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

102nd Session **Judgment No. 2571**

The Administrative Tribunal,

Considering the complaint filed by Ms V. A. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 20 January 2006 and corrected on 1 February, the Organization's reply of 12 May, the complainant's rejoinder of 21 June and UNESCO's surrejoinder of 27 September 2006;

Considering the applications to intervene filed by:

M. A.	L. G.	T.H. N. D.
R. A.	R. G.	C. N.
M. A.	H. G.	L. P.
P. A.	B. G.	F. P.
R. B.	M.J. G.	M. P.
S. B.	V. H.-V.	S. P.
J. B.	D. H.	C. Q.
N. B.	S. H.	H. R.
P. B.	H. I.	M. R.
J. B.	E. I.	A. R.
M. C.	A. J.	A. R.
L. C.	M. J.	M. R.
O. C.	N. K.	L. R.
G. C.	D. K.	A. R.-E.
C. C.-R.	G. K.	A. R.-G.
J.-P. C.	L. K.	C. R.
M.-T. C. d. B.	B. K.	F. R.
M.L. C.	M. K.	D. R.
A.-C. C.	F. L.	G. R.
V. C.	A. L.	C. R.
A. D.	J.-F. L.	A. S.-L.
A. D.	L. L.	A. S.

R. D.	R. L.	E. S. J.
J.-L. D.	R. L. P.	M.K. S. d. T.
B. D.	R. L.	C. S.
J. D.	O. L'H.	L. S.
A. D. R.	N. L.	S. S.
O. E.	A. M.	C. S.
E. F.	C. M.	B. S.-F.
A. G.	D. M.	A. T.
S. G.	A. M.	D. T.
V. G.	P. M.	C. T.
D. G.	S. M.	T.-L. T.
M.-P. G.-Z.	C. M.	D. T.
H. G.	Y. M. K.	S. V.
I. G.	E. M.	S. V.
P. G.	M. N.	M.E. V.-C.
M. G. L.	A. N.	S. W.

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a French national born in 1952, joined UNESCO in 1978. At the material time she held grade G-5.

A Local Salary Survey Committee, made up of representatives of UNESCO's Administration and staff, was set up in April 2004. Data were collected between 4 and 20 October 2004 by a survey team led by a member of the Secretariat of the International Civil Service Commission (ICSC) and including two other persons, who were members of the Local Salary Survey Committee (one representing the Administration and the other the staff). Following that survey, the ICSC recommended a new salary scale for staff in the General Service category working in Paris. In accordance with the instructions of the General Conference, the Director-General implemented that recommendation, whereby as from 1 October 2004 the staff concerned were to receive a salary increase of 1.19 per cent in relation to the salary scale applicable since 1 January 2004. Staff were informed of this measure in Administrative Circular No. 2241 dated 29 July 2005.

On 29 September 2005 the complainant filed a protest with the Director-General, challenging her payslip for August 2005 insofar as it reflected the application of the aforementioned recommendation. In a memorandum of 4 November 2005 the Director of the Bureau of Human Resources Management replied that the Director-General was maintaining his decision regarding the increase in the salary scale of General Service staff and that he authorised her, if she so wished, to lodge a complaint with the Tribunal without exhausting internal remedies. That is the impugned decision.

B. The complainant contends that the methodology used for the survey conducted in Paris in October 2004

produced results that were not compatible with what is known as the "Flemming principle"*, because "particular factors" were overlooked, and that the Director-General endorsed the mistake made by the ICSC. She argues that the surveyors, in applying paragraph 73 of the "Methodology for surveys of best prevailing conditions of employment at headquarters duty stations", failed to take account of the fact that since 1 January 2000 the legal working time in France has been 35 hours a week, subject to any additional hours being paid at an overtime rate 25 per cent above the normal rate (up to the 44th hour worked in the week). Apart from the fact that the panel of employers selected by the Commission for the Paris survey was, according to the complainant, "far from being made up of employers offering 'the best prevailing conditions'", the ICSC wrongly proceeded from the salary paid for a 35-hour week and applied "a simple rule of three" in order to obtain the pay corresponding to UNESCO's working week**, while overlooking the fact that any hours worked in excess of 35 hours should be paid at a rate 25 per cent higher. The complainant asserts that, if the ICSC had taken account of the fact that UNESCO staff worked 40 hours a week while most employees performing comparable duties in the Paris region worked only 35 hours, the salary increase should have been 3.37 per cent rather than the 1.19 per cent granted.

