,700 Swiss francs as the minimum figure of allowable tax deductions the new scales would have been 7.34 per cent lower than the old ones, and even if, as the complainants suggest, it had taken the figure of 3 per cent of net income, a minimum of 1,700 francs and a

maximum of 3,400, the new scales would still have been 7.28 per cent lower. So on any hypothesis there was no avoiding a fall in pay. When a survey shows pay to be too high the common system is wont, not to lower it, but to freeze it. So the defendant refrained from applying the new scales to staff like the complainants whom it had taken on before the scales went into force. Only for staff recruited after the new scales came in did the mistake have any effect on pay, and it was trifling at that.

CONSIDERATIONS

1. The complainants belong to the General Service category of staff of the International Telecommunication Union (ITU), which belongs to the common system of the United Nations. They are employed at headquarters in Geneva. They are challenging the Union's decisions on their pay as from the month of October 1995. The Union approved the pay scales on the recommendation of the International Civil Service Commission (ICSC). In keeping with what is known as the "Flemming" principle the Commission drew up the scales in the light of trends in the pay of the best-paid workers at the duty station. In accordance with a revised general methodology which it had adopted in 1992 it had had a survey of pay carried out in Geneva from June to August 1995, 1 June of that year being the "reference date".

The complainants' case is that the scales recommended by the Commission were unlawful and the Union should not have adopted them. In their view some of the amendments which the Commission had made in its methodology - and which are taken up in detail in 5 to 17 below - were in breach of the Flemming principle. They say that those amendments brought about a drop in pay that offended against what the Tribunal had said in Judgment 986 (*in re* Ayoub No. 2 and others): there was breach of their acquired rights, of their contracts of service, of good faith and of their rightful expectations about the level of pay. They see a further breach of their rights in the carrying out of the survey in that it broke rules of form and substance. On the strength of comparison of pay between Geneva and New York the scales betray preconceived thinking and abuse of authority. Lastly, the complainants put two more pleas to the Tribunal: one is that the scales were not conveyed in final form to the Secretary-General of the United Nations before coming into force; and the other is that in drawing up the scales of gross pensionable remuneration the Commission made a mistake of law by taking 66.25 per cent as the "rate of accumulation" and one of fact over the relevant rate of taxation.

The Commission rebuts all the pleas put forward by the complainants.

2. Many judgments have explained how the common system revises pay and what power of review the Tribunal has. Examples are Judgments 1000 (*in re* Clements and others), 1265 (*in re* Berlioz and others), 1266 (*in re* Cussac and others), 1457 (*in re* Di Palma and others), 1458 (*in re* Damond and others), 1459 (*in re* Hoebreck and others), 1460 (*in re* Derqué and others), 1498 (*in re* Schiffmann and others), 1499 (*in re* Berger and others), 1519 (*in re* Prados and others), 1641 (*in re* Berlioz No. 2 and others), 1642 (*in re* Huber and Treso), 1713 (*in re* Carretta and others), 1765 (*in re* Dondenne No. 2 and others), 1766 (*in re* Heitz No. 4), 1776 (*in re* Damond No. 3 and others), 1777 (*in re* Heitz No. 5), not to mention all the other precedents cited therein.

A staff member who challenges an individual decision that affects him may challenge the general one that it implements, even if the source of the general one was not the employer organisation itself but an outside body such as the Commission. So before acting on any decision or recommendation of the Commission's the organisation must be satisfied that it is lawful.

The choice of method for following a principle like Flemming is largely a technical issue and a matter of discretion. The Tribunal will therefore exercise only a limited power of review.

3. According to precedent it is the implementing decisions that may be challenged and here they are the ones that set the complainants' pay from October 1995. The general decision to approve the pay scales is not directly challengeable, though the complainants may indirectly challenge it insofar as it affords the basis for the impugned decisions.

4. To be receivable a complaint must disclose some cause of action.

In its final comments the Commission pleads that the complainants fail to show any cause of action: the new scales based on the findings of the survey caused them no loss of pay. That, it points out, is because they had the earlier figures of their pay "frozen". It explains:

"When someone on a 'frozen' scale gets a step, ordinarily once a year, or else promotion, pay is on that scale, not on the ones based on the survey, and stays on it until the new ones overtake it by dint of adjustment to the cost-of-living index. When they do, it is they that set pay. But they have not done so yet and are unlikely to before the next survey for Geneva, scheduled for 2001."

The Commission is mistaken. The complainants do have a cause of action and may now challenge the new scales because on them will depend the duration of the "freeze" in their pay and the reckoning of any rise they may become entitled to. Pay scales must ordinarily be challenged forthwith. As the Tribunal has said before, if administrative decisions are to hold good and relations between organisation and staff to be stable, no appeal may lie against them at the time of later revision: see, for example, Judgments 1664 (*in re* Cook No. 7 and Rosé No. 2), 1682 (*in re* Argos and others), 1780 (*in re* Kunstein-Hackbarth) and the other precedents there given. If someone on a frozen pay scale might wait to challenge the new scales, that would make for great uncertainty.

The amendments made in 1992 to the methodology

5. The Commission submits that Judgments 1641 and 1642 rejected by implication the complainants' objections to the revision of its methodology.

