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

EIGHTY-FIFTH SESSION

In re Damond (No. 3), Di Palma (No. 3), Dondenne (No. 3), Hansson (No. 4), Mossaz (No. 4), Royles (No. 3), Schwarz (No. 3) and Zotin (No. 3)

Judgment 1776

The Administrative Tribunal,

Considering the third complaints filed by Mrs. Andrée Damond, Mr. Salvatore Di Palma, Mr. Bernard Dondenne, Mr. Malcolm Royles, Mrs. Linda Schwarz and Mr. Sergei Zotin and the fourth complaints filed by Mr. Bo Hansson and Mr. Bernard Mossaz against the World Intellectual Property Organization (WIPO) on 6 December 1996 and corrected on 6 January 1997, the Organization's single reply of 14 July, the complainants' rejoinder of 24 July, WIPO's letter of 5 September informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder, the comments submitted by the International Civil Service Commission (ICSC) on 26 November 1997, the complainants' observations thereon of 6 January 1998, the Organization's letter of 9 February informing the Registrar that it did not wish to comment on those observations, the ICSC's final brief of 25 March and the Registrar's letter of 14 April 1988 affording WIPO the opportunity, which it did not take up, of entering a final brief;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 13, paragraph 3, of its 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. Post adjustment allowance forms part of the pay of officials in the Professional and higher categories of organisations that belong, as WIPO does, to the common system of the United Nations. Their pay is determined, in part, according to what is known as the Noblemaire principle, which Judgment 825 (*in re* Beattie and Sheeran) explained under 1 to 5. The post adjustment index has four main components: "in-area" expenditures, "rental/housing", "out-of-area" and contributions to the United Nations Joint Staff Pension Fund. The International Civil Service Commission explained in a brochure it put out in May 1994 about post adjustment that out-of-area expenditures are those which, "although incurred while the staff member is at the duty station, are disbursed outside the country, generally in another currency".

The Commission decided in 1989 to split duty stations into "bands" according to the proportion to total expenditure of out-of-area expenditure incurred by staff. Group 1 consisted of duty stations in countries with a "strong" currency where the "weight" - the term is the Commission's - of such expenditure was 10 per cent.

The devaluation of the currency in some of those countries made for difficulty. The Commission has what is known as an Advisory Committee on Post Adjustment Questions (ACPAQ). In 1995 that Committee recommended alternatives. One was to apply a weighting coefficient for out-of-area expenditure at each duty station instead of the 10 per cent weighting then being applied according to the system of bands. The other was to apply such "actual coefficients" only if a sudden and sharp fall in the rate of exchange of the local currency meant a drop of at least 10 points in the post adjustment index.

In its report for 1995 to the General Assembly of the United Nations the Commission informed the Assembly that it had decided:

"that actual out-of-area weights rather than the existing 10 per cent band system should be used in PAI [post

adjustment index] calculations for all group I duty stations. That procedure should be introduced with effect from 1 November 1995. In the case of duty stations that had experienced significant devaluations of local currency in recent years (e.g. Montreal, Rome), the actual out-of-area percentages should be applied with effect from June 1995".

The Assembly took note in resolution 50/208 of 22 December 1995.

In reckoning the post adjustment index for Geneva in November 1995 the Commission applied the "actual coefficient" for the "out-of-area component". The figure it took was 15.8 per cent, instead of the 10 it had until then been applying. At the material time the complainants belonged to the Professional and higher categories of staff at WIPO, which has its headquarters in Geneva. By identical letters dated 18 December 1995 they each asked the Director General to review his decision to apply the Commission's index to their pay for November 1995. Having got no answer, they put their case to the Appeal Board on 12 March 1996. In its report of 5 July the Board said that it was unable, because the Commission had declined to state its "views", to make any recommendation. By memoranda of 9 September 1996, which the complainants are impugning, the Director General rejected their appeals.

B. The complainants submit that the Commission's method of reckoning the coefficient for out-of-area expenditure was flawed. It had made no survey to determine the proportion that such expenditure bore to the total. It had consulted beforehand neither the ACPAQ nor the staff nor the management of the organisations. The statistics it used were inadmissibly vague. The outcome is a decision that suffers from mistakes of fact. The Commission made a blatantly wrong finding on the evidence and showed bad faith by wilfully belittling the effect of the proposed change on the post adjustment index for Geneva.

In the complainants' view the Commission was guilty of abuse of authority: it exploited currency weaknesses at some duty stations to achieve big savings. Citing Judgment 986 (*in re* Ayoub No. 2 and others), they contend that all the decisions that it took after 1995 to boost the weighting of out-of-area expenditure must be taken into account because they have brought the index for Geneva down by over 6 per cent. The secretariat of the Commission had a method of reckoning the coefficient that condoned "an element of retroactivity": it took the findings of a survey done in May 1990 whereas the change was not to take effect until 1 November 1995.

The complainants seek the quashing of the Director General's decisions to apply to their pay as from November 1995 the multiplier set by the Commission. They claim payment of interest at 8 per cent a year on the amounts due and 3,000 Swiss francs each in costs.

C. In its reply WIPO says that it is "very sorry" not to have had help from the Commission in checking - as Judgment 1265 (*in re* Berlioz and others) says it must - the lawfulness of its decisions. It was quite unable to deal with objections as serious as the complainants' without hearing from the Commission. Not being the source of the decisions, it lacked the technical knowledge to answer advisedly.

D. In their rejoinder the complainants merely "take note" of that reply.

E. The Commission explains that the purpose of the "bands" it introduced in 1989 was to hold in check variations in pay in the currency of the duty station. But it had to go back to "actual coefficients" so as not to defeat the whole purpose of post adjustment, which is to keep purchasing power constant from one duty station to another. There are other ways of steadying figures of pay in local currency.

It was guilty, it says, neither of misuse of authority nor of bad faith: it acted *intra vires* and had good technical reasons for what it did. Nor was there anything retroactive about its decision, which, though based on the findings of a survey done in May 1990, did not affect pay in Geneva until November 1995. What made those findings reliable was that the staff had themselves provided enough data. The ACPAQ believed that the "methodology" had been properly followed.

F. In observations on the Commission's brief the complainants deny that the purpose of introducing the bands in 1989 was to steady figures of pay in local currency or that the new system impaired parity in purchasing power between duty stations. The Commission acted from "sheer expedi-ency" and in bad faith and broke the rule against retroactivity. The only way to make the findings of the 1990 survey trustworthy was to compile data from all duty stations, a method at odds with the whole idea of having an "actual" coefficient for each duty station. The figures

worked out by the Commission's secretariat were never checked by anyone.

G. In its final brief the Commission rebuts the complainants' pleas and presses its own. It says that the ACPAQ did check the findings of the survey and take note of the figures the secretariat had itself worked out. There was nothing arbitrary about lowering the post adjustment for Geneva: the grounds for the decision were "wholly technical".

CONSIDERATIONS

1. These complaints, lodged on 6 December 1996 against the World Intellectual Property Organization, seek:

"the quashing of the Director General's administrative decision, reflected in the pay slip that [each complainant] got for November 1995, to apply the multiplier set by the International Civil Service Commission insofar as that multiplier is based on a partial coefficient for 'out-of-area' expenditure distorted by a purportedly actual weighting and to award full redress in law, including payment of interest at the rate of 8 per cent a year on the arrears due."

The complainants claim 3,000 Swiss francs each in costs.

2. By the impugned decisions the Director General applied to staff of WIPO the terms of a decision that the International Civil Service Commission had adopted in May 1995 at Montreal. The Commission thereby changed the method of reckoning the post adjustment allowance payable to the staff. It reckoned what is known as "out-of-area" expenditure by applying an "actual coefficient" instead of the fixed one that had till then been used under the system of grouping duty stations in "bands". The complainants' duty station is Geneva. For November 1995 the Commission reckoned their post adjustment allowance by the new method, the coefficient being 15.8 per cent. To their mind the Commission thereby made mistakes of fact, drew plainly wrong conclusions from the evidence, acted in bad faith, broke the rule against retroactivity, and abused and misused its authority.

3. Articles 10 and 11 of the Commission's Statutes vest authority in it to reckon the post adjustment. In doing so it must abide by technical rules. Having no technical competence in such matters, the Tribunal has only a limited power of review. It will do no more than check that the decision is *intra vires*, has complied with the right procedure, is free from mistakes of law and fact, takes account of the material facts, draws no obviously wrong inference from the evidence, and discloses no abuse of authority.

4. Post adjustment has two purposes. One is to ensure that the pay of all staff of the common system of the United Nations, whatever their duty station may be, has the same purchasing power in local currency as pay in New York, which serves as the basis for the whole system. The other purpose is to keep purchasing power broadly steady despite changes in the cost of living at the duty station. The post adjustment allowance applies to the pay of staff in the Professional and higher categories of staff in the common system, to which WIPO belongs.

5. The complainants have of course no quarrel with either of those purposes but are objecting to the Commission's method of achieving them. The Commission's "methodology" has had to move with the times. In its first brief the Commission says that sundry expedients have over the years been mooted to account for out-of-area expenditure in reckoning the post adjustment but that, "being intricate, they often needed long testing to see how well they worked".

6. The complainants submit that the Commission's decision shows several flaws fatal to the decisions by the Director General that they are impugning.

Mistakes of method and of fact

7. Their first argument is about method: the Commission worked out the weighting of 15.8 per cent by a method that was faulty on several scores and that made for mistakes of fact. As they see it, the Commission's decision is flawed because the procedure was wrong, the method was wrong, and the outcome was wrong. They quote from Judgment 1000 (*in re* Clements, Patak and Rödl):

"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."

The complainants are challenging the method of reckoning the coefficient for out-of-area expenditure in November 1995, or - to be more precise - the decision to apply an "actual" weighting instead of the 10 per cent one that had obtained under the old system of "bands" of duty stations for reckoning the post adjustment index at Geneva and elsewhere.

8. Preferring one method to another in working out that index is a technical choice and so one immune to judicial review save within the narrow bounds set out in 3 above. In any event the modulation of coefficients in line with actual findings will ordinarily be a surer and more objective safeguard of parity in purchasing power than the old system of fixed coefficients.

9. As for mistakes of fact, the complainants make out that, no special survey having been done in 1990, figures of out-of-area expenditure were mere guess-work. In their submission the "place-to-place survey" of 1990 "postulated a weighting set *a priori* at 10 per cent" and neither the Advisory Committee on Post Adjustment Questions (ACPAQ) nor representatives of staff nor of management had since checked the figures.

10. The Commission's answer is that it did a place-to-place survey at Geneva in May 1990 and then "let a small sample group of staff fill up a questionnaire about household expenditure under all heads". The questionnaire had been "drawn up in 1989, before the weighting for out-of-area expenditure was set at 10 per cent". It sought information too on expenses incurred in local currency. By "using the questionnaire in 1990 - even though the 10 per cent weighting had by then been set - it managed to get data on in-area and out-of-area expenditure". It has produced a document, ICSC/41/R.7, to show that it did tell the Advisory Committee of the findings of its survey.

11. Though the complainants rejoin that even if that was so the Advisory Committee could not know how the weightings had been worked out, the evidence does not bear out their contention.

12. The complainants cite a note (ICSC/ACPAQ/S-1/R.2), written by the secretariat of the Commission and headed "Cost-of-living surveys in headquarters duty stations and Washington, D.C.", and, more particularly, Annex VII thereto, which describes the approach adopted for duty stations in group II. They contend that for drawing up statistics that approach is so arbitrary that, however acceptable it may be for the purpose of defining bands, it will hardly do to set actual weightings. For want of information on the approach adopted for group I, which includes Geneva, they say they can but suppose that it too was unreliable.

13. The Tribunal will not uphold a plea that rests on mere conjecture and is therefore quite gratuitous.

14. The complainants refer to a special survey of out-of-area expenditure that the secretariat of the Commission attempted in 1993. In their submission the questionnaire it devised for the purpose showed the secretariat's thinking to be "fundamentally flawed". The Commission replies that "that survey had nothing to do with the reckoning of weightings for out-of-area expenditure" or with the weightings themselves. The complainants demur, and cite in support a passage in a paper of 10 May 1994 - ICSC/ACPAQ/18/R.4/Part I - written by the secretariat of the Commission.

