FORTY-SECOND ORDINARY SESSION

In re DOMON and LHOEST

Judgment No. 381

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints brought against the World Health Organization (WHO) by Mr. Jacques Domon and Mr. Charles Lhoest on 7 April 1978, the WHO's reply of 14 July 1978 to the two complaints, the letter of 19 July 1978 from the complainants' counsel withdrawing several of the claims made in their original complaints, the complainants' single rejoinder dated 28 December 1978 and their observations on Judgment No. 236 of the United Nations Administrative Tribunal (Belchamber v. the Secretary-General of the United Nations), and the WHO's surrejoinder and its observations on the same judgment, dated 16 March 1979;

Considering the applications to intervene filed by

F. Adam
D. Alliod
C. Allaman
B. Amaru
H. Amevet
F. Amoros
T. Antonin
D. Arcangeli
R. Archer
A. Bailly
J. Barge
S. Baron
F. Baudin
J. Bayley
B. Baylon
R. Bell
P. Belot
P. Bennett
M. Berton
G. Bertrand
R. Blanchet
R. Blattner
S. Blumenfeld
J. Bondet
J. Bornet
E. Breitenstein
E. Bornard
J. Boulens
M. Buchwalder
H. Buschbeck
A. Caimi
G. Capt
N. Carnazzola
M. Cartillier
J. Caruso
G. Cayol
M.C. Celaya
B. Cernadas
F. Chambet
M.C. Celaya

B. Cernadas
F. Chambet
J. Clark
M. Clerton
A. Cochet
G. Cohen
R. Comte
E-M. Corpotaux
A-M. Cuenat
A. Dagostino
C. Dal Col
J. Darmody
E. Dayer
G. Dazin
R. Derolland
V. de Saussure
C. Descloux
S. Descloux
C.C. de Weber
C. Dickens
C. Dischinger
P. Donnat
M. Doutriaux
S. Duc
A. Dunand
J. Dunand
H. Eckert
J. Eggs
A. Ellenberger
A. El Naggar
Z. Ertan
G. Esatoglu
P. Etienne
J. Faundez
R. Favre
P. Fell
A. Fernandez
J. Fernandez
A. Ferraro
N. Ferraro
D. Ferrus
L. Firla
M. Fischer
R. Fontana
R. Francelet
D. Fresle
F. Fully
C. Gaberell
R. Gaillard
S. Galati
A-L. Gallet
M-L. Gander
G. Garcia
J. Garetto
M. Gavillet
E. Geindre
J-P. Genet

F. Genoud
J. Germain
J. Gianelli
J-P. Gillet
M. Giogoso
R. Giroud
M. Gloor
D. Gottet
M. Goudal
B. Grandin
J-P. Gremaud
H. Greyfie de Bellcombe
B. Griffin
D. Gumy
P. Gutierrez
M. Gyte
S. Hackshall
J. Hargreaves
V. Hay
G. Henzelin
J. Hirsch
D. Hoffmann (Dieter)
D. Hoffmann (Dorothy)
W.H. Hoganne
J. Huber
B. Huwiler
J. Iaconi
R. Jaffre
H. Jaquemet
A. Helin
G. Joseph
J. Julen
M. Julliard
B. Junod
L. Kerebel
E. Labbe
M. Lacroix
E.A. Lankinen
N. Laurent
V. Lecygne
R. Leo
S. Leone de Magistris
J-P. Lidon
D. Liebermann
S. Luiset
E. Macdonald
D. Nagnin
M. Mahendren
M. Malin (Michel)
M. Malin (Monique)
R. Manzi
J. Martin
M.S. Martin
M. Martin
B. Maurel
H. Meier
M. Melloni

