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

SIXTY-EIGHTH SESSION

In re HILLHOUSE-REINE and WOESS

Judgment 1001

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Roberte Hillhouse-Reine and Mrs. Diana Wöss against the United Nations Industrial Development Organization (UNIDO) on 27 January 1989 and corrected on 24 February, UNIDO's replies of 14 June, the complainants' rejoinders of 4 August as corrected on 15 September and the Organization's surrejoinders of 16 October 1989;

Considering Article II, paragraph 5, and VII of the Statute of the Tribunal, Article XII, section 27(j), of the Agreement concluded on 13 April 1967 between the United Nations and the Republic of Austria regarding the headquarters of UNIDO, the Supplemental Agreement concluded on 1 March 1972 between UNIDO and the Austrian Government, the Memorandum of understanding on common services concluded on 31 March 1977 between the United Nations, the International Atomic Energy Agency and UNIDO, Regulation 3.1 of the United Nations Staff Regulations, which applied to UNIDO staff up to 30 June 1988, Rule 111.2 of the United Nations Staff Rules, which applied to UNIDO staff up to 4 October 1988, Regulation 6.5(a) of UNIDO's Staff Regulations, Rule 112.03 of UNIDO's Staff Rules, and Articles 11(a) and 12(1) of the Statute of the International Civil Service Commission;

Having examined the written evidence and disallowed the complainants' application for oral proceedings;

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

A. The Industrial Development Board of UNIDO, which is in Vienna, accepted the Statute of the International Civil Service Commission in 1985. Article 11(a) of the Statute provides that the Commission shall establish the "methods by which the principles for determining conditions of service should be applied", and Article 12(1) that "at the headquarters duty stations ... the Commission shall establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories".

To draw and keep the best-qualified people organisations in the United Nations system seek to offer staff in the General Service category conditions that match the best in the public and private sectors at the duty station. Regulation 6.5(a) of the UNIDO Staff Regulations is similar to Regulation 3.1 of the United Nations Staff Regulations, the text that applied to UNIDO staff up to 30 June 1988. It states that "The Director-General shall fix the salary scales for staff in the General Service and related categories, normally on the basis of the best prevailing conditions of employment in the locality, taking into account the recommendations of the International Civil Service Commission". Surveys are made of local conditions and the Commission has carried them out since 1977 under Article 12(1).

In a report it made at its 14th Session, in July 1981, the Commission approved the findings of a survey on Vienna and accordingly recommended that the General Assembly of the United Nations endorse new salary scales for staff in the General Service category and for manual workers in UNIDO and other organisations with headquarters in that city. A section of the report on benefits other than salary said that financial assistance, free or reduced-price company products and services and recreation benefits were important and common in Vienna. The Commission reckoned the yearly value of such products and services at some 3,000 or 3,500 Austrian schillings on average.

The staff of UNIDO and other international organisations in Vienna have access to a shop known as the Commissary that sells alcohol and tobacco subject to quotas, as well as household appliances, foodstuffs, cosmetics and other goods. In its 1981 report the Commission valued the "Commissary benefit" at some 9,600 schillings a year for Austrian staff and much more for others, who were allowed bigger quotas of alcohol and tobacco, and it concluded that the benefit offset the fringe benefits local workers got.

In Annex II to a report dated 15 September 1982 to the General Assembly the Commission set out the "general methodology" to be applied in future to surveys of local conditions of employment.

The secretariat of the Commission made in 1987 another survey on Vienna which purported to follow that methodology and it submitted its findings in June 1987. The Commission approved them in a report it adopted on 17 August 1987. In paragraphs 39 to 42 of its report it dealt with the "Commissary privileges", which it described as "not available to staff of the surveyed employers".

The yearly average value of the Commissary benefit being put at roughly 6,600 schillings, or 2.4 per cent of average net salary at grade G.5, the secretariat had proposed corresponding cuts in salary for staff in the General Service category and manual grades. The Commission agreed, docked the net salary of such staff by 2.4 per cent and recommended new scales of pay to come in as from 1 March 1987. It asked its secretariat in making surveys in future to give a "reasonably accurate" idea of the value of fringe benefits granted to local workers and of the Commissary benefit.

