SIXTY-NINTH SESSION

In re BEETLE, BOGENSBERGER, HOUGH, KOCIAN and PRICE

Judgment 1053

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the International Atomic Energy Agency (IAEA) by Mr. Alfred Kocian and by Mr. William Earl Price on 28 August, by Mr. Thomas Marcus Beetle and Mrs. Rose Marie Bogensberger on 11 September 1989 and by Mr. Charles Gordon Hough on 13 September, as corrected on 2 November, the Agency's single reply of 8 January 1990, the complainants' rejoinder of 23 February and the IAEA's surrejoinder of 25 April 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations 5.02(a) and 10.01 of the Agency's Provisional Staff Regulations and Rules 5.02.1 and 10.01.1 of its Provisional Staff Rules;

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

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

A. Officials of the Agency are members of the United Nations Joint Staff Pension Fund. On retirement a member may on application to the Fund have part of his pension entitlements commuted into a lump sum and made over to him in that form.

In July 1980 the Agency began repaying to retired employees the amount of any national tax they might have had levied on such lump-sum payment. Its purpose was to bring its policy for the refund of tax to staff into line with policy in the United Nations. Such policy was set forth in Resolution 34/165 passed by the General Assembly in 1979 and was based on Judgment 237 of the United Nations Administrative Tribunal.

By a letter of 30 July 1980 the acting Director General informed the Resident Representative of the United States to the Agency of the new policy. The United States Government indicated that it would not compensate the Agency for refund of tax levied on lump-sum payments from the Fund. But the Director of the Division of Budget and Finance (ADBF) recommended in a memorandum of 29 September 1980 to the Deputy Director General for Administration that the Agency should maintain its policy "in the interest of equity among members of the UN common system and equality among its personnel". The Deputy Director General having approved that recommendation, the Agency continued to refund income tax levied by the United States on lump-sum payments to citizens or permanent residents of that country.

In 1983 the United States discontinued paying refunds to the Agency and to other United Nations organisations that declined to conclude tax reimbursement agreements with it.

In a memorandum of 1 March 1989 to ADBF the Director of the Legal Division quoted Regulation 5.02(a) of the Agency's Provisional Staff Regulations:

"The salaries ... and the post adjustments [paid by the Agency] ... are deemed to be exempt from national income taxes. Should such taxes be levied on the salaries or allowances paid by the Agency, they will, unless otherwise specified in the letter of appointment, be reimbursed by the Agency."

Since the term "salaries or allowances" did not cover lump-sum payments from the Fund the practice of refund should stop, said the Director; any refund would be made ex gratia and only with the Director General's permission; and Judgment 237 of the United Nations Tribunal did not apply to the Agency.

In a memorandum of 2 March the Deputy Director General told the Director of ADBF to stop refunding national income tax paid on lump sums from the Fund. A circular, SEC/NOT/1252 of 21 March, informed the staff of the new policy: "Any practice to the contrary", it said, "is hereby discontinued".

On 5 April 1989 the Agency concluded a new tax reimbursement agreement with the United States. The agreement said that the Agency would reimburse to officials the amount of United States income tax levied on their "IAEA institutional income". An annex listed as "institutional income" basic salary and several grants and allowances but not lump sums from the Fund.

The Agency decided to apply the new policy with effect only from the 1989 tax year, and a staff circular, SEC/NOT/1263 of 5 May 1989, announced that "effective from the tax year 1989" the method of reckoning "amounts due in reimbursement for US taxes paid on Agency income" had been changed. The definition of such income again left out lump sums from the Fund.

On 13 April the president of the Staff Council wrote to the Director General objecting to the change of policy: the Council had not been consulted beforehand, the decision was retroactive and the staff concerned had not been warned. On 8 May the Director General answered that there was no change of policy but "the correction of an administrative error" that had been made on the mistaken assumption that resolutions adopted by the General Assembly applied to the Agency; such error, he maintained, conferred no entitlement.

The complainants, who are citizens of the United States, retired from the Agency at divers dates in 1988 after periods of service ranging from 13 to 28 years. On retirement each of them sought from the Fund and was granted part of his or her pension entitlements in a lump sum and each had United States income tax levied thereon.

