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

SEVENTY-SIXTH SESSION

In re ABRAHAM, POPPINGER and RONESCH (Nos. 1 and 2)

Judgment 1334

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Julius Abraham, Mr. Alfred Poppinger and Mr. Karl Ronesch against the International Atomic Energy Agency (IAEA) on 7 December 1992 and corrected on 22 January 1993, the IAEA's replies of 2 April, the complainants' rejoinders of 9 September and the Agency's surrejoinders of 3 November 1993;

Considering the second complaints filed by Mr. Abraham, Mr. Poppinger and Mr. Ronesch against the Agency on 7 December 1992 and corrected on 22 January 1993, the IAEA's replies filed on 2 April, the complainants' rejoinders of 9 September and the IAEA's surrejoinders of 3 November 1993;

Considering the Agency's further submissions of 20 October 1993 in reply to questions put to it on 28 September on the Tribunal's behalf and the complainants' comments thereon of 16 November 1993;

Considering the applications filed to intervene in both sets of complaints by:

H. Aigner

G. Bagliano

J. Berger

E. Bollmann

S. Deron

D. Donohue

N. Doubek

R. Fiedler

G. Grabmüller

G. Hemmer

G. Jammet

E. Lobner

A. Nirschl

R. Ouvrard

J. Parus

W. Raab

C. Resch

V. Vorisek

P. Zahradnik

A. Zoigner

Considering the applications filed to intervene in the second set of complaints by:

R. Hartmann

J. Heiss

R. Hochmann

Considering Articles II, paragraph 5, and VII, paragraphs 1, 2 and 3, of the Statute of the Tribunal, Regulations 1.01 and 1.02 and Rules 1.02.2, 12.01.1(D)(1) and 12.02.1(B) of the IAEA's Provisional Staff Regulations and Staff Rules;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The complainants are officials of the IAEA in the General Service category. They work in the Agency's Safeguards Analytical Laboratory at Seibersdorf, some twenty miles outside Vienna.

Under an agreement the IAEA signed with the Austrian Government in 1976 it was to keep teams ready at all hours to deal with emergencies. Since 1980 each team has been made up of three officials, who must be on call by telephone or radio at any time for a full week, Saturdays, Sundays and public holidays included. Such weeks are known as "on-call" duty and used to be remunerated at flat rates. In 1991 the rate for a full week was 5,534 schillings. Originally staff had to stay near the telephone, and they saw that as a drastic check on their freedom of movement. Later the Agency gave them pagers.

The complainants and others did such work. They learned that the Agency was to do away with flat-rate payment on 1 January 1992 and instead pay compensation only for overtime hours. In a memorandum of 16 December 1991 they proposed to the Director of the Division of Personnel a provisional solution whereby they would get compensatory leave for on-call duty "until normal financial conditions are restored".

In a memorandum of 20 January 1992 the Director told the complainants and others of the Director General's decision to do away with lump-sum compensation and instead pay overtime rates for emergency services actually rendered. The reason was, he said, that the use of pagers warranted review of the method of payment; there were also budgetary considerations, and the staff of other organisations in Vienna were not being paid for on-call duty.

By letters dated 19 March 1992 the complainants submitted to the Director General requests for review under Rule 12.01.1 (D)(1) alleging breach of the rule against retroactivity, of acquired rights, of basic principles on pay and of equality of treatment. They applied for leave to go straight to the Tribunal.

In letters of 15 April 1992 the Director General rejected their requests but said he would bring in the new arrangements only as from 20 January 1992, the date on which they had had notice of it, and would invite proposals about compensation in the form of "time-off on a limited scale" for on-call duty.

On 20 May the complainants went to the Joint Appeals Committee. The Committee having failed to report within the time limit in the rules, the complainants applied to the Director General in letters of 18 September for leave to go to the Tribunal. In letters of 16 October he gave them such leave but upheld his decision to pay only for actual overtime done while on call. Those are the decisions they are impugning in their first complaints.

