NINETY-NINTH SESSION

Judgment No. 2476

The Administrative Tribunal,

Considering the complaints filed by Mrs M.-O.D. and Mr E.E. against the United Nations Industrial Development Organization (UNIDO) on 13 January 2004 and corrected on 20 April and 12 May, the Organization's reply of 19 August, the complainants' rejoinder of 28 October 2004 and UNIDO's surrejoinder of 2 February 2005;

Considering Articles II, paragraph 5, and VII 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. The complainants, who have Lebanese and Austrian nationality, respectively, hold General Service category posts at UNIDO's headquarters in Vienna (Austria). As part of the United Nations (UN) common system, UNIDO determines the conditions of employment of its General Service staff in accordance with the Flemming principle, which the Tribunal recalled in Judgment 2303. Thus, Staff Regulation 6.5(a) provides that salary scales for staff in that category are determined "normally on the basis of the best prevailing conditions of employment in the locality, taking into account the recommendations of the International Civil Service Commission" (hereinafter the "ICSC"). Every five years, the ICSC carries out a comprehensive survey of conditions of employment in the locality and recommends salary adjustments on the basis of its findings. The ICSC's methodology also provides for interim adjustments between surveys, based in particular on fluctuations in the level of a reference wage index or price index, or of a combination of such indexes.

In the light of the salary survey that it carried out in 1996 for Vienna, the ICSC recommended that General Service salaries be reduced by 3.2 per cent. However, like the other Vienna-based agencies, UNIDO decided not to reduce the salaries of serving staff members. Instead, it established a new salary scale reflecting a 3.2 per cent reduction, but applied it only to staff recruited on or after 1 October 1996. The salaries of staff recruited prior to that date were to be maintained at their existing levels until such time as future interim adjustments brought the new scale into line with the old one. In the event, interim adjustments of 0.82 per cent, 1.20 per cent and 0.63 per cent were applied to the new salary scale in 1997, 1998 and 1999, respectively, so that by 2000 the gap between the two scales had been reduced to 0.55 per cent.

In the meantime, the Austrian authorities had introduced a tax reform in 1997 which tended to reduce the net incomes of employees outside the UN common system. A further tax reform occurred in 2000.

On 17 August 2000 the Organization published an information circular informing staff of a revised salary scale applicable to all General Service staff as from 1 April 2000. This scale reflected an interim adjustment of 1.9 per cent for staff recruited on or after 1 October 1996 and 1.35 per cent for staff recruited prior to October 1996, thus eliminating the gap between the net salary levels of these two groups of employees. According to the circular, the adjustment took into account changes in the consumer price and relevant wage indices over a period of 12 months.

In a letter of 16 October 2000 addressed to the Director-General, the complainants and one other staff member who has since retired expressed their surprise at the fact that the interim adjustment applied as from 1 April did not reflect the impact of the tax reform introduced by the Austrian authorities in 2000, which, they contended, would have yielded a further 1.3 per cent increase. They asked the Director-General to "correct this oversight" by applying an interim adjustment which would take into account the recent tax reform with retroactive effect from 1 April 2000. In the event that their request was denied, they asked him to allow them to appeal directly to the Tribunal and to assure them that any decision rendered in their favour by the Tribunal would automatically be applied to all similarly situated staff members. Replying on behalf of the Director-General, the Officer-in-Charge of the Field Operations and Administration Division informed the complainants, in a letter dated 13 December 2000, that the "lead agency" on this issue amongst the Vienna-based organisations, namely the International

Atomic Energy Agency (IAEA), had examined the impact of the tax reform for 2000, and that in the light of that examination it had been concluded that the appropriate rate of interim adjustment was that which was reflected in the information circular of 17 August 2000. Consequently, the Director-General saw no grounds for reviewing the contested adjustment. The complainants were also informed that their request to appeal directly to the Tribunal was denied.

On 9 February 2001 they lodged an appeal with the Joint Appeals Board challenging the decision not to revise the rate of the interim adjustment. In its report dated 11 September 2003 the Board concluded that the claim for the retroactive application to General Service salaries of an additional adjustment of 1.3 per cent was not justified. It therefore recommended that the appeal be dismissed. By memoranda dated 8 October 2003, the Reserve Secretary of the Joint Appeals Board informed each complainant that the Director-General had decided, on 2 October 2003, to endorse the Board's recommendation and hence to dismiss their appeal. That is the impugned decision.