Mr. Beetle filed a claim with the Agency on 24 March 1989 to refund of the tax on his lump-sum payment of 84,438 United States dollars. By a letter of 12 April the Division of Budget and Finance refused. On 1 June he wrote asking the Director General either to review the decision or, failing that, allow direct appeal to the Tribunal. In a letter of 20 June, which reached him on 29 June and is the decision he challenges, the Director General rejected his claim and said he could go straight to the Tribunal.

Mrs. Bogensberger wrote to the Director General on 1 June 1989 asking him not to apply to her the policy announced in circular 1252 or else let her go to the Tribunal. On 9 June she filed notice of a claim to payment of $829, the amount of the income tax payable on her lump sum from the Fund. In a letter of 14 June, which she did not get until 10 August, the Director turned down her claim and allowed appeal to the Tribunal. That is the decision she is impugning.

On 15 March 1989 Mr. Hough submitted a claim to the Fund of tax levied on his lump-sum payment of $127,254 from the Fund. ADBF replied on 12 April refusing refund and citing policy on the matter. On 5 June he applied to the Director General for review or leave to appeal to the Tribunal. The acting Director General granted him such leave in a letter of 21 June which he got on 26 June and which is the challenged decision.

On 27 February 1989 Mr. Kocian applied for reimbursement of United States income tax on, among other things, the lump sum paid to him by the Fund. On 15 March the Division told him orally that such tax would not be refunded. On 17 March he wrote to the acting director of the Division of Personnel asking him to reconsider, but the acting Director refused on 21 March, and in a memorandum of 13 April the Deputy Director General for Administration declared that the Agency's earlier, mistaken, practice had ceased. On 19 May he wrote to the Director General applying for review or else leave to appeal directly to the Tribunal. In a letter of 24 May, the decision under challenge, which he got on 2 June, the Director General declined to review but allowed direct appeal.

After filing a claim to refund on 22 March Mr. Price too was told orally of the Agency's policy. He wrote on 28 March to ADBF stating his objections. On 11 April the Director of the Legal Division sent him a letter explaining the decision and on 29 May he wrote to the Director General in terms similar to those of the other complainants' requests for review. The Director General's answer of 7 June, which he received on 12 June and which is the decision he is appealing against, gave him leave to go to the Tribunal.

B. The complainants have three main pleas.

(1) The first is that applying to them with retroactive effect a change in the Agency's policy on the refund of tax was a breach of their acquired rights.

In support of that plea they contend that they had a fully-established right to the refund of any national income tax

levied on lump-sum payments from the Fund. It is not in dispute that in 1988, when they retired, the Agency's practice was to reimburse such sums just as it would reimburse, under Regulation 5.02(a), tax on salary and allowances. That practice was still in force when each of them applied to the Fund for commutation of part of their entitlements and, for that matter, when the Fund paid them. By the end of 1988 at the latest the amount of tax due on the lump sums was calculable.

Their entitlement to reimbursement of the tax was founded on a practice the Agency deliberately started in 1980.

That practice was not unlawful, and no-one ever said it was. Nor would it be now: the agreement the Agency concluded with the United States in April 1989 does not bar refunding sums the agreement does not cover. The Agency's retort that Regulation 5.02(a) allows refund of tax only on salary and allowances is mistaken. For one thing the "allowances" include items like repatriation grant that are paid, like the lump-sum payment, only after separation from service. For another, the Fund makes payments to staff on the strength of the Agency's contributions as employer and in discharge of the Agency's duty to provide social security: so there is no substantive difference between such payments and some of the allowances.

The Agency contends that it started the practice only because it had misunderstood the state of the law. The discovery of a mistake of fact or of law may warrant a prompt change of practice but not a retroactive one. Besides, the Agency had no illusion about the law: the reason it gave in 1980 for the change was not that it had no choice in the matter - after all it knew that other UN agencies were not following suit - but that it wanted to put its own staff on a par with those of the United Nations.

A change that was not announced until March 1989 could not properly affect anyone who had left in 1988 and towards whom the Agency's obligations had been determined at the date of separation. The complainants may not be deprived of accrued rights by a retroactive measure.

Though the rules on reimbursement may be changed, the Agency and other organisations have ordinarily been wary of breach of a vested or acquired right of staff. That is the thrust of the case law, which the complainants discuss.

