THIRTY-NINTH ORDINARY SESSION

***In re* CONNOLLY-BATTISTI (No. 5)**

Judgment No. 323

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Food and Agriculture Organization of the United Nations (FAO) by Mrs. Norah Connolly-Battisti on 31 May 1976, the FAO's reply of 22 September, the complainant's rejoinder of 25 November, the FAO's surrejoinder of 24 December 1976, the complainant's further memorandum of 18 January 1977 and the FAO's reply thereto of 17 February 1977;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the FAO Staff Regulations, particularly Regulations 301.111 and 301.134, the FAO Staff Rules, particularly Rules 302.3012, 303.111 and 303.131, the FAO Manual, particularly sections 303.122, 308 and Appendix F to section 308, and the General Rules of the Organization;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. Since joining the staff of the FAO on 30 August 1954 the complainant has belonged to the General Service category, and she is now a research assistant at the G.6 grade.

B. In the light of a salary survey the FAO Council decided in November 1974 to establish new salary scales for General Service category staff with effect from 1 December 1974, the old rates of salary adjustment to continue to apply during a transitional period from 1 December 1974 until the new scales came into force. For the complainant the rate was one per cent. In February 1975 there fell due two wage-index adjustments to the salary scales for the General Service category. These adjustments were brought into effect on 1 March 1975 at the provisional rates approved by the Council - three per cent for G.1 to G.4 and one per cent for G.5 to G.7. In June 1975 the Council approved the conclusions of the salary survey and accordingly decided that a new salary scale should come into force with retroactive effect from 1 February 1975, that the wage index should be "rebased" at 100 from February 1975 and that in future the new rates of adjustment should be applied for each five per cent movement in the wage index.

C. In June 1975 the complainant appealed to the Director-General against the decision to pay her the two salary adjustments at the rate of only one per cent even though the general wage index had twice risen by five per cent. Her appeal was dismissed on 23 June and in July she went before the Appeals Committee. Among other things, she challenged the way in which salary deductions had been made on account of potential savings on "commissary" purchases and the progressive impact of Italian income tax. The Appeals Committee held that it was not competent to hear the matters referred to it and after noting its report the Director-General upheld his original decision of 23 June 1975 in a letter of 2 April 1976. That is the decision impugned.

D. The complainant asks the Tribunal to order the FAO to make up the difference between the two one per cent salary adjustments actually paid to her and the two five per cent adjustments she ought to have been paid during the period from 1 March to 30 June 1975 (in other words, eight per cent having been wrongly withheld). She also asks the Tribunal to declare whether it is lawful to reduce to one per cent the rate of adjustments which ought to have been paid at the rate of five per cent by basing calculations on matters which should not have been taken into account (see C above).

E. The FAO contends that the complainant's appeal to the Appeals Committee was time-barred and seems to conclude that the complaint too is irreceivable on procedural grounds. Secondly, it maintains that the impugned decision was in fact one taken by the FAO Council in the exercise of its constitutional authority and was therefore a legislative act. In its view the complaint is therefore again irreceivable. Besides, it is unfounded inasmuch as the complainant has failed to show that the decision or the action taken by the Director-General to put it into effect constituted a breach of the terms of her appointment or of the Staff Regulations. The FAO therefore asks the

Tribunal to dismiss the complaint.

CONSIDERATIONS:

Legal framework:

1. The salary of an officer of the FAO is, like the salary of officers in international organisations generally, settled in accordance with a salary structure embodied in the Staff Regulations. Staff Rule 302.3012 provides that "the salary scales for staff in the General Service category shall be those set forth in the FAO Manual". 308.312 states: "The rates in the General Service salary schedule for each locality are established in consultation with the offices of the United Nations and the Specialised Agencies operating in the area and on the basis of certain guiding Principles and standard procedures agreed upon among the United Nations and the Specialised Agencies (see Appendix F)".

