

NINETY-EIGHTH SESSION

Judgment No. 2420

The Administrative Tribunal,

Considering the complaints filed by Mr S. B., Mr L.C. C., Ms K.H.S. K., Mr W. P. and Mr R.C. W. against the Food and Agriculture Organization of the United Nations (FAO) on 22 July 2003 and corrected on 7 November 2003, the Organization's reply of 17 February 2004, the complainants' rejoinder of 28 June and the FAO's surrejoinder of 12 October 2004;

Considering the *amicus curiae* brief submitted by the Association of Professional Staff of the FAO and the World Food Programme on 1 June 2004;

Considering the letter of 7 July 2004 from the Executive Secretary of the International Civil Service Commission (ICSC) to the Registrar of the Tribunal, declining the Tribunal's invitation to enter a submission in the present case;

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

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

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

A. Salary scales for staff in the Professional and higher categories (grades P-1 to D-2) in organisations belonging to the United Nations (UN) common system are set by the UN General Assembly in resolutions implemented by the organisations concerned. Pursuant to Article 10(b) of its Statute, the ICSC makes recommendations to the General Assembly on this issue. Salaries in these categories are determined, in accordance with the Noblemaire principle, by reference to those of the highest-paid national civil service, which is referred to in this context as the "comparator". As a general rule, they are maintained at a level slightly higher than those of the comparator, particularly in order to ensure that the organisations are able to attract and retain high quality staff from all countries. Since the establishment of the common system, the comparator has always been the federal civil service of the United States of America.

The ICSC reviews salary levels in the comparator civil service on an ongoing basis and reports annually to the General Assembly. In the light of the ICSC's reports, the General Assembly establishes a salary scale showing the minimum net amounts received by staff in grades P-1 to D-2 throughout the world. This scale is known as the "base/floor salary scale". The average difference in remuneration between UN staff in grades P-1 to D-2 in New York and US federal civil servants in comparable positions in Washington D.C., adjusted for the cost-of-living differentiation between these two cities, is referred to as the "net remuneration margin". It is expressed as a percentage: thus, for example, a margin of 114 indicates that the net salaries of UN staff in the Professional and higher categories are on average 14 per cent higher than those of their counterparts in the comparator civil service.

In resolution 40/244 of 18 December 1985 the General Assembly approved "the range of 110 to 120, with a desirable mid-point of 115", for the net remuneration margin, "on the understanding that the margin would be maintained at a level around the desirable mid-point of 115 over a period of time". Since then, the General Assembly has reaffirmed on several occasions that this range, with its desirable mid-point, should continue to apply. Between 1985 and 2002 the margin nearly always remained within the prescribed range. However, as indicated above, the net remuneration margin represents the average of the margins for grades P-1 to D-2. At individual grades there were in fact substantial differences in margin during that same period. The margin at grades P-1 to P-3 was consistently higher than the desirable mid-point of 115, whilst the margin at grades P-4 to D-2 remained below the mid-point. At grades D-1 and D-2, it was invariably lower than 110.

In resolution 46/191 of 20 December 1991 the General Assembly invited the ICSC to review and report to it on the

differences between the net remuneration of UN officials and US federal civil servants at individual grade levels. Two years later, in resolution 48/224, it declared that the imbalance in the margins at individual grades should be addressed in the context of its overall margin considerations and invited the ICSC to make proposals to that effect. However, although the issue continued to be considered by both the ICSC and the General Assembly, it was not until 2002 that measures were taken to redress the imbalance.

In its report for 2002 the ICSC, having noted that the net remuneration margin for that year was estimated at 109.3, recommended to the General Assembly, for implementation as of 1 March 2003, “a differentiated real increase of the base/floor salary scale to address the low level of the margin at the upper grades of the salary scale and to restore the overall level of the margin to the desirable mid-point of 115”. The salary scale which the ICSC submitted to the General Assembly reflected salary increases at all grades, ranging from 0.45 per cent at grade P-1 to 10.7 per cent at grade D-2, and resulted in a net remuneration margin of 115.

By resolution 57/285 of 20 December 2002 the General Assembly, having considered the ICSC’s report, approved a revised base/floor salary scale which, though likewise reflecting differentiated real increases in salary, differed from the scale proposed by the ICSC in the following respects: no increase in salary was granted at grades P-1 to P-3; the increases granted at grades P-4 to D-2 were smaller than those recommended by the ICSC; the resulting net remuneration margin was 112.2; and the revised scale was to apply with effect from 1 January 2003. This resolution was duly implemented by the FAO.