They did not: they said under 4 that the amendments had not been challenged in the complaints. Besides, they were about another issue altogether - the setting of pay as from January 1995 - and so do not carry the authority of *res judicata.*

6. The Commission first revised its methodology in 1988. Its report for 1992 to the General Assembly of the United Nations gave an account of the second revision, done in that year. In resolution 47/216 of 23 December 1992 the Assembly took note of that second batch of amendments. In 1994 it asked the Commission to go ahead with the surveys under way at headquarters duty stations and to follow the revised methodology for the purpose. Actually some of the fifty-odd amendments were not innovations.

The complainants contend that, though some of the amendments - known in the Commission's parlance as "decisions" - had no effect on pay, one of them that did favour the staff was not applied at all to the Geneva survey in 1995 and nine were downright unfavourable. The complainants take up ten of the "decisions": in their submission all are challengeable because they betray Flemming and, taken together, serve to lower pay.

7. Decision (v) by the Commission was -

"To amend the condition in the current methodology as regards the inclusion of public service or parastatal institutions in the sample of employers, as follows:

'Surveyed employers should represent a reasonable cross-section of competitive economic sectors, as well as the public service or parastatal institutions with no sector unduly dominating the sample.'"

The 1988 version of the methodology had said on that subject:

"The employers should represent a reasonable cross-section of competitive economic sectors, including the public service or parastatal institutions, with no one sector unduly dominating the sample."

The complainants object to decision (v) on the grounds that it is to the staff's detriment to require "the inclusion ... of public service institutions, which are not ordinarily among the best-paying employers at any duty station".

The Commission says that there is nothing new about including the public service. The 1988 methodology did, and for years pay in the public service has been seen as a worthwhile standard of comparison. Including it is - says the Commission - quite in tune with Flemming and, according to paragraph 41 of its report on the 1992 methodology, discarding an employer is merely provisional anyway because the Commission itself has the last word in each instance.

As was said in 2 above, a staff member may challenge a general decision in impugning an individual one but must show that the general decision afforded the basis for it. Here the complainants do not allege, let alone show, that the above amendment to the methodology harmed their interests or, to be more particular, that the previous survey discounted pay in the public service or, for that matter, that the pay of public servants in Geneva falls below the

best rates to be found there. So it is immaterial whether the complainants are objecting only to the amendment or to counting public servants' pay, even if it already counted before the amendment.

Besides - subject to what statistics might reveal - the Tribunal sees no breach of Flemming in counting it: the national public service is much like the international civil service as to the sort of work done, the structure and size of units, and the manner of payment. On the evidence the Commission was guilty of no abuse of discretion on that score.

8. Decision (vi) says:

"That the minimum number of clerical and support employees per employer should be set at 100. Where transitional measures are required to maintain reasonable continuity of employers between surveys, the requirement concerning the revised minimum number of employees would be applicable only to employers not previously surveyed; in any case, employers with less than 50 employees would be excluded."

In the complainants' submission the purpose was to harm the staff's interests. In Geneva - they argue - where the employment market is small, there were keenly competitive employers with twenty or thirty employees, and the Geneva survey broke the rule so as to make the findings "look convincing".

The Commission explains that its purpose in raising the minimum number of employees was to bring it nearer to that of international staff at headquarters duty stations. It quotes from paragraph 14 of its report on the 1992 methodology:

"Where transitional measures are required to maintain reasonable continuity of employers between surveys, the requirement concerning the revised minimum number of employees would be applicable only to employers not previously surveyed."

Comparison of the surveys done in Geneva in 1990 and 1995 shows that the increase had little or no effect.

The complainants acknowledge as much in their rejoinder. So the impugned decisions are not flawed on that score.

9. Decision (xxvi) was -

"To delete the current rule in the methodology, whereby an employer would be excluded if the base salary plus other elements of remuneration for the lowest-ranking employer resulted in average salaries 10 per cent or more below the next higher average salary for each job."

In the complainants' view it was in breach of Flemming and the staff's rights to do away with the possibility of striking out an employer who was obviously not one of the best.

The Commission points out that according to the 1988 methodology an employer might be dropped if for all jobs pay was at least one tenth lower than the figures on offer from the other employers. Actually few employers ever were dropped: an employer might be offering the worst pay for some jobs but not commonly for all. So the survey switched to taking minimum and maximum figures from a schedule of pay rates for different sorts of job.

The complainants discern in the Commission's new approach a wish to harm their interests, the findings being unreliable if not all the highest figures of pay are taken. Besides, as Judgment 1713 made clear about a survey in Rome, the Commission is not actually taking the minimum and maximum figures that its new method is supposed to call for.

That judgment explained in 8 that the complainants in that case were objecting to the methodology on the grounds that the Commission had taken average figures of pay of categories of employees in Rome instead of the minimum and maximum ones it had been taking until then. The old approach would give a more objective yardstick because in Rome few employers had, like the United Nations, any system of grading posts. The Commission had demurred on the grounds that average figures did give a reliable picture. The Tribunal's ruling was that the Commission's purpose had not been to harm the staff's interests and that there was nothing blatantly wrong with the exercise of its discretion.

That ruling holds good here. The complainants have not shown that the survey was done in Geneva in the same

way as in Rome. Besides, if the challenged method was not applied in Geneva there is no substance to the plea. In any event the conclusion is, again, that there was no obvious abuse of the Commission's discretion in the change.