S. Menetrey
R. Mestrallet
E. Meyer de Stadelhoffen
C. Meynet
G. Meyrat
A. Michaud
C. Mivelle
R. Moille
L.G. Monico
B. Monnier
S. Montiel
R. Morcillo Puchades
L. Mori
B. Mossuz
J. Nallet
F. Napier
F. Nicod
M. Nicolet
W. Nottiez
I. Nuhiji
F. Page
M. Palomino
J. Pappalardo
R. Peguet
M. Penichot
G. Pennacchi
J. Perissier
J. Perrotte
A. Perroud
M. Pesenti
L. Piaget
G. Picar
D. Pinto de Magalhaes
V. Pintus
M. Piotrowicz
A. Pollinger
G. Pond
S. Portier
J. Pounder
M.T. Pozas
L. Pozzi
M. Prandle
N. Pritchard
S. Rachid
G. Raisin
E. Rakuschan
J. Raneda
R. Raphoz
J.F. Rappo
E. Remia
R. Renault
M. Reverdin
J. Reyboubet
G. Rocher
R. Rolland
J. Rossel
J-P. Rost

M. Ruch
D. Saidi
D. Salih
D. Salmon
M. Sancho
G. Sappey
J. Sauter
G. Scheidegger
M. Schluchter
M. Schmid
R. Scott-Smith
R. Senn
P. Serra
E. Sestito
V. Sharrock
J. Sikkens
F. Simon
J. Sims
M. Smith
J. Somny
R. Speck
H. Speidel
J. Spinner
M-F. Stencek
G. Stoba
R. Strauli
V. Strähle
R. Strini
K. Summers
B. Suffredini
S. Teasdale
A.P. Thiollay
A. Thomas
J. Todesco
K. Traub
A. Trezzini
A. Tribolet
J. Turrian
J. Twomey
M. Underwood
V. del Valle
A. Van Dobben
J. Veyrat
P. Vibert
G. Wade
G. Wagner
J. Zanetti
R. Zavallone
G. Zemp
L. Burford

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Regulations 3.2 and 8.1 and WHO Staff Rules 910 and 920;

Having examined the documents in the dossier and disallowed the complainants' application for oral proceedings;

Having ordered that the complaints be joined;

Considering that the material facts of the case are as follows:

A. Mr. Domon has been a member of the General Service category of staff since 1960 and Mr. Lhoest since 1966. They are objecting to a new salary scale which on 13 January 1978 the Director-General applied to their category by Circular No. 5. The new scale came into being in the following circumstances.

B. Since the early 1950s there has been a uniform salary scale for the General Service category staff of the United Nations Office and of United Nations specialised agencies in Geneva and it has been established by reference to the best prevailing salary rates in public and private employment in that city. To determine those rates, surveys have been carried out from time to time, but not at any set intervals, and by methods decided on after consulting the staff associations of the organisations. Since 1966 an institute independent of those organisations has collected and analysed data for the surveys. Giving effect to the results of the 1975 survey meant substantial salary increases, and the Administrations and the staff associations disputed the matter. The former refused to accept in full the results of the survey; the latter wanted them to be put into effect. The dispute led to a strike by United Nations staff from 25 February to 3 March 1976. On 23 April 1976 it was settled by an agreement which "a sole negotiator designated by the Secretary-General of the United Nations and by the Executive Heads of the Geneva - based agencies" concluded with the staff representatives of the organisations (the United Nations, the International Labour Organisation, the World Health Organization, the Interim Commission for the International Trade Organisation/General Agreement on Tariffs and Trade, the World Meteorological Organization, the International Telecommunication Union and the World Intellectual Property Organization). That agreement was a compromise providing for smaller increments, with different percentages for different grades. On 1 September 1976 the parties concluded a supplementary agreement, on interim cost-of-living adjustments.