At its 27th Session, in March 1988, the Commission came back to the matter and asked its secretariat to report further to it at its 28th Session, in July 1988, on the value of the Commissary benefit to United Nations staff in Vienna.

By a circular, DA/PS/INF.1098, of 22 April 1988 the Director-General of UNIDO announced his approval of new scales of pay for the General Service category as from 1 April 1988. Because of an interim adjustment the scales were slightly higher than those the Commission had recommended. They were first reflected in the pay slips for April 1988.

UNIDO employs the complainants in the General Service category of staff. Mrs. Hillhouse-Reine, who is French, holds grade G.6, and Mrs. Wöss, who is British, G.7. They and other officials in that category lodged requests for review of their pay slips for April 1988 under Rule 111.2 of the United Nations Staff Rules, which applied to UNIDO staff up to 4 October 1988. Writing to the Director-General in letters dated 30 May the complainants contended that the pay slips were based on salary scales that were unlawful because they were reduced by 2.4 per cent to take account of the Commissary benefit.

In replies of 14 June the Director-General told the complainants that the Commission would be looking at the matter in July and for the time being UNIDO would continue to apply the new salary scales.

At its 28th Session, in July 1988, the Commission had before it the further information it had asked for. Its secretariat found 6,600 schillings too low a figure: the yearly value of the benefit ran from some 27,900 schillings at G.3 to some 32,600 at G.8. But in a further report it adopted on the matter on 29 July the Commission, merely noting that its former estimate had been "conservative", abided by its earlier decision.

By letters of 14 September 1988 the complainants again made requests for review under Rule 111.2. In replies dated 31 October 1988, the decisions impugned, the Deputy Director-General said that the Director-General held to his earlier decisions but agreed to direct appeal to the Tribunal under Rule 112.03 of the UNIDO Staff Rules, which had come into force on 5 October 1988.

After consulting the Industrial Development Board the Director-General decided to apply to the General Service category as from 1 October 1987 the scales the Commission had recommended, and he so informed the staff by circular DA/PS/INF.1112 of 28 October 1988. Those scales applied from 1 October 1987 up to 29 February 1988 and were increased by the interim adjustment applied as from 1 March (not 1 April) 1988, arrears of payment being made in the pay slips for March 1988.

B. The complainants submit that according to the case law an international organisation is bound only by a lawful decision of the Commission's and must determine whether its decision is lawful; a fortiori it must determine whether a mere recommendation is. Since the Commission's recommendation was unlawful so were UNIDO's approval of the new salary scales and its decisions to apply them to the complainants.

(1) The Commission failed to respect its own methodology in making the survey: patere legem quam ipse fecisti. As the United Nations Administrative Tribunal held in Judgment 395, that methodology was binding on the Commission and there was breach of it in taking account of the Commissary benefit in drawing up the salary scales. The benefit comes under none of the categories of data the Commission may cover in surveys: it is not a

benefit from the employer but a privilege the host Government allows under the UNIDO headquarters Agreement the United Nations concluded with Austria in 1967. Article XII, section 27(j), of the Agreement says that UNIDO officials may "import for personal use, free of duty and other levies, prohibitions and restrictions on imports ... (iii) ... limited quantities of certain articles for personal use or consumption and not for gift or sale." UNIDO concluded a "supplemental agreement" with the Austrian Government in 1972. A "memorandum of understanding" concluded between the United Nations, UNIDO and the International Atomic Energy Agency in 1977 put the Agency in charge of the Commissary, and the Vienna International Centre issued further rules in a circular of 1 July 1982.

