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

102nd Session **Judgment No. 2610**

The Administrative Tribunal,

Considering the complaints filed by Ms H. D. (her third), Mr J.A. M. and Ms C. P. against the International Atomic Energy Agency (IAEA) on 13 July 2005 and corrected on 28 July, the Agency's reply of 7 December 2005, the complainants' rejoinder of 7 February 2006 and the IAEA's surrejoinder of 28 April 2006;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. In the wake of a survey of the best prevailing conditions of employment in Vienna, conducted in April 2002, the International Civil Service Commission (ICSC) recommended the application of a new salary scale for General Service staff serving in that city. It explained that "based on [the] data collected during the survey, there was no need to adjust the scale for a language factor". On 10 September 2002 the Board of Governors of the IAEA approved the implementation of the recommendation. In staff notice SEC/NOT/1919 of 23 September the Director General informed the IAEA staff that a new salary scale for General Service staff serving in Vienna would come into force with retroactive effect from 1 April 2002.

All three complainants are staff members with a G.5 grade who are serving at the Agency's Headquarters in Vienna. Each of them challenged the decision contained in the above-mentioned staff notice by letters of 19 November, which were addressed to the Director General. They asserted that the new salary scale was illegal because it amounted to a breach of the "Flemming" principle*. They referred to a note prepared by the Staff Council, dated 24 October 2002, which explained why the said principle had been breached. If the Director General did not agree to reconsider his decision, they requested permission to bring the case directly before the Tribunal without exhausting internal remedies. On 21 January 2003 the Acting Director General asked them to specify "why and in which respect" the new salary scale violated the Flemming principle. The complainants replied on 10 March. By letters of 16 April the Director General informed them that he did not consider *prima facie* that the 2002 salary survey was flawed, but that he would consider it "useful" if the Joint Appeals Board were to look further into the matter. He therefore did not authorise them to appeal directly to the Tribunal.

The complainants submitted identical appeals on 7 May 2003. On 10 January 2005 the appellants' counsel asked the Director General, given the length of the process, either to "reconsider [his] decision and honour the Flemming principle" or to grant the appellants permission to file their case immediately before the Tribunal as requested more than two years earlier. The Acting Director General refused this request in a letter of 28 January.

In its report of 21 March 2005 the Joint Appeals Board recommended that the Director General uphold "his decision to consider the 2002 salary survey to be valid". By letters of 22 April 2005 addressed to each of the complainants, the Director General dismissed their appeals. These are the impugned decisions.

B. The complainants trace the background of the "language factor" and the Tribunal's case law on this subject** and submit that, in order to comply with the Flemming principle, the ICSC must determine, for each and every salary survey, whether the language factor is or is not applicable. They draw attention to the fact that in Judgment 1713, under 14, the Tribunal pointed out that "[i]t is right to adjust pay by a language factor when jobs that do not require proficiency in a second language are matched with jobs that do. But it is wrong so to adjust pay when the matching is with outside posts that do require proficiency in a second language and that requirement is not compensated". In their opinion, only six of the twenty employers covered by the survey, representing 20 per cent of all the jobs surveyed, required proficiency in a second language. They argue that in the light of that data the refusal to apply a language factor constitutes a violation of the Flemming principle, and they add that the

methodology used by the ICSC is flawed in that it fails to take account of the Tribunal's case law. They accuse the ICSC and the Agency of consistently refusing to acknowledge the errors identified by the President of the Staff Council and denounce the misleading nature of the ICSC's conclusions. Moreover, they contend that Austrian collective agreements oblige employers to take into account foreign language proficiency and use, and that in practice this is reflected in a higher salary.

The complainants accuse the Joint Appeals Board of having committed an error of law in stating that "the Director General was not under any obligation to independently question the process that the ICSC used to determine whether a language factor was appropriate for the Vienna geographic area or the method used to collect information relevant to that determination". Since the Joint Appeals Board did not undertake an analysis of the methodology of the ICSC, its conclusion that the "survey was properly conducted in accordance with the methodology" is tainted with an error of law and of fact. They also accuse the Agency of having breached the principle of good faith through deliberate efforts to delay the internal appeal process, which lasted for some two and a half years, whereas the Joint Appeals Board is supposed to submit its report within three months of taking up the appeal, and any extension of time by the Director General must be reasonable. They were not given an opportunity to respond to the written evidence and arguments presented by the Agency in its reply to their appeals. The internal appeal process therefore failed to meet the minimum requirements of administrative due process and they consider that they have reason to claim compensation for the resultant moral damage.

The complainants request the setting aside of the impugned decisions, a readjustment of the General Service salary scales to take account of the language factor with retroactive effect from 1 April 2002, moral damages of 10,000 euros for each of them and an award of costs.

C. In its reply the IAEA expressly adopts the submissions presented by the ICSC in a memorandum it has considered necessary to annex to its own written submissions. The ICSC argues that the complainants' pleas concerning the decision to discontinue the "automatic" inclusion of a language factor adjustment in the calculation of salary scales have already been raised before both this Tribunal and the United Nations Administrative Tribunal (UNAT)*** in similar cases and have been dismissed by these tribunals. It submits that the methodology it used to conduct the 2002 salary survey did not breach the Flemming principle in any way. With respect to the plea concerning Austrian collective agreements, it asserts that in Judgment 1915 the Tribunal held that the bonuses for the knowledge and use of a foreign language for which provision was made in these agreements had already been correctly taken into account in the methodology used for the surveys. According to the ICSC, the gathering of data in 2002 was not flawed. It submits that the staff representatives did not point out any breaches of the applicable methodology during the process culminating in its recommendation concerning the new salary scales, and considers that the complainants are therefore estopped from alleging that the methodology has been breached. Lastly, it argues that it was right to recommend the exclusion of the language factor because the survey conducted in 2002, which was endorsed by all the parties involved at all stages of the procedure, showed that the majority of employers required their staff, or staff in certain positions, to use another language without providing any compensation for this requirement.

In addition to these arguments the IAEA cites Judgment 2303, under 7, to the effect that its sole obligation was "to check whether the rules applied in the chosen methodology and the ensuing results [did] not breach either the Flemming principle concerning General Service staff or the general principles of law applying to the international civil service". The Agency declares that it is not in a position to respond to the complainants' criticisms of the contents of the Joint Appeal Board's report because it views the Board as an independent body. Nevertheless, it adds that the Board was right to dismiss the complainants' submissions. As regards the procedure, it denies that it deliberately delayed the proceedings and asserts that the complainants' arguments in this respect are misleading. The Agency concedes that the Joint Appeal Board's delay was "unfortunate" but says that it provided the latter with sufficient resources to discharge its functions. It contends that the President of the Staff Council had indicated that the complainants might withdraw their appeals. Consequently, the appeals were not immediately forwarded to the ICSC, which partly explains the delay in the procedure. Lastly, it submits that "[t]he Joint Appeal Board's proceedings are not adversarial in nature" and that the Board is entitled to take such steps as it thinks necessary to inform itself. In the Agency's opinion, the complainants have therefore not demonstrated that they were denied administrative due process.

D. The complainants reiterate their position in their rejoinder. They take issue with the ICSC's argument whereby they are estopped from contesting the validity of the methodology simply because two "duly accredited" staff representatives did not express any objections during the survey process. They maintain that the methodology

was flawed as it ignored the peculiarities of the local market, such as collective agreements. They criticise the manner in which the ICSC and the IAEA interpret the Flemming principle which, in their opinion, leads to the conditions on the local labour market being totally disregarded. They take the view that the principles set forth in Judgment 1713 are still valid. They accuse the ICSC and the Administration of the IAEA of having treated the language factor as a "dead issue" from the outset. Lastly, in view of the delay in obtaining a decision on their appeals, they submit that the internal appeal system did not function properly and that this caused them injury.

E. In its surrejoinder the Agency states that it once again adopts the submissions presented by the ICSC in a memorandum which it annexes to its surrejoinder. In that memorandum the ICSC confirms its position. It submits that the applicable methodology does not permit the taking into consideration of any collective agreements *per se*. These agreements are relevant only to the extent that they are reflected in the data gathered in the course of the salary survey. As far as staff representation is concerned, it points out that acceptance of the complainants' contention would be prejudicial to the interests of staff throughout the United Nations common system. Lastly, it adds that, in its opinion, both this Tribunal and the UNAT have accepted that the "elimination of the language factor" does not *per se* violate the Flemming principle.

CONSIDERATIONS

1. In three complaints which the Tribunal has decided to join, the complainants, who are members of the General Service staff of the IAEA, request the setting aside of the Director General's decisions of 22 April 2005 which confirmed earlier decisions to base their remuneration as from 1 April 2002 on a new salary scale approved by the Board of Governors, of which the staff was informed in a notice of 23 September 2002. The new scale applied an ICSC recommendation resting on the findings of a salary survey conducted in Vienna in April 2002 in order to determine the best prevailing employment conditions in that city. The Director General had followed the ICSC's recommendation no longer to apply the "language factor" adjustment which had previously been granted to them as members of the General Service staff of an international organisation serving in cities where the national language is not one of the working languages of the organisation in question.

2. On 19 November 2002 the complainants lodged appeals challenging their salary as from April 2002, as reflected with retroactive effect on their payslip for September 2002, on the grounds that it was based on a salary scale which violated the "Flemming" principle. In the event of a negative answer they requested permission to bring the case directly before the Tribunal without being obliged to follow the internal appeal procedure. After an exchange of correspondence with the Administration, the complainants reiterated their requests on 10 March 2003 and set forth their legal arguments. The Director General replied on 16 April 2003, pointing out that the 2002 salary survey had been carried out by a local committee which, in his opinion, had complied with the requirements of the ICSC's methodology and which had included staff representatives. He concluded that it would be "useful" if the Joint Appeals Board were to look further into the matter. The complainants appealed to the Board on 7 May 2003 and were informed of the latter's composition in November 2003. The Board met frequently and on 21 March 2005 recommended that the General Director should uphold his decision to consider the 2002 salary survey to be valid. This recommendation led the Director General to take the impugned decisions dismissing the complainants' appeals on 22 April 2005.

3. Before the Tribunal the complainants maintain the arguments they put forward during the internal appeal procedure: the decision not to adjust the salary of General Service staff to allow for the fact that the national language is not the working language of the organisation breaches the Flemming principle; it is based on illegal methodology and it runs counter to the methodology itself. They add that the Joint Appeals Board's conclusions are tainted with an error of law and that the delay in the internal appeal proceedings amounts to a breach of administrative due process and of good faith on the part of the Agency.

4. The main issue raised by this case is whether the decision no longer to grant the General Service staff of the Agency, which has its Headquarters in Vienna, a "language factor" breaches the safeguards enjoyed by the staff of organisations within the United Nations common system by virtue of the Flemming principle, which "requires that the conditions of service for the locally recruited staff be determined by reference to the best prevailing conditions of service among other employers in the locality", that is to say conditions of service which are "among the best in the locality, without being the absolute best" (see Judgment 2303, under A).

5. As the Tribunal has ruled (see leading Judgments 1713 and 2303 and, with respect to complaints already

filed by staff of the IAEA concerning the 1996 salary study conducted in Vienna, Judgment 1915), it is incumbent upon the ICSC to define the methodology applied to analyse employment conditions on the local labour market. The ICSC must of course be allowed some discretion over method, but the Tribunal will nevertheless review the exercise of it, as was recalled in Judgment 1713:

"The decision impugned may not stand if, say, it overlooks or misconstrues some particular factor, or if some method is applied for the wilful contrivance of lower figures of local pay, or if corners are cut for the sake of saving time, but to the detriment of staff interests."

Thus, contrary to the view taken by the Joint Appeals Board, the Director General did not have to confine himself to ensuring that the methodology recommended by the ICSC had been followed; he was competent to "check whether the rules applied in the chosen methodology and the ensuing results [did] not breach either the Flemming principle […] or the general principles of law applying to the international civil service" (see Judgment 2303, under 7). The complainants may therefore challenge not only the methodology followed when conducting the 2002 salary survey but also the way in which its results were interpreted. Although the Joint Appeals Board's interpretation is certainly tainted with an error of law, as the complainants submit, it has not been adopted by the Agency and therefore cannot have any bearing on the lawfulness of the impugned decisions. Contrary to the view put forward by the ICSC in its comments on the complaints, they are entitled to express criticisms regardless of the fact that the staff representatives on the survey team did not raise any objections at the time. It is plain that while it is highly desirable that staff representatives should be allowed to participate in operations to determine their colleagues' remuneration, this can in no way affect the right of each staff member to avail himself or herself of the means of redress which are open to him or her and which constitute a fundamental safeguard for international civil servants. The ICSC is therefore mistaken in believing that it can rely on the theory of estoppel vis-à-vis the complainants by arguing that staff representatives are supposed to act on behalf of all the members of the personnel and that "their actions should be considered as legally attributable to each and every one of the staff they represent".

6. Having established the foregoing, the Tribunal must reject the arguments put forward by the complainants to support the view that the methodology applied was flawed and that it was itself breached. The Tribunal notes that, as in the previous salary survey conducted in Vienna in 1996, the local employers interviewed during the salary survey were asked whether all or some of their employees had to work in a language other than the working language of their enterprise or organisation and, if so, how the use of a foreign language other than the working language was compensated. No matter what the reply to the first of these questions was, no compensation was granted for the use of an additional language. The fact that some replies were imprecise or incomplete and that others concerned employees whose jobs did not match those of the Agency's General Service staff cannot call into question the plain finding that the enterprises and organisations which were consulted did not give any bonuses for proficiency in a second language. Likewise, the fact that some collective agreements in force in Austria recognise the value of work calling for language skills may not be used as an argument against the reality which emerges from the disputed salary survey. Overall remuneration alone should be taken into consideration irrespective of any collective agreements. There is nothing in the file to suggest that the method followed was flawed, that the survey was biased or that its findings are based on errors of fact. While the complainants assert in their rejoinder that the failure to pay the language factor results in the pay of the Agency's staff being significantly less than what is offered on the Vienna labour market, in breach of the Flemming principle, they provide no evidence which would make it possible to entertain that allegation, especially in view of Judgment 1915 delivered by the Tribunal on the decision taken in 1996 gradually to reduce the language factor.

7. Although the complainants' principal claims must be dismissed, the fact remains that the very long delay between the submission on 19 November 2002 of the initial requests to have the decision set aside and the final decision taken on 22 April 2005 reveals a malfunctioning of the appeal mechanisms in the defendant organisation which was all the more damaging to the staff concerned for the fact that what was at stake was the setting of the pay possibly due to them since April 2002. While the Agency was of course not obliged to authorise the complainants to bring their case directly before the Tribunal, even though it had done so in the case leading to Judgment 1915, it was its duty to provide the members of its staff with efficient internal means of redress (on this point see Judgment 2392, under 6) and, in order to justify what it itself terms an "unfortunate" delay, it cannot merely refer to the independent status of the Joint Appeals Board and its concern not to interfere in the Board's proceedings. The Tribunal will therefore allow in part the complainants' claims for moral damages and will grant each of them the sum of 500 euros.

8. Since they partially succeed on this last point, the complainants are each entitled to costs, which the

Tribunal sets at 500 euros.

DECISION

For the above reasons,

1. The IAEA shall pay each of the complainants 500 euros in moral damages.

2. It shall also pay each of them 500 euros in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

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* According to this principle, the pay of staff in the General Service category should be aligned with the best prevailing conditions at each duty station.

** See Judgments 1713, 1915 and 2303, delivered on 29 January 1998, 3 February 2000 and 4 February 2004 respectively.

*** See UNAT Judgement No. 1100.

Updated by PFR. Approved by CC. Last update: 15 February 2007.