10. The gist of decision (xxxiii), which is about "evaluating" fringe benefits, is that what counts is the cost to the employer, not the value to the employee.

That amendment aroused opposition when applied to a survey in Paris. Judgment 1519 said in 6 that, as the complainants had argued in that case, it did mean "a reduction of outside employees' fringe benefits"; but the change was "not as bad as they make out since some such benefits were already being evaluated in terms of cost to the employer"; "the effect of the change was slight"; and there was "nothing inherently wrong" with the Commission's exercising its discretion to count the cost of all fringe benefits to employers.

The complainants cite that judgment in support of their view that, being to their detriment, the amendment was unlawful.

The Tribunal sees no reason to depart from what it said before.

11. Decision (xl) does away with the "language factor". That was an adjustment that took account of language skills and used to be granted in Rome and in Vienna, where the working languages of the organisations do not include the one commonly spoken by local people.

Since the amendment had no effect on the findings about pay in Geneva, the complainants are mistaken in relying on Judgment 1713.

12. Decision (xlii) is to the effect -

"That, in view of the use of the job classification system and dual pay-line methodology, no adjustments in respect of internal/external differences in length of service/seniority should be made to internal salary levels."

The upshot is that for the sake of comparison with outside pay there is no longer any need to make corrections to take account of differences in employees' seniority, which become irrelevant.

The complainants again object on the grounds that the amendment is to their detriment. They say that in organisations which have a freeze on recruitment seniority is tending to rise whereas among outside employers it is not. The consequence is, they explain, that United Nations staff are earning more than outside employees in like jobs and their pay looks misleadingly high. To stop making adjustments on that account is unfair, though it would not be if international organisations took on many young people. In the complainants' submission Judgment 1519 condemned the change.

The Commission's answer is that, though seniority was one of the main criteria for granting step increments to General Service staff, most of the comparator employers made performance, and not seniority, the test.

Judgment 1519 took up under 17 a similar plea about the survey in Paris. It said that, though there was merit in the criticism - comparison of jobs at like levels of seniority being preferable - the comparison was fated to go awry, to whichever side one might tend on the point. The conclusion was that the approach that the survey had taken was not unlawful and had not gone beyond the bounds of the Commission's discretion.

That ruling holds good.

13. Decision (xliii) is -

"To include salary data for staff in receipt of the extra longevity step approved by the Commission in 1984, at the next lower step."

The complainants object on the grounds that the amendment "makes for even more tendentious findings".

The Commission submits that it is a more workmanlike approach to take figures of pay of staff in the common system without regard to the "extra" step: though of course everyone counts for the sake of comparison, those who get the extra step will be deemed to be at the one just below.

The complainants' retort is that the approach would be "workmanlike" only if the survey took for the sake of comparison outside employees in like case. It does not.

Here the complainants are objecting not to the methodology as such but to the way in which it was applied. There can be no breach of Flemming in any method that is supposed to show things up as they really are, and, besides, what was said in 12 above again holds good. The plea fails.

14. Decision (xliv) reads:

"To include salary data for staff at steps beyond those approved by the Commission, at their actual step."

The complainants contend that it flouts what Judgments 1265 and 1266 said under 36. To their mind it is unfair to count benefits improperly granted to staff in some organisations and so inflate the pay of staff in organisations like the World Intellectual Property Organization that do abide by the rules of the common system.

The Commission points out that those two judgments came after the 1990 survey in Geneva and that "in the Geneva survey in 1995 staff whose step was beyond the one approved by the Commission were put at steps set in keeping with Judgments 1265 and 1266".

In their rejoinder the complainants maintain that decision (xliv) ignored what the Tribunal had said; the method was not, they say, corrected even in the revision of July 1997, and adapting the methodology is no way of complying with Judgments 1265 and 1266.

Those judgments acknowledged in 36 that, if one organisation of the common system granted staff within-grade steps beyond those approved by the Commission for the purpose of Flemming, the extra ones should not count in setting pay in the international civil service at large. So the judgments set aside the impugned decisions and ordered the defendant to set pay by a reckoning that discounted the extra steps for the sake of comparison.

At issue here is whether the Commission observed precedent in carrying out the survey in Geneva in 1995. Judgments 1265 and 1266 went out on 14 July 1993; so, as the Commission observes, the methodology which the complainants are indirectly challenging - and which goes back to 1992 - is earlier and decision (xliv) cannot be seen as wilful defiance of precedent. Besides, the complainants have not objected to the Commission's statement that the conduct of the survey was in line with Judgments 1265 and 1266 and there is therefore no reason to question it. The complainants argue that the Commission ought to have gone back on decision (xliv) in 1997, when it again revised the methodology; but their point is immaterial if the decision was not actually applied in this case. Since it was not, it caused them no injury and their plea does not hold water.

15. By decision (xlvii) the Commission resolved -

"To establish a uniform factor of 0.9 by which the index movement should be governed for purposes of periodic adjustments between surveys ..."

The complainants object to that decision; the Commission explains it. But it too is immaterial: the decisions impugned were the outcome of a survey and "adjustments between surveys" are simply not at issue. The plea again fails.

16. The last of the Commission's "decisions" that the complainants challenge is (xlviii): it does away with "interim adjustments" of pay in the six months "prior to the reference date of a survey", and they see it as detrimental.