One purpose of the privilege is to draw staff of high quality, and to take account of it in reckoning salary thwarts that purpose. The 2.4 per cent is in effect being charged to Austria, which is forgoing tax on sales at the Commissary. The true purpose of the reduction in salary was the improper one of achieving large savings on staff expenditure under the Organization's budget. Fringe benefits as defined in the methodology come from the employer; so the Commissary benefit cannot qualify as one.

(2) The Commission failed to respect the rules in the methodology on how to take account of the Commissary benefit. The rules require the Commission to compare United Nations benefits with those granted by the local employers covered by the survey. The Commission did not do so: it added the value of the Commissary benefit to salary even though it cannot be properly quantified; it made unreliable estimates of the value; and it drew no comparison with similar benefits granted by local employers.

According to paragraph 50 of the methodology "fringe benefits" will not count unless (a) granted to all staff on the same terms, (b) made use of by most and (c) of a kind provided by many local employers. The Commissary benefit fails to meet condition (a) because Austrians get smaller quotas of alcohol and tobacco than others.

The Commission's survey of 1987 did not use proper data in working out the yearly average of 6,600 schillings. That was only a rough estimate, and the Commission asked its secretariat to get more reliable figures in future. Later it asked the secretariat to submit further information in July 1988. But the reckoning of the new estimate put to it in July 1988 was still flawed. By taking the ten best bargains at the Commissary and applying the same rate of savings to other goods the secretariat exaggerated the potential total of savings. Many goods on sale in shops in Vienna are cheaper than the foreign brands found at the Commissary.

The Commission made no attempt to see whether the value of similar benefits granted by local employers matched that of the Commissary benefit. It did make that comparison in its 1981 survey, concluding that local fringe benefits were "not insignificant" but set off the Commissary benefit. But fairness, logic and the methodology required assessing local fringe benefits as carefully as the Commissary benefit.

(3) The Commission's recommendation was in breach of equal treatment. (a) Salaries in the General Service category were uniformly cut by 2.4 per cent even though Austrians save much less by shopping at the Commissary. (b) Staff members do not make uniform use of the Commissary. Some smoke and drink, others do not. Some save more, some less, than the equivalent of 2.4 per cent of salary.

(4) There was breach of the principle that requires the employer to let the employee dispose of his earnings freely. To suffer no loss staff members have to shop at the Commissary to save the equivalent of 2.4 per cent of their salary.

The complainants seek the quashing of the impugned decisions and the payment as from 1 October 1987 of sums equivalent to the difference between pay reduced by the 2.4 per cent and pay not so reduced, the recalculation of their pensionable remuneration and an award of 40,000 French francs to each of them in costs.

C. In its replies UNIDO argues the case on the merits, observing that the Director-General's decision to bring in the salary scales, being a discretionary one, may be challenged only on the limited grounds set out in the case law.

(1) Though it affirmed the binding nature of the methodology, Judgment 395 of the United Nations Tribunal did not say that the Commission might not change it nor did it comment on internal procedures for applying it. The methodology does not come within the ambit of patere legem but is just a general description of a "working tool that can be improved and changed". Even if there was something new in the 1987 survey the Commission was free to adapt the methodology.

(2) The Commissary benefit is relevant to the survey because it brings financial advantage to the staff; that the

methodology may not mention that particular benefit is irrelevant.

(3) Also irrelevant is the plea that it is the Austrian Government that grants the benefit: what matters is that, as the Commission said, it was not available to workers in Vienna. The methodology did not bar taking account of it. According to the texts the complainants cite the Commissary benefit is the outcome, not of any "personal relationship" between the Government and UNIDO staff, but of international agreements with the Government, and it is granted in UNIDO's own interest.

Besides, the methodology shows the Commission's intention of counting not only benefits provided by local employers but also benefits their employees enjoy "by reason of their employment with a particular company or organisation", such as restaurant vouchers.

(4) Being free to adapt its methods to bring in any relevant data, the Commission held to the principles under-

lying the methodology. Whereas the French translation says that the benefit must be offered to everyone "dans les mêmes conditions", the original English more properly says "under similar conditions". Though Austrians get smaller quotas, "the purchase entitlement expressed as a percentage of the respective salary level is the same for non-Austrians and Austrians".