On 7 April 2003 the complainants, who are staff members of the FAO, individually challenged the application of resolution 57/285 as reflected in their payslips. By individual decisions dated 7 July 2003, which the complainants now impugn in identical complaints, the Deputy Director-General rejected their appeals on behalf of the Director-General and allowed the case to be brought directly before the Tribunal. Similar complaints, supported by identical submissions, have been filed by staff members of two other organisations and are the subject of Judgments 2421, 2422 and 2423, also delivered this day.

B. The complainants put forward four main arguments in support of their complaints. They submit, firstly, that the General Assembly failed to comply with the *patere legem quam ipse fecisti* principle according to which “[a]ny authority is bound by its own rules for so long as such rules have not been amended or abrogated”, as the Tribunal recalled in Judgment 51. The complainants point out that, having reaffirmed that the range of 110 to 120 should continue to apply and that the margin should be “maintained at a level around the desirable mid-point of 115 over a period of time”, the General Assembly breached its own rule by adopting a base/floor salary scale in which the margin for grade P-1 is outside the range, at 120.5, whilst the overall level of the margin is 112.2, which in their view cannot be said to be “around the desirable mid-point of 115”. Similarly, by adopting a scale in which the margins range from 115.4 at grade P-2 to 111 at grade D-2, the General Assembly did not properly address the margin imbalance at individual grade levels, despite having repeatedly asked the ICSC to make proposals to that effect.

Secondly, referring to Judgment 1821, the complainants recall that the methodology used to determine salary adjustments must ensure that the results are “stable, foreseeable and clearly understood”. They submit that whereas the ICSC’s recommendation for the 2003 base/floor salary scale was based on a detailed methodology approved by the General Assembly, there is no evidence that in deciding to adopt a different scale the General Assembly applied any methodology whatsoever.

Thirdly, they contend that no reasons have been given to support the decision of the General Assembly, which appears to have been motivated solely by the desire to save money at the staff’s expense. By contrast, the reasons underpinning the ICSC’s recommendation were well known and reflected a consensus, amongst the ICSC and the representatives of both the organisations and the staff, in favour of restoring the net remuneration margin to 115.

Lastly, they argue that the General Assembly’s decision was arbitrary, being neither fair, nor “technically grounded”, nor properly motivated.

The complainants ask the Tribunal to annul the impugned decisions insofar as they amount to a rejection of their appeals, and to draw all legal consequences from such annulment, particularly by referring the cases back to the Organization “so that the proper procedure can be followed with a view to awarding the complainant[s] the sums to which [they are] legally entitled”. They also claim costs.

C. The Organization contends that it is bound to apply the base/floor salary scale as approved by the General Assembly. On accepting the Statute of the ICSC, the FAO amended its regulations to take into account the fact that certain functions were thereby transferred to the ICSC. Thus, Rule XXXIX, paragraph 3, of the General Rules of the FAO provides that “[t]he Director-General shall have authority to promulgate Staff Regulations [...] to give effect to recommendations of the [ICSC] which have been approved by the General Assembly of the United Nations with regard to the salaries and allowances of the staff in the professional and higher categories”. The Director-General has no authority to substitute a salary scale for that approved by the General Assembly. Indeed, to do so would be contrary to the rules governing the common system. Moreover, the General Assembly enjoys a measure of discretion in establishing a base/floor salary scale in accordance with the methodology and other relevant parameters that it has approved.

The FAO asserts that in adopting the disputed scale the General Assembly acted in a legally correct manner. It complied with the *patere legem quam ipse fecisti* principle, since its decision was entirely consistent not only with the principles it had laid down in 1985 regarding the margin range, which clearly included an element of flexibility, but also with its decisions regarding the need to redress the imbalance in the margins at individual grade levels. The decision was taken in accordance with the methodology adopted for the implementation of the Noblemaire principle, and the fact that on this occasion differentiated salary increases were granted at some grades but not others did not constitute a departure from that methodology. Contrary to the view expressed by the complainants, it was also duly substantiated. The process leading to the adoption of a salary scale is to be seen as whole rather than as one involving two separate stages and two distinct decisions. Throughout that process, which involves consultation of the representatives of the staff and of the organisations by the ICSC, the need to redress the imbalance in the margins at individual grades was brought to the attention of all concerned. Indeed, it had already been under consideration for several years, as witness the numerous earlier resolutions expressly recalled by the General Assembly in resolution 57/285. For the same reasons, the Organization considers that the General Assembly’s decision cannot be deemed arbitrary.

