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

EIGHTY-EIGHTH SESSION

In re Abdur, Drechsler and Zeller

Judgment 1915

The Administrative Tribunal,

Considering the complaints filed by Mr Rahim Abdur, Mrs Herta Drechsler and Mr Dietrich Zeller against the International Atomic Energy Agency (IAEA) on 19 June 1998 and corrected on 27 August, the IAEA's reply of 9 December 1998, the complainants' rejoinder of 10 March 1999 and the Agency's surrejoinder of 16 July 1999;

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

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

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

A. According to what is known as the "Flemming" principle, pay of staff in the General Service category is aligned with the best conditions prevailing at each duty station. This principle forms the basis of the "general methodology" used by the International Civil Service Commission (ICSC) in carrying out salary surveys among outside employers and in setting scales of pay for General Service and other locally recruited staff.

In 1992 the Commission revised its general methodology. The survey of relevance to this case was carried out in Vienna in the spring of 1996 in accordance with the revised general methodology.

The complainants are in the General Service category of staff of the IAEA in Vienna.

In notice SEC/NOT/1649, dated 1 October 1996, the Director General informed all the staff that the new salary scale which had been adopted was lower than the scale it replaced by 3.2 per cent. The notice also indicated that the "language factor" would be progressively phased out through four separate one percentage point reductions starting with the April 1996 salary scale resulting from the survey, and thereafter on the occasion of subsequent interim adjustments.

On 29 November 1996 the complainants wrote to the Director General appealing against the decision progressively to phase out the language factor. They requested him to reconsider the decision. If he were unable to grant their request, the complainants asked him to allow them to appeal directly to the Tribunal. In a letter of 22 January 1997 the Director General informed them that he upheld the decision communicated to them previously. However, as he was aware that some staff of the Food and Agriculture Organization of the United Nations (FAO) had filed a complaint with the Tribunal on the same issue, he proposed to await the outcome of that case as he might reconsider his decision. The complainants accepted this latter proposal in a letter dated 25 February 1997.

On 29 January 1998 the Tribunal delivered Judgment 1713 *(in re* Carretta and others). On 4 February 1998, the complainants asked the new Director General of the Agency to reconsider his predecessor's decision in the light of Judgment 1713. In a letter dated 2 April 1998 addressed to each of the complainants, which is the impugned decision, the Director General informed them that he had:

"reviewed ... Judgment No. 1713 and ... concluded that it does not apply to Vienna because the April 1996 ICSC survey in Vienna established that, although the majority of local employers required their staff to have knowledge of and work in an additional language (frequently English), no additional compensation therefor was paid by any of the comparator employers."

The Director General accordingly informed the complainants that he upheld the impugned decision and

indicated that they could appeal directly to the Tribunal.

B. The complainants argue that the Agency reached manifestly wrong conclusions from the information available and that the language factor adjustment is still justified in Vienna.

They emphasise the lack of clarity in the form used for the salary survey conducted in Vienna in 1996 and the unreliable nature of the data gathered from the reference employers.

They say that an analysis of the data on salaries compiled in 1991 and 1996 leads to three main conclusions.

In the first place, the labour market situation in Vienna has not changed to such an extent that the language factor can be granted without any difficulties in 1991, yet be abolished, even progressively, in 1996. At the most, it is only possible to discern a slight "fluctuation", which cannot in any event justify abolishing the benefit.

In the second place, the quantitative analysis of the data compiled in 1996 reveals two major trends: the first lies in the finding that, of the reference employers which provided indications on this point, only a part of the staff is required to work in a foreign language; the second concerns the average, or completely marginal use of the foreign language. In this respect, there is no comparison between the General Service staff of the Agency and the staff of the reference employers. Indeed, while all the staff of the Agency have to work on a daily basis in at least one language other than German, the data from the 1996 survey show that, for the most part, only some of the staff of the reference employers have to work in a language other than German, and even then only occasionally or very marginally.

In the third place, the complainants draw attention, from a qualitative point of view, to the low level of knowledge of the foreign language required by outside employers and the "mundane" nature of the work conducted in that language.

The complainants emphasise that the ICSC itself, in a document dated 9 July 1998, insisted on the fact that international officials have to be fluent in at least one working language of the international organisations concerned. However, the last salary survey conducted in Vienna does not show that the employees selected for purposes of comparison are subject to the same requirement. The comparison is therefore misleading and, as a result, the question of whether to grant a wage supplement has been misrepresented. While it is clear that the question of additional pay does not arise for the occasional and imperfect use of a foreign language, it is entirely appropriate in the case of the constant usage of a foreign language of which the staff concerned have a good or perfect knowledge. The complainants submit that the abolition of the language factor was clearly decided upon for reasons (in all probability of a budgetary nature) which are wholly unrelated to the prevailing practice on the local market, which is the sole determining factor.

