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

SIXTY-SECOND ORDINARY SESSION

In re BEATTIE and SHEERAN

Judgment 825

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Roger Beattie and Miss Lynette Merrilyn Sheeran against the International Labour Organisation (ILO) on 30 December 1985 and corrected on 10 March 1986, the ILO's replies of 29 April, the complainants' rejoinders of 11 July, the ILO's surrejoinders of 30 October 1986, the telex of 23 April 1987 from the complainants' counsel to the President of the Tribunal about their claim to costs and the ILO's comments thereon of 30 April 1987;

Considering Articles II, paragraph 1, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, Articles 3.9, 13.2 and 14.7 of the Staff Regulations of the International Labour Office, Articles 10 and 11 of the Statute and the material provisions of the Rules of Procedure of the International Civil Service Commission;

Having examined the written evidence and heard in public on 4 May 1987 oral submissions from Mr. Jean-Didier Sicault, counsel for the complainants, and from Mr. Claude-Henri Vignes, agent of the World Health Organization (WHO) speaking for the defendant and the other organisations defending similar cases; Mr. Dominick Devlin, agent of the WHO; Mr. Francis Maupain, agent of the defendant; and Mr. Gabriel Mpozagara, agent of the United Nations Educational, Scientific and Cultural Organization;

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

A. Post adjustment allowances form part of the pay of staff in the Professional and higher categories in the United Nations, the ILO and the other specialised agencies of the UN system. One criterion of pay for such staff is the Noblemaire principle, which says that it should be high enough to attract and keep citizens of the country with the highest-paid civil service. That country is the United States, and the comparison is between the federal civil service in Washington D.C. and the international civil service at UN headquarters in New York. Tradition has it, too, that, since federal civil servants are living in their own country whereas most international ones are not, the latter should be paid more. How much more - what is known as the "margin" - has never been laid down: of late it has ranged from 9 to 20 per cent or over. Another yardstick is that, grade for grade and step for step, purchasing power should be much the same at all duty stations. The post adjustment allowance is a device that has been used since 1957 to meet that purpose. By complex methods and procedures that need not be gone into here each duty station is put on an index which sets the cost of living in New York at a base date at 100. By that means is worked out the amount of the post adjustment allowance to be added to the official's basic salary where the cost of living at his duty station is above 100, or subtracted where it is below. The amount is stated in "classes", each one being 5 per cent - as reckoned in dollars - above the one just below. Thus class 1 starts at 105, class 2 at 110 and class 3 at 116. The difference between 100 and any one class is known as the "multiplier": it is 5 for class 1, 10 for class 2, and 16 for class 3.

The sum due to each official is the product of the multiplier and the amount of the allowance that belongs to his grade and step. Changes brought about by a rise or fall in the cost of living are stated in full classes; changes due to wavering in the rate of exchange between the dollar and the local currency may be in fractions of a class. For duty stations where the currency is not the dollar, for example Geneva, Paris and Rome, changes in the post adjustment may be by full class or by a fraction thereof or, as is common, by both.

To avoid changes in class due to oscillation in the cost of living there has since 1964 been a rule, known as the "four-month rule", which says that the index of a duty station shall reach or exceed, or else fall to or below, the qualifying point for the higher or lower class for four months running before the class may go up or down, and that the change may come into force only as from the fifth month. But changes in class or fraction of class due to shifts in the exchange rate come into effect as from the first day of the following month, so as to make pay less vulnerable to volatility in that rate.

Since 1975 the International Civil Service Commission (the "Commission") has administered the system of post adjustment in accordance with Article 11(a) and (c) of its Statute, which all the agencies have endorsed. Its task is to see that the classes of the duty stations are kept up to date. For that purpose there is a subsidiary body known as the Advisory Committee on Post Adjustment Questions (ACPAQ), which is made up of experts in cost-of-living statistics and reports once or twice a year to the Commission. The Commission decides on the method of cost-of-living surveys and revises the classes of post adjustment where they have got out of line. It also makes routine decisions altering the classes of the duty stations month by month, and they are issued by its Chairman, to whom it has delegated authority for the purpose. Both sorts of decision are notified to the agencies by circular. The executive head of each organisation then applies the decisions to its staff by the authority vested in him under the staff regulations.