According to paragraph 46 of the methodology local fringe benefits must be either properly "quantified" or else put to general comparison with fringe benefits in the United Nations organisations. But there is no need for comparison if the fringe benefits in the United Nations can be quantified and since the Commissary benefit could be there was no need for comparison with the value of fringe benefits enjoyed by local workers.

Flaws of method in the further survey of 1988 are irrelevant: what is at issue is the lawfulness of the decisions based on the survey of 1987. What was done in 1981 is also immaterial.

There was no lack of data at the Commission's disposal, as is clear from the explanation in its report on the 1987 survey of how its secretariat had worked out the value of the Commissary benefit. The Organization discusses the method of calculation and observes that some local fringe benefits did not qualify under paragraph 50(c) of the methodology.

(5) The burden is on the complainants to prove that the Commission's true motive was to save on salaries and therefore somehow improper, and they have not discharged the burden.

(6) There is no breach of equal treatment. According to the rules in the circular issued in 1982 by the Vienna International Centre Austrian and other staff have the same entitlement to Commissary purchases as a percentage of salary at different grades. The recommended cut of 2.4 per cent fell far below the value of the benefit enjoyed even by Austrian staff. It is lawful to allow Austrians lower quotas for some goods: the distinction is based on nationality, Austrians not being in the same position in law as other staff. The same distinction is made also for the purpose of home leave and repatriation grant.

(7) There was no interference with the staff's right to dispose of their earnings. The cut in pay being lawful, if staff want to offset it by shopping at the Commissary they may do so, but there is no link in law or in logic between the cut and the free disposal of income.

D. In their rejoinders the complainants contend that in determining the salary scales the Commission and the DirectorGeneral are not taking purely discretionary decisions: they may not apply such general criteria as the public interest and though they enjoy some latitude in the matter they are bound by hard-and-fast procedural and substantive rules.

The complainants submit that, though the methodology does not explain exactly how to do a survey and though the Commission may, as UNIDO argues, make refinements - indeed texts later than 1982 do take some points further - it must still abide by the rules it made in 1982. It is mistaken to say that the more general the terms in which a text is drafted the more readily it may be ignored, and in any case there can be no point in amending the methodology if it is not binding.

The complainants develop their pleas and answer at length the Organization's replies. They discuss in detail what they see as serious flaws in the Commission's method of estimating the value of the Commissary benefit and

observe that the range in estimates is so great that they are utterly unreliable and can afford the basis of no proper decision. They object to the Commission's failure to take due account of the value of fringe benefits granted by local employers. They maintain that the Commission's ulterior and improper motive in reducing pay was to achieve big savings for the organisations. They enlarge on their pleas of breach of equal treatment and of the right to dispose freely of earnings. They press their claims.

E. In its surrejoinders the Organization seeks to refute seriatim the pleas in the complainants' rejoinders. In particular it observes that the Director-General's discretionary authority is clear from Article 6.5(a) of the UNIDO Staff Regulations. In its submission the general methodology has always been treated as a set of guidelines, not of detailed rules, and the reason why it says nothing of a Commissary benefit is that it is not available at every headquarters duty station. The Commission abided by the general methodology and its reckoning of the value of the benefit was perfectly sound. UNIDO again explains why fringe benefits provided by local employers were discounted. It submits that the complainants offer no evidence in support of their contention that the Commission acted from any improper motive and that the plea is therefore not proven. It sums up the pleas in its replies on the other issues the complainants raise.CONSIDERATIONS:

1. The complainants are employed in the General Service category of staff at the headquarters of the United Nations Industrial Development Organization (UNIDO) in Vienna. They seek the quashing of decisions by the Director-General of the Organization setting their pay according to new salary scales brought in as from 1 October 1987. It was the International Civil Service Commission (set up by the United Nations General Assembly by Resolution 3357 (XXIX) of 18 December 1974 (ICSC/1/Rev.1)), that drew up those salary scales, and the complainants are objecting to a flat 2.4 per cent reduction in salary that purports to offset the value of the so-called "Commissary benefit" enjoyed by the staff of the Organization. The Commissary is a shop, provided for under the headquarters agreement between the Organization and Austria, which sells goods at duty-free prices - foodstuffs, household goods, photographic equipment and the like - to the staff of several organisations and to the mission staff of governments accredited to those organisations. Some 7,000 people have access to the Commissary.

