Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A.-M. (No. 2) and others

v.

ILO

133rd Session **Judgment No. 4479**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr E. A.-M. and 20 other complainants (listed in Annex 1) against the International Labour Organization (ILO) on 20 February 2019 and corrected on 9 May, the ILO's reply of 14 June, the complainants' rejoinder of 14 August and the ILO's surrejoinder of 13 September 2019;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

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

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

The complainants challenge the changes made with respect to their salary resulting from the decision of the Director-General to implement the unified salary scale as adopted by the United Nations (UN) General Assembly.

In 2015, after having carried out a comprehensive review of the compensation package for all UN common system staff in the Professional and higher categories, the International Civil Service Commission (ICSC) produced a report in which it recommended the introduction of a unified net salary scale, which would replace the existing salary scale that included a single and a dependency rate. The new scale structure to be adopted contained one single salary rate payable to all staff, irrespective of their family status. The ICSC recommended instead that a support for dependant family members be provided through

a separate allowance. Officials with a non-dependent spouse who had previously been in receipt of a salary at the dependency rate by virtue of a first dependent child would instead receive a child allowance in respect of that child. These officials would receive a transitional allowance of 6 per cent of net remuneration in order to mitigate salary reductions. That transitional allowance would be reduced by one percentage point every 12 months thereafter until the amount of the transitional allowance became equal to or less than the amount of the child allowance. At this point in time, the child allowance would become payable instead.

In December 2015, the ICSC's recommendations were adopted by the UN General Assembly by Resolution 70/244. By the information note – IGDS document No. 464 (Version 1) – dated 26 February 2016 and entitled "Changes to the compensation package for the Professional and higher categories as of 1 January 2017", ILO staff members were informed of the changes to the compensation package for the Professional and higher categories to be implemented as of 1 January 2017. The relevant amendments to the Staff Regulations implementing the UN General Assembly's decision were promulgated in office directive – IGDS document No. 493 – of 10 January 2017 entitled "Amendments to the Staff Regulations: Changes to the compensation package for the Professional and higher categories as of 1 January 2017", and the new unified salary scale came into effect as of 1 January 2017.

Effective January 2018, the first reduction of the transitional allowance (by one percentage point) was implemented. On 24 July 2018, the complainants filed a grievance contesting the reduction, in violation of their acquired rights, of their total remuneration pursuant to the new unified salary scale as reflected in their January 2018 payslips.

By letter of 21 November 2018, which is the impugned decision, the Director of the Human Resources Development Department (HRD) dismissed the complainants' grievance as he considered that the ILO had lawfully implemented the changes to the compensation package, including the amendments to the Staff Regulations and the related transitional measures.

The complainants were exempted from the obligation to exhaust internal means of redress and authorized to impugn the decision directly before the Tribunal, which they did on 20 February 2019.

The complainants ask the Tribunal to set aside the impugned decision of 21 November 2018 as well as the individual decisions contained in their January 2018 payslips and in all subsequent payslips applying the unified salary scale and paying them a reduced salary. They further ask for the full retroactive reimbursement of all and any amounts unlawfully deducted from their total remuneration as of January 2018, with interest at an annual rate of 5 per cent. The complainants seek an award of moral damages for the violation of their acquired rights as well as costs.

The ILO requests the Tribunal to dismiss the complaints in their entirety.

CONSIDERATIONS

1. Twenty-one members of the staff of the ILO have filed complaints with the Tribunal. They each challenge their January 2018 payslip and indirectly challenge a general decision altering the basis on which they were remunerated. The complaints should be joined so that one judgment can be rendered, as they raise identical legal and factual issues.

2. The payslips reflect a decision to introduce a unified salary scale eliminating the distinction between staff who were single and those with dependents. For those staff with dependents who would suffer significant reductions in their salary as a result of the introduction of the unified salary scale, a transitional allowance was also introduced. In the January 2018 payslips, the transitional allowance paid to each complainant (which had been paid since January 2017) was reduced by 1 per cent. The complainants filed a grievance on 24 July 2018 against what was described in the grievance as "the imposition of the unified salary scale following amendments to the compensation package of the staff from the professional and higher categories".

3. The complainants advance a number of arguments concerning the lawfulness of the introduction of the unified salary scale and the operation of the transitional allowance. A central argument is that the elimination of the distinction between staff who were single and those with dependents involved the breach of an acquired right. This argument has been considered in other proceedings involving another organisation. It was rejected by the Tribunal (see Judgment 4381). There was, in this

respect, no material difference between the circumstances of the complainant in the earlier proceedings and the circumstances of the complainants in these, nor any material difference in the arguments advanced and considered. Accordingly, the Tribunal should, for reasons of consistency, adopt and apply the analysis and conclusion in Judgment 4381. In the result, the complainants' argument based on the breach of an acquired right must be rejected.

