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

FORTY-THIRD ORDINARY SESSION

In re DE LOS COBOS and WENGER

Judgment No 391

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints brought against the International Labour Organisation (ILO) by Mr. Luis de Los Cobos and Mrs Pauline Wenger on 7 October 1978, the ILO's reply of 18 December 1978 the complainants' rejoinders of 28 February 1979 and the ILO's surrejoinder of 23 May 1979;

Considering that the two complaints relate to the same matters and should be joined to form the subject of a single decision;

Considering the applications to intervene filed by :

P. Agostini
J. Ayusawa
E. Borer
R. Caldwell
D.A. Depaoli
M. Dubuis
L.M. Echevarria
I.M.C.S. Elsmark
A. Erbuke
K.E. Gordon
J. Grandjean
M.B. Guerin
J. Jones
S. Italici
J-P. Klein
B. Märsäter
I.A. Martin-Cedillo
C. Oliveira
P.D. Pereira
S. Price
H.S. Sariyan
K. Schramm
P. Sutcliffe
A.G. Taylor
J. Tallien de Cabarrus
M-O. Wells
J. Abakoumoff
A.B. Ahlborn
A. Ayusawa
N. Bianco
T. Bleuze
F. Uehara-Bora
A. Bosson
R.P. Bouche
C. Bouvier
E. Boylan
J. Brooks
P.A. Bryiers

J. Cabrit-Custot
D. Cartier
S. Cazelais
A. Cecconi
R. Cerf-Rudowicz
J. Chailleux
S.L. Champenois
C. Chan
B.E.A. Cochet
E. Comte
F. Cottet-Dumoulins
E. Coutelle
P. Crottaz
S.F. Dallemagne
G. Davidson
V.M. Davies
Y. Dechavanne
S.C. Devincenti
J.P. Drevard
M. Duenas de Araujo
G. Fraize
R. Geiger
M. Giorgi
M-T. Girod
C. Gonnet-Limousin
J. Gorka
M .W. Graham
C.J. Guiguet
M. Hamouda
J. Hartshorn
D. Haywood
R. Hecquet
B. Hilton
S.A. Hudson
I.L. Jaccard
S.O. Janssens
G.M. Kitching
C. Laborde
E. Leuenberger
B.J. Lewis
N.R. Louis-Fernand
L.J. Lozano
J. de Markos
R. Marti
J. Martin-Erbina
M. Mateo
M. Mathez
M. Meister
L.M.L. Moachon
N. Monod
A.F.G. Moranges
G. Morgan
R. Morizot
V. Narasimhan
J. Neeser
O.E. Niegemeier
C. Nussbaumer

B. Ottersgad
P. Pearse
S.J. Peters
N. di Pirro
R.A. Plunkett
H. Raffestin
H. Raux
M. Richard
M. Roberts
A. Sanchez
J. Sang
L. Schael
S. Schenk
D.C. Sermondade
M. Simon
H. Skybar
A. Stauffer
D.E. Streeton
C. Thomasson
J.M. Thompson
M. Touza
M. Verger
S. Walt;

Considering Article II, paragraph 2, of the Statute of the Tribunal and Articles 3.16, 3.2, 4.8, 14.4 and 14.5 of the Staff Regulations and Staff Rules of the International Labour Office;

Having examined the documents in the dossier and disallowed the complainants' applications for oral proceedings;

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

A. By Circular No. 144, Series 6, of 21 July 1978 the staff of the International Labour Office, including the complainants, were informed that in accordance with Article 4.8 of the Staff Regulations the Director-General had decided to make a temporary modification in the terms of their contracts of employment: four working days during the period from 1 August 1978 to 31 January 1979 were to be days of leave and unpaid. The net salary corresponding to the four days was to be deducted each month during that period. The amount to be deducted was equivalent to 2.2 per cent of the net salary of officials in the General Service category and to 2.2 per cent of the net salary, as increased or reduced by post adjustment, of officials in the Professional and higher categories. No deduction was to be made from benefits and allowances, and the amount of contributions payable to the Joint Staff Pension Fund and to the Staff Sickness Fund would not be affected. The decision was to apply to all serving officials covered by Article 4.8 of the Staff Regulations except experts, General Service category officials serving in external offices, part-time officials, officials on leave without pay, and officials taking early retirement or accepting termination of their contract without limit of time.