2. Provision is made for the revision of the salary scales. Staff Rule 302.3012, quoted in the preceding paragraph, continues: "These scales shall be subject to amendment or revision in accordance with the provisions of Staff Regulation 301.134". This regulation states: "The Director-General shall fix the salary scales for staff members in the General Service category, normally on the basis of the best prevailing conditions of employment in the locality of the FAO Office concerned". Under this regulation it is the duty of the Director-General to keep in touch with wage rates in different localities and to make such revisions as are necessary to keep pace with them, the overriding consideration being, as is stated in the United Nations Charter, "the need to obtain staff of the highest degree of competence, efficiency and integrity". Bearing in mind that the salary scales are established in consultation and on the basis of the Guiding Principles in Appendix F, it is also his duty in making revisions to have regard to the Guiding Principles. Subject to this, his power to fix salary scales under 301.134 is a discretionary one.

3. Appendix F is headed "Application of the Guiding Principles for the determination or revision of conditions of service of staff in the General Service category". It explains in paragraph 2 that the application of the principles involves four main processes, the second being the carrying out of a survey of the conditions of service in comparable jobs outside the Organization, a process to be repeated from time to time to ensure that existing staff are treated equitably and that conditions remain adequate to attract new staff. The survey involves the ascertainment of salary rates from a selection of outside employers. These will be gross rates, i.e. before deduction of national income tax; for the purpose of comparison they must be reduced to net.

4. The chief question in the present dispute relates to what are called "commissary savings". The commissary is the duty-free shop at which by arrangement between the FAO and the Government of Italy officers of the FAO are permitted to buy articles for personal use and consumption. The savings consist of the duty saved. Since this is in the nature of a fringe benefit, it is necessary to note what the Guiding Principles say about the way in which fringe benefits are to be treated. Paragraph 30 provides that when the survey is being made, measurable fringe benefits given by outside employers should be calculated and a rough balance struck with similar benefits inside the Organization; it is convenient to call the former outside benefits and the latter inside benefits. If the inside benefits exceed the outside, the difference should be ignored. But if the outside exceed the inside, there should be an upward adjustment of the outside salaries for the purpose of comparison.

5. Surveys should normally be made once in every four years. In between, interim adjustments should be made on the basis of the local wage index. The present dispute is concerned with an interim adjustment. The following paragraphs in the Guiding Principles are pertinent:

"49. In any event, whether adjustments are made on the basis of new surveys or of movement of indices, they should normally be made only when there is a case for a significant increase, normally 5 per cent or more. Account should be taken of the fact that the movement of outside gross salaries will, unless income taxes are negligible, be greater than the movement in net after-tax salaries.

5. In making interim adjustments, as distinct from changes based on new full-scale comprehensive surveys of outside conditions, it should not be necessary to re-examine fringe benefits ...".

6. Although the regulations place upon the Director-General the duty of fixing salary scales, it has been the practice in the FAO for the appropriate decisions to be taken by the Council.

Rule XXXIX.2 of the General Rules provides that the Director-General shall submit proposals to the Finance

Committee on the scale of salaries and conditions of recruitment and service of the staff, and Rule XXIV.3(j) provides that the Council shall consider and approve such recommendations. The complainant does not contest the right of the Council to establish salary levels but seems to question its right to decide how the wage index is to be ascertained. Since the interim adjustments for which the wage index is used are supplementary to the review of salary scales, it is difficult to separate the two. In any event the Director-General is required to act under the general supervision of the Council; see Rule XXIV.5(d) and Rule XXXVII.1.

7. The only significance of the point is whether in discharging his duty of fixing salary scales under Staff Regulation 301.134 the Director-General is required to act independently as he thinks right as he is for example under Rule XXXIX.4 when appointing, assigning and promoting staff, or whether he is acting as Executive Officer under Rule XXXVII.l and carrying out the decisions of the Council. The Tribunal considers that the latter is the correct view. But this does not mean the Council is substituted for the Director-General in

Regulation 301.134. The Council must act through the Director-General. What the regulation requires is a decision by the Director-General, but it is as satisfied with a decision which he is taking on the instructions of the Council as with one which he is taking on his own responsibility.