The complainant asks the Tribunal to set aside the impugned decision, to order that the case be referred back to the defendant for her remuneration to be recalculated with retroactive effect from October 2004, and to award her costs.

C. In its reply UNESCO contends that the ICSC complied strictly with the requirements of the applicable methodology. Regarding the employers selected for the survey, it points out that this is a new plea that was not raised in the protest and is therefore irreceivable. On the merits, nevertheless, it explains that while no guideline can ever guarantee that the selected employers will be truly representative and will be among those offering the best conditions of employment, the selection is made in the light of research, contacts and consultations with the representatives of administrations and staff, and an effort is made to ensure a certain variety in the economic sectors represented (at least 25 per cent of the employers must be taken from the public sector). A number of them also appeared in the previous survey. The Organization asserts that the list of selected employers was drawn up in accordance with the selection criteria established in the prevailing methodology.

Regarding the issue of the number of working hours to be taken into account, UNESCO submits that neither the Administration's representatives nor the staff representatives ever contested paragraph 73 or the way in which it was applied in previous surveys. It argues that the Tribunal's case law leaves the ICSC considerable discretion in its choice of methodology and that the complainant has not shown that the Commission abused its discretionary authority. Referring to a letter which the President of the ICSC wrote to the Deputy Director-General of UNESCO, it maintains that the wording of paragraph 73 leaves very little to interpretation and that the demands of the staff representatives (who were requesting that the practices of the surveyed employers be ignored and that a value greater than the full difference between the working hours applied by the local employers and those of international organisations be factored in the calculation) had been rejected because they clearly violated the methodology. UNESCO points out that if the complaint concerns the issue of overtime rather than hours of work, then it is paragraph 74 of the methodology that applies. According to this paragraph, as the practices concerning overtime compensation are generally aligned with local conditions, queries related to this issue should be excluded from the questionnaire sent to employers, "unless specifically requested by the duty station". In this instance, neither the Administration's representatives nor the staff representatives ever made such a request and the ICSC did not therefore collect any data on this subject from the surveyed employers. It adds that, since the complainant's contract of employment is governed by the terms of UNESCO's Staff Rules and Regulations, she is clearly mistaken in referring to the definition of overtime given by French legislation.

D. In her rejoinder the complainant contends that her allegations concerning the composition of the panel of employers are merely a further argument in support of a plea already submitted in her protest, namely that the salary scale established in the light of the Paris survey was unlawful. Moreover, although the Tribunal will not admit new claims submitted in the course of proceedings, the same does not apply to new pleas. With regard to the methodology adopted, she points out that an initial list of employers considered to be the "best" locally is drawn up, but if some employers refuse to reply, others are added from a "reserve" list. It is therefore clear, in her view, that the employers selected are not always the best, especially since, she adds, UNESCO no longer makes any effort to maintain good relations with the employers who are considered to be the best. This means that the results of the survey are distorted.

On the issue of working hours, the complainant explains that she is opposed not to the principle outlined in paragraph 73 of the methodology but to the way it was applied "mechanically", in disregard of the fact that

according to the case law account should have been taken of “particular factors” applying in Paris. While there was no reason to put in a request regarding overtime, the matter of the legal working hours in France should have been raised. The difference in weekly working hours is actually covered by paragraph 73, which makes provision for a “proportional adjustment”. In her view, such an adjustment should have been made by raising salaries by 25 per cent beyond the 35th hour worked.

