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

NINETY-THIRD SESSION

Judgment No. 2123

The Administrative Tribunal,

Considering the complaint filed by Mr J.-F. F. against the United Nations Industrial Development Organization (UNIDO) on 18 December 2000 and corrected on 20 June 2001, UNIDO's reply of 26 September, the complainant's rejoinder of 20 December 2001, and the Organization's surrejoinder of 8 April 2002;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Swiss national born in 1939, entered into the service of UNIDO in Vienna, Austria, on 20 August 1967 in the General Service category; at that time it was a subsidiary organ of the General Assembly of the United Nations (UN). UNIDO became a specialized agency of the UN in 1985. On 31 May 1998 the complainant took early retirement.

An entitlement to an end-of-service benefit upon retirement was incorporated into Austrian law in 1971. From 1 January 1972 to 30 September 1987 this entitlement was incorporated into the conditions of service for General Service staff members in Vienna through an adjustment to salary scales. In 1987 the International Civil Service Commission (ICSC) recommended to the Vienna-based organisations that an end-of-service benefit scheme be established rather than using a salary scale adjustment. By Administrative Circular UNIDO/DA/PS/AC.58 of 8 November 1989, UNIDO announced that, retroactive from 1 October 1987, an end-of-service allowance (EOSA) would be payable upon retirement. At the material time the relevant portion of the circular stated:

"7. The EOSA will be computed according to the following four steps:

(a) The allowance that would have been due for the staff member's total completed years of service had the scheme been in effect from the date of entry on duty will be calculated as a percentage of final annual salary;

(b) The payment made through the salary scales for service performed between 1 January 1972 and 31 March 1981 (2.85 per cent per annum) and between 1 April 1981 and either 28 February 1987 or 30 September 1987 (3 per cent per annum) will be calculated as a percentage of annual salary;

(c) The percentage obtained under (b) will be subtracted from the percentage obtained under (a);

(d) The percentage obtained under (c) will be multiplied by the staff member's annual salary upon separation to arrive at the amount payable."

In a document dated 27 May 1998 the Organization informed the complainant, among other things, that his end-of-service allowance to be paid on retirement would be 390,840 Austrian schillings. In a letter to the Director-General of 27 July, the complainant contested the methodology used by UNIDO for calculating the allowance and stated that he should have been entitled to 574,474 schillings. In particular, he objected to the percentage deducted from his salaries for the period from 1 January 1972 to 30 September 1987, which had led to an excessive amount of 183,634 schillings being deducted from the allowance.

On 24 September 1998 the Controller, Administrative and Financial Control and Director ad interim of the Staff Development and Management Branch, replied to the complainant on the Director-General's behalf that the latter was "satisfied" that the end-of-service allowance received by the complainant conformed to the methodology specified in the Administrative Circular in question. The complainant appealed against this decision to the Joint Appeals Board on 23 November, asking for a revision of the administrative practice of calculating the reduction factor of the end-of-service allowance from the final annual salary "in view of the distinction to be made between 'annual salary' and 'final annual salary' as stipulated in [the] Administrative Circular". He claimed 183,634 schillings.

In its report of 30 August 2000, the Joint Appeals Board concluded that the complainant was not entitled to any calculation of the allowance that departed from the established UNIDO methodology and recommended that the appeal be dismissed. The Director-General did so on 19 September 2000. That is the impugned decision.

B. The complainant asserts that an excessive amount was deducted from his end-of-service allowance because the methodology applied by UNIDO does not reflect the fact that his salary was not based on a single rate during his thirty years of service. He submits that the percentage referred to under sub-paragraph 7(b) of the Administrative Circular should have been calculated using his actual annual salaries for the period from 1 January 1972 to 30 September 1987. He alleges that UNIDO has maintained a methodology which has been known to be unsustainable, and therefore, inequitable to staff.

While recognising that UNIDO is not bound to follow practices in other organisations, he points out that an appeal similar to his was allowed at the United Nations Office at Vienna (UNOV) and that the staff member concerned was paid the difference between the end-of-service allowance that she was initially awarded and that which she claimed was due. He concludes that the UN Secretary-General's decision on the UNOV staff member's appeal could also apply in his case by virtue of UNIDO Staff Regulation 13.5, which states:

"The present regulations shall take effect as of 1 July 1988. Nothing in these regulations shall affect the acquired rights of staff under their appointments previously governed by the staff regulations and rules of the United Nations."

Until 1 July 1988 the UN Staff Rules applied at UNIDO, but the end-of-service allowance was announced in the Administrative Circular of 8 November 1989 with retroactive effect from 1 October 1987. Thus, the Administrative Circular in question had the effect of "retroactively 'changing'" the UN Staff Rules.