They request the Tribunal to quash the decision of 2 April 1998 and to grant them all consequent redress, that is to send the case back to the Agency, particularly for the reckoning of the pay due to them in accordance with the Flemming principle and to grant them costs.

C. In its reply the IAEA states that, given the role and functions of the ICSC, it deemed it appropriate to request the Commission for its comments, which it incorporates into its written submissions.

The ICSC affirms that the 1996 Vienna survey was carried out in a manner which fully respected the Flemming principle.

It submits that the matter at issue in this case is different from the one on which the Tribunal ruled in Judgment 1713. In contrast with the Rome survey, in Vienna the Commission methodically gathered information on whether local employers paid bonuses to staff who were required to work in a language other than the national language. The information gathered revealed that the majority of the local employers surveyed required staff to have knowledge of and work in a language other than the national language (i.e. German), but that no additional compensation was paid for that requirement. The Commission, therefore, properly decided to phase out the language factor. The Commission's decision is in keeping with Judgment 1713 in which the Tribunal held that when local employees are not paid added compensation for working in a language other than the national language, it would be wrong to pay additional bonuses for that requirement to staff of the common system.

The Commission contends that the present case can also be distinguished from the one leading to Judgment 1713 because the evidence submitted by the complainants in that case showed that at least one employer paid such bonuses to its employees. This suggested that other employers surveyed may have paid such premiums, but had not been surveyed on that point. In the case now at issue the information gathered establishes that none of the employers surveyed paid added compensation for that language requirement.

The Commission then refutes the claims made by the complainants. It says that the "phraseology" in the form used for the 1996 Vienna survey regarding the use of languages other than German did not give rise to confusion. Indeed, there is no evidence whatsoever that any of the reference employers surveyed did not understand the questionnaire.

The Commission contends that it is immaterial whether or not there were changes between the 1991 and 1996 surveys. The only pertinent issue is whether the 1996 survey was flawed.

The proportion of staff of reference employers who were required to use a language other than the national language was sufficiently high to offer a valid basis for comparison. The information gathered reveals that most of the employers surveyed required knowledge and usage of a language other than German for more than merely mundane tasks.

The complainants' allegation that the progressive phasing out of the language factor was decided upon for budgetary reasons is supported by no evidence and is therefore unsubstantiated.

In its concluding remarks, the Agency submits that both the staff of the IAEA and employees in the local labour market are usually required to work in one language only, i.e. in German in the local market and in English at the Agency. For some, this language may be their mother tongue and for others it may be a foreign language. For instance, at the Agency there are a considerable number of staff in the General Service category who have English as their mother tongue or major language of education. It would not be justified to pay a language allowance to staff working in their mother tongue.

The Agency emphasises that a specific language allowance is paid to the staff of the Agency under Staff Rule 5.01.7 for the use of additional languages. However, no such allowance is paid in the local market. IAEA staff therefore already have an advantage over employees in the local market with regard to compensation for language skills.

D. In their rejoinder the complainants emphasise the unprecedented nature of the Agency's reply, in which it incorporated and associated itself with the position of the ICSC. They request the Tribunal to judge the lawfulness of this procedure.

The complainants refute the arguments put forward by the Agency to the effect that many of its staff members have English as a mother tongue and that its staff already enjoy an advantage in relation to employees in the local labour market.

They contest the claim that the point at issue in the current case is different from the one on which the Tribunal ruled in Judgment 1713.

They press their claims concerning the unreliability of the data compiled from reference employers, particularly in view of the lack of clarity of the form used for the second salary survey conducted in Vienna.

They reaffirm the conclusions which they draw from their analysis of the salary data compiled in 1991 and 1996.

E. In its surrejoinder the Agency argues that nothing in the Statute or Rules of the Tribunal bars it from seeking technical advice from a competent body in the United Nations system. This is all the more true in a case such as the present one, in which the technical advice sought originates from the ICSC which is the regulatory and coordinating body in the United Nations system and which, under the terms of its Statute, establishes the facts which must be taken into account in the case at issue here.

The Agency and the Commission contend that the points raised by the complainants in the rejoinder simply

repeat the arguments made in the complaint.

CONSIDERATIONS

1. The complainants, who are in the General Service category of staff of the International Atomic Energy Agency (IAEA) at its headquarters in Vienna, benefit from a salary increment for proficiency in languages ("language factor").