2. As the Organization asks, the complaints are joined because they are identical.

3. The parties agreed to dispense with prior referral to the Joint Appeals Board and to put the dispute directly to the Tribunal, as Rule 112.03 of UNIDO's Staff Rules allows.

Article VII of the Tribunal's Statute reads:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations".Because of the above provision in the Organization's rules that requirement is met.

The issues of fact

4. The origin of the complaints lies in a provision that also sets the context of the dispute: Regulation 6.5(a) of UNIDO's Staff Regulations. That provision says that the pay of staff in the General Service and other locally-recruited categories shall normally be based on "the best prevailing conditions of employment in the locality". That is the "Fleming principle", so called after the chairman of the United Nations committee of experts that first stated it in 1949.

5. The Fleming principle applies to the whole of the United Nations system and it is the Commission that puts it into effect. In keeping with terms of reference approved by the General Assembly the Commission carries out surveys of living conditions and pay in Vienna and other host cities. It drew up in 1982 what it called a "general methodology" for the purpose of assessing conditions of employment at the main duty stations (Report of the Commission dated 15 September 1982 on its 16th Session, Documents of the General Assembly's 37th Session, Supplement No. 30, A/37/30, Annex II), and the defendant Organization treats the text as a set of rules to be taken into account in matters of personnel management.

6. According to the general methodology data of several kinds count in determining the best local conditions: salary, other items of pay, provision for social security, and fringe benefits.

7. The Commission followed the general methodology in 1987 in determining the relevant data for Vienna and set out its findings in a report dated 17 August 1987 and headed "Remuneration of the General Service and related

categories: survey of best prevailing conditions of service at Vienna" (Document ICSC/26/R.26). The report said that the data had been obtained from twenty-three commercial firms and one embassy in Austria, described as the "local employers". The point material to this case is that it was in that report that the Commission for the first time took into account, and quantified, the value of the Commissary benefit to staff in the General Service category.

8. By way of comparison the Commission did also consider non-monetary benefits granted by the local employers such as housing aid, the sale of their own products at a discount, loans and other forms of financial help, vocational training, Christmas and birthday presents, dinners and outings, and even theatre tickets. But the Commission thought such benefits too occasional and fortuitous to be quantifiable in monetary terms and therefore discounted them.

9. The upshot was that the Commissary benefit was the only item the Commission took into account in working out the relevant figure of pay in the Organization for the purpose of comparison with local pay. The value it put on the benefit to anyone allowed access to the Commissary was some 6,600 schillings a year. By extrapolation of figures it based on a salary group treated as typical it reckoned the benefit to be equivalent on the average to 2.4 per cent of the pay of General Service staff. Appended to its report were scales which afforded the basis for adjusting pay in the Organization and, to offset the value of the Commissary benefit, the scales reduced pay by 2.4 per cent for everyone they applied to.

10. The complainants object to the reduction on two grounds. First, they submit that the Commissary benefit is irrelevant in determining the best local conditions - the yardstick in the Organization's rules - that the methodology is therefore fundamentally flawed and that the Organization's action on staff pay is null and void. Their second objection is that even if the Tribunal endorses the methodology it was so arbitarily applied that, again, the impugned decisions are flawed.

11. UNIDO's answer is that it has discretion to set pay and made proper exercise of it in endorsing recommendations made by the Commission in pursuance of the methodology and on the strength of the Vienna survey.

