FORTY-THIRD ORDINARY SESSION

In re CONNOLLY-BATTISTI (No. 8)

(Execution of Judgment No. 323)

Judgment No. 401

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Food and Agriculture Organization of the United Nations (FAO) by Mrs. Norah Connolly-Battisti on 5 January 1979, the FAO's reply of 12 April, the complainant's rejoinder of 12 June, the FAO's surrejoinder of 24 July, the complainant's communication of 31 July and the FAO's comments thereon of 19 September 1979;

Considering the questions addressed to the parties by the Tribunal on 10 September 1979, the FAO's reply of 28 November and the complainant's reply of 26 November 1979;

Considering Judgments Nos. 294 and 323 of the Tribunal;

Considering Article II, paragraph 5, of the Statute of the Tribunal and FAO Manual section 308;

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. At the beginning of 1975 two provisional cost-of-living adjustments were made in the salaries of General Service category staff in the FAO. They took effect on 1 March 1975, pending the introduction of a new salary scale which was then under study. The cost-of-living index had twice risen by 5 per cent. But the arrangements for calculating salaries - which provided, for example, for reductions to take account of potential savings on "commissary" purchases and of the impact of Italian income tax - were such that the salary of the complainant, who was then at the highest step, step XI, in grade G.6, rose by only 2 per cent. She took her appeal right up to the Tribunal, which by Judgment No. 323 (Connolly-Battisti (No. 5) v. FAO) ordered that her salary should be "recalculated on the basis that there should have been a 10 per cent interim adjustment instead of a 2 per cent".

B. The new salary scale was introduced in June 1975 with retroactive effect from 1 February 1975. At the same time three new steps, numbered XII, XIII and XIV, were added to grade G.6, and so the complainant advanced to step XII. She nevertheless claimed step XIV on the grounds that she had been kept for seven years at step XI. By Judgment No. 294 (Connolly-Battisti (No. 4) v. FAO) the Tribunal allowed that complaint and ordered that she should be "treated as if on 1 February 1975 she had been at step XIV in grade G.6 for a period of five months".

C. The FAO revised its calculations. It found that the complainant's annual pensionable remuneration, plus non-residence allowance (216,000 lire), after applying the 2 per cent adjustment, amounted to 11,545,000 lire and that, had a 10 per cent instead of a 2 per cent adjustment been applied, it would have been 12,602,000 lire. However, because of the introduction of the new salary scale and her advancement to step XIV the salary paid to the complainant retroactively from 1 February 1975 amounted to 12,636,000 lire, a figure higher than that to which she was entitled under Judgment No. 323. The FAO concluded that no further payment was due to her. The complainant, on the other hand, believes that the calculation should be based on her net basic salary. On 1 February 1975 that salary, in round figures, amounted to 8,331,000 lire. After the 2 per cent adjustment it amounted to 8,497,600 lire. With the 10 per cent adjustment it would have risen to 9,164,100. With the creation of the new steps, however, the net salary for step XIV of grade G.6 - 9,243,000 lire - is 7.35 per cent higher than the net salary for step XI under the new salary scale - 8,610,000 lire. The complainant takes the view that the figure of 9,164,000 lire should be increased by 7.35 per cent so as to give her ane1 salary of 9,838,000 lire, as against the net salary of only 9,243,000 lire which she is paid at step XIV under the new scale.

D. In support of her claim the complainant argues that the 10 per cent adjustment awarded by the Tribunal should be applied to the same figure as that to which the 2 per cent adjustment, to which she objected, was applied,

namely to her net salary and not to her "pensionable remuneration". The latter is a purely artificial figure which is determined only for the purpose of calculating pension rights. She points out that the net salary for step XI under the new scale - 8,610,000 lire (the exact monthly figure being 717,525 lire) - is lower than what it would have been under the old scale after application oi the adjustment ordered in Judgment No. 323 (9,164,000 lire). The introduction of the new scale cannot have the effect of reducing her remuneration. She therefore asks the Tribunal to order that her salary be determined by her own method of calculation with effect from 1 March 1975.

E. In its reply the FAO maintains that its method of calculation is correct. Judgment No. 323 stated that it was the "pensionable salary payment" which was to be recalculated. That salary payment differs from "pensionable remuneration", or gross salary, merely in that the latter includes the non-residence allowance. The complainant is mistaken in basing her calculations on net salary. Even if calculated on that basis, however, the new net salary paid to her is higher than the former net salary with the 10 per cent increase. Judgment No. 323 related only to the period from 1 March to 30 June 1975, and from 1 July 1975 it was the new scale, to which the complainant does not object, which applied. The complainant's claim for the 7.35 per cent increase - i.e. the difference between the salary for new step XII and that for new step XIV - has no bearing on this case, which relates to the method of calculating the provisional salary from 1 March to 30 June 1975. The final salary payable under the new scale is higher than the provisional salary, even with the 10 per cent increase, and so the FAO believes that it has executed Judgment No. 323 correctly.