4. The complainants also advance an argument based purely on contractual rights. That is to say, they argue that, having regard to the terms of their contract upon appointment to the staff of the ILO, they were and remain contractually entitled to the payment of salary under a regime which differentiates between staff who have dependents and those who do not. The ILO's response is to say that the ongoing entitlement to salary, and the rate and manner in which it is paid, are not founded on contract but are statutorily based, rooted in the ILO's Staff Regulations. It is unnecessary to explore this question and whether, indeed, this dichotomy is a false one. That is because it is tolerably clear that the contract itself provides as a term, for the paramountcy of the Staff Regulations.

5. In evidence is a document dated 11 June 2009 concerning the appointment of one of the complainants, Mrs G., bearing the title "OFFER OF APPOINTMENT", immediately under which is the expression "Fixed-term contract". Towards its conclusion the document says that the offer and its acceptance will constitute the "contract of employment referred to in article 4.7 of the Staff Regulations". That article specifies what the offer of appointment must state. The first requirement in Article 4.7(b)(1) is that the offer must state that the appointment "is subject to the provisions of these Regulations". That is stated in the document dated 11 June 2009.

6. The complainants particularly rely on the fact that Article 4.7(b)(3) requires that the offer must state the "salary pertaining to the appointment and, where appropriate, the incremental rate and the maximum salary attaching to the grade". Again, the document dated 11 June 2009 does state this in that it states the salary both on the basis that the individual did not have dependents and on the basis that the individual did. It did not then expressly indicate which of these two alternatives applied, as a matter of fact, to the individual to whom the

offer was being made. However, what is stated in the document begs the question whether contractually the ILO was obliged to maintain this distinction. It was not.

7. This distinction was then contained in the Staff Regulations. It was removed from the Staff Regulations by amendments notified in an Office Directive dated 10 January 2017. Consistent with the overarching statement in the document of 11 June 2009, its terms were subject to the Staff Regulations. Plainly enough this meant the Staff Regulations then prevailing and as they would be amended from time to time. Thus, contractually, the ILO was not precluded from altering the basis on which the salary was payable to the person to whom the offer was made in June 2009, by amending the Staff Regulations as it did in January 2017. This plea should be rejected.

8. This conclusion is not intended to suggest that any alteration to the basis on which a salary was payable or the salary itself, arising from an amendment to the Staff Regulations, would be lawful. In some instances, but not this one, alterations of this character could constitute a breach of an acquired right which would, if need be, ultimately lead to a remedy in the Tribunal.

9. In their pleas, the complainants make two collateral attacks on the ILO's decision to alter the way in which they were remunerated. The first is this. The genesis of the decision to make the alteration removing the salary differential based on the existence of dependents was a decision of the UN General Assembly adopting a recommendation of the International Civil Service Commission (ICSC). Article 26 of the ICSC's Statute dictates that in making any recommendation the ICSC must do so without prejudice to, in effect, the acquired rights of staff ultimately affected by the implementation of the recommendation. The procedural flaw in the approach of the ICSC, as contended by the complainants, was that it relied on the advice of the UN Office of Legal Affairs (OLA) on the question of whether acquired rights would be violated. OLA concluded, correctly at least as concerns the issue presently arising, that no acquired rights would be violated. The complainants contend this procedure lacked independence, impartiality and was not in good faith. But this has not been demonstrated on the material before the Tribunal. This plea should be rejected.

10. The second collateral attack is similar in character to the first. The complainants refer to the Tribunal's case law which identifies a duty on an organisation which adopts standards or elements of the UN common system, to assess the lawfulness of those standards or elements before implementing them (see, for example, Judgments 1265, consideration 24, 1765, consideration 8, and 2420, consideration 11). They contend the ILO failed in its duty to assess the lawfulness of the unified salary scale by simply relying on the legal opinion obtained from the OLA by the ICSC. How this duty can be satisfied must vary according to the circumstances. The OLA's advice was, in relation to the unified salary scale and acquired rights, correct. The import of that advice was made known to the ILO in the period leading up to the implementation of the unified salary scale. There is not a scintilla of evidence to suggest that the ILO or any of its officers thought the advice was wrong. In these circumstances, the ILO discharged the duty the case law imposes. It is untenable to suggest, as the complainants do, that the Director-General contravened Article 9 of the ILO's Constitution (concerning his independence from outside instruction from any authority external to the ILO). This plea should be rejected.

11. Finally, reference should be made to a contention of the complainants that the ICSC breached its obligation to consult under its Rules of Procedure. But, in substance, this plea is no more than a recitation of findings, observations and conclusions in a passage in a judgment, quoted in the brief, on this topic by the United Nations Dispute Tribunal, Judgment UNDT/2017/098 (a judgment vacated on appeal by Judgment 2018-UNAT-841 of the United Nations Appeals Tribunal). This Tribunal is not bound to accept such findings, observations and conclusions and all the more so in the absence of evidence supportive of them. No such evidence of any probative value has been adduced in these proceedings. This plea should be rejected.

12. None of the complainants' pleas establish any unlawfulness attending the introduction and implementation of the unified salary scale and the associated transitional allowance. Accordingly, the complaints should be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 1 November 2021, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ

Annex 1

In re A.-M. (No. 2) and others

Mr E. A.-M. and the following 20 complainants
(in alphabetical order):

(Names removed)