B. The complainants found that the effect of the decision was to reduce the amount of remuneration paid to them on 20 August 1978, the date of the decision they impugn. On 18 September they appealed to the Director-General. The appeal was dismissed on 21 September.

C. The Director-General's decision was notified by circular and no amendments were made to the rules in force. On several grounds the complainants believed the decision to be unlawful. It overrides Article 3.16 of the Staff Regulations, which sets out an exhaustive list of the deductions which may be made from salary. The reduction on net salary constituted a breach of the acquired rights which the complainants enjoy under Articles 4.8 and 14.5 since the guarantee of payment of that salary was a factor of decisive importance to them in accepting appointment. Again, although under Article 14.4 no exception may be made to the Staff Regulations unless the official consents, the decision was taken at the instigation of the Staff Union. The Staff Union did consult ti staff as a whole by circulating a questionnaire, but the procedure was tainted with many flaws and at variance with the Staff Union's own rules. The decision was tainted with a mistake of law in that it made the alleged will of the majority a pretext for damaging the interests of individual officials. It was in breach of the rule requiring consideration for service

rendered. Because exceptions were made to it, it was in breach of the principle of equality. It was in breach of Article 3.2 of the Staff Regulations, which stipulates that salaries shall be fixed at a yearly rate and paid in twelve equal monthly instalments. Nor did it serve the Organisation's interests since it made no improvement in the services rendered to member States. The complainants ask the Tribunal: (a) to set aside Circular No. 144, the decision to apply it to individual officials, and any salary reductions made from August 1978; (b) to order the ILO to pay to the complainants the salary wrongfully withheld from them from August 1978; and (c) to order the ILO to pay each of the complainants 10,000 Swiss francs as costs.

D. In its reply the ILO states that the decision was proposed by the Staff Union on behalf of a large majority of the staff. It was prompted by the financial crisis which the ILO faced on the withdrawal of the United States from membership. It was taken with the unanimous approval of the Programme, Financial and Administrative Committee of the Governing Body. Its effect was to relieve the Office of the need to dismiss nearly 50 officials, including some of the lowest paid. It may be likened to a declaration of compulsory unemployment in private industry since it consisted in reducing working hours and making a corresponding reduction in salary. It was taken in exercise of the authority conferred on the Director-General by Article 4.8. That is the only material rule, and it makes it possible to put salary outside the purview of the contract of employment. The Director-General fulfilled the formal and procedural requirements: he secured the Governing Body's approval. There was no need to amend the Staff Regulations. Evidence of action and support by the Staff Union is material only insofar as it reveals a striking concordance of opinion between the Staff Union and the Director-General about the gravity of the crisis and the action required. There was no breach of the acquired rights referred to in Article 4.8 - which merely means that no modification may have retroactive effect to the prejudice of the staff - and of the rule requiring consideration for service rendered. In any event the Director-General might properly have based the decision to reduce salary, not on Article 4.8, but solely on the reduction in hours of work or might even have made a strict application of that article to reduce remuneration without reducing hours of work. Lastly, the principle of non-discrimination, which the complainants also plead, requires not merely that those in like case should be treated alike but also that those who are not in like case should not be treated alike. Those to whom the impugned decision did not apply were governed by different sets of rules. The ILO accordingly asks the Tribunal to dismiss the complaints as unfounded.

E. In their rejoinder the complainants point out that the ILO has given no statistical details concerning the use to which the deducted sums were put. They believe that the ILO contradicts itself: on the one hand, it says that the Staff Regulations gave the Staff Union no authority in the matter; on the other, it acknowledges that the Director-General did base his decision on the will of the staff as revealed by their response to the Staff Union's questionnaire. But the consultation procedure was unlawful and tainted with serious flaws. The complainants continue to contend that their acquired rights have been infringed. The authority which Article 4.8 confers is not unlimited and, as is clear from the text, the Director-General may not so exercise it as to infringe the other provisions of the Staff Regulations. The decision to reduce salaries was a breach of the principle whereby the terms of the contract of employment and the provisions of the Staff Regulations relating to salary may not be altered. Moreover, since the volume of work was not reduced the staff were not fully paid for the services rendered. For the same reason there was no compulsory unemployment. The analogy with the private sector is also false in that, where there is no collective agreement, the only safeguard the official enjoys is the inviolability of his salary. The ILO's plea that there was a crisis is groundless since the United States gave two years' notice of its withdrawal from membership. There is something self-righteous about the ILO's contention that it was safeguarding employment, and the Organisation is casting aspersions on the complainants by charging them with lack of solidarity. What the complainants are in fact doing is defending the international civil service against a quite improper measure which was illegal in form, bred further confusion and administrative difficulties to the prejudice of the staff, and was in no way in the ILO's interests.