Judgments 1641 and 1642 held that that decision was not at odds with Flemming and the complainants therefore waive the plea. Again, there is no reason to depart from what those judgments said.

17. The complainants point out that the surveys done according to the 1992 methodology brought about a big fall in pay. The fall was 7.4 per cent for Geneva, 7.3 for Montreal, 5.4 for Paris, 5.3 for London, 3.2 for Vienna and 2.6 for Rome, as against a rise of 1.13 per cent for New York. The complainants see such falls as a departure from Flemming. The gist of the argument is that they were largely due to the Commission's tampering with the methodology so as to bring down pay in the international civil service against the trend of local pay.

That line of argument is implausible, to say the least. Wages may of course strengthen, but when the economy goes

into a downswing they may slacken too. At all events the complainants have failed to show that staff pay fell for the reasons they make out. Although some of the amendments to the methodology may be moot, there are no grounds for treating them as the main cause of the falls in General Service pay or attributing them to wilful contrivance.

There is therefore no substance to the plea that the complainants rest on Judgment 986 (*in re* Ayoub No. 2 and others).

The 1995 survey

18. The complainants say that Commission and Union alike were guilty of misuse and abuse of authority by making 1 June 1995 the reference date for the survey. It would, they argue, have been right to hold over the survey so as to let General Service staff gain earlier from the so-called "six-month rule" and so also from the findings.

That rule took effect before the new scales came in; the complainants are challenging their pay for October 1995; and the rule is therefore not directly relevant. Besides, Judgments 1641 and 1642 declared that it had not been unlawful six months before 1 June 1995 to make that the reference date for the survey.

Once the date had been set it would doubtless have been hard to hold it over for the purpose of applying the six-month rule. It was also in line with Flemming not to take too long over the survey.

The complainants see misuse and abuse of authority in the Commis- sion's turning down the staff representatives' request for adjournment of the survey and of the entry into force of the new scales: it just did not have time for a proper survey. In support of that plea they cite some of their arguments about the complaints that Judgments 1641 and 1642 ruled on.

In rebuttal the Commission points out that the General Assembly wanted the survey done soon; the staff representatives would not take part, although the rules said they should, and put a spoke in the wheel by trying to get employers not to answer; and it ill befits the complainants to carp at the consequences of the representatives' stance.

Articles 6(1)(b) and 9 of the Tribunal's Rules require the complainants to state their pleas in their original brief and rejoinder. They may not just cite arguments about some other case: such pleading is not admissible and the Tribunal will not entertain it.

Judgment 1519 said in 18 that it was important to have staff representa- tives take part in general surveys. If they will not do so they may disrupt the work and the proper exchange of information. Here again they chose not to help.

The detailed evidence the Commission adduces on the merits is cogent. The Union - and only the Union's decisions are at issue - did not act unlawfully in declining on the grounds that the complainants suggest to turn down the Commission's recommendations.

19. The complainants see flaws in the proceedings of the Commission's 41st Session, which it held in Montreal from 1 to 19 May 1995.

(a) They plead breach of Rule 8 of its Rules of Procedure, which says that papers must go to members and observers no later than four weeks before the start of a regular session. They plead breach of Rule 18 too, which says that all papers about agenda items must go out in the working languages, English and French. They point out that the preparatory papers were dated 12 and 13 April 1995 and an appendix to document ICSC/41/R.12/Part I, which was a letter from the presidents of the Geneva staff unions and associations to the executive heads of the organisations in Geneva, was only in French, so that members who read only English could not fathom it.

The Commission says that, though indeed not strictly complied with, the two rules are for its members' own convenience, the members waived the time limit and the need for translation, no-one minded and the waiver was valid. Since the rules did not go to the essence of the procedure - the argument runs - it was up to anyone who alleged breach of them to demand compliance; the representatives of the staff of organisations in Geneva did not, and so there was no procedural flaw.

The Commission's reply is in line with general rules of procedure and is quite sound.

(b) Under the heading "Concealment" the complainants argue that the Chairman of the Commission did not let its members have enough information. On 30 September 1994 the organisations asked how the survey could go ahead without the recalcitrant staff representatives. Though the Chairman answered on 14 November 1994, the paper intended for the Commission was not ready until 12 April 1995, nineteen days before the start of its session. According to the complainants, a letter of 10 April from the secretariat said that it had not yet gone into the proposals for the survey, whereas the paper dated 13 April showed that it had. The complainants argue that that paper hid the fact that the Chairman needed more information before he exercised the authority delegated to him to approve the choice of employers, jobs, job descriptions and questionnaires. So the Commission did not work properly and the Chairman withheld information that its members needed to make up their minds.

The Commission protests that the charges are offensive to its Chairman.

Though the staff representatives' abstention did hamper the preparations for the survey and the conduct of it, that is no reason to doubt its lawfulness or impute improper behaviour to the Commission's secretariat or membership. And though things went swiftly, it is not shown that the Chairman or the secretariat failed to give the members enough information.

(c) The complainants further tax the Chairman with bad faith on the grounds that in a letter he promised to put the matter of adjournment to the Commission whereas in a later document that proposed action of various sorts to the Commission itself he said nothing on the subject.