She also indicates that her claim for costs amounts to 4,000 euros.

E. In its surrejoinder UNESCO maintains its position. It acknowledges that as far as the panel of employers is concerned there are no “rock-solid data” on which the choice of specific employers can rely. But it rejects the idea that closer contacts with employers would have made any difference to the results of the survey.

CONSIDERATIONS

1. The complainant, a French national, joined UNESCO on 27 November 1978. She belongs to the Organization’s General Service category.

She seeks the quashing of the decision of 4 November 2005 by which the Director-General rejected a protest she had filed, challenging her August 2005 payslip on the grounds that it reflected the application of the new salary scale for General Service staff drawn up in accordance with the recommendation of the ICSC. She also requests that the case be referred back to the Organization for the latter to recalculate the remuneration it owes her, with retroactive effect from October 2004.

These claims are receivable. Indeed, the Director-General authorised the complainant to bring her case directly before the Tribunal without first submitting it to the Appeals Board, which is the Organization’s internal appeals body. Moreover, the complainant is entitled to challenge her payslip, which constitutes an individual decision affecting her personally, and in so doing she may incidentally challenge the lawfulness of the general decision (regarding the salary scale) on which that individual decision is based (see Judgments 1840, under 2, and 1329, under 7).

2. One hundred and fourteen persons, all General Service staff of UNESCO, have applied to intervene in the complaint. Since these persons have the same rights as the complainant, their applications are allowed and the Tribunal’s ruling in this case shall be extended to them (see Judgment 51, under 6).

3. It is worth recalling the general principles that apply firstly to the remuneration of General Service staff recruited locally by international organisations and secondly to the methods of comparison used to establish the salary scale for such staff as accurately as possible.

(a) The general principle that applies to the remuneration of General Service staff recruited locally by international organisations was laid down for the first time in 1949 by a Committee of Experts on Salary, Allowances and Leave Systems set up by the General Assembly of the United Nations. This principle, known as the “Flemming principle”, has been regularly restated, in particular by the ICSC.

The principle is derived from the idea, originally expressed in Article 101 of the Charter of the United Nations, that the system of remuneration of the staff of international organisations should facilitate the recruitment of persons meeting the highest standards of efficiency, competence, and integrity. The conditions of service offered to locally-recruited staff must enable the international organisations belonging to the common system of the United Nations to compete with employers seeking in the same labour market to recruit equally qualified and competent staff to carry out similar and qualitatively identical tasks to those performed in the organisations. According to the Flemming principle, the conditions of service of international civil servants, that is their salaries and related benefits, must be among the best available locally.

The Flemming principle does not, however, require these conditions of service to be the absolute best. Moreover, the manner of applying the principle must not depend on such variables as the desire of international civil servants to keep their jobs or the ease or difficulty of finding suitable recruits on the local labour market (see Judgment 1713, under 2 and 14).

(b) The conditions of employment at the headquarters duty stations of the organisations are compared by means

of in-depth surveys conducted among employers who are deemed to be representative of the locality and for the sort of work performed by staff working in the organisations. The methodology used for these surveys can hardly be considered scientific. In particular, the external jobs which are taken into consideration in order to determine the best terms of employment available locally need not be exactly the same as those of the United Nations common system. There must merely be sufficient similarity between the jobs (see Judgment 1915, under 18).

The ICSC and the Local Salary Survey Committees must therefore be allowed a certain discretion in the choice and application of the methodology used to determine standard salaries. Consequently, the Tribunal holds only a limited power of review and will intervene only if the assessments arrived at by the ICSC or the Local Salary Survey Committee are flawed to the extent that they amount to abuse of authority. This may be the case, for instance, if the methodology used contrives artificially to reduce the levels of the salaries compared, or if corners are cut for the sake of saving time to the detriment of the staff concerned, or if some particular factor is overlooked or misconstrued (see Judgment 1713, under 8).