Factual background:

8. It appears that a scheme of the sort envisaged by the Guiding Principles was adopted by FAO in 1964. In particular, in relation to the interim adjustment the Council approved the report of the Finance Committee specifying the wage index that was to be used. The base figure was taken as the index figure on l January 1964 and it was provided that the pensionable salaries of the General Service category staff between surveys should be increased by 5 per cent at the beginning of the month following the month in which the index showed an increase of 5 per cent. When a new survey fixed new salary scales, a new base figure would be taken to correspond with the new level and the percentage increases would begin again.

9. In October 1973 the Council decided that the time had come for a new survey into Rome salary conditions. They appointed a Panel of three persons to conduct a survey "within the framework of the Guiding Principles" and authorised the Finance Committee to take final decisions on the Panel's report. At the same time the Council decided that pending the outcome of the survey, the interim adjustment for each 5 per cent movement of the index should be 3 per cent only, with provision for subsequent repayment should the survey results so indicate. There is nothing in the dossier to show what motivated the Council in departing from the basis for interim adjustments settled in 1964 nor how it arrived at the new figure of 3 per cent.

10. The Panel reported in March 1974 with their proposals for a revised salary schedule. With regard to the interim adjustment, they recommended that in determining its amount account should be taken, first, of the progressive increase in income tax payable on increasing outside salaries, and, second, of the savings resulting to staff from the use of the commissary: they concluded that, for the next four 5 per cent increases to the index, adjustments should be made at 3 per cent only. Although, as noted in the preceding paragraph, the Panel were instructed to conduct the survey within the framework of the Guiding Principles, there is nothing in the dossier to show what effect paragraphs 49 and 50 had on their recommendations for the interim adjustment. Prima facie the recommendation as to increased income tax appears to be in accordance with paragraph 49, but the recommendation on commissary savings contrary to paragraph 50.

11. In April 1974 the Finance Committee considered the Panel's report and in particular its recommendation on the interim adjustment, with which the Director-General expressed his concurrence. The Committee heard and rejected the claims of the staff that the Panel had not adhered to the Guiding Principles. On this point the Director-General expressed the view that commissary savings should, in accordance with the Guiding Principles, be taken into consideration in establishing General Service category salary schedules and that the Panel, with a view to softening the impact, had allowed for it in the interim adjustments rather than in the new schedule. The Finance Committee adopted the Panel's recommendation and, announcing this on 11 April, the Director-General said that this decision would be implemented forthwith.

12. The FAO General Service category staff was disturbed by this decision and by what they considered to be the lack of consultation in general and in May they went on strike. The strike lasted for five days and was directed by a Joint Action Committee. It ended on 31 May with an agreement between the Director-General and the Joint Action Committee which covered a number of issues. On the interim adjustment a compromise was reached. The 3 per

cent recommended by the Panel was retained only for the three top grades. In the four lower grades the 3 per cent was raised to 4 per cent and over. The agreement on the interim adjustment was made subject to the approval of the Council. At its meeting in July the Council referred the matter to the Finance Committee and asked for a recommendation for the next session of the Council in November, until then the rates in the May agreement were to be provisionally applied.

13. The matter came again before the Finance Committee in November 1974. It is clear that by this time, if not before, two separate questions had been identified. The first was whether commissary savings should be taken into account at all, either for the purpose of the salary scales or for the purpose of the interim adjustment. The second question was whether assuming that commissary savings should be taken into account in the salary scales, they should also be taken into account in the interim adjustment. The answer to the first question depended upon, first, whether the savings were a fringe benefit, second, whether, if they were, they were a measurable benefit, third whether, if they were a measurable benefit, the inside benefits exceeded the outside. It is not quite clear from the minutes of the discussion what the attitude of the Director-General was on the first question. But on the second question he was quite clear. He told the Committee that he had changed his opinion and now considered that commissary savings should be treated as a fringe benefit and left out of the interim adjustment; he so recommended.