D. In the rejoinder submitted on behalf of all the complainants, the pleas presented in their complaints are maintained. In addition, the complainants argue that the scale adopted by the General Assembly failed to set salaries at a competitive level enabling the organisations to address the widely-acknowledged need to offer better conditions of pay to managers at senior levels. In that respect, the scale did not comply with the Noblemaire principle, the ultimate goal of which, according to the complainants, is set forth in Article 101, paragraph 3, of the Charter of the United Nations in the following terms:

“The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.”

E. In its *amicus curiae* brief the Association of Professional Staff fully agrees with the arguments put forward by the complainants.

F. In its surrejoinder the Organization reiterates its position, noting that the complainants’ rejoinder adds no new element of fact or law.

CONSIDERATIONS

1. In separate complaints which the Tribunal sees fit to join, the complainants, who are staff members of the FAO holding grades from P-2 to D-1, challenge the decisions taken on 7 July 2003 on behalf of the Director-General, rejecting the appeals they had lodged against the determination of their respective salaries for 2003 as reflected by their pay slips for January 2003. They allege that the Organization, which belongs to the United Nations common system, disregarded the rules governing the determination of their salaries by applying the salary scale appended to the UN General Assembly’s resolution 57/285 of 20 December 2002.

2. In organisations belonging to the UN common system, the salaries of staff in the Professional and higher categories are set each year, in accordance with the Noblemaire principle, by reference to the salaries of national civil servants of equivalent rank in the country where those salaries are the highest. In order to establish that reference, the ICSC compares on a regular basis the remuneration of United Nations staff at grades P-1 to D-2 working in New York with that of US federal civil servants holding equivalent positions in Washington, whilst

making certain adjustments to reflect the difference in the cost of living between the two cities. In a resolution of 18 December 1985 the General Assembly established the principle that the “margin” between the net remunerations of US federal civil servants in Washington and those of UN staff in the Professional and higher categories in New York should remain within a range of 110 to 120, and that it should be maintained around a “desirable” mid-point of 115 “over a period of time”. In other words, the respective net remunerations of the staff in question must be higher than those of US federal civil servants of comparable rank and, in order to take into account the particular constraints assumed by international civil servants and to give effect to the Noblemaire principle, the difference in remuneration can range from 10 to 20 per cent, but it is desirable that the overall level of the margin, representing the average of the margins at the individual grades in question, should be around 15 per cent.

3. Following the adoption of that resolution, the ICSC, which is responsible inter alia for investigating salary levels and recommending salary scales to the General Assembly, implemented those principles, though not without certain difficulties associated with the chosen methodology, which led to substantial differences between the margins applicable at various grades. On several occasions the General Assembly drew the attention of the ICSC to the resulting imbalances. For instance, it pointed out in December 2000 that the margin was 119.2 at grade P-2 and 105.5 at grade D-2 and, in December 2001, that it ranged from 117.1 at grade P-2 to 104.4 at grade D-2. As for the overall level of the margin, it varied over the years, showing a value of 114.2 in 1993, 109.8 in 1995, 114.6 in 1996, 115.7 in 1997, 114.8 in 1998, 114.1 in 1999, 113.3 in 2000, 111 in 2001 and 109.3 in 2002.

4. Extensive discussions took place at the ICSC in the summer of 2002. All the participants agreed that the overall level of the margin should be restored to 115, which could be achieved by granting substantial salary increases to staff in the higher categories. In the recommendation submitted to the General Assembly, the following salary increases, effective 1 March 2003, were proposed:

- 0.45 per cent for staff at grade P-1 to achieve a margin of 120;
- 2 per cent for staff at grade P-2 to achieve a margin of 116.7;
- 2 per cent for staff at grade P-3 to achieve a margin of 116.8;
- 5.4 per cent for staff at grade P-4 to achieve a margin of 114.5;
- 6.5 per cent for staff at grade P-5 to achieve a margin of 114.2;
- 13.2 per cent for staff at grade D-1 to achieve a margin of 114.2; and
- 10.7 per cent for staff at grade D-2 to achieve a margin of 114.8.

These increases would have brought the overall level of the margin to 115.

5. The General Assembly’s Fifth Committee, which was responsible for examining this recommendation, significantly altered the amounts of the increases which were proposed to the General Assembly and adopted by the latter on 20 December 2002. No salary increase was proposed for staff at grades P-1, P-2 and P-3, for whom the margin stood at 120.5, 115.4 and 115.4, respectively. Staff at grades P-4, P-5, D-1 and D-2 obtained increases set, respectively, at 1.3 per cent, 2.6 per cent, 9.1 per cent and 6.3 per cent, bringing the margin at each of these grades to 111. The new salary scale was to enter into force on 1 January 2003.