F. In its surrejoinder the ILO argues that a distinction has to be drawn between the level of salary, which was a factor of importance to the staff member in accepting appointment and to which he does have an acquired right, and the amount of salary, which may vary with circumstances without really affecting the salary level. The complainants have failed to refute the analogy with the authority of management in private industry. Moreover, the reduction in salary, which did not last long anyway, was linked with other measures such as the grant of four days' compensatory leave, and so there are no grounds for complaint. What the complainants are really saying is not that the decision was unlawful but that it was undesirable. Lastly, their reasoning is mistaken in that it assimilates contractual to acquired rights.

CONSIDERATIONS:

The procedure

1. Each of the complainants has filed a complaint against the Organisation and a rejoinder which, with immaterial differences, rest on the same facts and make the same pleas and claims. The ILO has filed a single reply and a single surrejoinder. The Tribunal will therefore join the complaints and give a single decision.

2. The ILO states in its reply: "... the least that can be said" about the complainants "is that they do not seem to care much about the objectives and principles for which the ILO stands". The complainants ask the Tribunal to have that sentence expunged on the grounds that it is insulting. In fact, although the sentence they object to casts doubt on their agreement with the ILO's aims, it puts no slight on their honour. It is not insulting; indeed it does not even infringe the rules of courtesy which the parties must observe. There are therefore no grounds for expunging it.

3. The Organisation doubts whether there is any substance to the complaints and hence whether they are receivable. It argues that, if the complainants take the cash equivalent of the compulsory leave days, all they will have done is make a "loan", as it were, to the Organisation, and one "bearing a high rave of interest" at that. But that is just a hypothesis and dees not mean that there is no substance to the claims for relief.

The action taken by the Staff Union

4. The complaints argue that the Staff Union acted at variance with the "objects" and "means of action" laid down in its own rules in proposing reductions in salary and in hours of work which, though intended to prevent the dismissal of some members of the staff, were to the prejudice of the others. For one thing, they say, the Staff Union ought to have consulted only its own members, not the whole staff, obtained replies which bore officials' names and were signed by them, and so exerted supervision over the voting.

The Tribunal is not competent to pass judgment on the activities of the Staff Union and Staff Union bodies. The complainants' pleas are material only insofar as the Organisation gave weight to the Staff Union's resolutions, and the Tribunal will consider those pleas later, if need be, in the context of its review of the impugned decision.

Acquired rights

5. Article 4.8 of the Staff Regulations reads:

"The terms of any contract of employment may be modified, without prejudice to the acquired rights of officials, by the Director-General in order to bring them into conformity with any measure relating to the conditions of employment of officials which the General Conference or the Governing Body may decide to apply to serving officials."

The complainants contend that the Director-General infringed their acquired rights, in breach of that provision, by reducing their salary by 2.2 per cent during the six-month period from 1 August 1978 to 31 January 1979.

6. A right is acquired when he who has it may require that it be respected notwithstanding any amendments to the rules. A right is acquired, for example, in one or other of the following circumstances.

First, a right should be considered to be acquired when it is laid down in a provision of the Staff Regulations or Staff Rules and is of decisive importance to a candidate for appointment. To impair that right without the official's consent is to impair terms of appointment which he expects to be maintained.

Alternatively, a right will be acquired if it arises under an express provision of an official's contract of appointment and both parties intend that it should be inviolate. Thus not all rights arising under a contract of appointment are acquired rights, even if they relate to remuneration: it is of the essence that the contract should make express or implied provision that the rights will not be impaired. Thus there may be an acquired right to application of the principle that an allowance will be paid, but not necessarily to the method of calculation - in other words, to the actual amount - of that allowance.

7. The impugned decision reduced salary by 2.2 per cent over a period of six months, and that salary was determined, on the appointment of each of the complainants and subsequently, under his or her contract of employment. The right to payment of salary is therefore not derived from any provision of the Staff Regulations or

Staff Rules, but contractual, and so it is immune to amendment only if the parties intend that it should be inviolate.