C. Meanwhile, on 18 December 1974, the General Assembly of the United Nations had approved the statute of the International Civil Service Commission (ICSC). Article 1 of the statute states that the function of the Commission is "the regulation and co-ordination of the conditions of service of the United Nations common system" and that it shall perform its functions in respect of the United Nations and of those specialised agencies and other international organisations which participate in the United Nations common system and which accept the statute of the Commission. The World Health Assembly accepted the statute by resolution WHA 28.8 and so recognised the competence of the Commission. By Resolution XXI/193 B of 22 December 1976 the United Nations General Assembly instructed the Commission to carry out a new survey. A working party set up by the Commission consulted the representatives of the Geneva-based organisations and of their staffs and, despite strong objections expressed orally and in writing by the staff representatives, chose a method for collecting data which differed from the methods applied in earlier surveys. The staff representatives later took the view that the application of that method, to which they had objected, had been defective and therefore incorrect. They therefore rejected the Commission's recommendations and refused to join the Administrations in working out the arrangements for applying them, on the grounds that they did not afford an acceptable basis for discussion. No talks took place, and on 22 November 1977 the Secretary-General of the United Nations announced that the recommendations would be put into effect. On 13 January 1978 the Director-General of the WHO adopted the same arrangements, namely: salaries, including incidental allowances, were reduced by 17 per cent, but the amount of the reduction was offset by a "personal transitional allowance" of the same amount. The staff took the view, however, that the new scale was to their disadvantage, in that no cost-of-living adjustments were to be made until the difference of 17 per cent had been made up, and annual increments, increases resulting from promotion and compensation for overtime were to be paid in accordance with the new scale.

D. The new scale having come into force with the publication of Circular No. 5, the complainants wrote to the Director-General asking him to reconsider his decision. On 10 March 1978 the Director-General answered that there was nothing to be done and that he authorised the complainants to appeal directly to the Tribunal.

E. In their claims for relief, as amended on 19 July 1978, the complainants ask the Tribunal -

(a) to find that the agreement of 23 April 1976 either creates a clear understanding on prior negotiations or recognises that a clear understanding was already in existence,

(b) additionally, to find that the Director-General of the WHO breached the agreement by unilaterally revising without prior negotiations with the staff representatives the salary scale of the General Service category he fixed pursuant to the agreement,

and therefore

(a) to quash the decision of the Director-General of the WHO dated 13 January 1978, introducing as from 1 January 1978 a new salary scale for General Service category staff in the WHO,

(b) to restore, retroactively as from 1 January 1978, the status quo ante on the basis of the 1976 agreements on salary scales and interim adjustments.

(c) to assign to the defendant organisation any expenses incurred by the complainants in the preparation of their cases before the Tribunal, including lawyer's fees, on the basis of documentary evidence which will be submitted to that effect by the complainants.

F. In support of their claims the complainants observe that under the new scale they suffer a reduction in salary and incidental allowances. Salary, they maintain, is an element of the employment relationship which is governed not by the staff regulations but by the contract of appointment, and so the Organization may not alter it unilaterally. The 1976 salary scale was not put into effect unilaterally: it was the outcome of collective bargaining and of the agreements of April and September 1976, which were binding on both sides. Those agreements succeeded earlier ones, such as those of 1968-69 on the survey methods. Neither the agreements of 1968-69 nor those of 1976 make any express provision for denunciation. In other words, argue the complainants, both sides took the view that the agreements remained in force from one survey to the next. The signatories had been duly accredited: the Director-General under the preamble to the WHO Staff Regulations, and the staff representatives under WHO Staff Rule 920. The complainants argue that the Director-General may not plead the unilateral decision of the United Nations Secretary-General to apply the ICSC's recommendations in defence of his own arbitrary breach of his contractual relationship with the complainants' representatives.

G. In its reply the WHO contends that the claims for relief fall outside the Tribunal's competence because the complainants are challenging a general measure not directed at any one official. If, however, the Tribunal holds that the complaints relate to the individual application of the challenged measure to the complainants and that that measure is wrongful, then it is bound to direct that only the complainants should be unaffected by the measure. The complaints are in any case irreceivable because the complainants may not base claims on any breach of the rules which has no effect on their contracts of appointment.