Meanwhile the Director General approved new on-call arrangements granting staff one day off for each week on call plus payment at the overtime rates in Rule 1.02.2 for emergency service. On 18 August 1992 the complainants were informed that the new arrangements had come in as at 1 July.

In letters of 21 and 31 August 1992 the complainants submitted a further request for review to the Director General. They observed that the new arrangements for pay were not so good as the ones brought in in 1976 and they applied for leave to appeal to the Tribunal if he declined to review his decision. He gave them leave in letters of 9 September 1992 in which he also refused to reconsider his decision to bring in the new arrangements at 1 July 1992. Those are the decisions they are challenging in their second complaints.

B. In their first complaints the complainants plead breach of acquired rights. They say that the new arrangements for compensation have meant lower earnings in 1992 than in 1991: Mr. Abraham has earned 18.32, Mr. Poppinger 20.29 and Mr. Ronesch 6.30 per cent less. That is a change in the fundamental and essential terms of their employment.

In their submission the new arrangements are also in breach of general principles of law on pay. The Agency seems to be treating on-call duty as no more than emergency service and thereby ignoring how it restricts freedom of movement and the right to time off. Refusing to pay for work done outside ordinary working hours offends against the general principle of law that services must be paid for as their nature requires and when rendered.

Moreover, according to the "Fleming" principle that applies to the Agency and the rest of the United Nations common system, pay of staff in the General Service category must match the best prevailing conditions in the locality. The complainants' pay has not since 20 January 1992.

Lastly, they allege breach of equal treatment. The Agency should have applied the new arrangements that came in at 20 January 1992 to everyone who does on-call duty, but it went on paying the staff of the Division of Nuclear Safety according to the old arrangements.

In their second complaints they acknowledge that their average loss of earnings is one-third less than what they alleged in their first complaints, now that on-call duty is compensated by one day off for each week. But the Agency is setting the rate of pay for such duty improperly low: by their reckoning it should in 1991 have granted them about three days off for each week on call. So their pleas about breach of acquired rights and of the general principles of law on pay hold good.

But they are dropping the plea about breach of equal treatment because the arrangements introduced on 1 July 1992 appear to apply to everyone on call.

In their first complaints they ask the Tribunal to quash the decisions of 16 October 1992, to order the Agency to pay them as from 20 January 1992 amounts reckoned according to the arrangements for pay in force up to that date, and to award them 20,000 French francs each in costs.

In their second complaints they ask the Tribunal to quash the decisions of 9 September 1992, to order the Agency to pay them as from 1 July 1992, amounts reckoned according to the arrangements for pay in force up to 20 January 1992, and to award them 20,000 French francs each in costs.

C. In its replies the Agency submits that the first complaints are irreceivable. The Director General's letters of 16 October 1992 authorising the complainants to go directly to the Tribunal are not the right decisions for them to challenge if the complaints are to be receivable. They appealed on 20 May 1992 against the Director General's decision of 15 April 1992. On 5 August they wrote to the Secretary of the Joint Appeals Committee to say they were surprised to have got no answer. They could have challenged implied rejection under Article VII(3) of the Statute of the Tribunal, the Committee having failed to report in time; but instead they waited until 18 September to ask the Director General for leave to go straight to the Tribunal. The complaints filed on 7 December 1992 are therefore not receivable.

On the merits of the first complaints the Agency points out that the flat-rate arrangements introduced in 1976 were just provisional: neither the Staff Regulations and Rules nor the complainants' contracts expressly provided for them. Besides, they applied only to the Seibersdorf Laboratory.

Originally staff on call had to be within reach by telephone, but then came the pagers, which are not much of an inconvenience. Emergencies being very rare, the staff were compensated merely for being on call. Staff have special obligations under Regulation 1.02, which says that "the whole time of staff members shall be at the disposal of the Director General". There is no breach of general principles of law if pay and work time are reduced

together.

The Fleming principle applies only to general levels of pay and does not require comparison of every single term of employment at the Agency with the same term on the local labour market.

The payments made to the staff of the Division of Nuclear Safety from March to June 1992 were made by mistake; so there was no breach of equal treatment.