Following a salary survey conducted in Vienna in the spring of 1996 under the aegis of the International Civil Service Commission (ICSC), the Board of Governors of the IAEA, on the recommendation of the Director General, on 17 September 1996:

- approved the salary scale recommended by the ICSC, which had been established in accordance with the decision taken previously to phase out progressively the language factor of 4 per cent through separate one percentage point reductions on the occasion of each interim adjustment; and

- authorised the Director General to set the date for the implementation of the new salary scale, after consultation with the other Vienna-based United Nations organisations.

2. In a notice dated 1 October 1996, the Director General indicated that, with regard to the language factor:

"as the survey has resulted in a decrease relative to the April 1995 scale, the ICSC has decided that this factor should not be abolished immediately, but phased out through four separate one percentage point reductions, starting with the April 1996 scale resulting from the survey and thereafter on the occasion of subsequent interim adjustments."

3. On 29 November 1996 the complainants appealed to the Director General against the decision to phase out the language factor progressively. The Director General informed them in a letter of 22 January 1997 that he upheld his decision. Nevertheless, as he was aware that some staff of the FAO had lodged a complaint with the Tribunal concerning the abolition of the above increment, he proposed to await the outcome of the case to reconsider his decision should the findings of the Tribunal so require. This proposal was accepted by the complainants.

4. On 29 January 1998 the Tribunal delivered Judgment 1713 (*in re* Carretta and others) setting aside the decisions of the FAO to phase out progressively any salary adjustment in respect of language proficiency and sent back the cases to the Organization "to reckon the complainants' pay in line with this judgment".

5. On 4 February 1998 the complainants requested the Director General of the Agency to reconsider the decision against which they had appealed. However, the Director General asked the Deputy Director General in charge of Administration to reply that it was "not apparent" that the Agency would have to follow Judgment 1713 and would thus not implement it.

In a letter addressed to each of the complainants on 2 April, the Director General informed them that he had decided to uphold the decision; he indicated that the complainants could appeal directly to the Tribunal.

6. On 19 June 1998 the complainants filed a complaint with the Tribunal requesting it to quash the Director General's decision of 2 April 1998 and grant any consequent redress, that is to send the case back to the Agency for the purposes, in particular, of the recalculation of the pay due to them in accordance with the Flemming principle, and to grant them costs to be determined at the end of the case.

In support of their complaint, they submit that the Agency reached manifestly wrong conclusions from the information available.

7. The Tribunal has addressed the issue of the abolition of the language factor granted to General Service staff working in cities in which the national language is not one of the working languages of the organisation in its examination of the case which gave rise to Judgment 1713. It indicated in that judgment that:

"the manner of applying Flemming does not turn on such variables as the desire of staff to keep their jobs or the ease or difficulty of finding good local recruits. What Flemming ordains is that General Service staff shall have pay and other terms of employment that match the best on offer at their duty station ... It is right to adjust pay by a language factor when jobs that do not require proficiency in a second language are matched with jobs that do. But it is wrong so to adjust pay when the matching is with outside posts that do

require proficiency in a second language and that requirement is not compensated."

8. In the present case, interpreting Judgment 1713, the Agency considered that it was not justified in Vienna to pay a language factor since, in its view, although the majority of employers surveyed required their staff to have knowledge of and work in an additional language (frequently English), no additional compensation therefor was paid by any of the comparator employers.

However, the complainants consider that analysis of the salary data shows that outside jobs in Vienna are not at all comparable to those in the Agency, which has drawn manifestly wrong conclusions from the information available. They submit that the language factor is still justified in Vienna.

9. The written submissions show that in 1996 information on salaries was gathered from twenty-two employers. On the question of whether local employers paid compensation to staff who were required to work in a language other than the national language, the Commission emphasised that the methodically gathered information revealed that, although the majority of the local employers surveyed required staff to have knowledge of and work in a language other than the national language, i.e. German, no additional compensation was paid for that requirement.

10. On this point, the complainants consider that, because they are imprecise, the data compiled do not justify the abolition of the language factor. They add that almost all the employers who indicated that some of their staff worked in a foreign language confined themselves to remarks of a general nature and in no way defined the specific tasks for which this language was used, thereby making it impossible to determine jobs which might be comparable in this respect with those at the Agency.

11. The complainants criticise the Commission for not specifying the individual employers, which form a majority of the local employers surveyed, which required their staff to have knowledge of and work in a language other than German.

The Commission retorts that the questionnaires submitted as evidence show that all the employers surveyed, with the exception of only one, require their staff to have knowledge of and work in a language other than the national language. This statement is borne out by the written submissions.