F. In her rejoinder the complainant disagrees with the FAO's reasoning. She maintains that "net" salary is indeed pensionable salary since it is from that amount that her own 7 per cent contribution to the pension fund is, like other sums, deducted. Since the new scale, including the new steps, was retroactive in effect from 1 February 1975, the calculations should be made as if on 1 March 1975, when salaries under the old scale were adjusted, she had already been at step XIV, the salary for which is 7.35 per cent higher than the salary for step XI. According to the FAO's calculations the reductions mentioned in A above are still made, although in Judgment No. 323 the Tribunal held them to be unlawful. Furthermore, the new net salary for step XI - 8,610,000 lire - is lower than the former salary for that step with the 10 per cent increase - 9,164,100 lire - and so the effect of the new scale is to perpetuate the injustice which Judgment No. 323 sought to remove.

G. In its surrejoinder the FAO points out that the adjustments of 1 March 1975 were provisional and that the effect of the retroactive application of the new scale was to ensure that for the period in question the complainant was paid slightly more than the old salary increased by 10 per cent. The question of the reductions is therefore now immaterial.

H. In a supplementary memorandum the complainant objects that the termination indemnity should not be regarded as a postponed form of salary which should be taken into account in determining the amount of net salary paid in the course of the staff member's career. In its reply the FAO abides by its contention. It argues, among other things, that in the event of promotion from the General Service to the Professional category the staff member is paid the termination indemnity as determined at the date of promotion. In reply to the Tribunal's questions the parties state the net amounts that were paid to the complainant as salary (not including non-residence allowance) from March to June 1975, namely, 694,272 lire in March and April; 736,002 in May (including retroactive payment of an increase amounting to 13,910 lire a month); 708,182 in June; plus retroactive payment of 9,343 lire for each of the four months made in July 1975 on account of the introduction of the new salary scale; a further retroactive payment of 17,609 lire for each month made in August 1975 on account of the complainant's promotion to step XII, and, lastly, a further retroactive payment of 35,116 lire for each month made in August 1977 on account of the complainant's move from step XII to step XIV in performance of Judgment No. 294.

CONSIDERATIONS:

1. The complaint is that the Organization has not complied with the Tribunal's Judgment No. 323. The judgment, so far as material, ordered "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". The Organization has made the recalculation and in doing so has pointed out that "pensionable salary" is not a term used in the Organization's terminology. In this terminology there is "gross salary", which when diminished by a staff assessment becomes "net base salary"; and which, when increased by various other items and turned into United States dollars, becomes "pensionable remuneration". However, the main issue raised by the complaint does not relate to the calculation but to the question whether payment has been made. Under the system adopted by the Organization the only money which is actually transferred each month is the net

base salary payable in Italian lire; the other items are recorded in a payroll status form. It is therefore simplest to examine the question by looking at the monthly figure of net base salary. When the correct conclusions are drawn from this examination, there should be no dispute about the corrections if any are needed, to be made in the payroll status. It may also be noted that in the passage quoted above the judgment refers to 10 per cent and 2 per cent. It should more correctly have referred, as the Organization does, to 5 per cent plus 5 per cent (hereinafter called the "higher adjustment") and 1 per cent plus 1 per cent (hereinafter called the "lower adjustment").

2. The calculation made by the Organization shows that the monthly payment with the lower adjustment amounted to 708,182 lire and that with the higher adjustment it should have amounted to 765,417 lire. This means that in respect of each of the months affected the Organization had under Judgment No. 323 to pay to the complainant 57,235 lire. The Organization does not contend that these sums have been paid in the sense that there has been any transfer of lire earmarked as such payments. The judgment ordering payment was not delivered until 21 November 1977. Before that date a new salary scale had been brought into force with retroactive effect from 1 February 1975 and payments had been duly made under it. The Organization does not contend that the effect of the retroactivity was to destroy the right already acquired by the complainant to the monthly sum under the old scale with the higher adjustment. Its contention is that the retroactive payment under the new scale, amounting as it did to 770,250 lire per month, exceeded the liability, including the higher adjustment, under the old scale: this means that the retroactive payment must now be treated as satisfying the requirements of Judgment No. 323. Put another way, the complainant, having accepted payment under the new scale, which payment exceeds that due under the old scale, cannot claim in addition to the new the whole or any part of the old. The complainant's main response to this is that at best only a small and insufficient part of the retroactive payment can properly be set against the existing liability under the old scale. To understand the nature of this response it is necessary to examine in more detail the salary structure of the Organization.

3. This structure is fully described in Judgment No. 323. A salary scale is fixed by the Director-General on the basis of a survey of comparative salaries in Rome and a table is prepared giving a figure for every grade in the General Service category and for every step in the grade. The table is incorporated in the staff regulations and so becomes part of the Organization's contracts with its staff. The table is renewed - normally about every four years, so that it is convenient to call the period a quadrennium - by means of a fresh survey. It is, however, obvious that with current rates of inflation salaries need to be advanced quite rapidly during a quadrennium. So there is provision for interim adjustments, made on the basis of a local wage index, during the quadrennium. For this purpose the figure in the table is taken at 100 and percentages are applied to it to correspond with rises in the wage index. The percentages given in the part of Judgment No. 323 quoted in paragraph 1 above were percentages of this sort. When a new survey produces a new table the new figures are set at 100 and the process begins again.