No such inconsistency is proved. For one thing, the Chairman's saying that the proposal for adjournment would go to the Commission did not mean that he would back it or put it to the members in writing. For another thing, the document did not preclude his taking the matter up at the 41st Session.

(d) The complainants object to the Commission's going ahead on the grounds that the decision was hasty, stubborn and unwise.

But there was no denying the need for the survey and on the evidence the decision to go ahead was not improper. The plea fails.

20. The complainants blame the Commission for a mistake of procedure in the contacts it had with the chosen employers. They say that as early as 10 April 1995, even before the start of its 41st Session, its secretariat wrote to the international organisations in Geneva to tell them to make appointments with the employers in the period from 1 to 23 June 1995.

The Commission answers that its secretariat did so by way of precaution to gain time. Had there been no survey after all, it would of course have cancelled the appointments.

The explanation is plausible, indeed beyond reproach: there was no mistake of procedure.

21. The complainants contend that the survey itself showed many flaws, one being the choice of employers.

(a) They point out that the methodology puts the "reasonable number" of employers at "approximately twenty", whereas only sixteen were picked for the survey.

They are mistaken. The words "approximately twenty" and "reasonable number" show that the methodology gives no firm figure but just a rough idea; so the decision to take sixteen passes muster.

At all events - say the complainants - the number of employers should have been twelve to fourteen, because with some the interviews were improper for the reasons set out in (b), (c) and (d) below.

(b) One interview was by telephone: that shows how casual the survey was and, in accordance with Judgment 1000, warrants "setting aside" the findings.

The Commission explains that an interview by telephone, though quite unusual, is allowable when the employer has been consulted in an earlier survey and the Commission already has reliable information from it on the

matching of jobs and on levels of pay. Members of the survey team may draw on information obtained by telephone if they so wish.

Judgment 1000 says nothing on that score, and what the Commission says rules out abuse of discretion.

(c) The complainants point out that two of the employers had no system of grading posts, though the methodology says that that is desirable.

The Commission explains that, especially in Europe, not every employer has a system of grading like the one used in the common system. The criteria are that the setting of pay should not be haphazard and that distinctions in category and pay should depend on responsibility and on the work done; and it is up to the survey team to say whether an employer meets those criteria.

The Commission did not thereby abuse its discretion.

(d) The complainants observe that one employer had only 23 employees whereas the methodology requires at least 50.

The Commission explains that that employer had already been "used" in earlier surveys; there had to be some continuity in the choice of employers; and representatives of staff and management had often asked the Commission not to apply the rule too strictly but bear in mind the smallness of the employment market in Geneva. The Commission took its decision after careful thought.

In challenging decision (vi) the complainants have objected to the minimum of 50 employees on the grounds that it scarcely applies in Geneva: see 8 above. So it is odd that they should object to taking one employer that had fewer than 50. At all events it was in line with the methodology to take such transitional action. Again there was no abuse of the Commission's discretion.

(e) The complainants see "imbalance" in the choice of sectors of employment in the survey, there being a drop in the number of banks, which are among the best employers.

The Commission says that although there had been four banks in the last survey two of them had merged and so there were only three in 1995. Out of sixteen employers there were three banks, and that number is more than enough.

There again the complainants have failed to show any breach of discretion.

(f) The complainants accuse the Commission of perverting the methodology so as to get the survey to cover particular employers or jobs. The Commission answers that it does not follow the methodology too rigidly but fits it to local conditions and so, in Geneva, to the smallness of the employment market.

That approach complies with the methodology as revised in 1992, in particular with paragraphs 6 and 13, and with the broad, merely indicative guidelines that the methodology offers for carrying out surveys. So there was nothing unlawful about it.

22. The complainants object to the choice of jobs. Paragraph 22 of the methodology says that there must be a sample of fourteen to twenty jobs. Only by artifice did the Commission push the number up to fourteen: some of them did not fully qualify.

The Commission explains how it came to pick those jobs. Because some enterprises were small it was unreasonable to expect them to employ many people in the same sort of job. The Commission took care to see that jobs matched and it discarded any for which it felt that not enough employers were offering a true match.

Again there is no evidence to suggest any abuse of authority by the Commission.

23. The complainants object to the sample of jobs.

(a) One of the jobs the Commission took was senior secretary, and the final table shows 158 of them with fourteen employers. In the complainants' submission cantonal government was overwhelmingly preponderant in employing

such secretaries, and presumably computer information assistants too: there were 44 such assistants with three employers and one with each of another four.

The Commission says that it wanted to keep the job of senior secretary because it was typical, even though some employers had only one. As for the alleged predominance of cantonal government, the methodology is not strict about the number of people there should be on the same sort of job with any one employer. In any event the impact of employers with a large staff is, it argues, levelled out by logarithmic weighting.

There is no evidence of any mistake or breach of discretion on that score.

(b) The number of accounting clerks fell inexplicably from 44 to 43 for the same number of employers.

The Commission acknowledges a mistake in the paper by its secretariat but points to the correction in its report.

Obviously the mistake does not matter.

(c) The jobs of transport assistant and senior cashier were - say the complainants - kept, even though there were no such jobs in outside employment in Geneva.

The Commission demurs: those jobs were dropped in the final findings for want of enough employers offering matches.

There being no reason to question that explanation, the plea fails.