In replying to the second complaints the Agency denies breach of acquired rights: it was the complainants' own memorandum of 16 December 1991 to the Director General that suggested replacing cash payments provisionally with compensatory time off. And they have actually taken the time off due to them. Since their loss of earnings may not be regarded as fundamental, their terms of employment have not altered. The Agency maintains its arguments about the reasons for the changes in their terms of appointment and the provisional and non-monetary nature of compensation.

It points out that both aspects of on-call duty are properly compensated: constant availability by one day off for each week, and emergency service by overtime payment under Regulation 1.02.2.

D. In their rejoinders the complainants challenge the Agency's plea that their first complaints are irreceivable and submit that Article VII(3) of the Tribunal's Statute does not apply to internal appeals. They say that if they had followed the course the defendant is suggesting the Tribunal would certainly have dismissed their complaints as premature.

On the merits they submit that the payment for on-call duty was part of their salary. The Agency never questioned the principle of such compensation before it took the decisions under challenge, and it may not allege that it was provisional now that it is written into their terms of appointment. Besides, there are other instruments that govern officials' conditions of employment, such as directives, decisions, international treaties and the general principles of law.

They maintain that the Agency should have paid them a flat rate for on-call duty and overtime rates for emergency service. Notwithstanding Regulation 1.02 the constraints of such duty do warrant compensation. Furthermore, the Agency has not shortened the number of hours on call and carrying pagers is a real constraint.

What the Agency says about the Fleming principle is at odds with the "revised general methodology for surveys of best prevailing conditions of service at headquarters duty stations", approved by the International Civil Service Commission, which provides for establishing general scales on the strength of comparison of the various components of pay.

In rejoinders to their second complaints the complainants maintain their plea of breach of acquired rights. Their proposal of 16 December 1991 was meant only as a makeshift and they never suggested any arrangements like those the Agency later adopted. Although they have indeed taken the leave due to them they have expressly reserved their rights.

E. In its surrejoinders on the first complaints the Agency develops its pleas.

It points out that since the complainants did not take part in the on-call system from the outset they may not plead breach of acquired rights on the grounds that it was in operation from 1976 to 1992. The lack of a proper legal basis for payment of the compensation - which is not mentioned in their contracts, the Regulations and Rules, the Agency's "directives", or any international treaty applying to the Agency - was one of the reasons for changing the arrangements in force up to 20 January 1992. Contrary to their assertions, compensation for on-call duty was claimed on separate payment requests and did not go through the Agency's payroll system.

The Agency observes that it has never accepted the figures of loss of earnings submitted by the complainants and maintains that they have failed to prove that the new arrangements for compensation have altered their terms of employment.

It presses its pleas about the Fleming principle and maintains that there was no breach of general principles of law on pay.

In its surrejoinders on the second complaints it submits that the complainants and other staff concerned were at all times involved in drawing up the new arrangements. The staff actually proposed in the memorandum of 16 December 1991 compensation by time off rather than pay for on-call duty.

The new arrangements which came into effect on 1 July 1992 have reduced pay for such duty to a reasonable level.

F. In further submissions the IAEA explains that the system of on-call duty came about through an agreement with the Austrian Government. It has never had to impose on-call duty on anyone since enough staff members have always volunteered. In 1991 eight of the interveners did not carry out such duty. On the abolition of monetary compensation for on-call duty the Administration decided in June 1992 to give everyone an equal share of on-call duty. Between 1987 and 1991 the average number of weeks a year the complainants spent on call was 9.8 for Mr. Abraham, 8 for Mr. Poppinger and 5.6 for Mr. Ronesch. In 1991 Mr. Abraham and Mr. Poppinger were on call more often than others.

G. In comments on the Agency's further submissions the complainants observe that (1) on-call duty never depended on individual preferences; (2) how many weeks staff members spent on call depended entirely on the Agency's requirements; (3) on-call duty had always been regarded as a part of their jobs even before it was written into their job descriptions in 1992; and (4) the material figures for 1992 and 1993 do not show any change. Since Mr. Poppinger was on call only after September 1987 his case is not comparable for that year. From 1988 to 1991 he and Mr. Abraham each had an average of 10 weeks a year and Mr. Ronesch 5.25.