The pay of United States federal civil servants is adjusted, ordinarily once a year, by decision of the President of the United States and is not linked to the cost of living. Since such pay and pay in the international civil service are therefore fixed by different methods the margin between the two may broaden or narrow willy-nilly. In 1976 the Commission sought authority from the General Assembly of the United Nations to recommend to the Assembly measures for checking any big increase in the margin and to take action of its own. The Assembly agreed in resolution 31/141B of 17 December 1976. As it happened pay in the federal civil service was, then and later, keeping up with or outrunning rises in the cost of living and there was little risk of any widening of the margin. Besides, in its report of 1978 to the Assembly the Commission said it believed it already had authority under the post adjustment system to stop any undue increase: it could, for example, check a rise in class for New York, even if one fell due, and hold it up until the danger of a wider margin was over. As for the other duty stations, it said it could either set special restrictions on changes in class there, or lower the indices of all of them to the same extent to which it had held back the New York one, or else put the whole matter in the Assembly's hands. Though the margin grew from 13.9 per cent in 1978-79 to 18.2 in 1981-82, the Commission took no action of the kind it had spoken of.

Applying a new method, the Commission made cost-of-living surveys in 1982-83 in particular in London, Montreal, New York, Paris, Rome and Vienna. In its report of 1983 it told the Assembly that the classes of all but London seemed too high but that it could do nothing until the ACPAQ had looked into the matter. In resolution 38/232 (Section II) of 20 December 1983 the Assembly asked the Commission to sort things out promptly. The ACPAQ met thrice in 1984. It then reported to the Commission its view that because of flaws in the method and for other reasons the cost of living in New York had been underestimated for 25 years. It recommended altering the relation between the index of New York and that of each of the six cities.

In its report to the Assembly for 1984 the Commission stated its conclusion that the New York index was too low by at least 9.6 per cent. It had decided, it said, by virtue of Article 11(c) of its Statute to put the New York index up by that percentage as at October 1982 and use the corrected index to determine as from 1 April 1984 the classes of all the other duty stations for the purpose of reckoning the post adjustment. It had, it went on, conveyed its decisions to the agencies by circular of 24 August 1984 (CIRC/GEN/101), which said that the new "post adjustment indices for New York and the other North American and European duty stations" would take effect, under the four-month rule, as from 1 August 1984. (The classes of duty stations in other regions were to be published in September or later.) Up to 31 July 1984 New York had been at class 10; from 1 August 1984 the class was declared to be 11.

But there was more than that. By 1 August 1984 the New York index reached the qualifying point for class 12, and four months later, on 1 December, New York was to go up to that class. On 30 November 1984 the Assembly adopted a detailed resolution, 39/27, on the matter. It was disturbed to see that because the Commission had raised the class of New York to 11 the margin stood at about 24 per cent, a figure it found too high. It asked the Commission to recommend a lower range for the margin and ways of keeping the margin within that range. More important for the present case, it "requested" the Commission to "take the necessary measures to suspend implementation of the increase in post adjustment for New York envisaged for December 1984".

The Chairman of the Commission sent the agencies a telegram on 12 December 1984 saying it would be looking at the whole matter at its next meeting in March 1985. In the exercise of his delegated authority he was blocking New York at 11 and refusing any changes in class which were due to rises in the cost of living at the other duty stations and which would make purchasing power there higher than that of the pay corresponding to New York class 11. At its March meeting the Commission confirmed the blocking of New York at 11 - not letting it rise to 12 on 1

December 1984 - pending further study by the Assembly in September-December, and it took immediate measures to "ensure equivalence of purchasing power between New York and other duty stations". It set out those measures in a circular it sent the agencies on 18 April 1985 (SEC/PAC/157). What it did was to establish a new "notional" index for New York and a corresponding notional index for each of the other duty stations as from October 1982. According to the old index Geneva would by 1 April 1985 have been in class 5, with a multiplier of 28. But as from that date the Director-General of the International Labour Office gave effect to the new notional index applied to Geneva by the Commission, and Geneva was not in class 5 but in class "4/+5", with a multiplier of only 27. The lowering of the multiplier from 28 to 27 reduced the amount of the post adjustment for all ILO officials holding posts in the Professional and higher categories in Geneva.