(d) The complainants go with a fine-tooth comb through the data provided by one employer, a bank, on 8 August 1995, i.e. after the issuance of the preparatory paper of 2 August. They say that comparison of that paper with the final table shows that whereas the number of employers went up from seven to eight the number of messengers rose from 35 to 43; the bank had neither a junior nor a category I nor a category II secretary, but ten senior ones; it had five category I and as many category III accounting clerks but not a single senior finance assistant; it had five telephone operators, no security guard, five electronic-data-processing assistants, no computer information assistant and no senior cashier.

The Commission maintains that the data are reliable. Though for some jobs there are no matches, the jobs still exist: the duties simply fail to match the description. What with computers and redundancies everywhere more and more employers have been merging duties and responsibilities. Security in the bank is provided, not by its own employees, but by an outside firm.

Although the Commission's general comments call for no ruling, the Tribunal cannot go into detail and tell whether a proper match was found for each job taken. When in doubt on technical issues, however, it will endorse the Commission's assessment: here too the complainants have failed to show any abuse of discretion.

24. The complainants question the soundness of the data.

(a) They point out that the "benchmark" jobs in cantonal government were at lower levels than in the last survey and the corresponding figures of pay were thus brought 7 per cent lower. The Commission's secretariat estimated the effect at a reduction of 0.25 per cent in the total of outside pay.

The Commission says that because of the prominence of cantonal government matching jobs were chosen carefully and approved by two members of the survey team. It argues that, though the figures of pay for some of the matching jobs may have been lower in 1995 than in 1990, the reason is that the earlier survey discounted employees with under five years' seniority. In 1995 there was no new information about seniority, the criteria for matches being the work to be done, the required qualifications and the level of responsibility.

The complainants show no mistake of fact in the findings. The Tribunal took up in 12 above the plea about the amendment to the methodology and found decision (x1ii) beyond reproach. And the manner of applying it is not faulty either.

(b) The complainants point out that for five employers the number of staff ends in a nought and infer that the Commission rounded the figures up or down. To their mind that is evidence of shoddy work and suggests that the

findings are unreliable.

The Commission denies outright having tampered with the figures; it took the ones the employers gave, though some of them may of course have rounded staff numbers up or down.

No mistake is proved on that score.

(c) The complainants say that one employer offered a job with a single employee and for that reason the job ought to have been scrapped.

The Commission answers that, though the secretariat mentioned that job in its original paper so as to give the full picture, the job was eventually discarded. The complainants do not demur and their plea fails.

(d) The complainants say that the gulf between the best pay - 76,770 Swiss francs a year - and the worst - 46,878 - casts doubt on the choice of outside employers.

Though not denying the difference, the Commission sets it down to a policy of open-handedness in the best employer or to seniority or other factors.

The spread in pay does not suggest that the findings were wrong.

(e) The complainants point out that the worst employer would have been dropped according to the 1988 methodology but no longer is.

The Commission answers that by that methodology the worst employer might indeed have been struck out if consistently paying rates at least a tenth lower than the second worst one. But seldom did that happen; so the new rule - see 9 above - is that any extremes in pay should be referred to the Commission for a decision.

There was no mistake in the findings on that score.

(f) The complainants further question the findings on the grounds that for the job of documentation assistant those which had the lowest qualifications were earning the highest pay.

Since they concede, however, that the job was dropped from the list, no more need be said on that issue.

25. On rates of taxation applied to local pay the Commission took information from a firm of consultants known as AIRINC (Associates for International Research).

The complainants say that the Local Salary Survey Committee objected to not getting details of AIRINC's figures and, having had no answer, felt unable to check the ones in the data bank. They cite one example of the risk of error: a preparatory paper which gave tax figures omitted to dock earnings by 5 per cent against pension contributions, though the mistake was put right in the final document. Both papers show a deduction of 700 Swiss francs under professional expenses, whereas for the purposes of direct federal tax a Swiss tax guide puts the deductible amount under that head at 1,700 to 3,400 francs. The complainants contend that the risk of error makes the findings quite untrustworthy.

The Commission argues that it uses figures from AIRINC only if there are no others showing exactly what local tax liability is; it is up to the Local Committee to get the data and check them; and the secretariat asked it time and again to do so.

Yet in its further brief the Commission acknowledges the mistake in reckoning tax liability: in working out direct federal tax it deducted only 700 Swiss francs a year against professional expenses instead of 1,700.

Section 26 of the Swiss Federal Act on Direct Federal Tax reads:

"Expenses related to employment are deductible as follows:

(a) the necessary costs of travel between home and workplace;

(b) the extra costs incurred by taking meals away from home and by performing teamwork;

(c) any other costs entailed by the performance of work;

(d) the costs of advanced training and of retraining for the work performed.

The professional costs set out in (a) to (c) above are to be stated as fixed amounts; under (a) and (c) the taxpayer may offer evidence of higher costs."

The Federal Finance Department has issued an implementing order about the deduction, for the purpose of reckoning direct federal tax, of professional expenses incurred by anyone in gainful employment.

