

NINETY-EIGHTH SESSION

Judgment No. 2421

The Administrative Tribunal,

Considering the complaints filed by Messrs J.-P. C. and G. L. against the Food and Agriculture Organization of the United Nations (FAO) on 30 September 2003 and corrected on 7 November 2003, the Organization's reply of 17 February 2004, the complainants' rejoinder of 28 June and the FAO's surrejoinder of 12 October 2004;

Considering the *amicus curiae* brief submitted by the Field Staff Association of the FAO and the World Food Programme on 1 June 2004;

Considering the letter of 7 July 2004 from the Executive Secretary of the International Civil Service Commission (ICSC) to the Registrar of the Tribunal, declining the Tribunal's invitation to enter a submission in the present case;

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

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

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

A. Salary scales for staff in the Professional and higher categories (grades P-1 to D-2) in organisations belonging to the United Nations (UN) common system are set by the UN General Assembly in resolutions implemented by the organisations concerned. Pursuant to Article 10(b) of its Statute, the ICSC makes recommendations to the General Assembly on this issue. Salaries in these categories are determined, in accordance with the Noblemaire principle, by reference to those of the highest-paid national civil service, which is referred to in this context as the "comparator". As a general rule, they are maintained at a level slightly higher than those of the comparator, particularly in order to ensure that the organisations are able to attract and retain high quality staff from all countries. Since the establishment of the common system, the comparator has always been the federal civil service of the United States of America.

The ICSC reviews salary levels in the comparator civil service on an ongoing basis and reports annually to the General Assembly. In the light of the ICSC's reports, the General Assembly establishes a salary scale showing the minimum net amounts received by staff in grades P-1 to D-2 throughout the world. This scale is known as the "base/floor salary scale". The average difference in remuneration between UN staff in grades P-1 to D-2 in New York and federal civil service staff in the United States in comparable positions in Washington D.C., adjusted for the cost-of-living differentiation between these two cities, is referred to as the "net remuneration margin". It is expressed as a percentage: thus, for example, a margin of 114 indicates that the net salaries of UN staff in the Professional and higher categories are on average 14 per cent higher than those of their counterparts in the comparator civil service.

In resolution 40/244 of 18 December 1985 the General Assembly approved "the range of 110 to 120, with a desirable mid-point of 115", for the net remuneration margin, "on the understanding that the margin would be maintained at a level around the desirable mid-point of 115 over a period of time". Since then, the General Assembly has reaffirmed on several occasions that this range, with its desirable mid-point, should continue to apply. Between 1985 and 2002 the margin nearly always remained within the prescribed range. However, as indicated above, the net remuneration margin represents the average of the margins for grades P-1 to D-2. At individual grades there were in fact substantial differences in margin during that same period. The margin at grades P-1 to P-3 was consistently higher than the desirable mid-point of 115, whilst the margin at grades P-4 to D-2 remained below the mid-point. At grades D-1 and D-2, it was invariably lower than 110.

In resolution 46/191 of 20 December 1991 the General Assembly invited the ICSC to review and report to it on the

differences between the net remuneration of UN officials and US federal civil servants at individual grade levels. Two years later, in resolution 48/224, it declared that the imbalance in the margins at individual grades should be addressed in the context of its overall margin considerations and invited the ICSC to make proposals to that effect. However, although the issue continued to be considered by both the ICSC and the General Assembly, it was not until 2002 that measures were taken to redress the imbalance.

In its report for 2002 the ICSC, having noted that the net remuneration margin for that year was estimated at 109.3, recommended to the General Assembly, for implementation as of 1 March 2003, “a differentiated real increase of the base/floor salary scale to address the low level of the margin at the upper grades of the salary scale and to restore the overall level of the margin to the desirable mid-point of 115”. The salary scale which the ICSC submitted to the General Assembly reflected salary increases at all grades, ranging from 0.45 per cent at grade P-1 to 10.7 per cent at grade D-2, and resulted in a net remuneration margin of 115.

By resolution 57/285 of 20 December 2002 the General Assembly, having considered the ICSC’s report, approved a revised base/floor salary scale which, though likewise reflecting differentiated real increases in salary, differed from the scale proposed by the ICSC in the following respects: no increase in salary was granted at grades P-1 to P-3; the increases granted at grades P-4 to D-2 were smaller than those recommended by the ICSC; the resulting net remuneration margin was 112.2; and the revised scale was to apply with effect from 1 January 2003. This resolution was duly implemented by the World Food Programme (WFP), an autonomous joint subsidiary programme of the United Nations and the FAO.

On 3 April and 4 June 2003, respectively, Messrs C. and L., , who are staff members of the WFP, challenged the application of resolution 57/285 as reflected in their payslips. By individual decisions dated 5 September 2003, which the complainants now impugn in identical complaints, the Director-General of the FAO rejected their appeals and allowed the case to be brought directly before the Tribunal. Similar complaints, supported by identical submissions, have been filed by staff members of two other organisations and are the subject of Judgments 2420, 2422 and 2423, also delivered this day.