(2) Their second plea is that the Agency was estopped from acting to their detriment without due notice. They asked before retiring whether the policy followed since 1980 would continue, they got explicit confirmation from competent officials that it would, and, as the acting Director of the Division of Personnel admitted to Mr. Kocian in his memorandum of 21 March 1989, the information they got must have been right at the time. Such assurances induced them to make an irrevocable application for commutation and so incur tax liability. They are entitled to redress for the financial loss each has been misled into incurring.

(3) In any event the change in practice was flawed because the Agency acted in breach of Rule 10.01.1, which requires it to consult the Staff Council "on questions relating to staff welfare and administration, including policy ... on salaries and related allowances" and says that "Except for instructions to meet emergency situations, general administrative instructions or directions ... shall be transmitted in advance to the Staff Council ...". There was also breach of Regulation 10.01 in that the Director General did not consult the Joint Advisory Committee.

The complainants ask the Tribunal to order the Agency to pay them the difference between the amounts, if any, they got by way of reimbursement of United States income tax for 1988 and the sums they would have received had they been refunded the tax on the lump-sum payments: $16,018 for Mr. Beetle, $829 for Mrs Bogensberger, $25,566 for Mr. Hough, $42,086 for Mr. Kocian and $43,574 for Mr. Price; plus interest at the rate of 12 per cent a year from 17 April 1989 to the date of payment; and a total award of $6,000 in costs.

C. The Agency puts forward six main pleas in reply.

(1) Its former staff have no right to the refund of tax on payments from the Fund. Regulation 5.02(a) authorises the Director General to reimburse tax levied only on "salaries and allowances paid by the Agency" and Rule 5.02.1(a) provides for the reimbursement of "income taxes levied on income received from the Agency." Each of the complainants' contracts of service had a similarly worded clause and indeed rulings by the Tribunal confirm that, failing express provision to the contrary, lump-sum payments from the Fund are not earnings from an organisation that are subject to reimbursement of tax. The Agency discusses Judgments 426 and 514 and distinguishes the United Nations Tribunal's judgment on Powell. It observes that Regulation 5.02(a) cannot cover such payments and

that no official statement it has made estops it from refusing reimbursement to the complainants.

(2) The policy it adopted in 1980 was a mistake in that the Assembly resolution of 1979 corrected a practice of the United Nations' that it had never followed and was therefore inapplicable. Moreover, the Administration acted ultra vires in adopting that policy since Regulation 5.02(a), a text adopted by the Agency's Board of Governors, did not cover it and the Board's approval of the change was not obtained.

(3) The former practice engendered no acquired right. It was erratic and inconsistent and improperly discriminated against staff of nationalities other than that of the United States, who got no refund of tax levied on Fund payments. Indeed not even all United States citizens had the tax refunded. When the mistake came to light the Deputy Director General for Administration acted at once, by his memorandum of 2 March 1989. As the Tribunal has held, a practice confers no rights on staff if it rests on an administrative error, and a promise by an organisation is unenforceable unless intended to breed a contractual obligation. No such intent may be imputed to the Agency here, the practice having been introduced, as the complainants themselves plead, not from any sense of legal obligation but for cogent reasons of equity.

Though a practice may create an acquired right the conditions for its creation as declared in the case law are not met in this case. An official does not have an acquired right to every benefit covered by his contract but only to those that are fundamental, and according to Judgment 426 the refund of tax on Fund payments is not.

(4) The practice was so erratic as to arouse no reasonable expectation that it would be applied to the complainants' advantage, especially since the Staff Regulations and Rules prescribe no right to refund of tax levied on payments that the Agency itself has not made. The practice was never authoritatively announced to the staff, and the complainants merely say that they got "explicit confirmation from competent officials".

But who inquired, and of whom, and what is the evidence to show that they were "induced" to opt for lump-sum payments? Many staff so opt even in the knowledge that they will not get tax refunded.

(5) The Agency had both the right and the duty to stop refund on realising that its practice was ultra vires. A practice that rests on error cannot give rise to any duty to continue it. Since the complainants have shown neither an acquired right nor a reasonable expectation there is no question of breach of the rule against retroactivity. The case law they rely on is not apposite. As for consultation of the staff, a change in a practice based on a misreading of a rule or on a mistaken assumption is a mere change in interpretation and that, according to precedent, does not require such consultation.

