EIGHTIETH SESSION

In re BERGER, KARAS and MORGAN

Judgment 1499

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr. Karl Berger, Mr. Oskar Karas and Miss Joanna Morgan against the United Nations Industrial Development Organization (UNIDO) on 17 January 1995, UNIDO's reply of 26 April, the complainants' rejoinder of 2 June and the Organization's surrejoinder of 14 September 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, 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. The background of the present dispute appears, under A, in Judgment 1498 (in re Schiffmann, Siwy and Young), also delivered this day. At issue is the amount of interim adjustment payable from 1 April 1994 under the salary scale for General Service officials in the United Nations common system assigned to Vienna. The material adjustment was determined jointly by the executive heads of the three Vienna-based agencies - the International Atomic Energy Agency (IAEA), UNIDO and the United Nations Office at Vienna. The IAEA serves as what is called the "designated" or "lead" agency there.

In a memorandum of 31 March 1994 the president of UNIDO's Staff Council referred a senior officer in the Division of Administration to changes which had come into effect on 1 January 1994 in Austrian tax law on social security contributions: he said that the interim adjustment should take those changes into account.

On 9 June 1994, during a meeting of the IAEA's Joint Advisory Committee representatives of the Agency's Administration and staff failed to reach an agreement, the Administration taking the view that the changes in the tax law were not all relevant and would, if all taken into account, set salaries too high.

On 4 July 1994, at the 238th meeting of UNIDO's Joint Advisory Committee the representative of the Administration stressed that, the IAEA being the "lead" agency for Vienna, UNIDO's salary scale should agree with the Agency's.

On 26 July, at the Committee's 239th meeting, the representative said that the three executive heads had agreed not to take account of all the changes in Austrian tax law and had set the interim adjustment at 3.8 per cent. By an information circular dated 30 August 1994 the Administration formally announced the Director-General's decision.

The complainants belong to the General Service category of UNIDO's staff. On 10 October 1994 they sent the Director-General a "complaint" asking him to put the interim adjustment up to 5.32 per cent and applying for leave to go straight to the Tribunal if he refused. By letters dated 7 December - the impugned decisions - he rejected their request for the increase and gave them leave to come to the Tribunal.

B. The complainants submit that the Administration ought to have taken account of the changes in Austrian tax law insofar as they related to social security contributions. Citing a document of 14 April 1993 in which the International Civil Service Commission (ICSC) said that interim adjustments "should be automatic", they maintain that what counts in determining the adjustment is not wholly at the Administration's discretion. Besides, when Austrian tax law was last amended in 1989 the Administration promised to take account of the changes made as to social security contributions.

The Administration is wrong to make out that counting those changes will push salaries up too far. The methodology in force holds good until dropped or amended; and even if the next general survey bore out the Administration's view, the staff are entitled to have the existing rules observed until then.

The complainants ask the Tribunal to have their pay revised as from 1 April 1994 by ordering a further increase of 1.52 per cent and to award each of them counsel fees in the amount of 3,000 United States dollars.

C. In its reply UNIDO submits that its exercise of discretion was lawful. Staff Regulation 6.5(a) empowers the Director-General to fix salary scales for staff in the General Service category on the basis of recommendations from the ICSC. But the Commission merely stated general principles - not binding rules - in order to leave the organisations a certain latitude in respect of the particular data to take into account.

The impugned decisions are lawful: there were no valid grounds for allowing the items the complainants mentioned to enter in the reckoning of the adjustment inasmuch as they did not arise out of any change in Austria's tax law, but from a desire to refund part of the sums taxpayers spend on social insurance. But officials in the General Service staff come under a different social security scheme.

What is more, under the "general methodology" which the Commission adopted in 1985 interim adjustments are subject to confirmation in later salary surveys. So it would have been ill-advised to raise salaries only to have to "freeze" them after the next salary survey because of the revised methodology the Commission approved in 1992.

