

Translated from French

ADMINISTRATIVE TRIBUNAL

Judgement No. 859

Case No. 956: CARROLL

Against: The Secretary-General
of the International
Civil Aviation
Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Samar Sen, Vice-President;
Mr. Julio Barboza;

Whereas, at the request of Jane-Marie Carroll, a staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), the President of the Tribunal, with the agreement of the respondent, extended to 31 July and 31 October 1996 and to 27 February 1997 the time-limit for the filing of an application with the Tribunal;

Whereas, on 10 December 1996, the applicant filed an application in which she made, inter alia, the following requests to the Tribunal:

"That part of the Flemming principle which has been illegally modified by the ICSC (International Civil Service Commission) in 1992 wherein the language now provides for General Service salaries to be based on 'amongst the best prevailing conditions of employment in the locality' instead of 'the best' be declared null and void; ...

"In consideration that the 1992 methodology for determination of 'amongst the best prevailing conditions of employment in the locality' was flawed in that it failed to include other basic items such as 'retirement and health insurance schemes' although these had been indicated by the ICSC as necessary elements, that appropriate instructions be given to reformulate the methodology to include these items and the results of the 1993 Montreal survey be set aside;

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"That no further salary surveys be permitted, whether in headquarters or field duty stations, until the above indicated errors have been corrected;

"That the new ICAO salary scales for the General Service category in Montreal, as published in the ICAO Staff Notice No. 4064 dated 14 March 1996, be declared nullius in loco, and the General Service Salary scales in force in ICAO in 1993 (prior to the commencement of the challenged survey) be reinstituted."

Whereas, on 19 January 1997, Heidi Baumel, Wayne Dixon and Emmanual Liapakis, staff members of ICAO, requested to intervene in the case;

Whereas, on 24 January 1997, the Secretary of the Tribunal wrote to the Executive Secretary of the International Civil Service Commission to inform him, in accordance with General Assembly resolution 49/223, that the case might "affect a rule, decision or scale of emoluments or contributions of the common system of staff administration";

Whereas, on 12 May 1997, the ICSC submitted to the Tribunal its observations in the case;

Whereas the respondent filed his answer on 3 June 1997;

Whereas the applicant filed written observations on 12 August 1997;

Whereas, on 6 October 1997, the ICSC submitted comments on the applicant's written observations;

Whereas, on 29 October 1997, the respondent submitted comments on the applicant's written observations;

Whereas, on 31 October 1997, the applicant submitted comments on the observations of the ICSC;

Whereas, on 13 November 1997, the applicant submitted observations on the comments submitted by the respondent on 29 October 1997;

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Whereas the facts in the case are as follows:

The applicant entered the service of ICAO on 21 September 1978 as a secretary at the G-4 level, step I in the Office of the Director, Air Navigation Division, on a one-year fixed-term appointment which was subsequently extended to 21 September 1981. The applicant resigned on 13 January 1981. She re-entered the service of ICAO on 4 February 1982 and received a series of fixed-term appointments until 4 July 1989, when she received a permanent appointment while employed as a recruitment clerk.

In its resolution 3357 (XXIX) of 18 December 1974, the General Assembly established the ICSC and delegated to it the authority to establish "the methods by which the principles for determining conditions of service should be applied" (article 11, paragraph (a) of the Statute of the ICSC). In accordance with its Statute, the Commission "shall establish the relevant facts for, and make recommendations as to the salary scales of staff in the General Service and other locally recruited categories". In exercising these functions, the Commission "shall ... consult executive heads and staff representatives" (article 12 of the Statute of the ICSC).

The general principle applied in determining the remuneration of locally recruited staff members was enunciated for the first time by the Committee of Experts on Salary, Allowances and Leave Systems and is known as the "Flemming principle". This principle requires the organizations applying the United Nations common system to offer locally recruited staff conditions of service comparable to the best prevailing conditions in force among other employers in the locality. In order to determine the salary scales, the ICSC is required to conduct, every five years, a local salary survey based on a "general methodology" which it must adopt and modify under article 11, paragraph (a) of its Statute.

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Following the first round of headquarters salary surveys, the ICSC included a new version of the Flemming principle in its report to the General Assembly (A/37/30, annex 2). In its resolution 37/126 of 17 December 1982, the General Assembly took note of the general methodology into which this new version of the Flemming principle had been incorporated.

After completing a second round of headquarters salary surveys, the ICSC at its twenty-seventh session in 1988 approved a number of modifications to its survey methodology and adopted a revised general methodology. Following the third round of surveys carried out at the seven headquarters duty stations of the system, the ICSC reviewed this methodology again in 1992 and made a number of modifications to it, and adopted the current revised general methodology applicable to surveys of the best conditions of service at headquarters duty stations.

In its report to the General Assembly (A/47/30) the ICSC reaffirmed the Flemming principle as it had been enunciated at the fifteenth session of the Commission in 1982. Subsequently, in section III of its resolution 47/216 of 23 December 1992, the General Assembly:

"1. [Endorsed] the reaffirmation by the International Civil Service Commission of the Flemming principle as enunciated at its fifteenth session as the basis for the determination of conditions of service of the General Service and related categories;

"2. [Took note] of the decisions of the Commission in respect of the refinements and modifications to the methodology as contained in paragraph 231 of its report, and the procedures for their introduction as outlined in paragraph 232 of its report, on the understanding that such modifications will be taken into account beginning with the salary survey being carried out in Paris; ..."