15. The complainants' quotation from that text leaves out the words "should carry out" and so lends the passage a meaning quite different from the one intended. In any event what matters is not what the Commission said but what it did. And the complainants have failed to show that the 1993 survey had any effect on the reckoning of the weighting they object to.

16. Lastly, the complainants argue that the data that the secretariat of the Commission garnered from its place-to-place survey in 1990 were "highly unreliable" because too few staff had filled up the questionnaire. The Commission answers that the statistical findings of that survey are "not the less valid for the worryingly small number of staff who took part": "enough of them did reply for the findings to be reliable". It produces documents - ICSC/ACPAQ/S-1/R.4 and R.11 - to show that when the Advisory Committee made the survey in Geneva it found that the "methodology" had been correctly followed.

17. The complainants retort that the actual weightings were "not worked out in any statistically reliable way". But they merely deny what the Commission says without adducing any material evidence in support. The conclusion is that they have failed to show any flaw in the setting of the weighting at 15.8 per cent that would be fatal to the impugned decisions.

Plainly wrong conclusions

18. The complainants contend that the Commission drew plainly wrong conclusions from the evidence, and they have two pleas on that score.

19. The first is that "the management representatives from the organisations and on the whole the ACPAQ" were not agreed on what was to be done. That is notorious. But opposition in some body or organisation does not mean that the evidence belied the Commission's conclusions.

20. Secondly, they cite the Commission's statement in its report for 1995 to the General Assembly of the United Nations that the indices of post adjustment for Geneva, Tokyo and Vienna and other duty stations would be "slightly lower" than what they would have been had the system not been changed. At the same time - they say - the Commission observes in its pleadings that for Geneva the fall is actually 2.5 per cent. To their mind the two statements are inconsistent: a 2.5 per cent drop is "by no stretch of the imagination slight". In fact there is no inconsistency; what amounts to "slight" is just a matter of semantics, and therefore of opinion.

Breach of good faith

21. The complainants see bad faith, first, in the Commission's making a decision it knew to be technically flawed and belittling the effects of it for Geneva, Tokyo and Vienna; secondly, in its failing to mention in its yearly report to the Assembly the criticisms from the specialised agencies; and thirdly, in its failing to report to the Assembly its decision to add an arbitrarily determined amount equivalent to 5 per cent of basic salary to out-of-area expenditure.

22. As to the third leg of that argument, the Tribunal observes that it relates to the reckoning of the post adjustment in a period after the one at issue.

23. The Commission says that no evidence bears out the complainants' charges of bad faith: it is "not because what it did is not to their taste that they may take it to task for dishonesty".

24. The complainants concede that evidence of bad faith is wanting but say that it is always hard to come by in such cases; besides, the Commission has not proved its good faith either. The burden of proof shifts according to the rules of evidence, and the Tribunal will not depart from them: for a charge of bad faith, as for any other, *onus probandi incumbit actori*. The complainants having failed to discharge the burden, their plea fails.

Abuse and misuse of authority

25. The complainants plead abuse of authority on the grounds that the purpose of the Commission's decision was to make savings for member States. In their submission the misuse of authority lies in a string of decisions taken on post adjustment indices. However those decisions are to be described, what the complainants are seeking to show is that the sole purpose of applying the actual weighting for out-of-area expenditure in reckoning the post adjustment for November 1995 was to lower the post adjustment allowance at duty stations in countries with strong currencies so as to claw back some 10 million United States dollars a year.

26. If the new method is lawful the fact that applying it saves member States money cannot in itself be a flaw. The complainants level a serious charge in saying that the Commission distorted the findings of the survey by "departing from the original premisses". It is again a gratuitous one and cannot succeed.

Retroactivity

27. The complainants argue that the secretariat of the Commission used a method of reckoning that made the decision to some extent retroactive.

28. As the Commission observes, although the weightings it set after the 1990 survey were given retroactive effect, the new ones worked out from the revised data were not. So the decision that the complainants are objecting to does not break the rule against retroactivity.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 20 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

(Signed)

Michel Gentot
Julio Barberis
Jean-François Egli

A.B. Gardner

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