CONSIDERATIONS:

1. The complainants and the interveners are officials of the International Atomic Energy Agency and in charge of safety and control at the Safeguards Analytical Laboratory which the Agency has at Seibersdorf not far from its headquarters in Vienna. The complaints seek the quashing of two successive decisions in 1992 whereby the Director General changed arrangements originally made in 1976 to compensate staff for the constraint of ensuring round-the-clock surveillance of safety at the Laboratory.

2. Material to the Tribunal's rulings are the issues of fact set out below, the evidence for them being either in the parties' briefs or in their answers to questions the Tribunal put to them in the course of the proceedings.

3. In 1980, when the Agency transferred the Laboratory with other technical plant to Seibersdorf, it set up teams to be ready round the clock to deal with emergencies. The teams were each made up of three members of the Agency's technical staff and they were all to be on call by rotation for a week at a time.

4. The members of the teams were paid compensation for such "on-call" duty and the amount was from the outset aligned with rates of payment for like duty with municipal industrial services in Vienna. In the early days it came to some 2,000 schillings a week; but it went up in 1987 to about 4,000 and was thereafter indexed to pay rises.

5. The system worked smoothly and to the satisfaction of the staff who - says the Agency - ran it on their own. It ranged, they reckon, from roughly 5 to 20 per cent of their total earnings. Since there were many volunteers on-call duty was infrequent and accounted for 5 to 10 weeks a year. There was little or no emergency work.

6. Although on-call duty was particularly burdensome at first it became easier with the use of pagers. But by common consent it is still an inconvenience: the official must stay within a radius of nearly 40 miles from the Laboratory; keep clear of tunnels, undergrounds and reinforced concrete structures that block radio waves; get in touch with the Laboratory by telephone within ten minutes of being paged; and be constantly ready to report for duty, if need be, within the hour.

7. In 1988 management ordered an audit of the arrangements, apparently for two reasons, the introduction of the pagers and the need to rationalise the Agency's services to cope with grave financial difficulties. The evidence shows that several possibilities were considered in the review: having security guards on permanent duty (an idea that was soon dropped because of the cost); granting compensation, at overtime rates, only for services actually rendered; and allowing compensatory time off instead of extra pay for on-call duty, despite the risk it would create of disrupting ordinary services.

8. The staff concerned were involved in the audit and there was disagreement on the subject at various levels of management. The upshot was that the staff learned from a memorandum dated 20 January 1992 that the Director

General had decided to do away with the system of extra pay for on-call duty; that henceforth the only form of compensation would be payment at overtime rates for services actually rendered; and that job descriptions would refer to on-call duty. So that the new arrangements should not be retroactive they came into effect on 20 January 1992. The Administration waited until 6 May 1992 to change the post descriptions: it added under the heading "Major Duties" the words "Perform on-call duties, including the wearing of a radiopager, as requested by the supervisor".

9. The intermediate arrangements announced in the memorandum of 20 January 1992 prompted strong protest from the staff concerned. On 19 March 1992 they sent to the Director General requests for review under Rule 12.01.1 (D)(1) of the Agency's Provisional Staff Rules. Though the Director General rejected their requests by letters of 15 April 1992, he told them at the same time that he was considering whether to replace financial compensation for on-call duty with compensatory time off.

10. The complainants thereupon appealed, on 20 May 1992, to the Joint Appeals Committee.

11. In line with what the Director General had suggested in his letters of 15 April 1992 and under cover of a memorandum of 22 June 1992, the Director of the Division of Personnel sent the Director of the Laboratory and the Director of the Division of Nuclear Safety a document dated 29 May 1992 on the new on-call arrangements that were to apply as from 1 July at the Laboratory at Seibersdorf. The document explained how on-call duty was organised and what sort of obligations it laid on staff. According to paragraph 18 of that document, for one week of such duty a staff member was to get one day off. According to paragraph 19 emergency service rendered outside normal working hours was to be paid at the standard overtime rates. Paragraph 20 said that the Administration would get as many qualified staff as possible to take part by rotation so as to lessen the burden for each of them and any disruption of the Agency's ordinary work. The acting Directors of the Laboratory and of the Division of Nuclear Safety communicated that document to the on-call staff by a memorandum of 18 August 1992.