The complainants are officials of the International Labour Office, hold Professional category posts and are stationed in Geneva. From their pay slips for April 1985 they found that their allowances had fallen. They lodged internal "complaints" under Article 13.2 of the Staff Regulations - Mr. Beattie on 5 August and Miss Sheeran on 1 August - challenging the Director-General's applying to them, "as from 1 April 1985, a Geneva post adjustment class based on a multiplier calculated in a manner which fails to observe the rules of the system of adjustments".

The Chief of the Personnel Department wrote to Mr. Beattie on 3 October 1985 and to Miss Sheeran on 1 October rejecting their "complaints" on the Director-General's behalf and explaining why. Those are the final decisions impugned.

B. The complainants submit that the Tribunal is competent to entertain their complaints under Article II(1) of its Statute because they are challenging non-observance of the Staff Regulations of the ILO and other texts and principles that govern their conditions of service. They rely on the impropriety of a general decision only insofar as it has been applied to them as individual officials.

They further contend that their complaints are receivable in that they have exhausted the internal means of redress as Article VII(1) of the Statute requires and have observed the time limit in Article VII(2).

As to the merits they observe that there are many texts that govern their conditions of service as they relate to post adjustment. Article 3.9(a) of the ILO Staff Regulations reads:"The remuneration of officials in the Professional category and above may be adjusted by the application of plus or minus post adjustments ... They shall be applied in accordance with the classification of each duty station and at the rates specified ... The amounts shown are those which are added to or deducted from salary, for each variation of one point above or below the base respectively."

That means that all rules that make up the post adjustment system form part of the ILO Staff Regulations, and ILO officials may demand compliance with them. They include Article 11 of the Commission's Statute, which confers authority on it with regard to the post adjustment system; the internal rules of the Commission, which lay down the procedures it must follow; and all rules and methods for determining indices, classes and multipliers, which are to be found in the "Guidelines for the determination of post adjustment classification" of 5 May 1982 issued by the Commission's secretariat and the "Post Adjustment Manual" published on 26 May 1983. The system being a coherent body of rules, the determination of the index of a duty station cannot be separated from that of the New York index. Indeed Article 3.9(b) actually refers to New York. Moreover, Article 14.7 requires the Director-General to

"... amend the Regulations, without prejudice to the acquired rights of officials, and after consulting the Administrative Committee, in order to give effect to decisions of the International Civil Service Commission concerning (1) rates of allowances and benefits ... and (2) the classification of duty stations for the purpose of applying post adjustments (positive or negative); the Governing Body shall be informed of such amendments."

That shows that a decision taken in the ILO must comply with the whole system as administered by the Commission. The Staff Regulations afford a legal basis for challenge to any classification of Geneva that is not in line with the system, whether what is wrong is the class of New York or that of Geneva. More broadly, any decision the Director-General takes must be lawful: it may not escape review by the Tribunal simply because it rests on one which was taken by a body whose decisions may not be challenged before the Tribunal. For the decision on post adjustment to be lawful both the index of the duty station and its class must have been lawfully determined. The index is not at issue: the dispute turns on the determination of the class of the complainants' duty station - and the multiplier - which they believe to be wrong, for three reasons.

(1) Their first plea is that in deciding on 12 December 1984 to block New York at class 11 the Chairman of the Commission misread the Commission's authority, a mistake of law that the Commission also committed in March 1985 in upholding that decision: it was mistaken in believing it was bound by what the Assembly said in resolution 39/27 on a matter in which it had full competence to take decisions of its own. What led it to change its mind suddenly on a matter it had had under review for years was a wish to win back the Assembly's trust. Even supposing that the Commission did have power to tamper with the class of Geneva so as to reduce the margin, its decisions are exclusively its own and not the Assembly's. Its purpose was not to correct any error it had made, but to please the Assembly, and it rested on misconceptions of its relation in law to the Assembly and its competence.

The complainants have a subsidiary argument: the decision rests on considerations that are extraneous to the post adjustment system and therefore amounts to abuse of process. The Commission may not make use of the post adjustment system save for the purposes for which it is intended. The procedure for classifying duty stations for the purpose of post adjustment is not intended to fix the margin. In accepting the Commission's Statute the ILO and the other agencies consented to a notion of the post adjustment system which did not comprise the fixing of the margin. It is immaterial whether the Assembly may alter the Commission's Statute since it did not. It is no defence in law to say that the Assembly's resolution of 1976 enlarged the Commission's powers to cover the fixing of the margin.