H. As to the merits, the WHO argues that it has committed no breach of the agreements but has scrupulously respected them. Nor did it bring the agreements to a premature end: not containing any clause on its duration, the 1976 agreement, which was based on the results of a survey, was to remain in force only until the results of a new survey were announced. That new survey was carried out by the ICSC. The complainants are mistaken in contending that, being the outcome of negotiation, the 1976 agreement could be revised only after further negotiation. There is no rule in the WHO prescribing negotiation between the Director-General and the staff representatives, the latter's role being purely advisory. As a result of his contacts with the staff in 1976, the Director-General introduced the new salary scale, but on his own authority alone. There cannot be inferred from practice followed since 1951 any real custom requiring negotiation of new salary scales with the staff representatives. Besides, even if there were such a custom, it would be at odds with Staff Regulation 3.2, which states: "The salary and allowance plan shall be determined by the Director-General ...". Lastly, for the Director-General there was nothing to negotiate since Article 36 of the WHO Constitution states: "The conditions of service of the staff of the Organization shall conform as far as possible with those of other United Nations organizations." The WHO also denies that there has been any breach of acquired rights: remuneration is governed, not by the contract of appointment, but by the Staff Regulations and Staff Rules, and may therefore be altered. Moreover, even if the Director-General had undertaken to negotiate with the staff representatives, that undertaking would not be legally binding on individual staff members since they are employed, not by the Director-General, but by the WHO, an organisation made up of sovereign States. The situation is quite different from that which prevails under labour law. The function of the trade union under labour law is to negotiate conditions of employment, which are determined by the collective agreement alone, which do not need to be incorporated in individual contracts, and which apply to all, even non-unionists. Besides, even if the WHO had wanted to negotiate after the new survey, it would have been unable to do so because the staff representatives did not agree to the meeting proposed by the Director of Administrative and Financial Services of the United Nations Office in Geneva and all rejected the ICSC's report as a basis for discussion.

I. In their observations on the Belchamber judgment of 20 October 1978 the complainants observe that the United

Nations Administrative Tribunal concurs in the opinion given by the members of the Tribunal that the agreement of April 1976 did not qualify the authority of the executive bodies of the organisations. The United Nations Tribunal also agrees that the United Nations Secretary-General was under an implied obligation to consult the staff representatives before revising the salary scale. The complainants take the view, however, that the Belchamber judgment differs from the opinion in that the United Nations Tribunal found that the Secretary-General had sought unsuccessfully to start consultations and held that he was therefore released from the obligation; whereas the opinion appears to make the actual holding of consultations an indispensable condition of the lawfulness of later action. The complainants draw a parallel between collective bargaining governed by labour law and joint consultations held by the organisations: the employer's sole duty is to bargain in good faith. If collective bargaining reaches stalemate, the employer may then act as he pleases. The United Nations Tribunal was mistaken in holding that the staff representatives' "negative" attitude on the ICSC's work and recommendations had discharged the Secretary-General from his obligation to consult them. It was the Secretary-General who wanted to change the results of the 1976 agreement, and so it was he who was under a duty to press for holding consultations in good faith and who showed a negative attitude.

J. In their rejoinder the complainants observe that under Article VII, paragraph 2, of its Statute the Tribunal is competent to review decisions "affecting a class of officials". If it were not, that would be absurd since then an official would have no legal redress against any decision by the Director-General which was not formally notified to him as applying to his particular case. Besides, the Tribunal itself has held (cf. Judgment No. 323: Connolly-Battisti (No. 5), paragraph 23): "no matter how often a similar breach is repeated, it is not the same breach nor the same decision, and it gives rise to a fresh cause for complaint. If an official in ignorance of his rights allows an underpayment of salary to be repeated for many months without challenge, he can, as soon as he learns of his rights, complain ...". Since in Case No. 323 the Tribunal held that it was competent to review a decision by the FAO Council, a fortiori it should be competent to review a decision by the Director-General of the WHO. The complainants contend that they do suffer wrong: the arrangements introduced by the impugned decision will mean, among other things, an average salary cut of 17 per cent. Contrary to what the WHO says, the Director-General is under a manifest and well-defined duty to negotiate. According to Staff Regulation 8.1 he shall make provision for staff participation in the discussion of policies relating to staff questions; and Staff Rule 920, which relates to consultations on conditions of service, provides for referral to the elected staff representatives for comment of any proposal to change the Staff Regulations or Staff Rules. As for the allegation that the staff representatives refused to negotiate on the ICSC's recommendations, the way in which the ICSC's survey was carried out was deplorable and in breach of the announced method. The survey was, for example, based on a tiny number of samples. That explains the staff representatives' unwillingness to hold discussions on the basis of the results of that survey, which were reflected in the ICSC's recommendations. The staff would have agreed to negotiate on some other basis, but the Director-General felt that he had no authority to review the ICSC's recommendations or negotiate with the WHO staff a solution which would differ from the one adopted by the United Nations common system. That is why there were no negotiations with the WHO. In any event, it was up to the party which wanted to change the status quo - the Director-General - to ask for negotiations.