12. The complainants made requests for review of that new decision in letters they sent to the Director General on 21 and 31 August 1992. The Director General rejected them too by decisions of 9 September 1992.

13. Meanwhile the complainants came to the view that the Joint Appeals Committee was unable to function properly and that management was dilatory in playing its part in the adversarial proceedings. Prompted by a fear that its dilatoriness might deny them fair process they applied again to the Director General for leave to go directly to the Tribunal under Rule 12.02.1(B). He gave leave as to both sets of appeals: for the later ones in the letter actually rejecting them and for the earlier ones in a letter of 16 October 1992.

14. On 7 December 1992 the complainants filed two sets of complaints. Both sets are the same in substance save that one set follows the first request for review and is about the intermediate arrangements that were in effect from 20 January to 30 June 1992, and the other is about the arrangements brought in on 1 July 1992. Since the two complaints are inextricably connected they are joined to form the subject of a single judgment. The applications to intervene listed above are declared receivable.

15. The complainants have two pleas. The first is that the successive changes in the on-call system were in breach of their acquired rights as embodied in the arrangements for financial compensation in effect up to 20 January 1992. Their second plea is that the various arrangements in effect since the beginning of 1992 are unlawful and infringe general principles of administrative law, such as fair financial reward for services rendered, and the Fleming principle, which requires that the pay of locally recruited staff be on a par with the best prevailing conditions in the locality. They seek restoration of the former arrangements as from 20 January 1992.

16. The Agency pleads irreceivability. In its submission, since the complainants waived their right to lodge internal appeals with the Joint Appeals Committee the time limit in Article VII(2) of the Tribunal's Statute should run from the date on which they got notification of the decisions they are objecting to. By that reckoning the time limit ran out long before 7 December 1992, the date of filing.

17. On the merits the IAEA submits that the change in the arrangements for compensating on-call duty was not in breach of any acquired right since the arrangements brought in in 1976 were and continued to be provisional and not a component of salary. So the later changes in them had no effect on any essential term of the complainants' appointments. In answer to their plea about the general principles of administrative law the Agency refers to the duty of staff members under Regulations 1.01 and 1.02 to carry out any duties assigned to them and to put all of

their time at the disposal of the Director General. It maintains that the Fleming principle is immaterial on the grounds that its purpose is to establish general levels of pay not to require comparison between particular benefits other than pay. Lastly, the Agency denies discriminating against anyone: though it did, owing to an administrative mistake, continue to pay compensation after 20 January 1992 to some staff the arrangements it introduced on 1 July 1992 have applied to everyone concerned. The IAEA therefore asks the Tribunal to dismiss the complaints.

Receivability

18. The Agency's objection to receivability rests on a misreading of Article VII of the Tribunal's Statute. Article VII(1) says that "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".

19. The complainants filed two successive requests for review under the Staff Rules. The first request was rejected, and thereupon the matter went to the Joint Appeals Committee and was left pending. The second request was rejected in letters of 9 September 1992, and it was in those letters that the Director General gave leave for direct appeal to the Tribunal. In his letters of 16 October 1992 he gave further leave for direct appeal in the first case.

20. Those then are the dates by which the complainants "exhausted" the internal remedies, as Article VII(1) requires, and so it is the notification of the letters bearing those dates that set off the time limit of ninety days in VII(2). Having been filed before expiry of that time limit, both sets of complaints are plainly receivable.

The merits

The alleged breach of acquired rights and the Fleming principle

21. On the strength of an acquired right the complainants claim restoration of the arrangements for financial compensation for on-call duty as they were before the changes made on 20 January 1992. Under this head they rely on the case law on the doctrine of acquired rights, particularly Judgments 391 (in re de Los Cobos and Wenger), 832 (in re Ayoub and others) and 986 (in re Ayoub No. 2 and others). The plea they base on the Fleming principle comes under the same head.