6. It was on the basis of the resolution adopted on 20 December 2002 by the General Assembly that the FAO established the salary scale for the staff members concerned in an administrative circular of 2 January 2003 and issued the pay slips challenged by the complainants.

7. The Association of Professional Staff has submitted an *amicus curiae* brief. Although the possibility of gathering the observations of an association or union representing staff interests is not envisaged under its Statute, the Tribunal considers that it can only be beneficial to extend that possibility, as do other international administrative tribunals, to associations and unions wishing to defend the rights of the staff members whom they represent in the context of disputes concerning decisions affecting the staff as a whole or a specific category of staff members. Indeed, the Organization has raised no objection to the Tribunal’s examination of the submissions in question, which are not, however, to be equated with the brief of an intervener, and which are simply intended to clarify certain points raised by the complaints with the Tribunal.

8. Having been invited to submit comments in accordance with Article 13(3) of the Rules of the Tribunal, the ICSC replied that it would not enter a submission because the complaints concerned a decision taken by the UN General Assembly and not by the ICSC, but it nevertheless produced a document dated 7 July 2004 which the Tribunal has examined.

9. The complainants consider that the individual decisions that they challenge were taken in application of a decision of the UN General Assembly which contravenes the principle of *patere legem quam ipse fecisti*, is not based on a methodology yielding results that are stable, foreseeable and clearly understood, is not supported by reasons, except perhaps a desire to save money, and was taken arbitrarily.

10. The defendant Organization, for its part, argues that it was bound to apply the new salary scale approved by the General Assembly and that the complainants' pleas are in any case unfounded.

11. The Tribunal has on numerous occasions ruled on the issue of whether an international organisation is bound to comply with general provisions that would infringe the rights of its staff members. The fact that an international organisation belongs to the common system does not enable it to decline or limit its own responsibility towards the members of its staff or lessen the degree of judicial protection it owes them. Any organisation that introduces elements of the common system into its own rules has a duty to ensure that the texts it thereby imports are lawful (on this issue, see Judgment 1265, which refers to Judgments 382 and 825; for more recent examples concerning the duties of the FAO, see Judgments 1713 and 2303). Whilst the Tribunal fully appreciates the difficulties – emphasised by the defendant – that international organisations are liable to face in departing from the salary scales adopted on the basis of ICSC recommendations, it is nevertheless bound to ensure that international law is observed in the relations between the said organisations and their staff, regardless of the external authority from which the decisions taken emanate. Indeed, the case of an organisation having to revise salary scales resulting from recommendations or decisions affecting the common system, whether or not pursuant to a ruling by the competent tribunal, is not without precedent.

12. The Tribunal must therefore verify the lawfulness of the decisions setting the complainants' respective salaries, as taken by the defendant, by determining whether the statutory text which the latter intended to apply complies with the principles of the law of the international civil service.

13. The complainants' first plea is that, in establishing the scale applied by the defendant, the UN General Assembly failed to abide by its own rules and thus violated the principle of *patere legem quam ipse fecisti*. It is true that the methodology used to set salary scales, which has often been recalled in the resolutions adopted by the General Assembly on ICSC recommendations, is based on two principles: firstly, the margin between the respective net remunerations of staff in the categories in question and those of US federal civil servants working in Washington must lie within a range of 110 to 120; secondly, that margin must be maintained over a period of time around a "desirable" mid-point of 115. It should also be noted that in its resolutions the UN General Assembly has on several occasions expressed a desire that the imbalances resulting from the application of that methodology, which had in effect penalised staff in the higher categories, should be redressed, which was perfectly legitimate in the context of its powers concerning the determination of remuneration policy.