(2) The complainants' second plea is breach both of (a) the rule against retroactivity and of (b) the four-month rule.

(a) The case law of the Tribunal and of other tribunals condemns the retroactive application of a decision adverse to a staff member. Being monthly, pay must be set before the month begins. Although the Assembly resolution was passed on 30 November 1984, the decision was not notified to the agencies until 12 December 1984, or after the start of the month in which it altered the classes of New York and of the other duty stations.

(b) The four-month rule, which has been in force since 1964, has been taken over by the Commission. The index of Geneva reached the qualifying point for class 5 on 1 December 1984 and since it stayed above that point for four months running the class of Geneva should have risen to 5 on 1 April 1985. Even if the Commission's decision to introduce a new notional index and so a new class for Geneva as from April 1985 was lawful, the lowering of the post adjustment ought not to have come into effect until four months later, either on 1 September 1985, or, assuming that the introduction of a notional index was not a new decision but just the application of the one taken on 12 December 1984, not earlier than 1 May 1985 (four months after the lst of the following month, January 1985).

Even supposing the Commission amended the four-month rule - quod non - it was bound under the rule against retroactivity to apply the four-month rule until the month in which it made the amendment.

(3) The third plea is breach of the rule that an authority is bound by the rules it has itself laid down until it repeals or amends them: patere legem quam fecisti. It is no answer to say that the Commission merely suspended the application of certain rules. The rules, including the four-month one, are still in force and unchanged.

The complainants seek the quashing of the Director-

General's decision not to pay them, as from 1 April 1985, the post adjustment corresponding to the class of Geneva as determined in proper application of the rules; an order for payment of the sums due as from that date, less the sums actually paid to them as post adjustment; and an award of costs.

C. In its replies the ILO submits that the complainants are mistaken in contending that the whole set of rules on the post adjustment system forms part of the Staff Regulations. The Director-General's sole responsibility under the Staff Regulations is to see that the class of Geneva is correctly determined: he is not concerned with the determination of that of New York. The complainants are not imputing to him any mistake of law or of fact in applying the multiplier which pertained to Geneva because of the Assembly's resolution and the Commission's later decision. Even supposing all the rules on post adjustment did form part of the Staff Regulations, the Director-General has no power to question the procedure followed by the Commission or decline to apply its decisions on the class of Geneva. Although the agencies have endorsed the Commission's Statute, it is not akin to a body they have set up to help them in taking their decisions. It has full control over its own procedural rules and the substantive rules it has issued on the post adjustment system. Once it has taken a decision altering the class of a duty station the Director-

General is bound to follow, subject only to safeguard of the staff's acquired rights. The ILO accordingly asks the Tribunal to dismiss the complaints on the grounds that the complainants' pleas are not material: none of them challenges the lawfulness of the Director-General's decision to apply to Geneva the class determined by the Commission.

Subsidiarily the ILO submits that the complainants' pleas are devoid of merit.

(1) Neither the Commission nor its Chairman misconstrued its authority in acting on the Assembly's resolution. In a statement to the competent committee of the Assembly in November 1984 the Chairman of the Commission sought to explain why, though it had increased the index for New York by 9.6 per cent, it did not believe that the margin was too wide. The Assembly did not share that opinion but adopted resolution 39/27. In taking the view that it should act on the resolution the Commission did not misuse its authority: it simply made a judicious exercise thereof.

It is untrue that the Commission applied the procedure for post adjustment to a purpose - namely the setting of the margin - extraneous to those for which it was intended. The whole system rests on the Noblemaire principle and on the rule that there should be a margin, the classes of the duty stations being merely a device to ensure respect for that principle and that rule. If the Assembly believes that the device is not ensuring such respect, it is only reasonable that it should ask that the functioning of the device be suspended. That is what it did here, and the ILO is not concerned with whether the Assembly's stand on the matter was right or wrong. It is immaterial that the explanatory booklets issued to the staff on the post adjustment system do not bring out the importance of the margin: that is not what they are for. Their sole purpose is to explain how the system for ensuring equivalent purchasing power in the duty stations works. The Commission has always taken a close interest in the size of the margin.

(2) There was no breach of the rule against retroactivity and the four-month rule.