For the relevant tax year the fixed amount of deductible professional expenses ran to 3 per cent of net yearly earnings, albeit within a range from 1,700 to 3,400 Swiss francs. For any amount within those brackets the tax-payer did not have to offer evidence of expenses incurred but might do so for any expenses beyond 3,400 francs (see the Federal Law Digest 642.11 and 642.118.1 and, for the prevailing rate in 1995, the Official Digest of Federal Statutes, 1994, p. 1673).

The Commission submits that, even if it corrected the scales by taking the right tax figures, net pay for General Service staff would go up by only 0.08 per cent, or 5 Swiss francs a month, though it does not say how it worked that out.

The complainants postulate gross earnings of 100,000 Swiss francs a year and net earnings at that figure less 19,008; applying the rate of 3 per cent to the net figure, they come up with one of 2,429.76 francs for deductible expenses. Though unable to check the Commission's reckoning, they estimate that the mistake means a loss of 12.50 Swiss francs a month in pay.

The Commission was doubly wrong: it took the figure of 700 Swiss francs instead of 1,700 and it miscalculated the deduction, which is 3 per cent of net earnings subject to a minimum fixed amount of 1,700. But there is no need to allow for any bigger deduction against higher actual expenses shown by the tax-payer since the consequent tax cut is offset by the amount of such expenses.

Though there is no telling just what effect the mistake had, it was not trifling. The pay scales applicable as from October 1995 must be corrected even though, for the reasons explained in 4 above, the correction will not affect the amount of the complainants' pay in that month.

Bu*t the complainants cannot succeed in their contention that the mistake tainted the whole survey or the action that the Commission and the Union took on the findings.

26. The complainants see another mistake in the data about local dependency allowances. The spouse allowance fell - they observe - from 6,406 to 5,611 Swiss francs, while the child allowance rose from 3,411 or 3,299 - according to the date of recruitment - to 3,562 francs; the child allowance granted to a staff member with no spouse fell from 9,205 to 9,173 francs and the one for a secondary dependant from 1,452 or 1,254 - according to the date of recruitment - to 1,244 francs. In their submission those figures cast doubt on the accuracy of the data about allowances.

The Commission attributes the variations to the fact that in the last survey three employers were found to have been paying the spouse allowance whereas in the 1995 survey only one was. The last survey had also taken net earnings, whereas the figures of interim adjustments were based on gross earnings. The upshot is - says the Commission - too big an increase in the spouse allowance, though the reckoning was otherwise done by the same method in both surveys.

There is no reason to doubt the Commission's explanation.

27. The complainants discern flaws in the proceedings of the Commission's 42nd Session, which it held in New York from 24 July to 14 August 1995. They say that no text went out by the deadline set in its rules of procedure. The main preparatory paper, which was dated 2 August 1995, could not give the full picture since the last employer was not interviewed until 8 August. The papers were in only one language and some of them have not even yet come out in French. The draft report on the session is dated 13 August 1995 - a Sunday - whereas the last working paper was dated 10 August; so the Commission discussed on the 11th a paper it cannot have got before the 10th.

The Commission says that there were no flaws in the proceedings. As to the missed deadline and the missing translations, it points out that its rules of procedure are mere matters of form and its members implicitly waived compliance; and since the staff representatives chose not to take part there was no breach of staff rights.

For the reasons set out in 19 above the plea must fail.

28. The complainants claim the quashing of the impugned decisions on the grounds that they implemented a decision of the Commission's that seriously impaired their rights in three ways: the findings were conspicuously wrong; the Commission's approach was prejudiced; and it was bent on lowering General Service pay against the real trend in local pay in Geneva. There is, to their mind, no accounting otherwise for the fall of 7.4 per cent in the scales. According to the Swiss federal bureau of statistics pay rose in real terms by an average of 0.4 per cent a year from 1990 to 1994. Though not quite on a par with the Commission's, that figure does give a fair idea of the prevailing trend in Switzerland. Likewise the Commission's concurrent survey on the pay of language teachers in Geneva yielded a figure 1.3 per cent lower than at 1 January 1994, but the fall was due in part to taking most employers from the public sector, which was on a tight budget. The complainants argue that the trend in pay in cantonal government service ought to have had but little effect since according to the Commission's secretariat a drop of 7 per cent in such pay would mean one of only 0.25 per cent in the scales. The complainants say that Geneva is "just one of several headquarters duty stations to suffer a fall, with the striking exception of New York". Prejudiced as it was, the Commission spent much longer, they say, on the survey in Geneva than on the one in New York.

The Commission demurs, protesting that it went to great trouble over Geneva.

Despite the fall there is no affirming that its findings were wrong. Yet the complainants' general comment is true enough: the surveys at headquarters duty stations other than New York disclosed a dip in the best outside rates of pay: see 17 above. In Geneva the pay of language teachers fell by 1.3 per cent from January 1994 to June 1995. Besides, pay may vary appreciably by area and by job. Changes in the methodology, too, may account for some disparities and, the changes not being unlawful, neither are the consequences.

29. The complainants detect mistakes in bringing the new scales into force: they were applied in the United Nations before the Secretary-General was told of them, and the specialised agencies were not properly told either.

The complainants are not thereby challenging the lawfulness of the Commission's decision or the Union's duty to act on it as set out in 2 above.

There is no substance to the plea, and it therefore fails.