He notes that in February 2000 the Joint Appeals Board had recommended, in an appeal submitted by another UNIDO staff member, that a review of the relevant staff rules be undertaken "for the purpose of ensuring a uniform and unambiguous approach to the payment of EOSA in the Vienna-based organizations" and that "Staff Regulation 13.5 and its possible consequences be examined". However, the Administration has never acted on this recommendation.

He claims the quashing of the Director-General's decision dismissing his appeal, and that UNIDO be ordered to pay him 183,634 schillings, moral damages and costs.

C. In its reply the Organization rejects the complainant's method of calculating the allowance. The Administrative Circular clearly states the calculation procedure to be used; nowhere is it stated in UNIDO's Staff Rules that the allowance calculation should consider the grades and steps he held between 1 January 1972 and 30 September 1987. It notes that the complainant has admitted that the calculation was made on the basis of the existing rules and that he has failed to demonstrate how the methodology used by UNIDO is incorrect. It maintains that the complainant's end-of-service allowance was correctly calculated and the Director-General's decision lawfully taken.

The methodology adopted was based on a recommendation of the ICSC. UNIDO submits that the Tribunal thoroughly analysed the methodology in Judgment 1086 and it is the interpretation of the Organization that, based on that judgment, the Tribunal considered the end-of-service allowance scheme to be "good law".

It refutes the allegation that the methodology is inequitable; furthermore, the complainant has not provided any evidence of this. The methodology correctly reflects the proportionality of the reduction factor in regard to salaries paid. An important element of the methodology "is that the calculations are expressed in percentages and not in

actual amounts".

The complainant's argument that the Administrative Circular retroactively changed the UN Staff Rules is equally untenable. At the material time, the UN Staff Rules had no provisions governing an end-of-service allowance, as such an allowance had not yet been implemented; UN rules on the allowance were not promulgated until March 1990. Moreover, the Administrative Circular in question established the application of the methodology for the future.

There has been no breach of an acquired right. In the matter of salaries the Tribunal's jurisprudence is clear that there is no acquired right to the application of a particular method. Even if UNIDO's methodology differs from that of other Vienna-based organisations, it is nonetheless legal and, in fact, yields a higher end-of-service allowance than that of one of the other organisations.

Lastly, it argues that the results of the appeals of other Vienna staff members are not applicable to the complainant's case and it finds no grounds for awarding him moral damages.

D. In his rejoinder the complainant points out that he does not contest the principles upon which the calculation is based, but rather the inequitable and erroneous manner in which it has been carried out. He expands on his arguments, stating that the reduction of his end-of-service allowance was not "appropriate" and therefore in breach of Appendix B of the Staff Rules which states that the allowance will be subject to an "appropriate reduction". He contends that the Administrative Circular in question is not clear and he invokes the Tribunal's case law in arguing that any ambiguity in an organisation's rules should be interpreted in favour of the staff member. In his view an appropriate deduction would take into account his change in salary grades and steps over the period in question and that this was the intention of the Circular, which uses "final annual salary" in sub-paragraph 7(a) and "annual salary" in sub-paragraph 7(b). In deducting excessive amounts from his end-of-service allowance, UNIDO has been unjustly enriched.

He rejects the Organization's comments regarding the ICSC, stating that UNIDO is under no obligation to follow the former's recommendation and in fact the paragraph in dispute was not part of the ICSC's recommendation.

He presses his plea that the Administrative Circular is retroactive and inequitable. It also breaches the well-established practice of harmonisation and coordination with the "common system"; other Vienna-based organisations use more equitable calculation methods and these should be applied at UNIDO as well. The methodology used by the Organization breaches the Flemming principle. He asks the Tribunal to consider the recommendations made by the Joint Appeals Board in another staff member's case as evidence for his position that the Circular is "nebulous and misleading".

E. In its surrejoinder UNIDO maintains that the reduction of the complainant's end-of-service allowance was "appropriate" and in conformity with both Appendix B of the Staff Rules and the calculation method specified in the Administrative Circular. It asserts that the calculation method is based on a lawful recommendation of the ICSC and that the Organization has not been unjustly enriched.

UNIDO sees no legal reason why it should change its methodology for the one proposed by the complainant, particularly since its methodology is lawful and in compliance with the Flemming principle. Furthermore, the Director-General was free to adopt whatever method he wished, provided that the one chosen complied with the principles of the international civil service.

The Organization explains that with a view to harmonising UNIDO's methodology with that of other Vienna-based organisations, Administrative Circular UNIDO/DA/PS/AC.58 was amended on 25 October 2001. The modifications therein came into effect as of 1 September 2001 and do not apply to the complainant.