At the time when the complainants' basic salary was determined, and later when it was adjusted, the parties are unlikely to have had in mind the circumstances in which the ILO was led to take the impugned decision. But, had they done so, would they ordinarily have intended that the amount of remuneration should be inviolate?

The reduction in salary was both slight and short-lived. It is clear that, being long-standing officials who over the years had been paid salary increments and increases in allowances, the complainants still received during the period of the reduction a sum higher than that of their basic salary. Moreover, the decision was taken from a desire to keep on officials who, but for the deductions from salaries, would have been dismissed. It was therefore true to the aims of the ILO, which, in the interests of workers, not only safeguards their employment but protects its terms. It appears from the complainants' own statements that the ILO was right to assume that many of the headquarters staff were in favour. It is therefore immaterial whether or not the action taken by the Staff Union came within the scope expressly prescribed by its rules and whether its method of consulting the staff was beyond reproach. It is therefore quite within the realm of possibility that, had the parties, at the time when the contracts of employment were concluded and revised, envisaged the straitened circumstances in which the ILO was - in 1978 - to be placed, they would not have treated the agreed salary as inviolate. On the contrary, they would have consented to its slight and temporary reduction. In other words, the complainants have failed to prove any breach of acquired rights.

The rule requiring consideration for services rendered

8. According to the rule requiring consideration for services rendered, which is a rule of international as well as national civil service, the official's right to remuneration depends on the performance of the work he is given to do. There is no need to consider whether it is a breach of the rule to reduce remuneration without reducing working time. In this case both salary and working time were reduced. Whatever may have been the reasons for granting compulsory leave, there was no breach of the rule.

The principle of equality

9. There are several categories of officials to whom the impugned decision did not apply: experts, General Service category officials in the external offices and officials who had voluntarily left their employment or accepted part-time employment. The complainants do not belong to any of those categories and therefore allege discriminatory treatment.

The argument fails. The principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike. It is not violated if officials in different circumstances are treated differently. The ILO's plea is correct: the staff members who were exempt were in a position different from that of the complainants owing to special circumstances which warranted the difference in treatment. Unlike the complainants, most experts are usually paid out of funds obtained from outside the ILO. The General Service category staff in the field offices were exempted because their remuneration is lower or on social grounds. The others, who the complainants say have fared better than they, voluntarily helped in easing the ILO's financial burden.

The other pleas

10. The complainants contend that the ILO should not have taken account of the Staff Union's resolutions, which were not properly adopted, did not express the wishes of the whole staff and in any event should not have brought about any change in the position of the individual officials affected by the impugned decision. The most that can be said is that the plea would be material if the sole basis of that decision had been the resolutions adopted on the proposal of the Staff Union. But it was not. It is clear from the evidence that the ILO treated those resolutions as only one of several considerations, and, in view of what is said above, there was nothing improper about that. In fact the Organisation was moved not only by respect for the wishes of a more or less large part of its staff but above all by objective considerations which it rightly took to be true to its own aims.

11. The complainants further allege breach of Articles 14.4 and 14.5 of the Staff Regulations. They do not say in what the breach consists. Those articles, which relate to exceptions and amendments to the Staff Regulations, do not preclude the application of Article 4.8, which relates to the amendment of the contract of employment and affords a basis for the impugned decision.

12. Although Article 3.2 of the Staff Regulations states that salaries shall be paid in twelve equal monthly instalments, it applies only to salaries "fixed at a yearly rate". The complainants' salaries were reduced by 2.2 per cent only over a period of six months, and so the article is not material.

13. The complainants are mistaken in contending that the list of deductions from salary set out in Article 3.16 of the Staff Regulations is exhaustive. That article is subject to the special provisions of Article 4.8, and it was under Article 4.8 that the decision was taken.

14. It is immaterial that the decision made no formal amendment to the Staff Regulations or to individual contracts of employment of the staff members to which it applied. First, it was a temporary measure, and so there was no question of amending the Staff Regulations. Secondly, what happened was that individual contracts of employment were subject to implied amendment for a period of six months, as provided for in Article 4.8.

15. Lastly, for the reasons already given, it is mistaken to plead that the decision was not in the ILO's interests. Although it was not of benefit to member States, it was in keeping with the ILO's aims, and so with its interests as construed by its founders.

Costs

16. Since the complaints are dismissed the complainants will not be awarded costs.

The applications to intervene

17. Because the complaints are dismissed, so too are the applications to intervene.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

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

Delivered in public sitting in Geneva on 24 April 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy

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