B. The complainants assert, firstly, that the statement submitted to the Joint Appeals Board by the representative of the Director-General was irreceivable because it was not received by the Board within the two-month time limit provided for in Appendix K to the Staff Rules.

Secondly, they submit that the ICSC's methodology governing interim adjustments provides that changes in local taxation should be accounted for at the time that such adjustments are made. Consequently, the Organization's failure to take into account the favourable tax reform introduced in 2000 cannot be justified by the fact that in determining an interim adjustment for 1997 it chose not to reflect the adverse impact of the tax reform introduced that year. The complainants contend that UNIDO's position in this regard is contrary to Staff Rule 106.10(b), which provides that:

"Any payment made by the Organization to which a staff member is not entitled but which was received by the staff member in good faith may not be recovered by the Organization after a lapse of two years following such over-payment."

Thirdly, the complainants assert that the Organization was under an obligation to verify the lawfulness of the IAEA's decision and the validity of the latter's calculations, on which it relied. They submit that UNIDO's failure to do so is contrary to the Tribunal's ruling in Judgment 1765.

Fourthly, they query whether UNIDO's decision to offset the positive impact of the 2000 tax reform against the negative impact of the 1997 reform was envisaged by the ICSC as part of the discretionary power enjoyed by the Organization in determining salary policy. In this connection they note that Judgment 1499 confirms that in 1994 General Service staff did in fact obtain a salary increase based on changes in local taxation.

The complainants' fifth argument is that UNIDO has failed to discharge the burden of proving that the revised salary scale for General Service staff complied with the Flemming principle. They point out that the salary survey conducted in 2002 resulted in an adjustment of 2.98 per cent, which in their view demonstrates that there was in fact a discrepancy between General Service salaries and those offered locally by non-UN employers. Furthermore, the interim adjustment which would have been due on 1 April 2002 had there not been a survey that year was evaluated at only 1.9 per cent. According to the complainants, the gap between that figure and the adjustment of 2.98 per cent which was ultimately applied in 2002 is at least partly attributable to the Organization's failure to take into account the 2000 tax reform in the disputed interim adjustment.

The complainants' sixth argument is that the Organization cannot rely on the fact that in deciding the disputed adjustment it consulted with the other Vienna-based organisations. They submit that UNIDO's emphasis on inter-agency coordination is misplaced, since that coordination is clearly lacking in matters of human resources management. Although the Organization follows the practice of the "lead agency" on some issues, on others it adopts a different approach.

Lastly, the complainants blame UNIDO for what they consider to be excessive delay in the internal appeal proceedings. They point out that more than two years elapsed between the filing of their appeal and the constitution of an appeal panel.

They ask the Tribunal to dismiss the statement submitted to the Joint Appeals Board on behalf of the Director-General as irreceivable, and to order the Organization to increase the interim adjustment announced on 17 August

2000 by 1.3 per cent with retroactive effect, paying interest on the outstanding amounts due as a result of that increase and applying both increase and interest to the salaries of all General Service staff in service as of 1 April 2000. They also claim moral damages in respect of "the Organization's wholly unacceptable treatment of [their] internal appeal".

C. In its reply the Organization contends that the complaints are irreceivable for failure to comply with the 90-day time limit provided for in Article VII, paragraph 2, of the Statute of the Tribunal. It submits that a memorandum informing the complainants of the impugned decision was sent to each of them on 8 October 2003. The complaints were filed on 13 January 2004, more than 90 days later, but the complainants assert that they did not receive the memorandum in question until 15 October, precisely 90 days prior to the filing date. The Organization acknowledges that according to the case law it is for the sender to establish the date on which a communication was received, and that it is unable to do so in this case. However, it draws attention to a number of circumstances which, in its view, shift the burden of proof onto the complainants, such as the fact that each memorandum was delivered by internal mail to an office located on the same floor as the sender's, that a routing slip confirms the date of dispatch as being 8 October, that there were no official holidays during the period in question and that one of the complainants was on sick leave on the date on which he claims to have received the memorandum.

Regarding the complainants' claim for damages in respect of the delay in their internal appeal, the Organization refers to Judgment 1380 and submits that since this claim was not raised before the Joint Appeals Board, it is irreceivable. Furthermore, it argues that they did not pursue their appeal diligently and that in any case they have not shown that they suffered any moral injury.