(6) Lastly, neither the new agreement with the United States nor the amendment of the rules on reimbursement is material.

The Agency invites the Tribunal to dismiss the claims as devoid of merit.

D. In their rejoinder the complainants enlarge on their pleas and seek to rebut the Agency's.

They develop their contention that the practice they are relying on was wilfully and correctly adopted, was intra vires and was for years treated as binding in law. It was not the consequence of any mistake or misapprehension, and whatever flaw there may have been in adopting it does not entitle the Agency to discontinue it with retroactive effect. Though the Agency may have been under no duty to adopt that practice, once it had started it had to abide by the practice until the change was validly made and with due regard to any rights acquired thereby. Besides, the Agency itself appears not to have taken in March 1989 any other steps that would be the reasonable consequences of its having paid sums improperly for several years, such as reporting the matter to the Board of Governors.

On the evidence the practice was well-established, the Agency has never denied its existence, and there was nothing "erratic" or "inconsistent" about it. There is no evidence to suggest that the practice discriminated against citizens of countries other than the United States, let alone against certain United States citizens. There is no reason to presume that citizens of other member States failed to seek reimbursement from ignorance of the practice, which was well-known: the plain fact is that no other country taxes Fund payments. As for other United States citizens, they may simply have failed to report the Fund payments, whether in good faith or not, to the United States tax authorities and so have no need to claim the refund of tax.

The complainants discuss the case law they regard as relevant.

They address several other issues the Agency's reply raises.

As to their inquiries about the practice, they submit that in any event it is not certain that they had any duty to make them. They did make them, in the usual way, orally, and so they cannot show how or to whom. If the Agency presses the point they will seek permission to call witnesses at oral proceedings. It would be odd of a staff member about to retire not to take account of the tax liability he might incur on commuting Fund benefits.

The Agency did act in breach of its duty to consult the Staff Council: the precedent it relies on for its contention that it did not is distinguishable.

Lastly, the complainants submit that two collateral changes which the Agency properly introduced in its tax reimbursement system in 1989 may, if taken together, redound to their detriment in a way which they explain in some detail.

E. In its surrejoinder the Agency develops the case made out in its reply and answers in detail the further arguments in the rejoinder. It reaffirms that, whatever practice it may have followed up to 1989 rested on an administrative error and if it were estopped from reversing the practice it would be required to perpetuate that error. Its earlier decision to refund United States taxes levied on lump-sum commutations of Fund entitlements was ultra vires since such payments do not constitute income from the employer.

It explains that in any event the practice the complainants rely on conferred on them no acquired right to reimbursement of taxes. That practice was erratic, discriminatory and not well-established. The complainants have shown no basis for any reasonable expectation that whatever practice had been followed would be extended to them.

The Agency rejects the complainants' reading of the Tribunal's case law and discusses what effects the changes it made in the tax reimbursement system in 1989 might have on their rights.

CONSIDERATIONS:

1. The complainants have applied for joinder of their complaints, and the Agency concurs. The complaints rest on the same issues of fact insofar as the International Atomic Energy Agency's conduct is concerned and on substantially the same facts as far as the complainants' own circumstances are concerned and the issues of law are identical. The cases are therefore joined.

2. The issue is whether, to the detriment of officials who had retired from its service in 1988, the Agency was entitled without notice to stop in 1989 the practice it had followed since 1980 of reimbursing United States federal and state income taxes levied on lump-sum payments from the United Nations Joint Staff Pension Fund. Having retired in 1988 each of the complainants applied for and received from the Fund a lump-sum payment in partial settlement of his entitlements and in the expectation of refund of any United States taxes levied thereon. The Agency refused reimbursement by virtue of a decision it had made in March 1989 to discontinue the practice.

3. It was in 1980 that the Agency first received a claim from a staff member to the reimbursement of tax on such a lump-sum payment. It then took a decision to reimburse the tax but determined that anyone who had joined its staff after 1 January 1980 should not be entitled to reimbursement. In a memorandum of 29 September 1980 the Director of the Division of Budget and Finance recommended to the Deputy Director General for Administration that the Agency should continue to reimburse to other staff members tax levied on the lump-sum payments and charge the amount to the regular budget, and the Deputy Director General approved that recommendation on the same day. From that date everyone who had joined the staff before 1 January 1980 and who applied for reimbursement received it until the complainants made their claims in 1989.