What is under challenge is not a decision to alter the amount of monthly pay but a decision that there would be no change in that amount as from 1 December 1984. It did not revoke any decision that had yet been taken. The rise of New York to class 12 had merely been announced as likely in the Commission's report to the General Assembly, and that was not tantamount to any decision: the class of a duty station requires notification by the Chairman of the Commission to the agencies, and no such notification had been made. The decision taken was therefore not retroactive at all.

As to the four-month rule, it has always been applied only to changes due to a rise or a fall in the cost of living, never to changes that are made in the index of a duty station for any other reason. Besides, its purpose is to ensure that the rise in the cost of living that warrants a rise in class is not short-lived but a firm trend. Once it had been decided to suspend the rise in class, the rule no longer served that purpose.

(3) There is no substance to the plea that the Commission was not empowered to suspend the application of the rules it had itself laid down on the classification of the duty station. It would not have been possible to continue to apply the rules on post adjustment and at the same time to reduce the margin. Moreover, as early as 1978 the Commission informed the Assembly that it would take steps to check a rise in class if need be. Suspending the application of the rules on post adjustment had accordingly been mooted for years and formed part of the rules the Assembly and the Commission had all along thought it right to follow.

D. The complainants' rejoinders put forward a new plea: the decision notified by the Chairman of the Commission in his telex of 12 December 1984 was in breach of the Commission's rules of procedure and therefore showed a formal flaw. The United Nations Administrative Tribunal ruled on similar cases in Judgment 370 of 6 June 1986 and allowed that plea. The complainants also seek to rebut the defendant's arguments. In their submission the complaints do have substance: they demand payment of the difference between rates of post adjustment reckoned by applying different multipliers, and the quashing of individual decisions that are in breach of the terms of their appointment and cause them injury.

The Organisation has failed to show that the post adjustment rules fall outside the ambit of those terms.

It is quite mistaken to say that the executive heads of the agencies have no choice but to carry out the Commission's decisions. For one thing, where called upon to apply a decision he deems unlawful the Director-

General may seek an advisory opinion from the International Court of Justice. For another, a decision by the Commission holds good only insofar as it respects acquired rights. Thirdly, any action the Organisation takes must be lawful.

The review the Director-General must exercise goes beyond the class of the complainants' duty station to that of the base city since the two are linked.

There is no provision in the Commission's Statute that suggests decisions it is empowered to take are subject to review by the Assembly. The Assembly's evident intent is to abide by decisions which the Commission takes on certain strictly defined matters and which include decisions under Article 11 of its Statute on the classification of duty stations for the purpose of post adjustment. The system the Commission administers has two purposes: to make for parity of purchasing power between the base city and other duty stations, and to index each duty station to the cost of living. Although the Assembly has the power to amend the Commission's Statute, it did not do so in this instance, and the Commission committed an error of law by acting on the Assembly's request in resolution 39/27 in disregard of the bounds of its own competence.

The complainants enlarge on their subsidiary plea that there was abuse of process. They point out that the Commission's guidelines and the post adjustment manual say nothing of using the system to control the margin and that there are no rules on how to put it to that purpose, nor even any on what the margin should be.

The complainants develop their arguments about the breach of the transitional rules - the rule against retroactivity and the four-month rule - and challenge the construction the Organisation puts on those rules. They press their plea that there was breach of the principle patere legem quam fecisti, observing that the material rules were neither repealed nor amended, at least until the Assembly adopted amendments in resolution 40/244, which took effect only as from 1 January 1986.

Lastly, they contend that their claims are sound in equity. International civil servants are faring steadily worse in other duty stations than in New York, where they do badly anyway. Shifts in exchange rates are only partly offset and staff who are not paid in dollars are suffering from the fall of that currency.

E. In its surrejoinders the ILO develops the case put for- ward in its replies and seeks to refute the arguments in the rejoinders. It submits that the complainants have failed to show a mistake of fact or of law that taints any decision of the Director-General's; that the rules on the post adjustment system are not part of the Staff Regulations; that the Director-General may not review the lawfulness of the Commission's decisions; and that even if the complainants might plead the unlawfulness of such a decision they show no breach of their rights that causes them injury.

Subsidiarily, the Organisation comments on Judgment 370 of the United Nations Administrative Tribunal and maintains that it is immaterial whether the telegrammed decision of 12 December 1984 was invalid. It also develops its pleas that the Commission did not act ultra vires; that there was no abuse of process in that the post adjustment system was not applied to any extraneous purpose; and that there was no breach of the transitional rules, nor of any provision of the Commission's Statute.