UNIDO considers that the complainants' argument regarding the receivability of the statement submitted to the Joint Appeals Board on behalf of the Director-General is irrelevant, since the substance of the complaints is to be reviewed *de novo* by the Tribunal. It adds that this objection to receivability was rejected by the Board in the light of the applicable provisions of Appendix K to the Staff Rules. It also considers that the complainants' reference to Staff Rule 106.10(b) is irrelevant, because the present case does not concern erroneous over-payments to staff members nor an attempt to recover such over-payments.

The Organization emphasises that it has a discretion to set pay scales and interim adjustments, and that the exercise of that discretion is subject to only limited review by the Tribunal. It submits that the complainants have not established that it abused its discretion in setting the contested interim adjustment. Nor have they shown that the Austrian tax reform introduced in 2000 resulted in an actual increase of 1.3 per cent in the net incomes of employees outside the UN common system, although it is clear from Judgment 1499 that they bore the burden of proving their contention.

UNIDO explains that in 1997, since the salaries of most of its General Service staff were already frozen at the level they had reached prior to the 1996 salary survey pending the realignment of the two salary scales resulting from that survey, it decided not to reflect the negative impact of the 1997 Austrian tax reform in the interim adjustment for that year. In determining the interim adjustment for 2000 the IAEA, as "lead agency", considered the impact of both the 1997 and 2000 tax reforms. Its calculations indicated that if both reforms were taken into account, the interim adjustment of 1.9 per cent (or 1.35 per cent for staff recruited prior to October 1996), which was based solely on the movement of the relevant indexes over the 12 months that had elapsed since the 1999 adjustment, would be reduced by 0.708 per cent. The Organization contends that there was nothing unlawful in the decision not to reflect the cumulative effect of these reforms in the adjustment for 2000, and that nothing in the ICSC's methodology prevented it from considering the impact of both reforms at the same time.

According to UNIDO, to construe the requirement that changes in local taxation be accounted for at the time when interim adjustments are decided as meaning that such changes must be incorporated wholesale in the interim adjustment is contrary to the principle that the setting of salary scales is at the Organization's discretion.

UNIDO also asserts that there is no factual or legal basis for the complainants' assumption that the tax reforms of previous years account for the level of the adjustment applied in 2002, which, it argues, can just as easily be explained by inflation or rising wages. It also rejects as unfounded the allegation of a lack of coordination amongst the Vienna-based organisations, adding that this is not a relevant consideration in determining whether or not it abused its discretion, as noted by the Tribunal in Judgment 1086.

D. In their rejoinder the complainants develop the arguments put forward in their complaints. They emphasise that the exercise by the Organization of its discretionary authority should not serve as a pretext for ignoring changes in local taxation.

E. In its surrejoinder the Organization maintains its objection to receivability. It considers that the complainants' rejoinder adds no new arguments or evidence to support their position on the merits.

CONSIDERATIONS

1. On 17 August 2000 UNIDO issued an information circular apprising all Headquarters staff of a new salary scale applicable as of 1 April 2000 to staff in the General Service category. The implementation of the new salary scale, which reflected an interim adjustment of 1.9 per cent to the salaries of General Service staff recruited on or after 1 October 1996 (the "post-1996 group") and 1.35 per cent to the salaries of staff in the same category recruited prior to October 1996 (the "pre-1996 group"), had been decided following consultations with the other Vienna-based organisations.

2. In a joint letter to the Director-General dated 16 October 2000, the complainants, together with another staff member who has since retired from the Organization, submitted that the interim adjustment did not reflect the impact of the Austrian tax reform introduced in 2000, which would, in their submission, have yielded an estimated additional increase of 1.3 per cent for staff in the General Service category. They requested that this oversight be corrected and that the new rate be applied to all similarly situated staff members.

3. In a letter dated 13 December 2000, the complainants were informed that the Director-General found no grounds to revise the rate of interim adjustment effective 1 April 2000.

4. On 9 February 2001 the complainants submitted to the Secretary of the Joint Appeals Board an internal appeal against the administrative decision not to pay "the portion of the interim adjustment which reflect[ed] the tax [reform] made [in Austria] in the year 2000". The Secretary of the Board forwarded the appeal to the Chief of the Human Resource and Staff Development Section by memorandum dated Friday, 9 February 2001 (and, according to the Board's subsequent finding of fact, received the following Monday, 12 February) and the latter official then, on 11 April 2001, submitted in reply a statement on behalf of the Director-General to the Board.