22. The doctrine of acquired rights is irrelevant to this case. The purpose of the case law the complainants cite is to safeguard the substance of the staff's pay and pensions in the event of amendments to the material rules. The supplementary benefits were intended to afford compensation for constraints that at the time were not part of the complainants' ordinary duties. The abolition of such benefits did not affect the level of their basic pay.

23. Another material point is that only benefits that have some basis in law may be protected under the doctrine of acquired rights. It is plain on the evidence that the financial compensation paid for on-call duty was the outcome of shifting administrative practice which as such was constantly subject to change and had no basis in the Staff Regulations or terms of employment. No issue may arise in such circumstances over the safeguard of acquired rights.

24. As for the Fleming principle, it offers, as the defendant says, a guide for setting general levels of pay for local staff: it offers no basis for claims about any particular component of such pay.

25. The conclusion is that the complainants' pleas under this head fail.

The alleged breach of general principles of administrative law

26. Yet some of the other arguments which the complainants put forward or which the facts or evidence before the Tribunal suggest, and in particular the doubts expressed about the lawfulness of the impugned decisions, warrant setting them aside.

27. But before taking up those issues the Tribunal must make it plain that it will not interfere in the Agency's exercise of its discretion to determine the sort of additional duties or constraints that earn special compensation over and above the payment of salary for the performance of normal duties. Nor, if the Agency believes special compensation to be warranted, will the Tribunal, save in obviously anomalous cases, rule on the form such compensation should take or the arrangements for granting it.

28. The decision of 20 January 1992 alters the arrangements for on-call duty in two ways: it replaces all forms of compensation for being on call with changes in post descriptions. Subject to the criteria set out above the Tribunal holds that that decision is at odds with the most rudimentary requirements of administrative process. Although it amounts to an alteration of the position of the officials concerned, the decision fails to afford certain safeguards that make such alterations lawful. There is no reference to the basis for it in law; there is no explanation of how the decision maker derived his authority; and there is no suggestion that the staff were consulted in a manner prescribed in the Staff Regulations. Lastly, the decision does not say which staff members it applies to and so it allows for discrimination. Such discrimination has indeed already occurred.

29. The Tribunal does not require of the Agency the sort of strict attention to form that might bring its work to a standstill, but will require scrupulous observance of forms and procedures that protect staff interests in any administration that is lawfully managed and subject to proper review.

30. It is true that the arrangements in the document dated 29 May 1992 are more explicit than the earlier scheme insofar as for the first time that document sets out the on-call arrangements in full. But like the earlier scheme it fails to state the basis in law and to define the staff it applies to, and by implication takes for granted acceptance of the constraints demanded of staff by dint of a revision of their post descriptions, which the Tribunal has held to be improper.

31. The conclusion is that the impugned decisions must all be set aside together with the intermediate arrangements of 20 January 1992, including the revision of post descriptions, and the decisions of 18 August 1992 applying new arrangements to the complainants as from 1 July 1992. The cases are all sent back to the Agency for a new decision that complies with the requirements stated in this judgment.

32. The Tribunal declares the consequences of the quashing to be as follows. The arrangements for compensation in force up to 20 January 1992 are provisionally reinstated pending the introduction of new ones, save that for the period from 1 July 1992 up to the date of this judgment the effects of the arrangements brought in by the decisions of 18 August 1992 shall be deemed final.

33. Since their claims have in the main succeeded the complainants are entitled to costs, and the Tribunal sets the amount at a lump-sum total of 20,000 French francs.

34. The applications to intervene being allowed, the interveners shall have the same rights as the complainants insofar as they are in the same position in law and in fact.

DECISION:

For the above reasons,

1. The impugned decisions and the arrangements referred to in 31 above are set aside, with the consequences set out in 32 above.

2. The Agency shall pay the complainants a total of 20,000 French francs in costs.

3. The interveners shall have the same rights as the complainants insofar as they are in the same position in law and in fact.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda
P. Pescatore
Michel Gentot
A.B. Gardner

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