CONSIDERATIONS

1. The complainant is a former member of UNIDO's General Service staff. He joined the Organization in 1967 and was allowed to take early retirement from 31 May 1998. He is challenging the method used to reckon his end-of-service allowance. On 27 May 1998 he was told that he would be paid 390,840 schillings as his end-of-service allowance, which was equivalent to 54.15 per cent of his final annual salary. On 27 July 1998 he objected to the

methodology used in working out the amount, which, in his submission, should have been 574,474 schillings. The Administration having confirmed its figure, he went to the Joint Appeals Board. In its report of 30 August 2000 the Board found that he was not entitled to have his allowance calculated according to any methodology other than UNIDO's, and recommended rejecting his appeal. The Director-General endorsed the recommendation in a memorandum of 19 September 2000, which is the impugned decision.

2. The case turns on how the Organization is to calculate the amounts to be deducted from the allowance theoretically due for the staff member's completed years of service. To understand the parties' arguments fully, it is necessary to be acquainted with the circumstances in which the end-of-service allowance was introduced in the Vienna-based international organisations on the recommendation of the ICSC, and with the rules set by UNIDO.

3. As explained in Judgment 1086, which deals with staff pay in the International Atomic Energy Agency (IAEA) - another Vienna-based organisation - application of the "Flemming principle" led the organisations in Vienna and the ICSC to look for a way of offering staff in the General Service category a benefit comparable to the end-of-service allowance paid since 1971 to employees in Austria upon their retirement. The upshot was that between 1972 and 1987 General Service staff were compensated for the Austrian benefit in the form of a salary adjustment (of 2.85 per cent until 1 April 1981 and 3 per cent thereafter). In 1987, however, the ICSC recommended that the organisations concerned should replace the salary increase with an end-of-service allowance similar to the Austrian one, to be paid subject to certain conditions to staff members upon their retirement. Since it was necessary to avoid compensating staff twice over, once under the old system and again under the new one, the ICSC recommended deducting "as a percentage of annual salary" the compensation received by way of salary increases under the pre-1987 scheme. It also suggested a method of calculation.

4. UNIDO followed this recommendation. Rule 110.07(c) of the UNIDO Staff Rules states:

"Upon separation from service after three years or more of continuous service with the Organization, staff members in the General Service and related categories may be paid an end-of-service allowance in accordance with the terms and conditions set forth in appendix B to the Staff Rules. ..."

Appendix B, which lays down conditions for the grant of the end-of-service allowance, states that the latter is to be "calculated on the basis of gross salary less staff assessment, plus language allowance and non-resident's allowance" according to a scale given in the appendix. It further specifies that, in calculating the amount of the allowance, "the entire service of the staff member shall be taken into account, subject to an appropriate reduction of the service credit for the period from 1 January 1972 up to 30 September 1987 in the case of staff in the General Service category", during which period "the element of severance pay was taken into account in their respective salary scales".

5. An administrative circular of 8 November 1989 gives the reasons for introducing the end-of-service allowance and sets rules for calculating it which specify that a deduction is to be applied to staff in the General Service category who were compensated for the allowance between 1 January 1972 and 30 September 1987. The circular sets out a four-step procedure for computing the allowance:

"(a) The allowance that would have been due for the staff member's total completed years of service had the scheme been in effect from the date of entry on duty will be calculated as a percentage of final annual salary;

(b) The payment made through the salary scales for service performed between 1 January 1972 and 31 March 1981 (2.85 per cent per annum) and between 1 April 1981 and either 28 February 1987 or 30 September 1987 (3 per cent per annum) will be calculated as a percentage of annual salary;

(c) The percentage obtained under (b) will be subtracted from the percentage obtained under (a);

(d) The percentage obtained under (c) will be multiplied by the staff member's annual salary upon separation to arrive at the amount payable."

6. The complainant does not contest the percentage of the final annual salary taken to calculate the allowance due under (a). But he objects to what was deducted as a result of UNIDO's calculations as a percentage of his final annual salary the pay increases he had received between 1 January 1972 and 30 September 1987. In his view, the method used in reaching that result, though consistent with the circular of 8 November 1989, was not a proper application of Appendix B, which states that the reduction in respect of payments made from 1 January 1972 to

30 September 1987 must be "appropriate". Citing the case of a UNOV staff member, he recounts that the UN Secretary-General, on the recommendation of UNOV's Joint Appeals Board, granted that staff member a review of the deduction applied in order to take account of changes in salary. Thereafter, UNIDO changed its own methodology on 25 October 2001 in favour of a system similar to UNOV's. In the complainant's submission, a method by which the deduction from the allowance is calculated as a percentage of the final annual salary rather than of the salaries actually paid during the period in which the compensation scheme applied, is unjust, unfair and discriminatory - by comparison with the systems applied at UNOV and the IAEA - and impairs his acquired rights. He further asserts that the Administrative Circular is ambiguous, so the method does not conform to the principles of stability, foreseeability and clarity, as the case law requires.