UNIDO alleges, lastly, that what it calls the "ad hoc" agreement of 1989 did not establish a practice, especially since the tax reforms of 1989 and 1994 were different.

D. In their rejoinder the complainants repeat that the Director-General has no real discretion in the matter. They insist that the Commission's change of methodology did not entitle the Administration to "jump the gun" by applying rules it expected to be coming into force later on. The Administration must, they contend, take account of any increase in the net remuneration of Austrian employees - whatever the cause. The new methodology will not result in a "freeze" of salaries after the next general survey because the Commission decided in 1992 to bring it in by a phased approach.

E. In its surrejoinder the Organization presses its pleas in their entirety. The Commission has not approved a "phased approach" and, however that may be, the next survey will see a reduction in the salaries of General Service staff.

CONSIDERATIONS:

1. The complainants, who are members of the General Service category of UNIDO's staff at headquarters in Vienna, are challenging the rate of the interim adjustment that the Organization made as from 1 April 1994 in the pay of such staff.

2. The general considerations which are applicable to the determination of General Service staff pay, and which are not in dispute, may be summed up as follows.

(a) In accordance with what is known as the Fleming principle the salaries of the General Service staff of UNIDO and other organisations that belong to the common system of the United Nations must match the best prevailing conditions of service that other employers in the locality of the duty station grant to similar categories of employees.

(b) The International Civil Service Commission shall, according to Article 12 of its Statute, establish at head-quarters duty stations and in some circumstances for other duty stations "the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories".

(c) Determining the best prevailing rates of pay of similar local employees at a duty station is a long and complicated process, requiring as it does the selection and survey of "comparator employers" and of comparable jobs in the locality. A general survey is carried out for the purpose only once every five years. It seeks to establish the gross pay of comparable "outside" employees in the locality, allowance being made for cash benefits and others and for deductions, exemptions and rebates in amounts which are typical and appropriate for each category of employee. Net levels of pay for outside employees are ascertained by subtracting taxes and other compulsory payments, and it is by reference to those levels that the net rates of pay for General Service staff in the United Nations common system are worked out. Gross rates are then calculated from the net figures, additions being made to take account of "staff assessment" and other payments.

(d) Since in the years between general surveys there may occur appreciable changes in rates of gross and net pay for outside employees yearly interim adjustments may be required. To determine whether they are, interim surveys are carried out.

3. The "methodology" followed in carrying out surveys and relevant to this case is the one that the Commission approved and set out in a report dated 14 April 1993 (ICSC/37/R.18/Add.1.) on the remuneration of staff in the General Service and related categories. As to interim adjustment the report says in paragraph 81:

"(a) The adjustment should be based on an appropriate wage or price index or a combination of indexes;

(b) Indexes selected should be shown to produce salary movements that tend to be confirmed by successive salary surveys;

...

(f) ... Changes in local taxation should be accounted for at the time that such adjustments are made;

(g) The percentage adjustment to the net salary scale should be uniform at all levels, thereby leaving the structure of the salary scale intact ..."

4. The upshot of one interim survey was an interim adjustment as from 1 April 1994 in the pay of General Service staff at the Organization's headquarters in Vienna. The adjustment consisted in a 3.8 per cent rise in such pay which, among other things, UNIDO announced to its staff in an information circular UNIDO/DA/PS/INF.1251, dated 30 August 1994. Of that figure 3.06 per cent was accounted for by changes in indices of consumer prices and wages since 1 April 1993, when the last interim adjustment had been made. The remaining 0.74 per cent was due because of "certain changes in the local tax legislation". The general credit available to all taxpayers in Austria in the form of a direct deduction from income tax had been increased as from 1 January 1994 from 5,000 to 8,840 schillings a year. There is no dispute over these figures, nor over the 0.74 per cent increase that they accounted for.