14. The Committee concluded, however, that it was unable to agree with the Director-General's position. It considered that commissary benefits represented a measurable benefit which should be reflected in salaries. "The Committee did, none the less, recognise the need to ensure that the degree to which commissary entitlements were taken into account should be established on a basis consistent with the requirements of the Guiding Principles." The Committee recommended that "commissary savings be reintroduced through adjustment to the salary index with respect to the present salary schedules".

15. In December 1974 the Finance Committee's recommendation came before the Council. The Council resolved that, until the new salary scales came into effect, "the rates of adjustments as previously decided by the Finance Committee and set out in its report to the Council will be operative". The Council further decided that, if this resulted in an underpayment in terms of the new scale, adjustment would be made but that no reimbursement would be sought of overpayments. In announcing this decision to the staff on 11 December 1974 the Director-General said that the rates of adjustment as "originally established by the Finance Committee" would be 3 per cent for grades G.1 to G.4 and 1 per cent for grades G.5 to G.7. (It is impossible to ascertain from the dossier when the figure of 1 per cent first came into existence or how it was arrived at.) "The decisions of the Council", the Director-General said, "depart to some extent from my own recommendations."

16. On 27 May 1975 an administrative circular was issued, giving the wage index figure for February 1975 and stating that accordingly two provisional increases were due over February salaries and that in conformity with the Council's decisions adjustments had been applied to each increase retroactively to 1 March of 3 per cent for G.1 to G.4 and 1 per cent for G.5 to G.7 and would be included in May salary payments. On 10 June the complainant appealed to the Director-General against the decision in the circular. The Director-General in his reply on 23 June referred to Staff Rule 303.131, which requires an appeal to be made within two weeks after the notification of the decision impugned. He wrote that, while the decision appealed against was formally announced to the staff on 27 May 1975, it had been previously conveyed to the complainant in November 1974 in her capacity as a member of the Joint Action Committee and consequently her appeal was time-barred.

17. In July 1975 the Council finally approved the new salary scale and decided that it should be introduced as from 1 February 1975. There is no documentary evidence in the dossier but it is stated by the complainant that commissary savings were calculated as an inside benefit and balanced against outside benefits such as firm shops, housing land, free electricity and telephone and Christmas gifts; the inside benefits were held to equal or exceed the outside benefits with the result that the latter were not taken into account in the salary scale.

Receivability:

18. The complainant claims relief under five heads. The first is for a refund of money deducted for the period from 1 March to 30 June 1975 in respect of commissary savings and the second is a like claim in respect of income tax. The remaining three claims are for declarations which, save in so far as they may be covered by the quashing of the decision impugned (if the Tribunal should decide to quash), the Tribunal has no jurisdiction to grant. The Organization objects to all the claims as irreceivable on three grounds as follows:

1. that they are out of time as submitted in paragraph 16 above, and also because of the announcement made on 11 December 1974 (see paragraph 15 above);

2. that since the decision impugned was taken by one of the governing bodies of the FAO in the exercise of its constitutional powers and represented a legislative enactment, it is outside the jurisdiction of the Tribunal; and

3. that the decision was not a non-observance of the complainant's terms of appointment or of any provision of the Staff Regulations and so does not fall within the jurisdiction of the Tribunal.

19. It will make for clarity to consider the last objection first. The complaint is that the sum paid in accordance with the circular of 27 May 1975 was insufficient. Either the sum payable was, as it purported to be, a portion of the salary to which the complainant was entitled by contract or else it was an ex gratia payment from the Organization given to the complainant as a favour. The latter alternative can be considered more appropriately under the second objection. The former alternative disposes of the last objection since it means that, if the sum was insufficient, there is a breach of obligation. A complaint that an instalment of salary is less than it should be because incorrectly calculated is of the same nature as a complaint that salary has not been paid when due. So the complainant is alleging a breach of the terms of her appointment.