4. The complaint essentially raises the issue of the adjustment of difference in weekly working hours applied, respectively, by employers in the Paris region and by UNESCO, in view of the fact that under French legislation the working week is established at 35 hours, and overtime is paid at a higher rate.

(a) The defendant Organization rejected the complainant's protest on the grounds that the ICSC accepted the outcome of the survey of conditions of employment conducted in Paris in October 2004, deeming it to be in accordance with the applicable methodology. The impugned decision points out, moreover, that the question of the adjustment of working hours was scrutinised most carefully.

(b) In a message to all staff, the defendant had previously replied to a number of questions raised by its decision, on 22 June 2005, to follow the ICSC's recommendation and to adopt the new salary scale for staff in the General Service category.

Two of the replies to these questions deal with the way the difference between the weekly hours of work laid down under French legislation and those practised within the Organization might affect the salaries of UNESCO officials.

The answer given to question 11, as to whether the difference in the weekly working hours of UNESCO staff and the host country had been taken into account in the calculation of salaries, was as follows:

"Concerning the difference between the hours of work and those of UNESCO, ICSC adopted the same approach as in other [headquarters] duty stations. This approach reflects [paragraph] 73 of document ICSC/57/R.14 [entitled 'Methodology for surveys of best prevailing conditions of employment at headquarters duty stations'], that is, this 'difference should be calculated on the basis of a proportional adjustment of salaries, corresponding exactly to the difference between the hours of work'.

For example, an external employee earns 35,000 € a year, and works 35 hours a week, whereas the [United Nations] employee works 40 hours a week. The external salary used in the calculations is :

$$\frac{35{,}000\ €}{35} \times 40 = 40{,}000\ €.$$"

To question 12, as to whether there was any other adjustment concerning weekly hours of work, the defendant replied:

"Concerning the adjustment of difference in weekly working hours on the basis of overtime rates, while this may be the practice of some employers in France, it is certainly not the case of all the employers included in the salary survey. By way of example, [two] employers also worked a 40 hour week and did not grant additional compensation. A third employer, while applying the 35 hour week, had frozen salaries to reflect the reduction in hours worked. [Three] other employers were applying the 35 hour week but were granting additional holidays instead of financial compensation. In this respect, it should be noted that the average leave entitlement among the employers included in the survey was 27.6 days, compared to 30 days in UNESCO.

In line with the Director-General's instructions, [the Human Resources Management Bureau] is currently discussing with ICSC whether the methodology used in the [United Nations] Common System can be improved so that it continues to take into account the best local conditions of employment."

(c) On 15 November 2005, however, the defendant decided to reduce the number of working hours of its staff from 40 to 37½ hours per week, effective 1 January 2006, in response, according to the Director-General, "to the request for compensation for the difference between the hours worked in the host country and at Headquarters".

5. The complainant criticises the choice made of employers selected for the salary survey conducted in Paris in October 2004.

(a) The defendant counters that this criticism is irreceivable because it constitutes a new plea which was not put forward in the protest on which the impugned decision was based.

This objection ignores the fact that the receivability of a complaint depends on the claims it contains, and not on the pleas (see Judgments 1519, under 14, and 1590, under 3). What matters in this case is that, to the extent that they concern her remuneration as established in accordance with the disputed pay scale, the complainant's claims are receivable. She may therefore enter any plea she considers useful in support of her complaint, even if the plea was not put forward in her internal protest.

(b) In the complainant's view, the panel of employers selected by the ICSC did not comprise those who offer their staff the best prevailing conditions of service.

In its reply and in its surrejoinder the defendant has explained in detail the criteria on which the choice of employers was based for the purposes of the survey. It appears from these explanations and from the documentation produced by the parties that the ICSC selected a large number of external reference employers, taken from a variety of economic and social sectors, that it took account of the lists of employers used in the course of previous surveys and that it removed from those lists those positioned at the bottom of the salary scale. It cannot be said, therefore, that the choice of reference employers lacked objectivity and thoroughness.