K. In its surrejoinder the WHO points out that Article VII, paragraph 2, of the Statute of the Tribunal relates to time limits, not to matters of competence. The argument based on Judgment No. 323 (Connolly-Battisti (No. 5)) is also immaterial: the passage cited relates to staff members who are ignorant of their rights, and the complainants were not. Moreover, the facts of that case were quite different. Owing to the transitional arrangements the complainants have not suffered any prejudice and, there being no wrong, the complaints are irreceivable. The WHO is in a different position from the other organisations because it has no machinery for "negotiation". It is for the Director-General and for him alone to determine the salary scale for staff of the General Service category by virtue of his authority under the Constitution and the Staff Regulations and Staff Rules. The staff representatives were in no way misled when the agreement was signed in April 1976. At the time they had submitted a draft introduction to the agreement which suggested that its purpose was to determine salaries. The "sole negotiator" said that "the establishment of salary scales could not be based on agreement between the Executive Heads and Staff Representatives since, according to the Staff Regulations, this was within the exclusive authority of the Secretary-General and the Executive Heads", and at the negotiator's express request the text of the draft introduction was by agreement amended. That proves that the staff representatives were quite aware of the situation. The arguments based on the provisions of the Staff Regulations and Staff Rules are immaterial since the salary scale for staff of the General Service category does not form part of those texts. It is not the Director-General who employs the staff but the WHO, and there is nothing in the Connolly-Battisti judgment to suggest anything different. Whether they like it or not, the complainants are bound to admit that the staff representatives are entirely to blame for the fact that no consultations were held after the ICSC had made its recommendations.

M. The Organization accordingly asks that the two complaints be dismissed.

CONSIDERATIONS:

As to jurisdiction:

1. These complaints are against the Director-General's decision contained in an information circular dated 13 January 1978 by which he introduced a new salary scale for staff of the General Service category. The relief sought by the complainants in its first two paragraphs requests the Tribunal to make certain findings concerning an agreement of 23 April 1976 (hereinafter called "the April Agreement") made between the representative of the executive heads of the international organisations based in Geneva (hereinafter called "the Geneva organisations") of the one part and the representatives of the staffs of the Geneva organisations of the other part; in its third paragraph the relief requests that the decision of 13 January 1978 be quashed; in its fourth and fifth paragraphs it requests certain consequential orders. The Tribunal is competent to quash any decision of the Director-General which does not observe the terms of appointment of officials of the Organization or of the provisions of its Staff Regulations and to make the appropriate consequential orders. When considering whether or not to quash such a decision it may or may not be relevant for the Tribunal to reach conclusions about the meaning and effect of an agreement such as the April Agreement and to make findings about whether there has been a breach of it; if so, such conclusions may be expressed in the considerations leading to the order which the Tribunal makes. But they will not be part of the order and the Tribunal will not attend to requests for specific declarations. The first two paragraphs of the relief sought are therefore rejected.

2. As to the third paragraph of the relief it would manifestly be convenient, having regard to the competence of the Tribunal as defined in Article II, paragraph 5, of its Statute, if the complaints specified the terms or regulations which allegedly have not been observed and the respects in which they have not been complied with. The complaints do not contain any precise allegation of this character. A perusal of the dossiers has led the Tribunal to conclude that the main complaint is that the decision impugned was contrary to certain qualifications on a contractual basis derived from the April Agreement and an earlier collective agreement of the same type.

3. Since the complaints so construed allege a breach of the contract of employment they are prima facie within the jurisdiction of the Tribunal. The Organization objects to the jurisdiction on the ground that, if the complaints are established, the Tribunal is not competent to grant the relief sought. Since however it is not disputed that the Tribunal would, if the facts justify it, be competent to grant relief in some other appropriate form, the preliminary objection fails.