4. The weakness in this system is that the local wage index and the quadrennial surveys are not connected. In trying to keep pace with inflation one may run faster than the other. It is possible that the last interim adjustment of a period may produce a figure far below that produced by the new survey, so that there may have to be a big jump from the last month of the old quadrennium to the first month of the new. Or, as seems to have happened in the present case, it may be the other way round: then the figure for the last month of the old may exceed the figure for the first month of the new, thus causing the new quadrennium to be initiated by a reduction in staff salaries. Naturally the Organization would favour a smooth transition and that would be best achieved if the figure which ends the old quadrennium is slightly, but only slightly, below the figure which starts off the new. This may have been one of the factors which caused the Finance Committee of the Organization in 1974 to tamper with the mechanism of the interim adjustments. Or it may be that the Committee considered that earlier interim adjustments had been too high because they had not given weight to a fringe benefit known as "commissary savings", i.e. the benefit to the staff of being able to buy at a duty-free shop. Whatever the reason, the Organization, beginning with February 1975, reduced the interim adjustments from the 5 per cent at which they should have been calculated to 1 per cent. This reduction, whether or not it was so intended, did in fact result in a figure slightly below the figure which was to start off the new quadrennium. The Tribunal considered that the Organization had not the power which it claimed to alter the interim adjustment in this way and by Judgment No. 323 ordered the payment of the 4 per cent balance.

5. The new table was introduced by Administrative Circular 75/57 dated 24 June 1975 to take effect from 1 February 1975. The complainant was then at step XI of grade 6 and the figure given in the table for this step is 717,525 lire. If the Organization had been correct in fixing her last interim adjustment, the figure would have exceeded the 708,182 lire which that adjustment produced. But it falls substantially below the 765,417 lire which the Tribunal has held the adjustment should have produced. If the matter rested here, there would be a substantial

sum still to be paid under Judgment No. 323.

6. But the circular 75/57 contained also another and different sort of provision, specially benefiting the complainant and a few other senior officers, which the Organization contends, and the complainant denies, should enter into the calculation. This other provision was the subject of a dispute between the parties, which was resolved by the Tribunal in Judgment No. 294 where the provision is fully considered. Grade 6, to which the complainant belonged, was anomalous in having only 11 steps. The new provision brought grade 6 into line with most of the others by increasing the number of steps to 14. The complainant's seniority was such that she was forthwith elevated (though retroactive effect was not given to the elevation until August 1977 after Judgment No. 294 had been pronounced) to step XIV where the monthly salary is 770,250 lire. The situation is therefore that the monthly sum of 57,235 lire due to the complainant under Judgment No. 323 has been met only as to 9,343 lire by the rise in the general level of salaries. As to the much larger balance of 47,892 lire, this can be said to be satisfied only if there can be applied to it the fruits of the complainant's personal advancement to a higher step. The complainant contends that the two things are quite separate. She claims therefore to be entitled to her salary calculated under the old scale with the addition of 7.35 per cent, which she describes as "the parametric distance between step XI and step XIV".

7. The complainant's argument ranges over a wider field than this. The Organization's methods of calculating salary and related benefits are now so complicated as to leave many avenues open to exploration by anyone who, like the complainant, makes any serious attempt to understand the computation. But the only issue that arises in this case is whether or nor Judgment No. 323 has been satisfied and this in the opinion of the Tribunal depends entirely on the point stated in the preceding paragraph. This in turn depends upon the effect of the retroactive payment made in consequence of circular 75/57.

8. In so far as it affects the past the circular cannot be treated as a decision by the Director-General binding on the complainant. As to the past it can be treated only as an offer which the staff member is free to accept or reject. Both sides have quite naturally taken it for granted that if, but only if, the circular offers improved terms, it will be accepted. In the opinion of the Tribunal it is a single and indivisible offer which the staff member must accept or reject as a whole; there are not two separate offers, one covering the general increase in salary levels and the other offering the special increase resulting from the extension of the steps in grade 6. It would seem from paragraph 3 of Judgment No. 294 that the decision to extend the steps was not an isolated one, but was derived from the methodology on which the new survey was based as a whole. However this may be, all that is strictly relevant is the manner in which it was introduced into the regulations, thereby becoming part of the complainant's contract of employment. This was done simply by the substitution of a new salary schedule for the old. The complainant can choose between the two schedules. If she chooses the old, she cannot claim a salary appropriate to a step XIV since there is no such step in it. If she chooses the new, she must abandon her rights under the old. She cannot pick from the new the factors in it which she likes and apply them to the old. It is to her advantage to choose the new and she has clearly done so.

DECISION:

For the above reasons,

The complaint is 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.

André Grisel
Devlin
H. Armbruster

Bernard Spy