Pensions

30. Should the above pleas fail, the complainants offer two subsidiary arguments which they did not put forward in the internal proceedings. One is that there was a mistake of law in putting the figure of the retirement pension too low by the lights of a resolution of the General Assembly. The other is that there was a mistake of fact: in working out that figure on the strength of gross pay so as to let pensioners have a certain percentage of their employment earnings the Commission subtracted too little to cover the tax liability of pensioners, who are less likely than employees to get tax deductions. The complainants observe that the level of pensions affects that of contributions required of serving staff to finance them.

Precedent has it that the Tribunal will entertain new pleas if they fall within the ambit of the case as delimited by the claims made in the internal proceedings : see, for example, Judgment 1519 under 14. Since the reckoning of the pension turns in part on the salary scales in force as from 1 October 1995, the complainants may be deemed, in objecting to those scales, to be objecting to the reckoning of pensions too. That reckoning concerns the complainants insofar as it affects the level of their future pensions, whether the new scales mean a rise or a fall in contributions levied on pay.

On the Commission's recommendation the organisations of the common system explained to their General Service staff that the new scales reflected a decision the General Assembly had taken in 1993 to change the method of setting gross pensionable remuneration: contributions to the United Nations Joint Staff Pension Fund, to be levied on the figures of pay under the new scales, were to be geared to gross pensionable remuneration and not, as before,

to gross salary.

(a) In their original brief the complainants point out that the levels of both pensions and pension contributions used to depend on gross salary, but henceforth the contributions are to be levied on only a segment of gross salary known as "gross pensionable remuneration". The segment was 66.25 per cent in 1993 and it corresponded to the maximum rate of pension accumulation for which at the time staff recruited on or after 1 January 1983 might qualify. The Assembly later increased that rate to 70 per cent as from 1 July 1995. The complainants contend that, "to be true to the spirit of the decision of 1993, the Commission should have taken the rate of 70 per cent in setting the scales". Not to do so was, they believe, wrong in law.

The Commission explains that the rate of conversion was set at 66.25 per cent in 1994 and also in that year the staff representatives proposed to the Commission and to the Joint Board of the Pension Fund putting the rate up to 70 per cent. The rate of conversion is not the same thing as the maximum rate of accumulation that applies to someone with the right seniority. Though there was much talk of the link between the rate of conversion and the average length of pensioners' membership of the Fund, neither Commission nor Board ever had it in mind that that rate should perforce change if the maximum rate of accumulation provided for in the Fund's Regulations did. For that purpose the Commission would have had to take the matter up with the Board and make a recommendation to the Assembly, and the Assembly, in its turn, would have had to approve the recommendation and amend Article 54 of the Fund's Regulations accordingly. In a resolution of 18 December 1996 the Assembly approved the Commission's decision to set the rate of conversion at 66.25 per cent. The complainants acknowledge that at the time there was no word of putting it up to 70 per cent, but say that the Commission was remiss not to recommend at once such an increase. To their mind there would have been no need to amend the Fund's Regulations.

There the complainants are merely advocating what the rules ought to say: there is no mistake of law.

(b) The complainants see a further mistake, and one of fact, in the rate of taxation that the Commission posited for the purpose of reckoning the net amount of local pensions in Geneva. It took the rate applicable to the earnings of an employee. Yet an employee may deduct professional expenses and social security contributions from taxable earnings whereas the pensioner may not and therefore bears a proportionately greater tax burden.

The Commission admits that it did take the lower rates of taxation applicable to local employees. Its debate on the issue revealed that the matter had not come up when the method of income replacement for the Professional and higher categories of staff had been determined. It held that it usually showed common sense in reckoning the tax burden of local employees so as to get pensionable remuneration just right. National law does not ordinarily link pensionable remuneration to net earnings but takes the gross figure instead. So the Commission's conclusion was that neither employees' earnings nor those of pensioners counted in setting pension contributions. The theory of it all - argues the Commission - is that at one stage it is the employees' earnings that count, at another the pensioners', and then the employees' again. So there was some consistency in reckoning the tax rates applicable to local employees' earnings in determining the rates of pension contribution applicable to General Service staff.

The complainants press their argument in their rejoinder. They cite an opinion expressed on the subject by the Standing Committee of the Joint Board of the Fund, which saw it as inconsistent to take the figure of pensioners' net income, yet make no deductions on account of their tax liability.

The complainants do not explain just what rule or principle they think the Commission has offended against. Of course pensionable remuneration does not depend on Flemming, nor are the complainants making out that it should. Nor, for that matter, are they relying on any binding promise about the level of pensionable remuneration. So they have failed to show any mistake of law in the method of determining it. The Commission knew that the method was moot, and the complainants are right to argue for special criteria for reckoning the tax liability of pensioners instead of the ones that apply to employees. But again they show no breach of their rights. Though the Commission cites the notion of income replacement that underlines the setting of pensions, the complainants have not even alleged, let alone shown, that the common system is bound by any strict rules for giving effect to the notion. Nor have they said how far a change in the method of reckoning local pensioners' tax burden would affect the amount of their own pension. The conclusion is that there was no abuse of the Commission's discretion in the method it followed and that the plea cannot be allowed.

DECISION

For the above reasons,

1. In accordance with what is said in 25 above the Union shall apply a new scale to the complainants' pay.

2. The Union shall pay each of the complainants 200 Swiss francs in costs.

3. Their other claims are dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner

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