In fact the complainant criticises the ICSC rather for failing to choose employers offering suitable points of comparison which could be used to arrive at a correct adjustment of the difference in weekly working hours. This criticism is not, however, justified. It cannot be deduced from the reply to question 12 given in the aforementioned message to staff that there was – as the complainant alleges – any "vagueness" in the choice of employers. The answer given simply reflects the defendant Organization's doubts regarding the best way of addressing not only the difference between French legislation and UNESCO's rules concerning weekly working hours but also the diversity of ways in which the French legislation on weekly working hours is applied in practice.

The criticism concerning the choice of employers for the survey is therefore unfounded.

6. The complainant states that she has no objection to the methodology applied by the ICSC for the survey conducted in October 2004 and in particular to the contents of its paragraph 73.

(a) That paragraph is worded as follows:

"**Hours of work**

73. Hours of work should be understood to mean the length of the work week, excluding officially recognized lunch and other breaks. Differences in the reported hours of work between surveyed employers and the United Nations should be taken into account. The calculation of the difference should be based on a proportional adjustment to salaries, accounting precisely for the full difference in hours worked. This adjustment should be made on an employer-by-employer basis and applied to the base annual gross salary per job as well as to any allowances and benefits expressed as a proportion of base salary."

(b) If the Tribunal were, on its own motion, to consider the question of the compatibility of this rule with the Flemming principle, it would find that the system of proportional adjustment provided for is not so indefensible as to warrant interfering in the exercise of the discretionary authority enjoyed by the ICSC with regard to the technical issues that arise when determining the best prevailing conditions of employment among local employers (see Judgments 1265, under 25-30, and 1840, under 2).

(c) The complainant challenges only the way in which this rule was applied in this particular case. She maintains that the ICSC disregarded the fact that French labour legislation sets the working week at 35 hours as from 1

January 2000, with the effect that any hours worked over and above that ceiling are paid as overtime at a higher rate. She argues that the ICSC was wrong in comparing a given situation (the 35-hour week of local employers) with the 40-hour week applying to officials of UNESCO until 31 December 2005. According to her, that mistake led in practice to a significant and unjustified cut in salary, since the percentage increase applied to the disputed pay scale was 1.19, whereas it would have amounted to 3.37 per cent if that particular factor had been taken into account.

In the above-mentioned message to staff, the defendant indicated that in that respect the ICSC had adopted the same approach as for the surveys conducted in other headquarters duty stations and that this approach was in line with the third sentence of paragraph 73. It noted that there was no need for an "adjustment of difference in weekly working hours on the basis of overtime rates", since this form of remuneration is not common practice at UNESCO Headquarters and in any case is not applied by all the employers included in the survey.

(d) The Tribunal finds no fault in the manner in which the ICSC applied the methodology in this case.

Indeed, in determining which conditions of service should serve as a reference for establishing the salary scale for staff in the General Service category, the Organization must take account of the general conditions of remuneration normally applied by the surveyed external employers. The fact that different rules governing working hours should give rise to specific compensation for overtime hours which are part of the Organization's normal working hours cannot oblige the latter to take this factor into account systematically and to apply the resulting overtime compensation mathematically to its staff's salaries, without taking into account all the other components of the remuneration.

(e) The Tribunal thus concludes that the strict implementation in this case of paragraph 73 of the Methodology for surveys of best prevailing conditions of employment at headquarters duty stations is not in breach of the Flemming principle.

7. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 10 November 2006, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Seydou Ba

Mary G. Gaudron

Mr Claude Rouiller

Catherine Comtet

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* According to this principle, the pay of staff in the General Service category should be aligned with the best prevailing conditions at each duty station.

** At the material time, the weekly working time at UNESCO was 40 hours. It was changed to 37½ hours on 1

January 2006.

Updated by PFR. Approved by CC. Last update: 15 February 2007.