20. It is convenient, while on this topic, for the Tribunal to express more precisely its opinion of what, assuming that the sum was incorrectly calculated, constitutes the breach. The regulation which would then be broken would be Staff Regulation 301.134. This is the regulation which requires the Director-General to fix salary scales on the basis of the best prevailing conditions. This is an obligation of a very general character and the Director- General has a very wide discretion as to how he will carry it out. The Tribunal has concluded, as stated in paragraph 2 above, that in carrying it out he must have regard to the Guiding Principles. These provide for interim adjustments to be ascertained by reference to a wage index. It may however be argued that this is a principle and not a command and that, provided that the Organization acts in accordance with the principle, it is not bound to adopt the exact method, e.g. the wage index and the 5 per cent increase, specified. The Organization contends that the wage index system was introduced by the Council in 1964 and that the Council "by the same authority may vary, modify, substitute or extend the system at any time".

21. This raises a large question which, since it has not been fully argued, the Tribunal will not now completely decide. It will assume that the argument that the Organization is not bound to adopt the method prescribed by the Guiding Principles, and that it did so in 1964 solely by its own choice, is correct. It does not however follow that it may thereafter vary the system at any time. Many of the obligations put upon the Organization by the Regulations are in general terms, leaving the Organization free to choose its own method of discharging them. The method chosen may be announced in an administrative circular or similar document or it may become established by practice. Once it is settled, it becomes, until it is altered part of the obligation. By giving reasonable notice the Organization may change the method, provided of course that the new method complies with the general terms of the obligation.

But until the change is made, an official is entitled to have the obligation discharged in the manner selected by the Organization itself, and to complain if it is not. The method proposed in the Guiding Principles and adopted by the Organization has never been changed. On the contrary it has been followed for a decade, and the terms of reference to the Panel were to keep within the framework.

22. The Tribunal will now consider the first objection. This is based upon two misconceptions. The first of them, which appears throughout the Organization's written pleadings, is that a decision of the Council which, when executed, will inevitably have an effect upon an official's rights, ipso facto alters those rights from the moment it is made and before it is executed. This is not so. As pointed out above in paragraph 7 it is the Director- General, not the Council, who vis-a-vis the official fixes his salary; this is so, whether or not in fixing the salary the Director-General is required to conform with decisions of the Council. Apart from the specific provision of Staff Regulation 301.134 the Council in general in its dealings with the staff acts through the Director-General to whom under the Constitution (Article VIII.2) the staff is responsible and who by General Rule XXXVII.1 carries out the Council's decisions. The way in which these decisions are recorded in the minutes is perfectly intelligible to anyone who has participated in the discussion or studied the minutes, but probably not intelligible (see, for example, the decision recorded in paragraph 15 above) to an official. Council decisions in staff matters are to be read as an instruction to the Director-General. It is his duty to put them into a form which clearly conveys to the official in precisely what way his rights are affected. It is the Director-General's decision which the official is entitled to have and which

constitutes the decision for the purposes of the time-bar imposed by Staff Rule 303.131.

23. The second misconception is the more important in that it ignores a basic principle. Every time the Organization commits a breach of an obligation, it necessarily decides to commit that breach. No matter how often a similar breach is repeated, it is not the same breach nor the same decision, and it gives rise to a fresh cause for complaint. If an official in ignorance of his rights allows an underpayment of salary to be repeated for many months without challenge, he can, as soon as he learns of his rights, complain about the next underpayment, though he will not be able to recover past underpayments. So if an organisation is in continuing breach a complaint alleging the breach may be made at any time, notwithstanding that relief will not be given against any consequences of the breach which occurred two weeks (or whatever the time limit is) before the complaint was made.

24. Certainly, it is true to say that a decision which is no more than a reiteration of a previous decision does not give rise to a new cause for complaint. A decision, however, is not a mere reiteration if it is one which leads to the commission of a new breach, even though the new breach is similar to previous breaches, or if circumstances have changed (e.g. by the interposition of a recommendation from an appeals committee) or if fresh material is genuinely presented for consideration. But the argument of the Organization in this case goes far beyond this. It amounts to an assertion that, whenever the breach committed is in pursuance of a policy previously announced, however long before, any official who has not within two weeks of the announcement complained about the policy, has lost his or her right for ever. In the opinion of the Tribunal the complainant complied with Staff Rule 303.131 by despatching her letter of appeal within two weeks of the decision impugned.