14. As a result of the decisions taken in December 2002, those imbalances were reduced: staff whose remuneration reflected a margin greater than 115 obtained no salary rise, whilst those whose remuneration corresponded to a margin of less than 110 (109.2 for staff at grade P-4, 107.8 for staff at grade P-5, 101.2 for staff at grade D-1 and 104.2 for staff at grade D-2) were granted increases which brought their respective margins to a level of 111. Thus, apart from the fact that in the new scale the salaries of staff at grade P-1 showed a margin slightly greater than 120, which is hardly significant in this case and which may be explained by the fact that it would have been necessary to reduce the salaries of those staff in order to achieve a margin of 120, the margins resulting from the new scale are consistent with the methodology previously adopted and do not contravene the *patere legem quam ipse fecisti* principle. Nevertheless, the overall level of the margin remains significantly lower than 115, being evaluated at 112.2, which leads the complainants to argue that although there was no obligation to set the overall level at 115, it was unlawful to stray too far from that objective. On this point the Tribunal considers that, in view of the wording of the previous General Assembly resolutions, which stated that the margin was to be maintained "around the desirable mid-point of 115", and the fact that the General Assembly has reaffirmed the need to continue pursuing that goal, no illegality can be found in the present case, particularly since the overall level of the margin was considerably lower in the two previous years, at 111 in 2001 and 109.3 in 2002.

15. The complainants' second plea is that the methodology applied by the General Assembly does not satisfy the requirements of stability, foreseeability and transparency established by the case law. They submit that the ICSC correctly followed the methodology in its recommendation, but that the same cannot be said of the Fifth Committee, whose proposals were adopted by the General Assembly. The ICSC's recommendation would undoubtedly have produced a margin strictly consistent with the objectives which, according to the methodology, it was desirable to attain. Given that the application of that methodology can yield results as different as those obtained, on the one hand, by the ICSC, and on the other, by the Fifth Committee and subsequently the General Assembly, one may legitimately query its foreseeability. However, it must be borne in mind that a methodology cannot be applied without a degree of flexibility and without leaving some room for interpretation by the competent authority, which was entitled to take into account the imbalances generated by past applications of the adopted methodology in order to try to attenuate the effects thereof and properly to implement the Noblemaire principle. By restoring the margins to values which, with one exception mentioned above, lay within a range of 110 to 120, the competent authorities applied a methodology which they confirmed: other results would have been conceivable, but the differences between the possible outcomes do not detract from the appropriateness of the methodology, which must continue to govern the remuneration levels of the staff concerned for as long as it remains unmodified.

16. The complainants' third plea concerns the lack of valid reasons to justify the decision of the General Assembly, on the advice of the Fifth Committee, to depart from the recommendation of the ICSC. One may, indeed, legitimately enquire why that reasoned recommendation, which had the support of both the organisations and the staff representative bodies, was not followed, and wonder whether, as the complainants suggest, the decision ultimately taken might not have been based partly on a desire to make budgetary savings. The defendant in fact refers in its surrejoinder to the fears expressed by states such as Canada, China, the United States and the Russian Federation regarding the impact of the salary increases on Member States. However, the fact that financial considerations were taken into account does not, in itself, invalidate the decision setting the salary scale, provided that the other reasons justifying the decision are correct. In the present case, the evidence on file shows that the scale ultimately adopted was justified by the desire to reduce the imbalances resulting from the application of the previous decisions penalising staff in the higher categories, to restore the remuneration margins in relation to US federal civil servants to values within the range of 110 to 120 and to move closer to attaining the objective of an overall margin level of 115. These reasons, which were discussed before the ICSC, take into account the concerns voiced by the heads of numerous organisations belonging to the common system, who emphasised that the existing imbalances were hampering their policy of recruiting qualified managers. The resolution of 20 December 2002 clearly reaffirms the need to apply the range of 110 to 120 and to restore the margin to the mid-point of 115 over a period of time, and it invites the ICSC to keep the matter under review and to report to the General Assembly on the outcome of that review at the latter's sixty-second session, taking due account of the Noblemaire principle. These reasons were sufficient, given that a point-by-point account of the details of the adopted scale was hardly to be expected.

17. Lastly, by a plea very similar to the previous one, the complainants contend that the impugned decisions were arbitrary. They argue that these decisions did not properly implement the Noblemaire principle and that they were not based on a desire to attain the objectives set by Article 101, paragraph 3, of the Charter of the United Nations, namely to recruit and retain managers and specialists as well as young staff possessing the highest standards of efficiency, competence and integrity, despite the fact that it was vital, as the Deputy Director-General of the FAO had pointed out during the fifty-fourth session of the ICSC, to take steps to restore the competitiveness of the remuneration package offered to staff and to improve the attractiveness of the UN common system organisations as employers. However pertinent these arguments may be, they do not support the conclusion that the salary increases granted to staff at grades P-4, P-5, D-1 and D-2, and the freezing of salaries for staff at grades P-1, P-2 and P-3, constituted arbitrary decisions, given that they were based on the reasons discussed above and are not contrary to the methodology adopted for the application of the Noblemaire principle.

18. Since none of the pleas succeeds, the complaints must be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.