B. The complainants put forward four main arguments in support of their complaints. They submit, firstly, that the General Assembly failed to comply with the *patere legem quam ipse fecisti* principle according to which “[a]ny authority is bound by its own rules for so long as such rules have not been amended or abrogated”, as the Tribunal recalled in Judgment 51. The complainants point out that, having reaffirmed that the range of 110 to 120 should continue to apply and that the margin should be “maintained at a level around the desirable mid-point of 115 over a period of time”, the General Assembly breached its own rule by adopting a base/floor salary scale in which the margin for grade P-1 is outside the range, at 120.5, whilst the overall level of the margin is 112.2, which in their view cannot be said to be “around the desirable mid-point of 115”. Similarly, by adopting a scale in which the margins range from 115.4 at grade P-2 to 111 at grade D-2, the General Assembly did not properly address the margin imbalance at individual grade levels, despite having repeatedly asked the ICSC to make proposals to that effect.

Secondly, referring to Judgment 1821, the complainants recall that the methodology used to determine salary adjustments must ensure that the results are “stable, foreseeable and clearly understood”. They submit that whereas the ICSC’s recommendation for the 2003 base/floor salary scale was based on a detailed methodology approved by the General Assembly, there is no evidence that in deciding to adopt a different scale the General Assembly applied any methodology whatsoever.

Thirdly, they contend that no reasons have been given to support the decision of the General Assembly, which appears to have been motivated solely by the desire to save money at the staff’s expense. By contrast, the reasons underpinning the ICSC’s recommendation were well known and reflected a consensus, amongst the ICSC and the representatives of both the organisations and the staff, in favour of restoring the net remuneration margin to 115.

Lastly, they argue that the General Assembly’s decision was arbitrary, being neither fair, nor “technically grounded”, nor properly motivated.

The complainants ask the Tribunal to annul the impugned decisions insofar as they amount to a rejection of their appeals, and to draw all legal consequences from such annulment, particularly by referring the cases back to the Organization “so that the proper procedure can be followed with a view to awarding the complainant[s] the sums to which [they are] legally entitled”. They also claim costs.

C. The Organization contends that it is bound to apply the base/floor salary scale as approved by the General Assembly. On accepting the Statute of the ICSC, the FAO amended its regulations to take into account the fact that certain functions were thereby transferred to the ICSC. Thus, Rule XXXIX, paragraph 3, of the General Rules of the FAO provides that “[t]he Director-General shall have authority to promulgate Staff Regulations [...] to give effect to recommendations of the [ICSC] which have been approved by the General Assembly of the United Nations with regard to the salaries and allowances of the staff in the professional and higher categories”. The Director-General has no authority to substitute a salary scale for that approved by the General Assembly. Indeed, to do so would be contrary to the rules governing the common system. Moreover, the General Assembly enjoys a measure of discretion in establishing a base/floor salary scale in accordance with the methodology and other relevant parameters that it has approved.

The FAO asserts that in adopting the disputed scale the General Assembly acted in a legally correct manner. It complied with the *patere legem quam ipse fecisti* principle, since its decision was entirely consistent not only with the principles it had laid down in 1985 regarding the margin range, which clearly included an element of flexibility, but also with its decisions regarding the need to redress the imbalance in the margins at individual grade levels. The decision was taken in accordance with the methodology adopted for the implementation of the Noblemaire principle, and the fact that on this occasion differentiated salary increases were granted at some grades but not others did not constitute a departure from that methodology. Contrary to the view expressed by the complainants, it was also duly substantiated. The process leading to the adoption of a salary scale is to be seen as whole rather than as one involving two separate stages and two distinct decisions. Throughout that process, which involves consultation of the representatives of the staff and of the organisations by the ICSC, the need to redress the imbalance in the margins at individual grades was brought to the attention of all concerned. Indeed, it had already been under consideration for several years, as witness the numerous earlier resolutions expressly recalled by the General Assembly in resolution 57/285. For the same reasons, the Organization considers that the General Assembly’s decision cannot be deemed arbitrary.

D. In the rejoinder submitted on behalf of both complainants, the pleas presented in their complaints are maintained. In addition, the complainants argue that the scale adopted by the General Assembly failed to set salaries at a competitive level enabling the organisations to address the widely-acknowledged need to offer better conditions of pay to managers at senior levels. In that respect, the scale did not comply with the Noblemaire principle, the ultimate goal of which, according to the complainants, is set forth in Article 101, paragraph 3, of the Charter of the United Nations in the following terms:

“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. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.”

E. In its *amicus curiae* brief the Field Staff Association fully agrees with the arguments put forward by the complainants.

F. In its surrejoinder the Organization reiterates its position, noting that the complainants’ rejoinder adds no new element of fact or law.

CONSIDERATIONS

1. In separate complaints which the Tribunal sees fit to join, two staff members of the World Food Programme (WFP) holding grades P-5 and D-1, respectively, challenge the decisions of 5 September 2003 by which the Director-General of the FAO rejected the appeals they had lodged with the Executive Director of the WFP against the determination of their respective salaries for 2003 as indicated in a memorandum of 24 December 2002 applying the salary scale adopted by the United Nations General Assembly in its resolution 57/285.

2. The Field Staff Association, which states that it represents field staff belonging to the Professional category, has submitted an *amicus curiae* brief. For the reasons set forth in Judgment 2420, also delivered this day, the Tribunal agrees to take into account these submissions, which are not, however, to be regarded as the brief of an intervener.

3. The arguments exchanged between the parties are identical to those examined in Judgment 2420 and,

mutatis mutandis, call for the same replies. The complaints must therefore be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet