118th Session **Judgment No. 3360**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Messrs A. C. (his second), D.L. D., D. N. (his second) and J.A.W. P. against the International Atomic Energy Agency (IAEA) on 9 November 2011 and corrected on 6 February 2012, the IAEA's reply of 3 August, the complainants' rejoinder of 29 October 2012 and the IAEA's surrejoinder of 4 February 2013;

Considering the letter of 21 June 2012 from the Chief of the Cost-of-Living Division of the International Civil Service Commission (ICSC) to the Registrar of the Tribunal containing the ICSC's comments on the complaints;

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

Having examined the written submissions and decided not to hold oral proceedings, 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. Further to a recommendation by its Advisory Committee on Post-Adjustment Questions (hereinafter "the Advisory Committee"), the ICSC approved at its 72nd session, held from 21 March to 1 April 2011, the results of the cost-of-living surveys conducted in 2010 at

the seven headquarters duty stations and Washington D.C. By note STA/NOT/988 of 16 May 2011, the IAEA Administration communicated to staff a message from the Chairman of the ICSC regarding the results of these surveys. In the detailed explanation of the results for Vienna it was noted: "In April 2011, the comparison was made between the multiplier to be derived from the cost-of-living survey, which was 62.7 […] and that based exclusively on changes to the exchange rate of the Euro relative to the US Dollar, which was 65.2. Since the latter was higher, in accordance with the established methodology for the updating of the [post adjustment classification] for Group I duty stations, the new multiplier for Vienna was set at 65.2. This means that the 2010 cost-of-living survey did not trigger any change in the [post adjustment classification] for Vienna."

In July 2011 the complainants wrote to the Director General requesting a review of the decision to apply to their post adjustment for April 2011 the results of the ICSC 2010 cost-of-living survey for Vienna and to pay them, as a result, salaries that were lower than those to which they considered they were entitled. They argued *inter alia* that the 2010 cost-of-living survey for Vienna was flawed and that the ICSC methodology used as the basis for the calculation of the post adjustment index for Vienna violated the Noblemaire principle and the Tribunal's case law. They requested that they be paid as from April 2011 the salaries to which they were "legally entitled". In the event that their request was not granted, they sought authorisation to file a complaint directly with the Tribunal. The Director General replied on 18 August 2011 that, as he saw no grounds to consider the IAEA's acceptance and application of the survey results as unlawful, he had decided to maintain his decision to apply these results to the post adjustment paid to staff in the Professional and higher categories as from April 2011. He nevertheless agreed to waive the internal appeal procedure, thus authorising the complainants to seise the Tribunal directly. The complainants filed their complaints with the Tribunal on 9 November 2011 impugning that decision.

B. The complainants explain that by impugning the Director General's decision to reject their requests for review, they are also

challenging the lawfulness of the general decision underlying the individual decisions they seek to have quashed. They submit that as a member Organisation of the United Nations (UN) common system, the IAEA has an obligation to ensure that the elements of the common system which it introduces into its own rules are lawful. In their view, certain rules of the ICSC methodology under which the 2010 cost-of-living surveys were conducted were illegal. In particular, the rule prescribing the use of arbitrary figures for the out-of-area component of the post adjustment index was illegal, because it contravened not only the Tribunal's case law according to which the methodology must ensure that the results are stable, foreseeable and clearly understood, but also the Noblemaire principle. Rather than using arbitrary figures, the ICSC ought to have used the actual out-of-area weight. This would have been consistent with UN General Assembly resolution 51/216, introducing minimum out-of-area expenditure weights in the calculation of post adjustment indices, as well as the position taken by the Advisory Committee. Similarly, the rule prohibiting consideration of the multiplier derived from the cost-of-living survey when the multiplier based on the changes to the exchange rate between the euro and the US dollar is higher is illegal, because it effectively precludes implementation of the survey results for Vienna.

In addition, the complainants argue that certain rules of the methodology used for the 2010 cost-of-living surveys were not correctly applied. They refer in particular to the housing and medical insurance components of the post adjustment index. With regard to the housing component, they assert that the benchmark figures used for New York are incorrect because they do not match the prevailing figures in the actual location of staff dwellings. In effect, the housing component is artificially decreased for Vienna. Moreover, the house maintenance costs (*Betriebskosten*) and related costs in Vienna have not been adequately considered because, unlike New York rents, Vienna rents do not include maintenance costs, which must hence be paid in addition to the net rent. With regard to the medical insurance component, they contend that the medical insurance premiums paid by staff in Vienna, and which the ICSC uses to calculate the

medical insurance index, relate to different medical insurance schemes. Indeed, the premiums paid in New York relate to coverage that is much broader than in Vienna. For these reasons, a like-to-like comparison of housing or medical insurance costs is not possible, and thus the methodology has been applied in a way which fails to ensure either stable, foreseeable and clearly understood results or the pay parity inherent in the Noblemaire principle.

The complainants ask the Tribunal to set aside the Director General's decision of 18 August 2011 and to draw all legal consequences from such rescission, in particular to remit the matter to the IAEA for the procedure to be repeated correctly, in order that they be paid as from 1 April 2011 the salary to which they are entitled. They also claim costs.

C. In its reply the IAEA states at the outset that it recognises the authority of the ICSC to determine the level of post adjustment applied to salaries in the Professional and higher categories of organisations that belong to the common system and, by virtue of its membership of that system, also to the IAEA salaries in those categories. It considers that it acted properly in implementing the results of the 2010 ICSC cost-of-living survey, given that those results were obtained on the basis of a correct and valid methodology, in the development of which the Agency's Administration and its staff representatives were fully involved.

Relying on the case law, the Agency recalls that the Tribunal has on several occasions recognised the ICSC's prerogative to freely choose its methods for calculating salary levels. It considers that it fulfilled its responsibility towards its staff, given that it acted in good faith and consulted with the ICSC on the complainants' assertions, rather than blindly implementing the results of the 2010 cost-of-living survey. It fully participated in all deliberations leading to the establishment of the survey methodology and it also ensured that the ensuing cost-of-living survey was conducted in line with that methodology.

It denies that any rules of the methodology used for the 2010 cost-of-living surveys were illegal. The method for calculating the out-of-area component of the post adjustment index has been consistently applied by the ICSC since 2000 and the fact that the ICSC has expressed its intention to consider recommendations for its revision for the 2015 round of surveys does not render the present methodology unlawful. The 2010 cost-of-living survey did not trigger any change in the post adjustment classification for Vienna because the multiplier based exclusively on changes to the exchange rate of the euro relative to the US dollar was higher than that derived from the survey. It refers the Tribunal to the explanation provided by the ICSC on this point, according to which "[t]he operational rules dictate that salaries of professional staff, paid in Euro, be kept stable by monthly adjustments of the post adjustment multiplier for exchange-rate movements of the Euro relative to the US dollar. If the survey results produce a post adjustment index that is less than the prevailing pay index […] which is required to keep salaries in Euro stable from month to month, then the prevailing pay index is maintained."

According to the Agency, the ICSC was within its rights to choose the survey methodology that it did concerning the housing and the medical insurance component. That methodology was established pursuant to a transparent process and bears no error of fact or law that would cause the Agency to violate its duty of care towards its staff, if it were to apply it. Regarding the housing component of the post adjustment index, the IAEA dismisses the allegation that incorrect benchmark figures were used for New York as gratuitous, in view of the complainants' own admission that they are not able to provide evidence in that respect. As to *Betriebskosten*, it explains that it did raise this point with the ICSC in 2006 and again in 2011, and that it received confirmation that *Betriebskosten* were accounted for under other housing costs, similar to the apportioned costs in New York. It notes that, as the ICSC confirmed in its comments to the Tribunal, the matter was considered on several occasions and the conclusion was that "adding *Betriebskosten* to rent would destroy the comparability of rental data and introduce double counting, since running costs were already represented by other components of the housing index". With

regard to the medical insurance component of the post adjustment index, it draws attention to the explanation provided by the ICSC, according to which "[i]t is a comparison of the average medical insurance premium in the duty station relative to New York, and there is no assumption that the coverage is the same".

D. In their rejoinder the complainants observe that the quotation relied upon by the Agency in its reply to defend the ICSC's calculation of the medical insurance component of the post adjustment index is nowhere to be found in the ICSC's letter to the Tribunal. They also express astonishment at the fact that in its letter the ICSC replies to a question which was not asked by the Registrar. They argue that the Agency has itself consistently supported the use of the actual weights for the calculation of the out-of-area component of the post adjustment index and cannot hence convincingly argue that it has discharged its obligation to ensure that the elements of the common system which it introduces into its own rules are lawful. To support their allegation that incorrect benchmark figures were used for the New York housing component, they adduce as evidence the report of the Advisory Committee at its thirty-fourth session.

E. In its surrejoinder the IAEA submits that the argument regarding the use of incorrect benchmark figures for New York in the calculation of the housing component is in reality an argument against an element of the ICSC methodology, namely the comparison of rental prices based on the market data provided by the Organisation for Economic Cooperation and Development (OECD). While accepting that market data may differ from actual figures, the Agency considers that their use is lawful and reasonable, especially in the absence of evidence that the OECD's mechanism for obtaining such data was illegal. Although it acknowledges that the ICSC methodology could be enhanced to further ensure equal purchasing power in the various duty stations, it denies that any of its elements could be considered illegal or that its application would cause the IAEA to violate its duty of care.

CONSIDERATIONS

1. The complainants contest the decision to apply to their salaries the post adjustment calculated on the basis of the ICSC 2010 cost-of-living survey for Vienna, as reflected in their April 2011 payslips. Specifically, they note that the 2010 cost-of-living survey did not trigger any change in the post adjustment classification for Vienna. They submit that the survey was flawed and that the ICSC methodology used as the basis for the calculation of the post adjustment index for Vienna violated the Noblemaire principle and the Tribunal's case law. The Director General, in a letter dated 18 August 2011, informed them that, as there were no grounds to consider the IAEA's application of the survey results unlawful, he had decided to maintain his decision to apply these results to their salaries. He nevertheless waived the internal appeal procedure, thus authorising the complainants to apply to the Tribunal directly, which they did on 9 November 2011. By impugning the Director General's decision to reject their requests for review of the application of the post adjustment index calculated on the basis of the 2010 ICSC cost-of-living survey to their April 2011 salary, the complainants are also challenging the lawfulness of the general decision underlying the individual decisions they seek to have quashed.

2. The main issue to be resolved in the present case is whether or not it was correct to apply the above-mentioned survey results and consequent post adjustment index to the complainants' salaries with effect from April 2011. The complainants cite several factors as examples of mistakes of fact and law. They submit that the methodology used for calculating the post adjustment index and the application of the latter by the IAEA are illegal, specifically:

(a) the rule prescribing the use of arbitrary figures (i.e. the 20 per cent minimum for out-of-area expenses) contravenes both the Noblemaire principle and the Tribunal's case law, which requires that a methodology ensure that the results are stable, foreseeable and clearly understood; and

(b) the rule prohibiting consideration of the multiplier derived from the survey results when the multiplier based on changes to the exchange rate between the euro and the US dollar is higher, is illegal.

They also submit that certain rules of the methodology regarding the housing and the medical insurance components of the post adjustment index were not correctly applied.

3. As the complaints are identical, the Tribunal finds it appropriate that they be joined to form the subject of a single judgment.

4. The complaints are receivable and the Tribunal is competent to rule on their merits. However as they raise issues of a very technical nature, similar considerations apply here as in Judgment 3273, under 6, where the Tribunal noted that "an evaluation or classification exercise is based on the technical judgment to be made by those whose training and experience equip them for that task. It is subject to only limited review. The Tribunal cannot, in particular, substitute its own assessment for that of the organisation. Such a decision cannot be set aside unless it was taken without authority, shows some formal or procedural flaw or a mistake of fact or of law, overlooks some material fact, draws clearly mistaken conclusions from the facts or is an abuse of authority (see, for example, Judgment 2581)."

5. The Tribunal concludes that the IAEA was correct in applying the rule which has been consistently applied and in effect since 2000, which states in relevant part that:

> "For the purpose of classifying out-of-area expenditures, duty stations are divided into two groups. For headquarters and other duty stations with similar characteristics, which are classified as Group I duty stations, 20 per cent of the net income (net base salary plus post adjustment) plus 5 per cent of net base salary (non-consumption commitments) is used as the minimum out-of-area expenditure. If the actual out-of-area expenditure (derived from household questionnaires) is greater than 20% then the actual out-of-area weight is used."

The IAEA submits that the fact that the ICSC has expressed its intention to consider recommendations for revision of the methodology for calculating the out-of-area component of the post adjustment index for the 2015 round of surveys does not render the present methodology unlawful. This is correct. There are many instances in which one of a variety of options may be chosen, as in this case, and the Tribunal will not set aside the IAEA's discretionary decision except in the limited situations as listed above under consideration 4.

6. With regard to the complainants' submission regarding the legality of the rule prohibiting consideration of the multiplier derived from the cost-of-living survey when the multiplier based on the changes to the exchange rate between the euro and the US dollar is higher than that derived from the survey, the ICSC states in response that "[t]he operational rules dictate that salaries of professional staff, paid in Euro, be kept stable by monthly adjustments of the post adjustment multiplier for exchange-rate movements of the Euro, relative to the US dollar. If the survey results produce a post adjustment index that is less than the prevailing pay index (post adjustment multiplier plus 100), which is required to keep salaries in Euro stable from month to month, then the prevailing pay index is maintained. The same principle has been applied for all group I duty stations in the entire system over the years." This approach is unexceptionable considering the objective of the post adjustment system, which is precisely to ensure purchasing parity between duty stations. If the ICSC did not account for the fluctuations in the exchange rates between the US dollar and the euro, there could be a distinct and varying disadvantage between duty station salaries.

7. In speaking of the housing component of the post adjustment index, the complainants submit that the benchmark figures used for New York are incorrect, as they do not match the prevailing figures in the actual location of staff dwellings, and that the housing component for Vienna is artificially decreased, as house maintenance costs (*Betriebskosten*) and related costs have not been adequately considered,

which results in a like-to-like comparison of housing costs being impossible. As pointed out by the ICSC, the method used to determine the housing component of the post adjustment index has been in effect since 1995. The IAEA notes that the house maintenance costs were accounted for, not under the category of pure rent, but when considering running costs and maintenance as a separate subsection. While ideally, the ICSC would be able to use only precise numbers to reflect staff rents for each duty station, the reality is that it would be excessively cumbersome to adopt that methodology, particularly considering that the rates would not undergo drastic changes from the estimated numbers that are currently used. Considering the overall goal of establishing and maintaining purchasing parity among the various duty stations and the difficulty associated with calculating costs using every single staff member's precise information, the Tribunal concludes that it is not unreasonable for the ICSC to adopt a system of estimation in the interest of efficiency and brevity. The Tribunal is satisfied that the methodology used was established pursuant to a prescribed, transparent process, without any vitiating errors of fact or law.

8. The complainants also contest the medical insurance component of the post adjustment index, noting that the insurance premiums paid by staff which were being used to calculate the medical insurance index do not reflect the different medical schemes and related coverage. Thus, a proper like-to-like comparison is impossible. The ICSC states that it does "not have any data comparing levels of coverage of medical insurance at various duty stations, or on additional expenditures on medical insurance incurred by staff at various duty stations in order to bring their coverage up to the same or comparable level with that in New York". Instead of comparing prices of similar items, the ICSC "simply compare[s] the average premium for medical insurance coverage at a duty station with that in New York, regardless of the level of coverage". The Agency asserts that "the ICSC was within its rights to choose the survey methodology that it did concerning the medical insurance component" and, although it agrees that a comparison of actual coverage could influence the

medical insurance component, it notes that it would require consideration of additional factors (e.g. level or quality of treatment, average waiting time for treatment, etc.), which "would further complicate the work before the ICSC in fulfilling its mandate". The Tribunal is not satisfied that the complainants have submitted any evidence which demonstrates that the methodology used by the ICSC in the calculation of the medical component was in any way illegal. Given the variability of the factors involved in comparing medical insurance coverage from duty station to duty station, the approach adopted by the ICSC based only on cost comparison, is not unreasonable. For the above considerations, the Tribunal finds the complaints receivable but unfounded on the merits.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 15 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO
DOLORES M. HANSEN
MICHAEL F. MOORE

DRAŽEN PETROVIĆ