Lastly, the defendant submits that the complaints are unsound in equity: movements in the currency exchange rate are a risk everyone faces nowadays.

CONSIDERATIONS:

The system of pay

1. The Noblemaire principle, which dates back to the days of the League of Nations and which the United Nations took over, embodies two rules. One is that, to keep the international civil service as one, its employees shall get equal pay for work of equal value, whatever their nationality or the salaries earned in their own country. The other rule is that in recruiting staff from their full membership international organisations shall offer pay that will draw and keep citizens of countries where salaries are highest.

Several measures have been taken to give effect to the two rules.

2. Ever since the United Nations was founded the United States has been the country deemed to have the highest salaries. Thus the pay of international civil servants is set against the pay of United States federal civil servants

stationed in Washington D.C., or rather the comparison is between international civil servants in New York, the base city, and national civil servants in Washington, one factor of disparity being the cost of living.

3. Another measure is that since most international civil servants are not living in their own country their pay shall ordinarily be higher than that of American federal civil servants. The difference is known as the "margin", and it is variable.

4. The purpose of a third measure is to make the pay of international civil servants equivalent by making its real value, or purchasing power, as uniform as possible from one duty station to another. For that purpose account has to be taken of variations in the cost of living and the value of the local currency in terms of the United States dollar, the currency in which international civil servants' salaries and allowances are reckoned. In 1957 the United Nations introduced what are known as "post adjustment" allowances. These are the sums added to or subtracted from the base salary according as the purchasing power of the dollar is higher or lower in another duty station than in New York.

There is an index for each duty station which is geared to the New York index and determines the amount of the adjustment to be added or subtracted. The adjustments are reckoned by class or "multiplier".

5. Lastly, there is the "four-month rule". It says that a duty station will change classes when its index stays for four months above or below the qualifying point for the class at which it stands. The change comes about only as from the first day of the fifth month.

When the change is triggered by a shift in the currency exchange rate it comes into effect as from the first day of the following month.

The International Civil Service Commission

6. By resolution 3042 of 18 December 1972 the General Assembly of the United Nations set up the International Civil Service Commission. It has a Statute and Rules of Procedure and there is a subsidiary body known as the Advisory Committee on Post Adjustment Questions (ACPAQ).

7. The Commission's functions come under two heads, recommendations and decisions.

Article 10 of its Statute says that it shall make recommendations to the General Assembly on:

"(a) The broad principles for the determination of the conditions of service of the staff;

(b) The scales of salaries and post adjustments for staff in the Professional and higher categories;

(c) Allowances and benefits of staff which are determined by the General Assembly;

(d) Staff assessment."

Article 11 says that the Commission shall decide on:

"(a) The methods by which the principles for determining conditions of service should be applied;

(b) Rates of allowances and benefits, other than pensions and those referred to in article 10(c), the conditions of entitlement thereto and standards of travel;

(c) The classification of duty stations for the purpose of applying post adjustments."

Articles 13 to 18 confer on the Commission other responsibilities that are not material to this case.

Decisions by the General Assembly and the Commission

8. The ACPAQ reported that by October 1982 the New York index was 9.6 per cent too low. On its recommendation the Commission raised the index accordingly so that New York rose to class 11, and the consequent rise in the post adjustment took effect on 1 August 1984.

9. The New York index had by then already gone above 180, the qualifying point for class 12, and it did not fall below 180 in the next four months.

The Fifth Committee of the General Assembly objected to New York's rise to class 12 and on 30 November 1984, on its recommendation, the Assembly adopted resolution 39/27. The Assembly:

"Considers that a margin of 24 per cent is too high in relation to past levels of the margin and, consequently, requests the International Civil Service Commission to: ... (c) ... suspend implementation of the increase in post adjustment for New York envisaged for December 1984, pending receipt by the General Assembly at its forthieth session, and action thereon, of the Commission's recommendations regarding the margin and other measures referred to in subparagraphs (a) and (b) above; and take whatever related measures are required in respect of the post adjustment levels at other duty stations to ensure equivalence of purchasing power as soon as possible at all duty stations in relation to the level of net remuneration in New York".