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On 6 April 1993, the President of the ICSC wrote to the Secretary-General of ICAO to inform him that a "survey of the best conditions of service for locally recruited staff in the General Service and related categories in Montreal [would be] carried out by [the ICSC] ... in the autumn of 1993" and that a report on the survey would be submitted to the ICSC for consideration at its spring 1994 session.

On 14 April 1993, the ICSC adopted its "Report on the work of the thirty-seventh session: remuneration of the General Service and related categories: revised general methodology for surveys of best prevailing conditions of service at headquarters duty stations approved by the International Civil Service Commission".

The ICSC report on the 1993 Montreal survey was considered by the ICAO Council at its September 1994 session on the basis of a report prepared by the Secretary-General. The ICAO Council decided to adopt on a provisional basis, with effect from 1 October 1993, the salary scale recommended by the ICSC, and to review the conditions of service of General Service staff at headquarters again in 1995 after receipt of the ICSC recommendations on the pension benefits of ICAO.

In May 1995, at its forty-first session, the ICSC decided to reaffirm its 1992 decision to determine General Service pensionable remuneration on a universal basis, rather than to establish pension benefits on the basis of local practice. In October 1995, at its one hundred and forty-sixth session, the ICAO Council considered this question and decided to confirm the General Service salary scale which it had adopted on a provisional basis at its September 1994 session.

The Secretary-General of ICAO communicated this decision to General Service staff members on 15 January 1996.

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On 12 February 1996, the applicant requested the agreement of the Secretary-General to a direct submission of the appeal to the United Nations Administrative Tribunal. On 13 February 1996, she was authorized by the Secretary-General to submit the appeal directly to the Tribunal.

On 14 March 1996 the Secretary-General approved the amendments of the ICAO Service Code required for the application of the new General Service salary scale.

On 10 December 1996 the applicant filed the above-mentioned appeal with the Tribunal.

Whereas the applicant's principal contentions are as follows:

1. The methodology applied by the ICSC in its October 1993 survey of conditions of service violated the ICSC Statute because the Commission did not consult staff representatives.

2. The ICSC survey of conditions of service was flawed because the ICSC did not apply the Flemming principle correctly.

Whereas the respondent's principal contention is as follows:

The ICAO Council acted lawfully in accepting the salary scales for the General Service category of staff at ICAO headquarters in Montreal as recommended by the ICSC and resulting from the latter's salary survey in October 1993.

The Tribunal, having deliberated from 13 to 26 November 1997, now pronounces the following judgement:

I. The applicant, who has been in the service of ICAO since 1978, contests the decision taken by the organization's Governing Council on 7 December 1995,

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confirming a new General Service salary scale which had previously been adopted on a provisional basis.

II. While the contested decision is of a regulatory nature, it affects the interests of the applicant. As the facts are not in dispute, the Secretary-General of ICAO agreed that the application should be submitted directly to the Tribunal under the option provided for in article 7 of the Statute of the Tribunal. Consequently, the Tribunal declares the application receivable.

III. The decision of the ICAO Council stems from its acceptance of the recommendations of the International Civil Service Commission (ICSC). In 1993, in accordance with its Statute, ICSC carried out a survey in Montreal in order to determine the best local conditions of service with a view to the application of the "Flemming principle", according to which General Service staff members of organizations in the United Nations system should enjoy the best conditions offered by employers to their employees in the localities concerned. Nevertheless, this survey was carried out using a new methodology which is challenged by the applicant, and, in general, by the staff representatives of the organizations.

IV. The parties disagree on the interpretation of the Flemming principle, which, according to the Commission, was not substantially modified, whereas the applicant, citing recent versions adopted by the Commission, makes the opposite claim. The parties also disagree on the application of this principle in accordance with the new methodology. It is not necessary for the Tribunal to take a position on these questions since the legality of the contested decision taken by the ICAO Council does not depend on the interpretation of the Flemming principle.

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V. The ICAO Council could have chosen not to accept the ICSC recommendations and to continue the existing scales. The Council, in the exercise of its powers to establish the conditions of service of General Service staff, has freedom of choice provided that the ICSC recommendations are not of a binding nature.

It appears, however, that the Council complied with General Assembly resolution 48/224 of 23 December 1993, which "urges organizations to implement the recommendations of the Commission with regard to salary scales for staff in the General Service and related categories. ..." Likewise, the Council's action was consistent with its acceptance of the ICSC Statute in December 1975.

Lastly, the Council's decision accords with the case law of the International Labour Organization Administrative Tribunal, which in its Judgement No. 1266 (in re Cussac et al.) stated that "membership of the common system lays on organizations an obligation to do their utmost in good faith to import into their own internal rules the Commission's guidelines, policies and recommendations and to draw the consequences of fact which the Commission is called upon to make under article 12 of its Statute."

VI. The Tribunal believes, accordingly, that the decision by which the Council accepted, first on a provisional basis and then definitively, the salary scales for the General Service category of staff at ICAO headquarters in Montreal as recommended by the ICSC and resulting from the latter's salary survey conducted in Montreal in October 1993, is not tainted by illegality.

VII. For these reasons, the Tribunal:

- (a) Rejects the requests for intervention;
- (b) Rejects the application.

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(Signatures)

Hubert THIERRY
President

Samar SEN
Vice-President

Julio BARBOZA
Member

New York, 26 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary
