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

SIXTY-EIGHTH SESSION

In re CLEMENTS, PATAK and ROEDL

Judgment 1000

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Miss Shirley Clements, Mr. Peter Patak and Miss Margareta Rödl against the International Atomic Energy Agency (IAEA) on 7 February 1989 and corrected on 24 February, the Agency's replies of 9 June, the complainants' rejoinders of 4 August as corrected on 15 September and the Agency's surrejoinders of 13 October 1989;

Considering Article II, paragraph 5, and VII of the Statute of the Tribunal, Article XV, section 38(j), of the Agreement concluded on 11 December 1957 between the Agency and the Republic of Austria regarding the headquarters of the Agency, the Supplemental Agreement concluded between the Agency and Austria on 17 July 1958, the Memorandum of understanding on common services concluded on 31 March 1977 between the United Nations, the Agency and the United Nations Industrial Development Organization, Regulations 1.10 and 5.01(a) and para-

graph B.1 of Annex II of the Agency's Provisional Staff Regulations, Rule 12.02.1 of the Agency's Provisional Staff Rules, and Articles 11(a) and 12(1) of the Statute of the International Civil Service Commission;

Having examined the written evidence and disallowed the complainants' application for oral proceedings;

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

A. The IAEA, which is in Vienna, accepted the Statute of the International Civil Service Commission in 1979. Article 11(a) of the Statute provides that the Commission shall establish the "methods by which the principles for determining conditions of service should be applied", and Article 12(1) that "at the headquarters duty stations ... the Commission shall establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories".

To draw and keep the best-qualified people organisations in the United Nations system seek to offer staff in the General Service category conditions that match the best in the public and private sectors at the duty station. Regulation 5.01(a) of the Agency's Provisional Staff Regulations states that "The gross base salary scale applicable at the Agency's headquarters for each grade in the General Service category or any other category which is locally recruited shall be promulgated by the Director General with the approval of the Board of Governors". Paragraph B.1 of Annex II to the Regulations makes similar provision and adds: "The scales shall be determined on the basis of the best prevailing conditions of employment in the locality concerned ...". For that purpose surveys are made of local conditions and the Commission has carried them out since 1977 under Article 12(1).

In a report it made at its 14th Session, in July 1981, the Commission approved the findings of a survey on Vienna and accordingly recommended that the General Assembly of the United Nations endorse new salary scales for staff in the General Service category and for manual workers in the Agency and other organisations with headquarters in that city. A section of the report on benefits other than salary said that financial assistance, free or reduced-price company products and services and recreation benefits were important and common in Vienna. The Commission reckoned the yearly value of such products and services at some 3,000 or 3,500 Austrian schillings on average.

The staff of the IAEA and other international organisations in Vienna have access to a shop known as the Commissary that sells alcohol and tobacco subject to quotas, as well as household appliances, foodstuffs, cosmetics and other goods. In its 1981 report the Commission valued the "Commissary benefit" at some 9,600 schillings a year for Austrian staff and much more for others, who were allowed bigger quotas of alcohol and tobacco, and it concluded that the benefit offset the fringe benefits local workers got.

In Annex II to a report dated 15 September 1982 to the General Assembly the Commission set out the "general methodology" to be applied in future to surveys of local conditions of employment.

The secretariat of the Commission made in 1987 another survey on Vienna which purported to follow that methodology and it submitted its findings in June 1987. The Commission approved them in a report it adopted on 17 August 1987. In paragraphs 39 to 42 of its report it dealt with the "Commissary privileges", which it described as "not available to staff of the surveyed employers".

The yearly average value of the Commissary benefit being put at roughly 6,600 schillings, or 2.4 per cent of average net salary at grade G.5, the secretariat had proposed corresponding cuts in salary for staff in the General Service category and manual grades. The Commission agreed, docked the net salary of such staff by 2.4 per cent and recommended new scales of pay to come in as from 1 March 1987. It asked its secretariat in making surveys in future to give a "reasonably accurate" idea of the value of fringe benefits granted to local workers and of the Commissary benefit.

Staff representatives saw the Chairman of the Commission on 8 October to protest against the 2.4 per cent cut in salary and he agreed that the Commission might look at the matter again.

By a circular, SEC/NOT/1187, of 27 October 1987 the Administration of the Agency informed the staff that, with the approval of its Board of Governors, the Director General would apply the new scales of pay to the General Service category and to certain other staff as from 1 October 1987. Because of an interim adjustment the scales were slightly higher than those the Commission had recommended.

The Agency employs the complainants in the General Service category of staff. Miss Clements, who is British, is at grade G.7; Mr. Patak, who is Austrian, at G.8; and Miss Rödl, who is also Austrian, at G.7. On 27 November Miss Clements, Miss Rödl and another official addressed a memorandum to the Director General asking him to agree that an appeal against the decision to apply the new scales should still be receivable in April 1988 if, after taking the matter up again at its 27th Session, in March 1988, the Commission failed to recommend scales that made no reduction on account of the Commissary benefit. In a letter of 23 December 1987 the Director General said that appeals would not be time-barred.

At its 27th Session, in March 1988, the Commission came back to the matter and asked its secretariat to report further to it at its 28th Session, in July 1988, on the value of the Commissary benefit to United Nations staff in Vienna.

The complainants and another staff member sent a memorandum to the Director General on 15 June 1988 asking him, since the Commission was to look at the matter again in July, to agree that appeals would still be receivable "in Fall 1988" if the Commission did not then go back on its decision of July 1987 about the Commissary benefit. The Director General so agreed on 23 June.

At its 28th Session, in July 1988, the Commission had before it the further information it had asked for. Its secretariat found 6,600 schillings too low a figure: the yearly value of the benefit ran from some 27,900 schillings at G.3 to some 32,600 at G.8. But in a further report it adopted on the matter on 29 July the Commission, merely noting that its former estimate had been "conservative", abided by its earlier decision.

In a memorandum of 4 November 1988 the complainants and another official asked the Director General, in keeping with Rule 12.02.1 of the Agency's Provisional Staff Rules, for waiver of the jurisdiction of the Joint Appeals Committee and for permission to appeal directly to the Tribunal. The Director General wrote "Approved" on their memorandum on 9 November, and those are the decisions the complainants impugn.

B. The complainants submit that according to the case law an international organisation is bound only by a lawful decision of the Commission's and must determine whether its decision is lawful; a fortiori it must determine whether a mere recommendation is. Since the Commission's recommendation was unlawful so were IAEA's approval of the new salary scales and its decisions to apply them to the complainants.

(1) The Commission failed to respect its own methodology in making the survey: patere legem quam ipse fecisti. As the United Nations Administrative Tribunal held in Judgment 395, that methodology was binding on the Commission and there was breach of it in taking account of the Commissary benefit in drawing up the salary scales. The benefit comes under none of the categories of data the Commission may cover in surveys: it is not a

benefit from the employer but a privilege the host Government allows under the headquarters Agreement which the Agency concluded with Austria in 1957. Article XV, section 38(j), of the Agreement says that IAEA officials may "import for personal use, free of duty and other levies, prohibitions and restrictions on imports ... (iii) ... limited quantities of certain articles for personal use or consumption and not for gift or sale." The Agency concluded a "supplemental agreement" with the Austrian Government in 1958. A "memorandum of understanding" concluded between the United Nations, the Agency and the United Nations Industrial Development Organization in 1977 put the Agency in charge of the Commissary, and the Vienna International Centre issued further rules in a circular of 1 July 1982.

One purpose of the privilege is to draw staff of high quality, and to take account of it in reckoning salary thwarts that purpose. The 2.4 per cent is in effect being charged to Austria, which is forgoing tax on sales at the Commissary. The true purpose of the reduction in salary was the improper one of achieving large savings on staff expenditure under the Agency's budget. Fringe benefits as defined in the methodology come from the employer; so the Commissary benefit cannot qualify as one.

(2) The Commission failed to respect the rules in the methodology on how to take account of the Commissary benefit. The rules require the Commission to compare United Nations benefits with those granted by the local employers covered by the survey. The Commission did not do so: it added the value of the Commissary benefit to salary even though it cannot be properly quantified; it made unreliable estimates of the value; and it drew no comparison with similar benefits granted by local employers.

According to paragraph 50 of the methodology "fringe benefits" will not count unless (a) granted to all staff on the same terms, (b) made use of by most and (c) of a kind provided by many local employers. The Commissary benefit fails to meet condition (a) because Austrians get smaller quotas of alcohol and tobacco than others.

The Commission's survey of 1987 did not use proper data in working out the yearly average of 6,600 schillings. That was only a rough estimate, and the Commission asked its secretariat to get more reliable figures in future. Later it asked the secretariat to submit further information in July 1988. But the reckoning of the new estimate put to it in July 1988 was still flawed. By taking the ten best bargains at the Commissary and applying the same rate of savings to other goods the secretariat exaggerated the potential total of savings. Many goods on sale in shops in Vienna are cheaper than the foreign brands found at the Commissary.

The Commission made no attempt to see whether the value of similar benefits granted by local employers matched that of the Commissary benefit. It did make that comparison in its 1981 survey, concluding that local fringe benefits were "not insignificant" but set off the Commissary benefit. But fairness, logic and the methodology required assessing local fringe benefits as carefully as the Commissary benefit.

(3) The Commission's recommendation was in breach of equal treatment. (a) Salaries in the General Service category were uniformly cut by 2.4 per cent even though Austrians save much less by shopping at the Commissary. (b) Staff members do not make uniform use of the Commissary. Some smoke and drink, others do not. Some save more, some less, than the equivalent of 2.4 per cent of salary.

(4) There was breach of the principle that requires the employer to let the employee dispose of his earnings freely. To suffer no loss staff members have to shop at the Commissary to save the equivalent of 2.4 per cent of their salary.

The complainants seek the quashing of the impugned decisions and the payment as from 1 October 1987 of sums equivalent to the difference between pay reduced by the 2.4 per cent and pay not so reduced, the recalculation of their pensionable remuneration and an award of 40,000 French francs to each of them in costs.

C. In its replies the Agency submits pleas on the merits.

(1) It argues that according to the material rules the setting of salary scales in the Agency is at the discretion of its Director General and Board of Governors, the only fetter being that they must take account of the best local conditions of employment. In exercising their discretion they must set store by the Commission's recommendations: that other bodies might reasonably have come to other conclusions is not a sufficient reason for rejecting those recommendations. The decisions taken thereon may be set aside only if they show a fatal flaw of the kind the case law condemns.

(2) The Commission's methodology lays down general guidelines and must be flexibly applied so as to suit conditions at all duty stations. It is not a set of hard-and-fast rules to be applied mechanically.

(3) The plea that it is the Austrian Government that grants the benefit implies too narrow an interpretation of the fringe benefits provided by local employers. The methodology did not bar taking account of the Commissary benefit. According to the texts the complainants cite it is the outcome of international agreements with the Government and was obtained by the Agency in its own interest and on behalf of its staff. Austria is not free to do away with the benefit: it may change or remove it only with the Agency's consent. In that sense it is the Agency, not Austria, that provides the benefit for its staff.

(4) The text of the methodology makes it plain that the Commission intends to count not just the benefits granted by local employers but also those which employees have "by reason of their employment with a particular organisation", one example being meal vouchers.

(5) Being free to take account of any relevant data, the Commission abided by the principles that underlie its methodology. What the English text requires is that the benefit be offered to everyone "under similar conditions". The purchase entitlement is the same for Austrians and for others as a percentage of salary, and the fact that Austrians get smaller quotas of tobacco and alcohol does not amount to breach of the requirement.

According to paragraph 46 of the methodology local fringe benefits must be either properly "quantified" or else put to general comparison with fringe benefits in the United Nations organisations. But there is no need for comparison if the fringe benefits in the United Nations can be quantified. Since the Commissary benefit could be there was no need for the Commission to make any comparison with the value of fringe benefits enjoyed by local workers.

Flaws of method in the further survey of 1988 are irrelevant: what is at issue is the lawfulness of the decisions based on the survey of 1987. What was done in 1981 is also immaterial.

The Commission had sufficient data at its disposal, as was plain from the account in its report on the 1987 survey of how its secretariat had assessed the value of the Commissary benefit. The Agency explains the method of reckoning, contending that the Commission properly determined the pattern of Commissary purchases by reference to all categories of those who had the privilege, of whom General Service and manual staff accounted for about 30 per cent. The Commission's call for further information in future did not mean that it had had insufficient data in 1987.

(6) The burden is on the complainants to show that the true - and improper - motive of the discretionary decision was, not to determine salaries according to the methodology, but to make big savings on the payroll. The complainants have failed to discharge that burden.

(7) There has been no breach of equal treatment. As was said above, Austrians have the same entitlement as other staff to Commissary purchases as a percentage of their salaries at different grades. The fact that the Agency has secured larger quotas of alcohol and tobacco for non-Austrians than for Austrians, within identical monetary limits for purchases, is no breach of the principle. It is lawful to give Austrians lower quotas, the distinction being based on nationality. Since Austrians and others are not in like case, they need not be treated alike.

(8) There is no prejudice to the staff's freedom to dispose of their earnings: they may spend their income as and where they please, being under no compulsion to go to the Commissary.

D. In their rejoinders the complainants contend that in determining the salary scales the Commission and the Agency are not taking purely discretionary decisions: they may not apply such general criteria as the public interest and though they enjoy some latitude in the matter they are bound by hard-and-fast procedural and substantive rules.

The complainants submit that, though the methodology does not explain exactly how to do a survey and though the Commission may make refinements - indeed texts later than 1982 do take some points further - it must still abide by the rules it made in 1982. It is mistaken to suggest that general guidelines may be more readily ignored than texts of a more specific kind, and in any case there can be no point in amending the methodology if it is not binding.

The complainants develop their pleas and answer at length the Agency's replies. They discuss in detail what they

see as serious flaws in the Commission's method of estimating the value of the Commissary benefit and observe that the range in estimates is so great that they are utterly unreliable and can afford the basis of no proper decision. They object to the Commission's failure to take due account of the value of fringe benefits granted by local employers. They maintain that the Commission's ulterior and improper motive in reducing pay was to achieve big savings for the organisations. They enlarge on their pleas of breach of equal treatment and of the right to dispose freely of earnings. They press their claims.

E. The Agency points out in its surrejoinders that the complainants' rejoinders add nothing of substance to their original briefs. Contrary to what they maintain, they have apparently accepted several times already that the Director General has discretionary authority in the matter. The general methodology is just a set of guidelines and the Commission never intended treating it as a corpus of detailed rules. The reason why the methodology does not mention the Commissary benefit is that it is only occasional and does not apply at every headquarters duty station. The Commission followed the methodology correctly and made an utterly reliable evaluation of the benefit. The Agency further maintains that the methodology is not unlawful and that fringe benefits provided directly by the local employers do not count. It enlarges on its earlier replies to the complainants' other pleas.

CONSIDERATIONS:

1. The complainants are employed in the General Service category of staff at the headquarters of the International Atomic Energy Agency (IAEA) in Vienna. They seek the quashing of decisions by the Director General of the Agency setting their pay according to new salary scales brought in as from 1 October 1987. It was the International Civil Service Commission (Set up by the United Nations General Assembly by Resolution 3357 (XXIX) of 18 December 1974 (ICSC/1/Rev.1)) that drew up those salary scales, and the complainants are objecting to a flat 2.4 per cent reduction in salary that purports to offset the value of the so-called "Commissary benefit" enjoyed by Agency staff. The Commissary is a shop, provided for under the headquarters agreement between the Agency and Austria, which sells goods at duty-free prices - foodstuffs, household goods, photographic equipment and the like - to the staff of several organisations and to the mission staff of governments accredited to those organisations. Some 7,000 people have access to the Commissary.

2. As the Agency asks, the complaints are joined because they are identical.

3. The parties agreed to dispense with prior referral to the Joint Appeals Committee and to put the dispute directly to the Tribunal, as Rule 12.02.1(B) of the Agency's Provisional Staff Rules allows.

Article VII of the Tribunal's Statute reads:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations".

Because of the above provision in the Agency's rules that requirement is met.

The issues of fact

4. The origin of the complaints lies in a provision that also sets the context of the dispute: Annex II, paragraph B.1, of the Agency's Provisional Staff Regulations. That provision says that the pay of staff in the General Service and other locally-recruited categories shall normally be based on "the best prevailing conditions of employment in the locality". That is the "Fleming principle", so called after the chairman of the United Nations committee of experts that first stated it in 1949.

5. The Fleming principle applies to the whole of the United Nations system and it is the Commission that puts it into effect. In keeping with terms of reference approved by the General Assembly the Commission carries out surveys of living conditions and pay in Vienna and other host cities. It drew up in 1982 what it called a "general methodology" for the purpose of assessing conditions of employment at the main duty stations (Report of the Commission dated 15 September 1982 on its 16th Session, Documents of the General Assembly's 37th Session, Supplement No. 30, A/37/30, Annex II.), and the defendant organisation treats the text as a set of rules to be taken into account in matters of personnel management.

6. According to the general methodology data of several kinds count in determining the best local conditions: salary, other items of pay, provision for social security, and fringe benefits.

7. The Commission followed the general methodology in 1987 in determining the relevant data for Vienna and set out its findings in a report dated 17 August 1987 and headed "Remuneration of the General Service and related categories: survey of best prevailing conditions of service at Vienna" (Document ICSC/26/R.26). The report said that the data had been obtained from twentythree commercial firms and one embassy in Austria, described as the "local employers". The point material to this case is that it was in that report that the Commission for the first time took into account, and quantified, the value of the Commissary benefit to staff in the General Service category.

8. By way of comparison the Commission did also consider non-monetary benefits granted by the local employers such as housing aid, the sale of their own products at a discount, loans and other forms of financial help, vocational training, Christmas and birthday presents, dinners and outings, and even theatre tickets. But the Commission thought such benefits too occasional and fortuitous to be quantifiable in monetary terms and therefore discounted them.

9. The upshot was that the Commissary benefit was the only item the Commission took into account in working out the relevant figure of pay in the Agency for the purpose of comparison with local pay. The value it put on the benefit to anyone allowed access to the Commissary was some 6,600 schillings a year. By extrapolation of figures it based on a salary group treated as typical it reckoned the benefit to be equivalent on the average to 2.4 per cent of the pay of General Service staff. Appended to its report were scales which afforded the basis for adjusting pay in the Agency and, to offset the value of the Commissary benefit, the scales reduced pay by 2.4 per cent for everyone they applied to.

10. The complainants object to the reduction on two grounds. First, they submit that the Commissary benefit is irrelevant in determining the best local conditions - the yardstick in the Agency's rules - that the methodology is therefore fundamentally flawed and that the Agency's action on staff pay is null and void. Their second objection is that even if the Tribunal endorses the methodology it was so arbitarily applied that, again, the impugned decisions are flawed.

11. The Agency's answer is that it has discretion to set pay and made proper exercise of it in endorsing recommendations made by the Commission in pursuance of the methodology and on the strength of the Vienna survey.

The issues of law

12. Some principles there is ample precedent for will bear restating. One is that when impugning an individual decision that touches him directly the employee of an international organisation may challenge the lawfulness of any general or prior decision, even by someone outside the organisation, that affords the basis for the individual one (cf. Judgments 382 (in re Hatt and Leuba), 622 (in re Sikka) and 825 (in re Beattie and Sheeran)). The present complainants may accordingly challenge the lawfulness of the general methodology and of the 1987 survey of Vienna, which, taken together, constitute the basis in law of the decisions under challenge.

Another principle is that a decision by an organisation may be reviewed, albeit on limited grounds: it will be set aside if there was no authority to take it, or if there was a breach of form or of procedure or some obvious mistake of fact or of law, or if the decision was arbitrary, or if there was abuse or misuse of authority (cf. judgments ranging from No. 39 (in re Cardena) to No. 972 (in re Unninayar)).

Those are the general principles that apply to the present complaints.

13. The complainants' objections to the Commission's recommendations and to the decisions impugned must be viewed against the rule about the best local conditions, which is in the Staff Regulations of the organisation. The introduction to the 1982 report on the methodology stressed in paragraph 3 how important the rule of parity is. What it said was:

"... It is stated under Article 101 of the Charter of the United Nations that 'the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity'. To comply with the standards established by the Charter as regards the employment of locally recruited staff, the organizations of the United Nations system must be competitive with those employers in the same labour market who recruit staff of equally high calibre and qualifications for work which is similar in nature and equal in value to that of the organizations. Remaining

competitive in order to both attract and retain staff of the high standards 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. ..."

14. Comparison lies between General Service pay in the Agency and typical pay on the local employment market. So the effect of counting any item other than salary proper in reckoning the pay of the international staff is to cancel an equivalent portion of the items that count in reckoning local pay and to lower correspondingly the level at which there must be the parity the Agency's rules require.

15. The first point to determine is the figure of pay that is to count for the purpose of comparison with local conditions. The report on the methodology does not bring that out though paragraph 40 does say that items paid in cash "are relatively easy to compare with the remuneration of the United Nations organizations, which, with few exceptions, do not pay extra allowances in addition to base salary". According to the system of pay in the defendant organisation salaries are defined in its Staff Regulations and financial rules and appear in its accounts. For the purpose of establishing parity with local pay the only relevant items are the ones defined in its Staff Regulations and financial rules and actually paid out of its own funds.

16. Something like the Commissary benefit cannot count in such comparison. It is not provided for in the Staff Regulations or financial rules, and though the Agency did negotiate for it for the staff's sake it is a form of tax relief that the host country bestows by way of privilege on those who have access to the Commissary and at no cost whatever to the organisation.

17. In following the Commission's conclusions in its report of 1987 about how to take account of the Commissary benefit the Agency altered the salary scales by bringing in an irrelevant factor, the effect being to lower salaries and lighten the Agency's own burden as employer.

18. That reason alone is a sufficient one for quashing the decisions to take account of the value of the Commissary benefit for the purpose of comparing pay and ensuring parity. There is no need to go into the complainants' further objections to the reckoning of the Commissary benefit and to the way in which it affected the salary scales. 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.

19. The impugned decisions cannot stand. The Agency must so recalculate the complainants' pay as to discount the Commissary benefit and pay their salary in full as from the date at which the scales they object to were brought in. It shall also pay them a total of 40,000 French francs in costs.

DECISION:

For the above reasons,

1. The decisions that set the complainants' pay in keeping with the salary scales that came into effect at 1 October 1987 are set aside.

2. The cases are sent back to the Agency for the recalculation of their pay as prescribed above.

3. The Agency shall pay the complainants a total of 40,000 French francs in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner

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