The issues of law

12. Some principles there is ample precedent for will bear restating. One is that when impugning an individual decision that touches him directly the employee of an international organisation may challenge the lawfulness of any general or prior decision, even by someone outside the organisation, that affords the basis for the individual one (cf. Judgments 382 (in re Hatt and Leuba), 622 (in re Sikka) and 825 (in re Beattie and Sheeran)). The present complainants may accordingly challenge the lawfulness of the general methodology and of the 1987 survey of Vienna, which, taken together, constitute the basis in law of the decisions under challenge.

Another principle is that a decision by an organisation may be reviewed, albeit on limited grounds: it will be set aside if there was no authority to take it, or if there was a breach of form or of procedure or some obvious mistake of fact or of law, or if the decision was arbitrary, or if there was abuse or misuse of authority (cf. judgments ranging from No. 39 (in re Cardena) to No. 972 (in re Unninayar)).

Those are the general principles that apply to the present complaints.

13. The complainants' objections to the Commission's recommendations and to the decisions impugned must be viewed against the rule about the best local conditions, which is in the Staff Regulations of the Organization. The introduction to the 1982 report on the methodology stressed in paragraph 3 how important the rule of parity is. What it said was:

"... It is stated under Article 101 of the Charter of the United Nations that 'the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity'. To comply with the standards established by the Charter as regards the employment of locally recruited staff, the organizations of the United Nations system must be competitive with those employers in the same labour market who recruit staff of equally high calibre and qualifications for work which is similar in nature and equal in value to that of the organizations. Remaining competitive in order to both attract and retain staff of the high standards requires that the conditions of service for the locally recruited staff be determined by reference to the best prevailing conditions of service among other

employers in the locality. ..."

14. Comparison lies between General Service pay in the Organization and typical pay on the local employment market. So the effect of counting any item other than salary proper in reckoning the pay of the international staff is to cancel an equivalent portion of the items that count in reckoning local pay and to lower correspondingly the level at which there must be the parity the Organization's rules require.

15. The first point to determine is the figure of pay that is to count for the purpose of comparison with local conditions. The report on the methodology does not bring that out though paragraph 40 does say that items paid in cash "are relatively easy to compare with the remuneration of the United Nations organizations, which, with few exceptions, do not pay extra allowances in addition to base salary". According to the system of pay in the defendant Organization salaries are defined in its Staff Regulations and financial rules and appear in its accounts. For the purpose of establishing parity with local pay the only relevant items are the ones defined in its Staff Regulations and financial rules and actually paid out of its own funds.

16. Something like the Commissary benefit cannot count in such comparison. It is not provided for in the Staff Regulations or financial rules, and though the Organization did negotiate for it for the staff's sake it is a form of tax relief that the host country bestows by way of privilege on those who have access to the Commissary and at no cost whatever to the Organization.

17. In following the Commission's conclusions in its report of 1987 about how to take account of the Commissary benefit the Organization altered the salary scales by bringing in an irrelevant factor, the effect being to lower salaries and lighten UNIDO's own burden as employer.

18. That reason alone is a sufficient one for quashing the decisions to take account of the value of the Commissary benefit for the purpose of comparing pay and ensuring parity. There is no need to go into the complainants' further objections to the reckoning of the Commissary benefit and to the way in which it affected the salary scales. Suffice it to say that the Commission's approach, involving as it did the use of some thoroughly unreliable lump-sum estimates, was an inadmissible way of carrying out a survey that was eventually to affect the pay of a large category of staff and, indirectly, their pension entitlements as well.

19. The impugned decisions cannot stand. The Organization must so recalculate the complainants' pay as to discount the Commissary benefit and pay their salary in full as from the date at which the scales they object to were brought in. It shall also pay them a total of 40,000 French francs in costs.

DECISION:

For the above reasons,

1. The decisions that set the complainants' pay in keeping with the salary scales that came into effect at 1 October 1987 are set aside.

2. The cases are sent back to the Organization for the recalculation of their pay as prescribed above.

3. The Organization shall pay the complainants a total of 40,000 French francs in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner