

SEVENTY-NINTH SESSION

In re DI PALMA, MOSSAZ and ZOTIN

Judgment 1457

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr. Salvatore Di Palma, Mr. Bernard Mossaz and Mr. Sergei Zotin against the World Intellectual Property Organization (WIPO) on 17 December 1993;

Considering the interlocutory order in Judgment 1417 of 1 February 1995 and the submissions by the complainants, the Organization and the International Civil Service Commission (ICSC) that are cited in the second paragraph of the preamble to that order;

Considering the further submissions filed, in accordance with points 1 and 2 of the decision in Judgment 1417, by the Commission on 6 March 1995 and by the complainants on 12 April, and WIPO's letter of 1 May 1995 informing the Registrar that it did not wish to submit a final brief;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal;

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. Facts relevant to this case appear in Judgment 1417 under 1 and 2. The complainants belong to the Professional category of staff of WIPO. According to WIPO Staff Regulation 3.5(a) base salaries of staff of the Organization in the Professional and higher categories are "adjusted" to variations in the cost of living at Geneva. That is done by reference to a "post adjustment index" and by payment to the staff of a non-pensionable allowance known as "post adjustment". The index for Geneva serves as a measure of the cost of living there as against New York, the duty station that the common system of the United Nations takes for the sake of comparison.

Regulation 3.5(e) reads:

"The multiplier applied for calculating the post adjustment shall be that established for Geneva by the International Civil Service Commission, and the effective date of any change in the multiplier shall be as fixed by the said Commission."

To calculate the post adjustment index, of which "rental/housing" costs are a main component, the Commission carries out periodic surveys into the cost of living at duty stations in the common system of United Nations organisations. Subtracting 100 from the post adjustment index gives the figure known as the "multiplier", which is multiplied by 1 per cent of base salary to yield the amount of the post adjustment allowance.

By circular 18/1991 of 11 March 1991 the Organization announced the multiplier which it was applying to pay as from January 1991.

A letter dated 30 April 1992 from the Controller and Director of the Budget and Finance Division of WIPO to the Chairman of the Commission referred to errors in "the implementation of the methodology" of the "place-to-place survey" which the Commission had carried out in May 1990. The letter said that had the methodology been properly followed the so-called "Walsh index", which is a gauge of prices at various duty stations, would have gone up by 0.5 per cent. It asked the Chairman to review the matter so that the Organization might make "the necessary corrections" in the pay of the Professional and higher categories of its staff.

In a reply dated 1 June 1992 the Chairman said that he saw no grounds for any such corrections.

On 14 September 1992 the Director of the Personnel Division sent staff in the Professional and higher categories a

memorandum in answer to queries about pay. He observed that the post adjustment index for Geneva was "some 0.2% higher than it should have been to ensure parity of purchasing power between Geneva and New York" and that the Director General had refrained from taking any administrative decision on the grounds that "the results of the 1990 place-to-place survey as regards [the post adjustment index] for Geneva were not reflected in the post adjustment multiplier until ... July 1991".

By letters of 26 October 1992 the complainants submitted to the Director General under Rule 11.1.1(b)(1) requests for review of the decision to apply the multiplier announced on 11 March 1991 to their pay for January of that year. They alleged that on the strength of the 1990 place-to-place survey a higher multiplier should have been applied as from September 1990.

In the absence of a reply from the Director General within the six-week time limit in Rule 11.1.1(b)(2) they submitted appeals to the chairman of the Appeal Board in letters dated 14 January 1993.

In its report of 21 July 1993 the Board recommended rejecting their appeals. The Director General having taken no further decisions, the complainants are impugning the rejection which they infer under Article VII(3) of the Tribunal's Statute.

B. The complainants challenge the lawfulness of the multiplier that was applied to their pay for January 1991. They have three main pleas.

The first is breach of *patere legem quam ipse fecisti*. The applicable methodology set at six the minimum desirable number of price quotations to be obtained for each item that was used in determining the consumer price index, and no item for which there were fewer than three quotations was to count. But the Commission counted three items for which it had only one or two quotations. The three were a cane chair, a man's short-sleeved cotton shirt and a short-wave radio. There was also a breach of procedure in that the Commission failed to report "background information" on those three items to its Advisory Committee on Post Adjustment Questions (ACPAQ).

The complainants' second plea is that the place-to-place survey done in May 1990 shows the "fundamental flaws" they pointed out in their letters of 26 October 1992 to the Director General. One example is the arbitrary way in which the Commission simply assumed that the prices of motor cars were the same at all duty stations and so miscalculated the cost of car ownership. The complainants allege that the prices of eight models of car were on the average 68.2 per cent higher in Geneva than in New York in 1990. Since prices are so much lower in the United States than in Switzerland there was flagrant discrimination against staff stationed in Geneva.

Thirdly, they accuse the Commission of "gross negligence" on the grounds that members of its secretariat had a "vested interest" in showing their "approach" to be "correct". The Commission is preoccupied with policy in the United Nations to the detriment of the common system at large.

The complainants seek the quashing of the decisions setting their pay according to the results of the place-to-place survey done in May 1990 as from "the month found by the Tribunal to be the relevant month". They claim payment of the further amounts due, plus interest at the rate of 8 per cent a year, and awards of 3,000 Swiss francs each in costs.

C. In its reply of 14 April 1994 WIPO cites Regulation 3.19(a), which gives staff members two years in which to claim any payment due under the Staff Regulations or Rules. The complainants' challenges to their pay for any of the months from October 1990 to September 1992 are in the defendant's view receivable.

On the merits the Organization submits that it had nothing to do with the Commission's choice of the method of determining the multiplier: that was a matter for the Commission alone. The Organization neither confirms nor denies the complainants' allegations.

D. In their rejoinder of 10 May 1994 the complainants contend that WIPO is yet again in breach of its duty, stated in Judgment 1265 (in re Berlioz and others), to see that any "elements of the common system or any other outside system" which it puts in its own rules are lawful. At least one other organisation that belongs to the common system has refused to apply a multiplier which it thought flawed.

E. The Commission sent WIPO on 13 May 1994 a letter and observations which the Organization filed on its behalf on 13 June. Commenting on issues the complainants raised in their letters of 26 October 1992 to the Director

General about "methodology", the Commission maintains that it carried out the survey in 1990 in compliance with the methodology it had itself "approved" and "reported" to the General Assembly after "close cooperation and consultation" with representatives of the organisations and staff associations in the common system.

F. In their further submissions of 14 July 1994 the complainants contend that the Commission has ignored their whole complaint by confining comment to their letters of 26 October 1992 to the Director General. Failing to address the substance of their pleas tacitly acknowledges that they are right.

The complainants claim further amounts in costs.

G. Further observations which the Commission made on 14 October 1994 and which WIPO filed on its behalf on 18 October address the complainants' brief of 14 July 1994.

H. In the further submissions which the Tribunal invited in point 1 of its decision in Judgment 1417 the Commission says that it had the "full co-operation" of staff representatives in doing the survey in 1990. None of them raised any "objective objections" [sic] to the methodology at the time. Any discrepancy there may have been was tiny and due to the exercise of discretion: the survey procedure, being complex, could not be followed in "absolute conformity" with unbending rules. The best approach is to resort to the "consultative process", which enables the Commission to take account of objections. Only "fundamental conceptual flaws" should be challengeable, not "minor" details.

The Commission raises a procedural objection. Citing its own Statute and Rules of Procedure, it observes that they provide in elaborate detail for the participation of organisations and staff and that the staff representatives of WIPO may address it in writing or orally. So it -

"... behooves staff members who are not satisfied with some aspect of the work of the Commission ... to cause their staff representatives, and possibly the executive head of the employing organization, to raise these points with the Commission in a timely and formal manner ... so that they might be considered before definitive decisions are taken by the Commission. ..."

In this case the complainants failed to do so.

I. In the final submissions which the Tribunal invited in point 2 of its decision in Judgment 1417 the complainants point out that "independent experts" did not take part - as they ought to have done - at all stages of the survey. The collection of data on prices in New York was "grossly unprofessional". The Commission's plea that any discrepancy was small and a matter of discretion concedes its mistakes, for which the complainants press their claim to redress.

They seek yet further amounts in costs.

CONSIDERATIONS:

1. The complainants are challenging the amount of their pay for January 1991. They object to the reckoning insofar as it was affected by what is known as the "in-area component" of the post adjustment index for Geneva as determined on the strength of the "place-to-place survey" which the International Civil Service Commission carried out in May 1990.

2. The post adjustment allowance is payable to staff in the Professional and higher categories in the common system of the United Nations, to which the complainants' employer, the World Intellectual Property Organization, belongs. It is paid over and above base salary. Its purpose is to ensure that the take-home pay of such staff has the same purchasing power in all duty stations. New York at present serves as the standard of comparison for the system of post adjustment. If the cost of living at any other duty station is found to be lower than at New York, no downward adjustment is made to base salary.

3. The system of post adjustment has been revised in each decade since the establishment of the United Nations. A thorough review in 1989 of the conditions of service of staff in the Professional and higher categories led to broad reforms that were intended to streamline the process of making surveys of the cost of living and make the whole system more open.

4. In May 1994 the International Civil Service Commission published a guide entitled *The post adjustment system: what it is, how it works*. The guide explains that the reckoning of post adjustment will depend on:

- (1) any differences in prices between New York and the other duty station;
- (2) the rate of any inflation in the cost of living at that duty station; and
- (3) the rate of exchange between the United States dollar and the currency of the country of the duty station.

The post adjustment index is established by means of periodic place-to-place surveys, which compare the cost of living in New York and at other duty stations. It is also adjusted from time to time in between surveys. Its main components are:

- (1) the "in-area component", which relates to living costs incurred in the country of the duty station;
- (2) the "rental/housing component"; and
- (3) the "out-of-area component", reflecting expenses which, though incurred while the staff member is at the duty station, are met outside the country of the duty station and generally in the currency of another country.

5. The guide further explains that the in-area component, the one at issue in this case, is calculated from a "basket" of goods and services. The "basket" contains some 240 representative items. They include food, clothing, maintaining a household, means of transport, education, recreation, health and personal care. Data on the prices of the items at the duty station are collected and compared with data on the prices of the same items in New York. The "ratios" of the prices in the two cities are then - says the guide - "combined to produce a total in-area index that excludes housing, the latter element comprising a separate component of the index".

6. The second component - "rental/housing" - accounts for much of expenditure by staff at many duty stations. As the guide explains, over and above "the basic cost of dwelling" "housing costs include utility costs". Data on such costs are obtained directly from staff. Rents are compared between the duty station and New York for "dwellings of equivalent characteristics". The cost of "home ownership (i.e. mortgage/interest charges)" is discounted.

7. Thirdly, the "out-of-area component" is included in recognition of the fact that staff spend part of their pay outside the country of their duty station. Such expenditure includes items that they import directly "because of limitations of the local market", private travel on home leave and on holidays, the education and support of dependants abroad and the upkeep of a dwelling in the home country. Information on such expenditure and on the proportion it bears to total expenditure is obtained by asking the staff to fill up questionnaires in the context of the place-to-place surveys. The component is adjusted from time to time by the application of a "global factor known as the out-of-area price index" which - says the guide - "derives from the international character of common system staff: no particular country can be designated as the focal point for expenditures incurred outside the duty station". To classify out-of-area expenditure duty stations are divided into groups. For "headquarters and other duty stations with similar characteristics", which are known as "Group I duty stations", the Commission has established a 10 per cent out-of-area weighting. Geneva, where WIPO has its headquarters, belongs to Group I.

8. The post adjustment index for a duty station is the measure of the cost of living of staff there as against New York at a specific date. The post adjustment is expressed in the form of a "multiplier" for each duty station. The multiplier is the figure of the post adjustment index minus 100: for example, the post adjustment index figure of 110 yields a multiplier of 10. The multiplier is applied to 1 per cent of net base annual salary, which is divided by 12 to give the monthly figure of post adjustment for each grade and step. That amount is added to the base monthly salary.

9. As to the "methodology" of place-to-place surveys the Commission decided (ICSC/28/R.15, paragraph 38(f)) at its 28th Session, in July 1988:

"As much as possible, the rules of the post adjustment system should be followed by the secretariat [of the Commission]. In exceptional circumstances some judgment would have to be exercised and flexible interpretations arrived at. In these cases, the secretariat should make recommendations to the Chairman of ICSC for exceptions. All such exceptions should be reported to ACPAQ [the Commission's Advisory Committee on Post Adjustment Questions] with background information."

The Commission (ICSC/32/R.24, paragraph 15(g)) further decided at its 32nd Session, in July 1990 -

"... to reconfirm the existing guidelines of six price quotations per item as the desirable minimum number. Items with two or less price quotations should be excluded from the comparison for index calculation. Such prices should be treated following procedures already approved by the Commission on the recommendation of ACPAQ."

10. Citing those guidelines on the methodology, the complainants plead breach of *patere legem*. They point out that in the survey which the Commission made in 1990 there were three items for which "two or less" - or, to put it another way, fewer than three - quotations had been obtained. At New York there were two such items: a man's short-sleeved pure cotton shirt, for which there had been only two quotations, and a cane chair, for which there was only one. At Geneva there was a third item: a short-wave radio (Sony model ICF-7601), for which only two quotations had been found. The complainants reckon that if those three items had been discounted the post adjustment index for Geneva would have been higher; so the determination of their pay for January 1991 by application of the wrong multiplier was flawed. They argue that the Commission's decision at its 32nd Session, in July 1990, superseded the one it had taken at its 28th Session, in July 1988, and barred any flexibility in including items for which fewer than three quotations had been obtained. They further contend that the three items had not been reported on, with the required "background information", to ACPAQ.

11. In its reply the Organization stated that it and its Director General "neither affirm nor deny the information contained, or the statements set forth, or the allegations made by the complainants" and suggested that any additional information or commentary on the methodology involved or on the decisions challenged or any views on the merits of the complaint would have to come from the Commission. Judgment 1417 accordingly invited the Commission to file further submissions and the parties to file final briefs.

12. In its latest brief the Commission replies that the organisations and bodies representing the staff of the common system selected two independent observers who took part at all phases of the surveys made in 1990 of the cost of living at six duty stations, including Geneva, and of the data on prices in New York. Their report dated 22 October 1990 to ACPAQ said (ICSC/ACPAQ/S-1/CRP.4) in paragraph 8:

"Having followed the various teams of ICSC the observers noted differences in their approach with regard to the choice of articles to be priced. That having been said, the observers acknowledge that the ICSC price collectors carried out their work conscientiously and with integrity and followed the item specifications carefully. They refused to collect prices for items which did not correspond to the specifications nor did they generally take prices for substitute articles without noting the substitution with its characteristics of quality, size, composition, etc."

None of the observers' ensuing comments was about any of the items for which there had been fewer than three price quotations. The observers concluded in paragraphs 14 and 15:

"It must be recognized that it is impossible to carry out surveys of this nature without mistakes occurring in the price collection phase, nor to avoid personal judgement in the choice of items too vaguely specified.

Considering that the ICSC price collectors performed their work conscientiously, it could be assumed that the differences in approach and possible mistakes more or less balance each other out."