5. The complainants filed a reply to that statement on 4 March 2003. In its report dated 11 September 2003 the Board recommended that the appeal be dismissed. The Director-General reviewed and endorsed this recommendation on 2 October 2003. The Director-General's decision was communicated to each of the complainants by a memorandum dated 8 October 2003 but, according to them, only received by them one week later, on 15 October.

6. On 13 January 2004 the complainants filed their complaints with the Tribunal challenging the Director-General's decision of 2 October 2003. By letter dated 20 April 2004, the complainants' counsel informed the Registrar of the Tribunal that the two complainants rely on the same pleas and arguments. The two complaints are accordingly hereby ordered to be joined.

Receivability

7. Both sides start by raising arguments on receivability. The complainants repeat an argument that was raised before the Joint Appeals Board. They say that the statement submitted on behalf of the Director-General, on 11 April 2001, was out of time and therefore not receivable. The point is without merit. Not only did the Board make a finding of fact that the Administration did not receive the relevant documents before 12 February, thus making the 11 April filing timely, but more significantly, no possible benefit can flow to the complainants from a finding that the Board erred in treating the Administration's reply to the appeal as receivable, since such a finding could never result in a conclusion that the appeal should have been decided in the complainants' favour. That can only happen if the Tribunal concludes that their arguments on the merits are correct. There is no showing of a breach of natural justice of such a nature as to nullify the Board's findings.

8. The defendant similarly argues irreceivability based on Article VII(2) of the Statute of the Tribunal, which requires that each complaint be filed "within ninety days after the complainant was notified of the decision impugned". While the Organization acknowledges that the Tribunal's case law casts the burden of proving receipt

of any communication on the sender (see Judgment 723, under 4) and admits that it cannot prove the exact date on which the notification of the impugned decision was received, it draws attention to a number of facts which cast considerable doubt on the complainants' assertion that they did not receive such notification until 15 October. While the Tribunal shares those doubts, given the conclusion to which it has arrived on the merits it does not think it indispensable for it to consider further the question of receivability.

The merits

9. UNIDO Staff Regulation 6.5(a) provides, in pertinent part, that:

"The Director-General shall fix the salary scales for staff in the General Service and related categories, normally on the basis of the best prevailing conditions of employment in the locality, taking into account the recommendations of the International Civil Service Commission."

The last salary survey conducted in Vienna by the ICSC prior to the interim adjustment at issue in the complaints was carried out in 1996. Based on that survey, the ICSC recommended a new salary scale for staff in the General Service category that was lower than the prevailing scale by 3.20 per cent. In accordance with past practice in other duty stations, UNIDO (and the other Vienna-based organisations) decided to apply the revised scale immediately to the post-1996 group alone, until such time as future interim adjustments would result in higher net and gross pensionable salaries.

10. As of October 1996, therefore, two salary scales existed for General Service staff members: a pre-1996 survey scale for the pre-1996 group and a 1996 survey-based scale for the post-1996 group.

11. In accordance with salary policy at UNIDO, interim adjustments based on consumer price and relevant wage indices were applied to the salary scale of General Service staff in the post-1996 group as follows: 0.82 per cent, 1.20 per cent and 0.63 per cent in 1997, 1998 and 1999, respectively. General Service staff in the pre-1996 group, whose salaries were to remain unchanged until overtaken by future adjustments to the salary scale applicable to General Service staff in the post-1996 group, received no interim adjustments during these years.

12. In 1997 the Austrian government introduced tax reforms that had the effect of reducing the net incomes of employees outside the UN common system. At the time that the interim adjustment for 1997 was being considered, the Vienna-based organisations decided not to incorporate the negative results of those reforms because of the earlier decision to freeze the salary scale for the majority of General Service staff, who were in the pre-1996 group, until it was overtaken through the interim adjustment procedure by the salary scale of General Service staff in the post-1996 group. To have done otherwise would have resulted in an even lower salary scale for the post-1996 group by comparison with their colleagues in the pre-1996 group.