25. The second objection alleges that the decision impugned was taken by one of the governing bodies of the FAO in the exercise of its constitutional powers and represented a legislative enactment. On this the Tribunal makes three observations. The first is that the term "governing body" is not a term used in the Constitution of FAO and there is no definition of what it means. Under the Constitution of the FAO the supreme body is the Conference. The Council is described in General Rule XXIV as the executive organ of the Conference and Article V.3 of the Constitution gives it such powers as the Conference may delegate to it. There is no assertion in the Organization's reply of the delegation of any power that would justify the Council in depriving any official of any part of the salary to which under the regulations he or she is entitled.

26. The second observation is that the relations between the Organization and an official are governed by a contract made by the Director-General under the authority conferred upon him by General Rule XXXIX.1 and in which there are incorporated the Staff Regulations. The conception of a legislative enactment, in so far as it applies to matters within the jurisdiction of the Tribunal, means the power to alter unilaterally by a general enactment the relationship created by the contract. The Tribunal has recognised this power to the extent that it may affect those terms of the contract which appertain to the structure and functioning of the international civil service and to benefits of an impersonal nature and subject to variation, but not to the extent to which it purports to affect the individual terms and conditions of an official in consideration of which he accepted appointment. For reasons which appear below it is unnecessary to apply this distinction to the facts of this case.

27. The third observation is that the Council is primarily an executive body engaged in making administrative decisions within the framework of the Constitution and the Regulations. This is the framework within which it normally operates. In the present case there is no evidence that the Council was prepared to use a legislative power, if it had one, to override the Guiding Principles. On the contrary the evidence summarised in paragraphs 9 to 14 above is overwhelming that from first to last the Council's concern and that of the Finance Committee was that their decisions should be in accordance with the Guiding Principles. The Panel had been instructed to make the new survey in accordance with them and in the end the discussion was concerned with the difference between the Panel on the one hand, which thought that its proposals were consistent with the Guiding Principles, and the Director- General on the other, who thought that they were not. No one suggested that the discussions were a waste of time since the Council could do what it liked anyway. On 21 May 1974 the Director-General, addressing the staff and referring to an appeal against the proposed new scale on three grounds, the second of which was that the Guiding Principles had not been respected, said that this was a legal issue on which he would welcome a decision by the Tribunal.

23. The Organization's case on this point is confined to the bald statement given at the beginning of paragraph 25 and is undeveloped by any argument. If it is true, it means that there is no control whatever over the dealings of an executive body such as the Council with the staff of the Organization and no point in enquiring whether they are in

accordance with regulations which the Council has no need to observe. Since the Director-General in his dealings with the staff is subject to the control of the Council, it means that an official's contract gives him no rights which the Council cannot nullify and in particular that he is paid his salary ex gratia and not as a matter of contract. In the opinion of the Tribunal this is not the law.

The merits:

29. The Tribunal has stated in paragraph 2 above what it holds to be the correct approach to questions arising out of the application of Staff Regulation 301.134 and the Guiding

Principles. There can be no doubt that the decisions to be taken on such questions fall within the discretion of the Director-General. In considering the width of this discretion the Tribunal would have to bear constantly in mind two features peculiar to this particular subject. The first is that the comparison of wage rates, especially when they include fringe benefits, is a difficult task which may often involve delicate choice between several solutions of almost equal merit. The second is that the text to be interpreted is a set of principles and not of precise requirements. Where it is alleged that the Director-General has made an error of law in their interpretation, the Tribunal will consider the text broadly and will be careful not to put the Director-General's discretion into a legal straitjacket.

30. Under the Guiding Principles the calculation of an interim adjustment is very simple: for every 5 per cent by which the wage index rises, there is a corresponding increase of 5 per cent in the official's salary. When therefore the increase in the complainant's salary is reduced to 1 per cent, some explanation is clearly called for. It has not been forthcoming. Except on a minor point covered by paragraph 34 below, the Organization has presented no case on the merits. It submits that "the method applied by the Council to arrive at its determination of General Service remuneration cannot be called in question in these proceedings" and so deems it to be unnecessary to discuss the question of commissary savings and the incidence of income tax. The Organization has exhibited virtually no documents and the Tribunal is dependent for its knowledge of the facts on the documents exhibited by the complainant. These are mainly in the form of extracts; there is not, for example, a complete copy of the Panel's report.