7. In rebuttal UNIDO argues that it properly applied a method that had been recommended by the Executive Secretary of the ICSC and endorsed by the Tribunal in Judgment 1086. That method is not inconsistent with the Flemming principle and treats staff no less favourably than the one applied in a sister organisation in Vienna, and, what is more, the complainant cannot claim any acquired rights.

8. The Tribunal's first observation is that the ICSC merely suggested a "possible method" of computing the allowance, which it submitted for consideration by the Vienna-based organisations, and that its recommendation was therefore not binding. The issue dealt with in Judgment 1086 was not the reckoning of a deduction, so the Tribunal's ruling in that case will have no bearing on the outcome of the present complaint, even though it noted that the defendant organisation "was not bound to adopt a method of reckoning that did not form part of the actual decision it was putting into effect and that the [ICSC's] Executive Secretary had merely suggested".

9. The Tribunal's second point is that, as UNIDO rightly says, the complainant is mistaken in his assertion that he has acquired rights by virtue of Staff Regulation 13.5, quoted under B, above. The complainant argues that until June 1988 UNIDO applied the UN staff rules, so until that date those were the rules that governed his entitlement to the end-of-service allowance; he accordingly has an acquired right to the application of the UN rules, including those applied to UNOV staff as a result of an appeal, deemed justified, by a UNOV official. But as UNIDO rightly observes, the conditions for granting the allowance to UNIDO officials are governed by the UNIDO Staff Regulations and no others. There can be no acquired right to alignment with rules applied to UN staff after 1988. Desirable though alignment of reckoning methods may be, as the Tribunal said in Judgment 1086 there is "no text requiring co-ordination" between the Vienna-based organisations. The plea of breach of acquired rights therefore fails.

10. It is perhaps unfortunate that because different methods are used in its calculation, the end-of-service allowance can vary greatly from one organisation to another though their staff may well be in a very similar position. This point is illustrated in a memorandum attached to UNIDO's surrejoinder showing that the complainant's allowance, equivalent to 28,403 euros as worked out by UNIDO, would have amounted to 33,538 euros using UNOV's method and 17,484 euros applying the IAEA's method. That UNIDO was unhappy with its own method is obvious: it applied a new one as from 1 September 2001, pursuant to an amendment adopted on 25 October 2001. But while that may be indicative of doubt about the soundness of its method, UNIDO was not bound to apply the amendment to the complainant. Nor is it certain that the new rules will give him entire satisfaction.

11. What needs to be determined by the Tribunal, therefore, is whether the method used to calculate the complainant's end-of-service allowance was legally flawed or not. *Prima facie*, the argument that it was flawed is very convincing since the method used leads to a deduction from the allowance that is theoretically due which is higher than the compensation paid in the form of salary increases prior to 1987. This is because the deduction is calculated as a percentage of the final annual salary, whereas annual salaries prior to 1987 were obviously lower, given the system of promotion of a staff member during his/her career. However questionable this method of calculating the deduction may be, it cannot be isolated from the system as a whole as set forth in the Administrative Circular of 8 November 1989, in particular from the calculation of the allowance that is theoretically due by virtue of paragraph (a) of the circular. The system is intended to be a cohesive whole, so to review only the method for calculating the deduction, as the complainant is suggesting, would create an imbalance between its various components. The only issue, therefore, is whether the calculation so affects the staff as to constitute a breach of the Flemming principle. That principle, which is recalled in Judgment 1086, requires that in international organisations the pay of staff in the General Service category is to be determined "on the basis of the best prevailing conditions of service in the locality of their duty station". As in Judgment 1086 - which related to the end-of-service allowance granted to the staff of the IAEA, who fare less well than UNIDO staff in that respect - the Tribunal finds no evidence that the defendant's method of calculation was inconsistent with the

Flemming principle. Though questionable, which is why UNIDO abandoned it, the methodology did meet the criteria of predictability and stability required by the case law cited by the complainant, and did not offend against any general principles of international civil service law.

12. The Tribunal is therefore bound to dismiss the complainant's claims to the quashing of the impugned decision, payment of 183,634 schillings and compensation for the moral injury caused by the Organization's treatment of him. Furthermore, the Tribunal is of the view that, given the circumstances of the case, although the internal appeal procedure was too long the delay did not amount to misconduct warranting redress.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 22 July 2002.