10. By a telegram of 12 December 1984 the Chairman of the Commission informed the executive heads and staff representatives that after consultation and pending full inquiry at its 21st Session in March 1985 the Commission had decided to meet the Assembly's wishes and suspend the rise of New York to class 12 and the changes in the class of other duty stations.

11. A score of post adjustment points having been embodied in base salary, New York changed on 1 January 1985 from class 11 to class "7/+2" and the classes of other duty stations changed in line.

12. At its 21st Session (11-29 March 1985) the Commission upheld the decision in the telegram of 12 December 1984. Its Secretary drew up notional indices for the duty stations in which "inter-city" cost-of-living surveys had been carried out by methods approved in 1981. The Geneva index, which would have reached 127.9 with the rise of New York from class 11 to class 12, was set at 122.5 and Geneva dropped from class 5 to class 4/+5, the multiplier being 27 instead of 28.

The Commission's decision went into effect on 1 April 1985.

13. By resolution 40/244 of 18 December 1985 the Assembly approved the Commission's recommendations on the margin, which was to be somewhere between 110 and 120, with the midpoint at 115. It asked the Commission to make arrangements for keeping post adjustments inside that range, which came into effect on 1 January 1986.

Judgment 370 of the United Nations Administrative Tribunal

14. Several complaints filed with the United Nations Administrative Tribunal asked it to quash the decision by the Secretary-General of the United Nations to reckon post adjustment on the strength of New York class 11 and claimed the post adjustment that went with class 12 as from 1 December 1984 or, failing that, damages.

15. In Judgment 370 of 6 June 1986 the United Nations Tribunal found that before deciding against a special session the Chairman of the Commission did hold a vote by telegram on that and two other options, but that the Executive Secretary of the Commission failed to record the results of the vote and to inform the members. Though it doubted whether such breaches of form avoided the decision of 12 December 1984, the Tribunal held that the procedural requirements of the Commission's Rules of Procedure had not been complied with.

It therefore allowed the claims for four months from 1 December 1984, or until the Commission's own decision of March 1985 came into effect, but it held the decision to be lawful.

The impugned decisions

16. As their pay slips show, the complainants' post adjustments for April 1985 were based on Geneva class 4/+5 and a multiplier of 27.

They filed appeals with the Director-General challenging the reckoning of their post adjustments from 1 April 1985 on the grounds that the class should have been 5 and the multiplier 28.

The Chief of the Personnel Department informed them that the Director-General had rejected their appeals, and those are the decisions they impugn.

Joinder

17. Complaints against a single organisation may be taken together provided the substance of the claims and the facts they rest on are the same.

The present complaints meet both requirements. The claims are the same in substance - indeed they are word for word identical - and the facts relied on - how the challenged decisions came about - are the same too.

The substance of the complaints

18. The Organisation pleads that the Director-General is bound by the Commission's decisions and that the complainants may not challenge them.

The plea fails.

The rule is that an Administration is bound to comply with the law. If its own decision is based on one taken by someone else it is bound to check that the other one is lawful (see Judgment 382, in re Hatt and Leuba), the only exception being where some extraordinary provision debars it expressly or by implication from doing so.

There are no grounds for exception here. Article 3.9 of the Staff Regulations does say that the Director-General "shall take account of the application of the post adjustment system within the United Nations common system of salaries and allowances", and Article 14.7 that he shall amend the Regulations to give effect to some of the Commission's decisions. But those provisions, though they speak of decisions by the Commission, do not relieve the Director-General of the duty to check that the decision is lawful.

Whether or not the decision is put into the Staff Regulations is immaterial: be that as it may it is binding on the Director-General only if lawful.

19. The Organisation also submits that the complainants may challenge only the determination of the Geneva index against the New York one, but not the indices themselves.

This plea fails too.

Since the Commission's decisions may be checked by the Director-General they are open to challenge from the complainants as well. So too must be the indices determined on the strength of those decisions.

The complainants' pleas

20. The complainants contend that the decision notified by the Chairman of the Commission on 12 December 1984 is tainted with a formal flaw in that it does not comply with the Commission's Rules of Procedure.

That is beside the point. The decisions impugned rest, not on the telegrammed decision of 12 December 1984, but on the Commission's decision of March 1985, which, though it confirmed the telegram, is a separate one. Any flaw there may have been in the telegrammed decision is immaterial.