As to receivability:

4. The Organization objects also to the receivability of the complaints on the ground that the complainants will, by reason of transitory measures to which the decision impugned gives effect, continue to receive the same monthly salary as they were getting before the decision took effect and therefore have no personal interest in quashing it. The complainants however contend that they have suffered or may suffer material damage in other respects which they have specified. This issue will not arise unless the complaints succeed on the merits and it cannot be conveniently considered until after the merits have been determined.

On the merits:

5. It is not disputed that under Staff Regulation 3.2 the Director-General is empowered to establish for the General Service category of staff salaries and allowances in accordance with the best prevailing local practices. The complainants allege that the Director-General together with the other executive heads made in 1976 in the course of negotiations(commonly called wage bargaining) which culminated in the April Agreement (which was of a type commonly known as a collective agreement) certain commitments including in particular an obligation to negotiate before exercising his powers under Staff Regulation 3.2. The essential question in this case is whether these commitments, if made, became part of the complainants' contracts of employment so as to bring these complaints within the Tribunal's jurisdiction. In the opinion of the Tribunal they did not.

6. An obligation put upon an employer to negotiate before introducing changes, such as an increase or diminution of salary, into the individual contract of employment is a common feature of collective agreements. There is no reason in law why such an obligation should not be made a term of the individual contract of employment. But its

inclusion in such contract would be sufficiently unusual to mean that it would either have to be specifically expressed in the contract or very clearly implied. Merely because the term is contained in a collective agreement, it cannot be deemed ipso facto to be incorporated in the individual contracts of all those affected by the collective agreement.

7. In the present case no such term is expressed in the complainants' contracts of employment. Since it would be a term of general and not of individual application, its expression would require the amendment of the Staff Regulations. This is a formal process and it is not contended that it has been complied with in the present case.

8. As to the clear implication, in the opinion of the Tribunal there are no grounds which would justify any implication in the complainants' contracts of employment. The Tribunal draws attention in particular to three points. The first is that the obligation to negotiate would arise out of a collective agreement made between the executive heads and the staff associations of seven separate organisations. If it was introduced into the individual's contract of employment, what would it mean? That WHO was to negotiate with its own staff association in defiance of the common system? Or that it was to negotiate in conjunction with the other six organisations? What then if one or more of the other executive heads refused

to negotiate? The second point is that Staff Rule 920 expressly provides that the Director-General shall consult with his staff on personnel policy and conditions of service. This makes it difficult to imply a further term requiring him not merely to consult but to negotiate, and even more difficult to imply a term requiring him to combine with other executive heads to negotiate with a group of staff associations. Thirdly, it must be noted that a collective agreement such as the April Agreement is not in need of incorporation into a contract of employment so as to make it effective. The sanction for the breach of it is the occurrence of the labour trouble which the agreement was designed to avoid.

9. The complainants have in their argument referred to Staff Rule 920, but not in terms which suggest that they are using it as the basis of any implication. Staff Rule 920 provides:

"In any consultations concerning personnel policy or conditions of service, the duly elected representatives of the staff shall be recognised by the Organization as representing the views of that portion of the staff from which elected. Any proposal to change the Staff Regulations or Staff Rules of the Organization shall be referred to the elected representatives of the staff for comment."

In their statement at C.2(b) the complainants referred to this rule in support of a contention that the WHO staff representatives who signed the 1968-69 and the April agreements had the necessary status. The Organization responded (paragraph 26) that it had not (as the International Labour Organisation and the United Nations had) any machinery for "negotiations" with its staff. The complainants rejoined (paragraph 12) that no opportunity was given to the staff to make representations. The Organization surrejoined (paragraph 10) that there had been nothing to prevent the staff from making representations if they had thought them to be useful. The Tribunal has noted this exchange of views, from which it appears that it is not contended that an obligation to negotiate was introduced into the contract of employment through Staff Rule 920.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 June 1979.

M. Letourneur
Andre Grisel
Devlin

A.B. Gardner

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