Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

G., H., H. E., H. M., M. K., M., L.

v.

ILO

125th Session **Judgment No. 3952**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Z. T. G. against the International Labour Organization (ILO) on 7 July 2015 and corrected on 1 September 2015;

Considering the complaints filed against the ILO by Ms K. A. H., Ms E. H., Ms M. H., Ms Z. M. K. and Ms E. M. on 8 July 2015 and corrected on 6 October 2015;

Considering the complaint filed by Ms T. L. against the ILO on 15 July 2015 and corrected on 6 October 2015;

Considering the ILO's single reply of 2 December 2015 and the complainants' e-mail of 11 March 2016 informing the Registrar of the Tribunal that they did not wish to enter a rejoinder;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

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

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

The complainants impugn the Director-General's decision not to grant them a special increment beyond the maximum salary attaching to their individual grades.

The complainants are officials of the International Labour Office, the ILO's secretariat, and they are based in Budapest, Hungary. At the

material time they were all at grade G.6 except for Mr G., who was at grade P.2, and Ms L., who was at grade G.7. They were all recruited after 31 December 1994, and on 1 September 2013 each of them was in receipt of the maximum salary attaching to her or his grade.

Further to the issuance on 30 September 2013 of Information Note IGDS No. 300 (Version 2), entitled "Salary increments for merit and long service – 2013 exercise, Articles 6.5 and 6.6 of the Staff Regulations", the list of officials eligible for the award of a special merit increment was established. This list did not include the names of officials who had been recruited after 31 December 1994, which was the case of the complainants.

On 25 November 2013 the complainants submitted individual grievances to the Human Resources Development Department (HRD) requesting that all officials having reached the maximum salary rate attaching to their grade be included in the list of officials eligible for the special merit increment or, otherwise, that Article 6.6 of the Staff Regulations be annulled as being contrary to the principles of equal treatment and equal pay for work of equal value. By separate letters of 11 February 2014, the Director of HRD informed the complainants that their grievances had been rejected as unfounded because Article 6.6 of the Staff Regulations was only applicable to officials who had been in the service of the ILO since 31 December 1994 or earlier.

On 11 March 2014 the complainants filed a single grievance with the Joint Advisory Appeals Board (JAAB). The JAAB issued its report on 16 March 2015 recommending that the grievance be dismissed as devoid of merit. By a letter of 10 April 2015, the complainants were notified of the Director-General's decision to follow the JAAB's recommendation. That is the impugned decision.

The complainants ask the Tribunal to set aside the impugned decision and to order the ILO to compensate them and pay each of them 2,000 United States dollars in costs.

The ILO asks the Tribunal to dismiss the complaints in their entirety.

CONSIDERATIONS

1. These seven complaints are conveniently joined in this judgment as they arise from the same underlying facts, are presented in identical terms and raise the same issues.

2. The complainants were not included in the 2013 lists of ILO officials who were eligible for the award of an additional increment for merit or long service. The lists were established in the 2013 exercise on the basis of Information Note IGDS No. 300 (Version 2), dated 30 September 2013. Neither the names of the complainants nor of any other official who joined the ILO after 31 December 1994 and who was in receipt of the maximum salary attaching to her or his grade were included in these lists.

3. Articles 6.5 and 6.6 of the Staff Regulations govern the award of the additional increments in relation to officials at the material time. The Tribunal considered the applicability of Article 6.5 of the Staff Regulations in Judgment 3776. In that case, the complainant, who had joined the ILO before 31 December 1994 and who was in receipt of the maximum salary attaching to her grade at the material time, had been recommended for consideration for an additional increment. The recommendation was made for meritorious performance but specifically under Article 6.5. The Tribunal determined that, inasmuch as the complainant was in receipt of the maximum salary attaching to her grade, her inclusion in the list was expressly forbidden by paragraph 1 of Article 6.5, which reads as follows:

> "The responsible chief may recommend the grant of an additional increment to officials whose performance during the period under review has been appraised pursuant to article 6.7 as being especially meritorious and who are not in receipt of the maximum salary attaching to their grade."

4. In their grievances in the present cases, which were in identical terms, as well as in their complaints, the complainants rely on Article 6.6 of the Staff Regulations to support their claims. They contend, in effect, that they are entitled to be included in the lists which were established in the 2013 exercise under Article 6.6. The ILO agrees

that this is the applicable provision but insists that the complainants are excluded from its terms.

5. Article 6.6 of the Staff Regulations, which is under the rubric "Special increments beyond the maximum salary rate", states as follows:

> "1. For officials who have been in service since 31 December 1994 or earlier, the responsible chief may, subject to paragraph 5 of this article, recommend the grant of not more than one additional special increment if the officials are in receipt of the maximum salary attaching to their grade, and their performance during the preceding review period has been appraised pursuant to article 6.7 as especially meritorious.
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> 2. The responsible chief's recommendation shall be reviewed by the official to whom the responsible chief reports who, if in agreement, shall refer the recommendation to the Reports Board for decision. The grant of a special increment to officials who have reached the maximum salary attaching to their grade since the last performance appraisal as well as the grant of a second such increment during the period before the next performance appraisal is due are subject to the provisions of article 6.7(4).
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> 3. The timing of the increments provided for in paragraph 1 as well as the number of recommendations which may be made each year will be subject to limitations defined by the Director-General after consulting the Joint Negotiating Committee.
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> 4. Officials who have been in service since 31 December 1994 or earlier, who have completed more years of service in their grade than the number of years which it would normally take to progress from the minimum to the maximum of the salary scale attaching to the grade, and who are at the maximum, shall, subject to paragraph 5 of this article, be eligible to receive one additional special increment on completion of more than 20 years of continuous service and one additional special increment on completion of more than 25 years of continuous service.
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> 5. The total number of additional special increments payable during the whole period of service of an official following 31 December 1994 under the provisions of this article shall be limited to one."

6. In the primary ground of their complaints, the complainants contend that Article 6.6 of the Staff Regulations is ambiguous. They note that "[t]he Article, in paragraph 1 refers to 'not more than one additional special increment' whereas paragraph 2 refers to the 'grant of a special increment [...] as well as the grant of a second such increment' and paragraph 5 refers again to 'additional special increment'". In their

view, the ambiguity of Article 6.6 is borne out by the fact that until about October 2012 the Administration interpreted the provision in a way which caused it to grant the additional increment under its terms to officials who joined the ILO after 31 December 1994.

7. The Tribunal considers that the primary ground of the complaints is unfounded. In the first place, the complaints are not concerned with whether or not Article 6.6 is ambiguous with respect to how many additional increments may be granted to an official under this Article. The issue is whether the complainants were unlawfully excluded from the 2013 lists because they joined the ILO after 31 December 1994. Whether or not these formulations, which the complainants highlight, reflect ambiguity in Article 6.6 is irrelevant to their underlying cases.

8. It is observed that the first paragraph of Article 6.6 of the Staff Regulations permits a responsible chief, subject to paragraph 5, to recommend the grant of one additional special increment to officials "who have been in service since 31 December 1994 or earlier" and who "are in receipt of the maximum salary attaching to their grade" for especially meritorious performance. These requirements are repeated in paragraph 4 of Article 6.6 of the Staff Regulations for the grant of additional special increments to officials who have completed 20 years and 25 years of continuous service. The Tribunal concludes that the grant of special merit increments under Article 6.6 is limited to officials who joined the ILO up until 31 December 1994.

9. The Tribunal's conclusion accords with the intention for providing Article 6.6 of the Staff Regulations, which came into effect on 1 January 1995, with the expressed intention to abolish the grant of special increments beyond the maximum salary rate attaching to each grade in line with the United Nations common system. That was an essential aspect in the deliberations of the ILO's Governing Body at its 261st Session, as is reflected in document GB.261/PFA/7/7. That document states, among other things, that at its 258th Session in November 1993, the Governing Body had authorized the Director-

General to cease granting special increments beyond the top of the common-system scales to officials recruited on or after 1 January 1995. The Governing Body had further decided that the modalities for phasing out the additional special increment for long service and for discontinuing the grant of an extra increment for meritorious performance for serving staff were to be the subject of further internal study and negotiations, particularly with the staff representatives. Thereafter, the Director-General had referred the matter to the Administrative Committee. The proposals which came out of the Committee's mandate culminated in the Governing Body, at its 261st Session, authorizing the Director-General to amend Article 6.6 as it then was to implement the decision not to grant extra special increments beyond the top of the salary scales to officials who joined the ILO on or after 1 January 1995. That decision is reflected in Circular No. 517, dated 21 December 1994, which stated in paragraph 4(a) that "[s]teps beyond the common system scales will no longer be applicable to staff recruited on or after 1 January 1995". Additionally, paragraph 4(b) stated that "[s]taff in service before 1 January 1995 will be eligible to receive one more increment beyond the common system scales [...]".

10. In the second ground of their complaints, the complainants contend that they were excluded from the 2013 lists because of a change to a practice which had stood for about twenty years. They insist that under that practice the Administration listed officials who were in similar circumstances to them under Article 6.6 for the special merit increment. They relevantly state this ground as follows: "The award of additional increments for meritorious performance was, until recently, an established practice and, even if suspected to be erroneous, as such in order to be changed, such a practice should have been subject to discussion with the Joint [Negotiating] Committee as set forth in article 2 of the Collective agreement [...]. More importantly and although it is true that the Tribunal has ruled that 'practice inconsistent with Staff Regulations cannot obtain legal force' in this case the unlawful practice was not in favour of the staff member. Consequently, according to a general principle of labour law, in case of conflict

between laws, the law which is most favourable to the staff member must supersede the other one. Thus, in the current case, [we] consider that the long-standing practice to grant additional steps in the circumstances outlined above was more favourable than the very strict interpretation of Chapter 6 of the Staff Regulations and thus should continue to be applied until it has been changed in accordance with the applicable provisions (consultation and negotiation with the Joint Negotiating Committee).”

11. The Tribunal determines that this ground of the complaints is also unfounded. The Tribunal observes, first, that this is not a case in which there is a conflict between two laws. Rather, the ILO had, in error and contrary to amended Article 6.6 of the Staff Regulations, continued to consider officials who joined the ILO after 31 December 1994 for the grant of the additional special merit increment. The complainants cannot rely on that error as a basis for their claim that they too should have been considered for the said increment. In this regard, the Tribunal recalls that, according to consistent precedent, “there cannot be equality in unlawfulness” (see, for example, Judgments 3450, under 11, and 3782, under 4). The Tribunal also recalls, as the complainants have observed, its consistent statement, in Judgment 3601 for example, that:

> “a practice cannot become legally binding if it contravenes a written rule that is already in force (see, for example, Judgments 2959, under 7, or 3544, under 14)”.

12. For the foregoing reasons, the complaints are unfounded in their entirety and will accordingly be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 25 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