21. The complainants further maintain that the Commission acted ultra vires in suspending the post adjustments the change of New York from class 11 to class 12 ought to have brought about. Their argument is that it is clauses (a) and (c) of Article 11 of the Statute that empower the Commission to decide on post adjustments but that the clauses do not cover the Commission's decision in this case and are binding on the Assembly until amended.

That is to misread resolution 39/27.

The Assembly asked the Commission to stop the adjustments until its 40th Session. But the Tribunal is not competent to rule on the lawfulness of Assembly resolutions, and so it will not state whether the Assembly would have done better to amend what the Statutes say about post adjustment than to adopt the resolution. Besides, in Judgment 370 the United Nations Tribunal held that the Assembly "had unquestionable power to regulate in this way emoluments not yet earned, if it regarded suspensory action as necessary in the circumstances".

What resolution 39/27 means is admittedly not beyond dispute. Is it issuing an invitation or an order when it

"requests" the Commission to make arrangements? But whichever it is does not matter: the Assembly empowered the Commission to act and delegated authority to it for the purpose.

The Commission did not pass the bounds of that authority but strictly respected it in its decision of March 1985. Since it was exercising authority vested in it by a text the Tribunal may not review there is no question of its having acted ultra vires.

Whether it is for the United Nations Tribunal rather than this one to rule on the exercise of the delegated authority is another point that need not be settled. In Judgment 370 that Tribunal said: "In any event, the ICSC accepted and complied with the expressed wishes of the General Assembly ...". Thus it has already come to the conclusion which this Tribunal has set forth above, and even if the United Nations Tribunal were exclusively competent this Tribunal would have no grounds for adjournment.

All this makes it immaterial whether the decision of March 1985 may, if need be, rest on an extensive construction of clause (a) or clause (c). In any event it is neither here nor there that the Post Adjustment Manual, a purely informative text that is not binding in law, does not provide for the suspension of post adjustment.

22. Another plea of the complainants' is that the Commission misused its authority by availing itself of the post adjustment with the improper intent of checking an allegedly undue widening of the margin.

One reason why the plea fails is that, as has been seen, the Commission acted intra vires. In authorising the Commission to suspend the increase in the post adjustment the Assembly also authorised the purpose of doing so. It vested in the Commission power to take action that would stop the widening of the margin and in pursuing that purpose the Commission did not obey considerations it ought to have discounted: indeed its decision of March 1985 served the very purpose it was intended for.

Besides, the complainants have failed to show that the post adjustment system discounted the size of the margin until 1985. What makes that the less certain is the Assembly's asking the Commission in resolution 31/141B of 17 December 1976 to take urgent action proprio motu and in the context of the post adjustment system to prevent widening.

23. The complainants further submit that the Commission broke the rule against retroactivity in stopping the adjustment regardless of the rise of New York from class 11 to class 12.

The answer to that may be short. It was in March 1985 that the Commission took the decision that affords the basis of the ones impugned and that decision came into effect on 1 April 1985. Since that date is later than the date of adoption there was no breach of the rule.

It is immaterial whether the change in the class of New York was automatic or came about only after the Commission had formally decided it: what matters is that the decision of March 1985 did not take effect until the next month. Besides, whether a rise is automatic is not beyond doubt.

The decision in the telegram of 12 December 1984 is not under challenge, and whether it was retroactive is immaterial.

24. Another plea is breach of the rule that the class changes when for four months the cost-of-living index has stayed constantly above or below the qualifying point for the change.

It is moot whether the conditions for bringing the rule into play were fulfilled. The decision was not to change the class of New York from 11 to 12 but - and it is not perforce the same thing - to hold over the effects of the change until the Assembly's 40th Session.

Moreover, even if the Commission broke the four-month rule its decision was covered by the authority vested in it. Insofar as the rule was at odds with resolution 39/27 it was not binding on the Commission.

25. Lastly, the complainants contend that the Commission was in breach of the principle patere legem quam fecisti.

But the principle applies only to the maker of the broken rule. Since it was not the Commission that laid down the salary and post adjustment scales and the rule about changes in class, the Commission did not break any rule of its

own in suspending the change in the class of New York.

Nor, since it had a mandate from the Assembly, was it bound to follow its own earlier arrangements.

26. The conclusion is that none of the complainants' pleas is sound and that their complaints must fail.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1987.

(Signed)

André Grisel
Jacques Ducoux
Mohamed Suffian
A.B. Gardner

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