4. The Director General decided to discontinue the practice on the strength of an opinion, stated by the Director of the Legal Division in a memorandum of 1 March 1989, that partial or full lump-sum payments from the Fund did not come within the expression "salaries or allowances paid by the Agency" in Regulation 5.02(a) of the Agency's Provisional Staff Regulations and therefore did not qualify for tax reimbursement. A staff circular to that effect was published on 21 March 1989.

5. The complainants contend that the retroactive application to them of the change in practice was in breach of their

acquired rights. They are mistaken: it is not a question of acquired rights, but rather it is the application of the principles of good faith and non-retroactivity that is material in this case.

6. The first issue to be decided is whether the introduction of the practice in 1980 gave rise to a legal obligation. As the Tribunal held in Judgment 421 (in re Haghgou), such an obligation may be created by the establishment of a practice on which the staff have come to rely. Enforcement of the practice will depend on whether it was intended to have contractual effect, and that must be determined in the circumstances of each case.

The Agency argues that the decision it took in 1980 was ultra vires and therefore unlawful. It seems that the decision was based on a ruling by the United Nations Administrative Tribunal in Judgment 237 (in re Powell). That judgment said, in reference to the arrangements for tax reimbursement in the United Nations, that the term that appeared in the UN Staff Regulations - "salaries and emoluments paid ... by the United Nations" - did not prevent the Secretary-General from reimbursing national income tax levied on lump-sum payments from the Fund. Though the Agency was not bound to follow the interpretation adopted by the UN Secretary-General, it did so and thereby made by analogy an interpretation of its own regulations which had been sanctioned by the decision of the other Tribunal. The interpretation was made in good faith and the Agency's plain intent was to bind itself thereby since every staff member who applied for reimbursement was granted it.

Having been followed over several years, the interpretation became part of the Agency's personnel policy and had to be applied to all departing staff members who found themselves in similar circumstances. If the Agency chose to take a different view of the interpretation at a later stage, it could not in doing so break with the general principle of good faith which it is required to observe in dealings with its staff members.

The Agency submits that the practice of reimbursement was "erratic" because, out of the nineteen staff members who retired and would have been eligible, only eleven put in claims. The Tribunal will not speculate about the reasons why the other eight made no claim: it need only observe that every staff member who did claim was paid.

The Agency makes the further point that the decision it took in 1980 was not promulgated by staff circular. That is irrelevant since the decision was obviously well known to the staff, including the complainants.

The conclusion is that the Agency intended that the decision should be binding on itself and should create legal obligations.

7. The other issue is whether the decision the Agency took in March 1989 to stop reimbursement might properly affect the rights of officials who had retired in 1988.

It cites Judgments 426 (in re Settino) and 514 (in re Alonso No. 3). But both those cases may be distinguished from the present one. Mr. Settino was relying on a provision of the rules which had ceased to be applicable twenty years before he had retired and Miss Alonso on an administrative directive which had ceased to be applicable eight years before she had retired. In both cases the Tribunal held that there were no acquired rights and that former rights had not survived the amendment of the provisions relied on. In this case the complainants are relying on an administrative practice which was not altered until each of them had actually retired.

All the complainants believed the practice to be applicable when they made their choice. The principle of non-

retroactivity applies, as does that of good faith. The Agency was not free to make its new interpretation of the rule retroactive so as to affect the complainants' rights, which had been determined at the date at which each of them had retired. The complainants are therefore each entitled to have the Staff Regulations applied in accordance with the interpretation followed by the Agency at that date.

DECISION:

For the above reasons,

1. Each of the complainants is entitled to reimbursement, in accordance with the Agency's former practice, of the United States taxes levied on his or her lump-sum payment from the United Nations Joint Staff Pension Fund, together with interest at the rate of 10 per cent a year as from the date at which those taxes became payable.

2. The Agency shall pay the complainants collectively a total of 6,000 United States dollars 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 26 June 1990.

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

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