13. In his letter of 30 April 1992 to the Chairman of the Commission the Controller and Director of the Budget and Finance Division of WIPO asked for revision of elements of the survey carried out in Geneva in May 1990. In a memorandum of 1 June 1992 to the Executive Secretary of the Commission the Chief of the Cost-of-Living Division of the Commission's secretariat commented on the Controller's letter. He referred to the Commission's decision of July 1988, set out in 9 above, and then said:

"Hence, ACPAQ guidelines, even when approved by ICSC, should be looked at as general rules, subject to exceptions, and not as fixed and immutable laws. By no means, cane chair and men's short sleeve shirts in New York and Sony radio in Geneva can be considered as 'uncommon and exotic items'. They just were not found in most selected shops at the time of the price collection."

He went on:

"... the price collection of every item was 'observed' by two and sometimes three experts chosen by representatives

of local organizations and staff of headquarters duty stations. After that, two high level experts from Geneva came to New York, closely followed the processing of the data and checked every detail of prices collected in New York. They had access to all of the material and received copies of same. When the exercise was completed, summary tables with average, minimum and maximum prices were prepared; number of quotations collected and used, for each item, were sent to the coordinator of the survey at each duty station to be shared with organizations and staff representatives. The same information was provided to members of ACPAQ. Finally the survey was 'dissected' by the members of ACPAQ jointly with representatives of organizations and staff, during the first special session of the Committee in New York."

14. The report dated 2 November 1990 on that session (ICSC/ACPAQ/S-1/R.11), which ACPAQ held in October 1990, said in paragraph 65:

"The Committee noted that the survey had been carried out according to the existing rules. ..."

15. Lastly, according to the report (ICSC/S-3/R.3, paragraph 17) dated 17 January 1991 on its third special session, in November 1990 -

"The Commission decided that:

(a) The price collection exercises and the surveys of household expenditures, including the surveys of housing and domestic service costs of staff members, had been properly carried out. ..."

16. It is plain on the evidence that when ACPAQ took up the findings of the survey for Geneva at its first special session, in October 1990, it had before it all the background information, including the numbers of price quotations. It nevertheless concluded that the approved methodology had been properly applied. It was on its recommendation that the Commission endorsed the whole exercise of the collection of data and approved the results of the survey. So the material issue in this case is whether the methodology that the Commission approved in 1990 as to the "desirable minimum number" of price quotations to be obtained for each item is inflexible or still admits the degree of flexibility that the Commission allowed for by its decision of July 1988.

17. The Tribunal is satisfied that the decision of July 1988 is a general one which still holds good and applied to the survey of the cost of living in Geneva that was made in May 1990. Since the "basket" consisted of 240 items, the three anomalies that the complainants rely on were of minimal importance and it was well within the discretion of the Commission to let them pass. It did so on the recommendation of ACPAQ, which had had the benefit of all the required background information and the report of the observers jointly appointed by organisations and staff. The conclusion is that the survey was not in breach of the methodology.

18. The complainants put forward the further plea that the methodology was fundamentally flawed in that it could not serve its intended purpose, was arbitrary and discriminated against staff at Geneva. They object, for example, to the exclusion of the costs of car ownership. But in this context they do not point to any breach of the methodology. Again, the Tribunal is satisfied that the decisions the Commission took were within the limits of the discretion it enjoys in applying the methodology. It is entitled to adopt its own methodology and is not bound to follow any suggestions from WIPO's working group on professional remuneration.

19. The complainants' plea of gross negligence in carrying out the survey of the cost of living in New York is not supported by the evidence.

20. Nor is their allegation that the Commission has a vested interest in achieving the highest possible figure for the cost of living in New York. Indeed the complainants themselves admit that "in the absence of any evidence, a claim to a general behaviour and to decisions driven by self-interest cannot be made".

21. In its latest brief the Commission raises a procedural objection set out under H above. But since the complaint fails on the merits, there is no need to entertain that objection.

DECISIONS:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss. Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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