12. The complainants contend that the abolition of the language factor is not justified in view of the fact that the employers surveyed did not indicate that they required their staff to work in a language other than German.

The Tribunal agrees with the Commission that, with twenty-one of the twenty-two employers surveyed indicating that they require the use of another language, the employers covered by the survey constitute a valid basis for comparison with the common system on the question of the usage by staff of a language other than German in Vienna.

13. The complainants submit that the questionnaire was drawn up in terms which were too general and that it was ambiguous. With regard to the alleged unreliability of the information gathered, contrary to the claims made by the complainants, the questionnaire was in fact clear: question 3.2(c) specifically covered the issue of whether a premium was paid to staff for the use of additional languages. And the reply was clear, since the twenty-one employers requiring their staff to use a language other than German indicated that they did not pay a premium for that requirement.

14. Furthermore, analysis of the questionnaire shows that employers were indeed requested to indicate, in addition to base salary and remuneration elements, the bonuses which they paid to individual employees or groups of employees covered by the survey.

The questionnaire, therefore, covered all outside jobs and provided the opportunity to determine for each outside job selected whether premiums were paid for the usage of another language. The ambiguity which the complainants say existed in the wording of the questions does not appear to have had any influence on the replies made by the employers and no evidence is produced that these employers were confused as to the meaning of the questions. The information gathered, irrespective of the imperfections pointed out, which are inherent in any survey of this nature, provided a basis for determining the knowledge of and extent to which a language other than the national language was used, and also whether additional pay for the usage of such

a language could be justified.

Moreover, it should be borne in mind that, in this type of survey, there can be no perfect match and that such a match is not necessary to reach sound conclusions.

15. The complainants contend that the survey is flawed because none of the employers surveyed replied to the question covering the basis on which compensation is determined for the usage of another language. This plea is not pertinent, since the question could only concern employers answering in the affirmative to the question of whether they paid a premium for the use of additional languages. None of the employers surveyed replied in the affirmative to this question.

16. The complainants observe that certain of the employers surveyed belong to the petroleum industry and that the collective agreement applying to the industry provides that shorthand typists and correspondence clerks working in a language other than German are recompensed by being classified in a higher occupational group.

With regard to this new argument, it should be noted that the survey was conducted on the basis of a comparison between jobs in the common system and those of outside employers selected for reference purposes. During the survey, outside employers were requested to identify jobs held by their staff which carry similar responsibilities and require similar qualifications to those included in the benchmark job descriptions. Once a job match was established, the total pay for the job was used to calculate the correct salary figure for that particular outside job. The total pay included the salary and related benefits, as well as any adjustment for special factors, such as knowledge of languages. This remuneration was subsequently used to establish pay for jobs in the common system. Therefore, if jobs covered by a collective agreement were included in the survey in the case of the petroleum industry, compensation for the use of a second language in these jobs (in the form of being placed in a higher occupational group) was fully taken into account, since the pay used as a reference to establish the salaries for jobs in the common system was the total pay of the surveyed outside jobs at the higher occupational group level.

17. The complainants argue that not all employees of the outside employers selected for the survey are required to work in a language other than German, whereas all common system staff are required to do so. While this statement is correct, the information gathered reveals that the proportion of employees working for outside reference employers who are required to work in a language other than the local language is high enough to offer a valid basis for comparison.

18. It is argued that the survey is flawed because the staff of the surveyed employers in Vienna are only required to work in a language other than German occasionally, whereas common system employees do so on a daily basis.

This argument cannot stand, since the information gathered shows that, even though some staff do not use a language other than German on a daily basis, the use of another language by staff of outside employers is sufficiently common to provide a valid basis for comparison. Moreover, the Tribunal holds that it is not necessary to achieve a perfect match between outside jobs and those in the common system. There must merely be sufficient similarity between these jobs.

19. The complainants contend that the comparison between common system staff and outside employees is not valid because the level of language proficiency required of staff in the common system is higher than the level required among outside employees.

The written submissions show that most of the employers surveyed required more than a basic knowledge of a language other than German, with thirteen employers indicating that they required an intermediate level of language proficiency from their employees and others that they required significant levels of language proficiency. The objection is, therefore, unfounded.

20. The Tribunal finds from the above that the 1996 survey was conducted properly and that it provided a basis for determining that, even though the majority of local reference employers in Vienna required their staff to have knowledge of and work in a language other than the local language, they paid no additional compensation for that requirement.

21. The question of the procedure used by the Agency in its reply, in which it associated itself with the position of the ICSC, has no bearing on the decision. Nothing prevents the defendant from seeking a technical opinion, which it is free to include or not in its written submissions to the Tribunal.

22. The complaints therefore fail.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

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