5. By a letter dated 10 October 1994 the three complainants addressed to the Director-General of the Organization a request under Staff Rule 112.02(a) for review of the figure of the 3.8 per cent increase. They said:

"... under the interim adjustment procedure prevailing in Vienna, it is necessary to take into account all, and not just `certain', changes in local tax legislation. Concretely, instead of merely taking into account taxation changes amounting to 0.74%, leading to the announced interim adjustment of 3.8%, account should have been taken of taxation changes totalling 2.26%, leading to an interim adjustment of 5.32%."

They asked the Director-General, if he refused to grant the further 1.52 per cent increase that they were accordingly claiming in General Service pay, to let them make a direct appeal to the Tribunal instead of going through the Joint Appeals Board. By a letter of 7 December 1994 the Director-General informed them that he was upholding his decision but consented to direct appeal. That is the decision that they are impugning in their common complaint, which is receivable under Article VII(1) of the Tribunal's Statute, the internal means of redress being exhausted.

6. It is not in dispute that under Austrian law outside employees in the locality of the complainants' duty station are entitled to deductions from taxable income on account of compulsory contributions to social security schemes, premiums paid towards old-age and disability pensions and medical or unemployment insurance, dues to professional bodies, payments to building societies and the like. The amounts of such deductions from taxable income increased in the period at issue in this case because the percentage rates of such payments, or the maximum amounts to which such rates applied, or both, were increased under Austrian law. The result was a reduction in the income tax payable by "outside" employees in Vienna.

7. The Head of the Staff Administration Section of the Division of Personnel of the International Atomic Energy Agency, which is the "lead" agency in salary matters at Vienna, sent the secretariat of the Commission a letter by fax on 22 April 1994 asking it to assess separately the impact on the results of the survey of changes in the general tax credit and in tax rules as to social security contributions in Austria. The Chief of the Salaries and Allowances Division of the Commission answered the Agency in a minute of 27 April:

"... The overall survey results before and after the tax changes are as follows:

Before tax changes: -2.8%

After tax changes

- general tax credit only: -2.2%

- social security contributions only: -1.3%."

He added:

"... the results of these calculations were indicative rather than definitive ... I urge you to exercise caution in interpreting these results ..."

The Director of the Division of Personnel of the Agency concluded in a fax of 3 May to the Commission:

"I understand that your calculations which take into account both the tax changes which took effect on 1 January 1994 and the combined index movement for the period March 1993 - March 1994 result in a salary increase of 2.4% in the current General Service salary scale ..."

The Chief of the Commission's Salaries and Allowances Division confirmed that understanding in a minute of the same date and added:

"... the tax impact of the change in social security contributions was included in our calculations resulting in the 2.4% increase."

8. The Tribunal observes that the calculations provided by the Commission on the strength of all the factors at issue would have warranted a total increase of only 2.4 per cent. Since that figure is lower than that of the increase which UNIDO actually applied the Commission's calculations do not help the complainants' case.

9. The complainants contend that the reduction in the income tax payable by outside employees in the locality of their duty station, though it was attributable to amendments to social security legislation, amounted to a "change in local taxation"; that according to the methodology the Director-General had no discretion to discount that change in determining the interim adjustment for 1994; and that "any tax reduction increases the net incomes of employees, including those of the comparator employers".

10. The complainants do not, however, go on to show that the actual effect of the increase in social security contributions and of the reduction in income tax was to increase the net pay of outside employees. The Organization states in its reply that the increases in deductions from taxable income had two purposes. One was -

"... to partly reimburse the tax payer for increased costs created by social security and other payments. This rationale, it seems, cannot be automatically applied to the salary situation of General Service staff who are under a different social security scheme and may not have the same expenses as the Austrian tax payers."

The other purpose, says UNIDO, was -

"... essentially, to help employees in the lower income bracket, who could not be compared to [the lead agency's] staff."

The complainants do not take issue with those pleas in their rejoinder: they still maintain that all the changes should have been taken into account in determining the 1994 adjustment simply because they reduced the tax burden of such employees. For want of proof of any actual increase in the net incomes of outside employees the complainants' plea cannot be sustained.

11. The complainants further contend that, acting on the same principles and on the Commission's advice, UNIDO and the other international organisations in Vienna had taken account of changes in tax law insofar as they related to social security contributions in determining the interim adjustment for 1989, and that the Organization was therefore wrong to ignore such changes in determining the adjustment for 1994.

12. UNIDO's reply on that score may be summed up as follows:

(a) The setting of salary scales after a general survey is at its discretion, and so must be the determination of interim adjustments. Indeed - says the Organization - the complainants themselves acknowledge in their original brief that, although the secretariat of the Commission "may assist in making" calculations for an interim adjustment, "the Commission makes no recommendations concerning them, leaving the matter to the discretion of the organization concerned". That too is the Commission's own view: in its minute of 27 April 1994, referred to in 7 above, it was also at pains to -

"... emphasize that the power of decision on interim adjustment matters rests with the organizations rather than with the Commission which limits itself in the methodology to making general recommendation as to interim adjustment factors."

(b) Paragraph 81 of the methodology does not require that "all" the changes in local taxation be taken into account. It says "changes in local taxation", and that means changes in tax law as such, not "effects on local taxation that may be caused by changes in laws other than tax laws that bring about an increase in certain tax deductible amounts". Besides, though organisations "should" take such changes into account, they are not bound to do so.

(c) The adjustment was made ad hoc in 1989; there was no such adjustment in any year from 1990 to 1993 and UNIDO was not required to make one in 1994. What happened in 1989, says UNIDO, was that comprehensive tax reform in Austria -

"... made it necessary for all the elements in the formula for netting down gross to net salaries to be reviewed, as was done in salary surveys. The recent changes in the local tax legislation were limited in scope ... There was, therefore, no justification to repeat what was done, rightly or wrongly, in 1989."

(d) By 1994 the salaries of General Service staff were already on the high side as against those of outside employees in the locality of the duty station, and the next salary survey was likely to show that such staff were being over-compensated.

So any further increase would have offended against the principle that interim adjustments should make for movements in pay that later surveys will tend to confirm.

13. The complainants rejoin that UNIDO may not withhold increases that are due at present on the mere grounds that reductions may prove necessary later.

14. As is plain from the case law, the setting of pay scales is at an organisation's discretion. The Tribunal has recognised as much in Judgments 1000 (in re Clements, Patak and Rödl) and 1265 (in re Berlioz and others), where under 26 it said, quite specifically, that it would not interfere in the drafting of the salary policy that the exercise of such discretion was based on, even though it did have a power of review in the area. The discretionary authority of the Organization holds good for interim adjustments as well as for the setting of pay scales on the strength of the five-yearly general surveys.

15. Even supposing that, as the complainants contend, the indirect effects on taxation of the amendments to Austrian social security legislation did amount to "changes in local taxation" within the meaning of the methodology and that such changes should have been taken into account in 1994, as in 1989, the complainants' difficulty is again, as was said in 10 above, that they have not shown that the changes actually resulted in an increase in the net income for outside employees. The higher tax credit of 8,840 schillings did result in such increase and therefore warranted the 0.74 per cent rise in pay referred to in 4 above. But the evidence before the Tribunal is that only partly were the increases in social security contributions offset by tax reductions and that on that count there was no resultant increase in net income for local employees. Since the purpose of interim adjustment is to match any rise in the net incomes of local employees it would not have been proper for UNIDO to exercise its discretion in the matter so as to take into account changes in local taxation that did not bring about any rise of that kind. The conclusion is that the grant of the further 1.52 per cent increase in General Service staff pay that the complainants are claiming would have been inconsistent with trends in local pay and would have resulted in salary movements in excess of increases in such pay.

16. The claim being unwarranted on those grounds, it is unnecessary to entertain any of the complainants' other pleas.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas
Michel Gentot
Mark Fernando
A.B. Gardner

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