31. It is not for the complainant nor for the Tribunal to construct a case which the Organization does not wish to put forward. The Tribunal has nevertheless examined the documents exhibited by the complainant to see whether they suggest any explanation of the reduction from 5 per cent to 1 per cent which could serve to bring the Director-General's decision within the spirit, if not the letter, of the Guiding Principles. Some reduction of the 5 per cent could almost certainly be justified by reference to the progressive increase of Italian income tax; paragraph 49 of the Guiding Principles appears to contemplate that this would be a factor to be taken into account. Paragraph 50 on the other hand indicates that fringe benefits should be left out of account. Commissary savings, if they are to be taken into account at all, can be taken into account only as a fringe benefit. If, contrary to what is suggested in paragraph 50, they are to be taken into account as a fringe benefit in the interim adjustment, they must surely comply with paragraph 30, that is to say, as an inside benefit they must be shown to exceed corresponding outside benefits. There is no indication in the dossier that any such comparison was made for the purposes of the interim adjustment. Nor is there any calculation to be found showing what part of the reduction is attributable to the incidence of Italian taxation.

32. Indeed, the only conclusion that can be drawn from the material in the dossier is that the reduction of the 5 per cent was either arbitrary or designed to serve some purpose of which the Tribunal is ignorant. What was originally proposed in the Panel's report was a flat rate of 3 per cent for all grades. It is noteworthy that this is simply a repetition of the figure decreed by the Council as a temporary measure before the Panel began its investigation. The Report said that four increases at the reduced rate of 3 per cent would "absorb" the commissary savings; this suggests that the reduction was intended as some sort of recoupment of wage increases given in the past; indeed, the factor to be taken into account was earlier described as "the progressive absorption" of the savings. There is nothing in the dossier to show how the decision was taken to reduce the 3 per cent to 1 per cent in the case of the three top grades. Presumably it was thought that the three top grades with higher salaries could absorb more than the lower salaries. But there is nothing in the Guiding Principles to suggest that in the interim adjustments the higher paid should fare proportionately less well than the lower paid.

33. There is also in the material disclosed some indication that what the Council and its Finance Committee were concerned with was the main surveys rather than the interim adjustments and that the amount of the latter did not

matter so long as they fitted in with the former. It is conceivable that on a broad interpretation of the Guiding Principles as a whole such an attitude could be justified. But it is impossible for the Tribunal to speculate about this or any other point. The complainant has made out a prima facie case which has been left unanswered. The only conclusion which the Tribunal can draw is that the calculation upon which the decision impugned was founded was made arbitrarily and in disregard of the Guiding Principles and of the system which the Council had itself laid down, and that consequently the decision must be quashed.

34. The Organization contends that since the increases covered by the decision impugned were increases to salary in February 1975 and thereafter and since in June 1975 it was decided to make the new salary scale retroactive to 1 February 1975, the decision impugned was thereby "superseded". The legal effect of a supersession is not developed; when the

Organization has calculated a payment of salary and announced it, the officials entitled to it acquire a right which the Organization has no power to destroy. It is true that the increases awarded under the circular were described as provisional, but it appears that the Council also decided that any overpayment need not be reimbursed. If there is anything in this point, it should have been properly argued.

DECISION:

For the above reasons,

It is ordered:

1. that the decision of the Director-General of 2 April 1976 be quashed;

2. that the pensionable salary payment made to the complainant on 28 May 1975 be recalculated on the basis that there should have been a 10 per cent interim adjustment instead of a 2 per cent, and that payment be made accordingly; and

3. that the other claims of the complainant be dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 21 November 1977.

M. Letourneur
André Grisel
Devlin

Roland Morellet

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