13. This, then, was the context in which the 2000 interim adjustment took place. The IAEA, as the "lead agency" in Vienna for salary related matters, calculated that, based on the movement of the two indices over the 12 months since the 1999 interim adjustment, a 1.90 per cent salary adjustment for the year 2000 would be appropriate. However, because the salary scale applicable to pre-1996 General Service staff was still 0.55 per cent higher than the scale applicable to the post-1996 group, the full 1.90 per cent salary adjustment would only be applied to the latter group while the former group would receive a salary adjustment of 1.35 per cent. With regard to the impact of the 1997 and 2000 Austrian tax reforms on the interim adjustment for 2000, the IAEA calculated that, if both tax changes were taken into account, the adjusted General Service salaries would have to be reduced by 0.708 per cent. Thus, the 1.90 per cent increase due on 1 April 2000 on the basis of the combined index would have been reduced to 1.35 per cent in respect of the post-1996 group (0.65 per cent for the pre-1996 group). In the light of the IAEA's calculations, the Vienna-based organisations, including UNIDO, decided to implement a salary adjustment based solely on the movement of the combined index without making any further adjustment on account of the recent Austrian tax reform.

14. As a result of the interim adjustment for the year 2000, the salary scale applicable to the post-1996 group was on a par with the scale applicable to the pre-1996 group.

15. The key argument made by the complainants relies on a passage in a document emanating from the IAEA Joint Advisory Committee which indicates that the Austrian tax reform for 2000 would result in a salary increase of 1.3 per cent over and above the 1.901 per cent increase due to the movement in the combined index. The

remainder of their arguments save for the issue of delay, are dependent upon their being right on this main point on which they bear the burden of proof.

16. The argument is wholly unconvincing. It is based on a document which on its face is merely a draft. Even if it were to be considered as the final version of the Committee's recommendations, the document still gives no support whatever to the complainants' arguments.

17. The passage cited by both the complainants and UNIDO is paragraph 5. On its face it sets out the opposing views expressed by the IAEA's Administration and Staff Council. The Administration suggests that the 1997 and 2000 tax changes should both be taken into account. The Staff Council suggests that the impact of the tax reforms should be calculated on the grossed-up General Service net salaries valid as of December 1999, after which tax changes introduced effective 1 January 2000 must be applied in the subsequent down-netting exercise of gross salaries in order to arrive at a new salary scale to be implemented and adjusted effective 1 April 2000.

18. The following passage, paragraph 6, states:

"Following consultations with its members concerning the two different approaches, the Staff Council has proposed, as a compromise, that the interim adjustment due on 1 April 2000 should be based only on the movement in the combined index. The Administration offers no objection to this compromise [...]."

19. Under the final paragraph, entitled "Action Required", the following appears:

"Agreement of the [Committee] is hereby sought to implement with effect from 1 April 2000 an increase in [General Service] salaries of 1.901 per cent for staff members who were appointed on or after 1 October 1996 and an increase of 1.35 per cent for the staff appointed before that date. These increases are based only on the movement in the combined index, as shown in paragraph 2 above."

20. Thus, the complainants' primary argument is founded upon a document which, when read in its entirety, suggests, as an appropriate course of action, agreed upon by the Staff Council and the Administration, the very action which they are contesting. The argument, together with those which depend upon it, is not sustainable. They have simply failed to show that UNIDO exercised its discretion unreasonably.

21. As a subsidiary argument the complainants assert that UNIDO failed to follow the methodology laid down by the ICSC. That methodologyincludes the phrase: "[c]hanges in local taxation should be accounted for at the time that the reference index justifies an adjustment to the scale".

22. These changes, according to the methodology, should be based on movements of the reference index, which is precisely what was considered in the Committee report citedabove which specifically states that "the interim adjustment due on 1 April 2000 should be based only on the movement in the combined index".

23. The complainants' argument that their salary was not adequately adjusted at the time of the changes in local taxation is without merit. Those changes were accounted for by the 1.9 per cent and 1.35 per cent salary adjustments at the time when they occurred, and with reference to the index as required by the ICSC methodology.

24. The final argument raised by the complainants is delay. They say that their internal appeal, submitted in February 2001, was not before a panel until April 2003. Their plea concerning delay is completely devoid of merit. The majority of the downtime was due to the complainants' inaction between April 2001 and March 2003, during which period they did nothing whatsoever to pursue their internal appeal with diligence (see Judgment 2467 also delivered this day).

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.