



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1100

Case No. 1079: HASANAT SCHMOELTZER ET AL. Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Mr. Spyridon Flogaitis;
Ms. Brigitte Stern;

Whereas at the request of Gerda Hasanat Schmoeltzer, Estela Deon, Veronika Jeffrey and Regina Weithaler, staff members of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 December 1997 and periodically thereafter until 30 April 1999;

Whereas, on 28 April 1999, the Applicants jointly filed Applications containing pleas which read as follows:

"PLEAS OF THE APPLICANT

MAY IT PLEASE the presiding member to agree to an oral proceeding in this case.

MAY IT FURTHER PLEASE the Tribunal:

1. To declare that it has jurisdiction in this case;
2. To adjudge and declare this application admissible;
3. To quash the binding decision of the Secretary-General, as communicated to the Applicant in a letter dated 30 January 1997 from the Assistant Secretary-General for Human Resources Management, and to draw the necessary legal conclusions therefrom, namely, to send the cases back specifically for the Organization to re-reckon the Applicant's pay in compliance with the Flemming principle;
4. To award the Applicant, as costs, a sum payable by the Respondent, to be determined at the conclusion of the proceeding."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 1999 and periodically thereafter until 31 July 2001;

Whereas the Respondent filed his Answer to all four Applications on 26 June 2001;

Whereas, on 6 July 2001, the Tribunal, in accordance with the terms of General Assembly resolution 49/223, informed the International Civil Service Commission (ICSC or Commission) that the present Application pending before the Tribunal might affect a rule, decision or scale of emoluments or contributions of the common system of staff administration, transmitted a copy of the Application and the Respondent's Answer, and inquired whether the Commission wished to participate in the proceedings;

Whereas the Applicants filed Written Observations on 10 July 2001;

Whereas, on 16 July 2001, the ICSC indicated that it wished to participate in the proceedings and, on 24 July 2001, it submitted its comments;

Whereas, on 6 August 2001, the Applicants submitted a reply to the ICSC comments, and, on 2 October 2001, the ICSC submitted comments thereon;

Whereas, on 19 November 2001, the Tribunal decided to postpone consideration of this case until its summer session and not to hold oral proceedings in the case;

Whereas, on 5 December 2001, the Tribunal put questions to the Applicants and questions to the ICSC, respectively;

Whereas, on 29 April 2002, the Applicants replied to the questions put by the Tribunal;

Whereas, on 31 May 2002, the ICSC replied to the questions put by the Tribunal, and on 5 July 2002, the Applicants provided comments thereon;

Whereas, on 11 July 2002, the ICSC submitted comments on the Applicants' submission of 29 April;

Whereas, on 16 July 2002, the Tribunal decided to postpone consideration of this case until its autumn session and to hold oral proceedings in the case;

Whereas on 9 October 2002, the Respondent submitted an additional written statement;

Whereas, on 30 October 2002, the Tribunal held oral proceedings in the case;

Whereas, on the same date, at the request of the Tribunal, the Respondent submitted an additional document;

Whereas, on 7 November 2002, at the request of the Tribunal, the ICSC submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant Hasanat Schmoeltzer, a national of Austria, joined the United Nations Office at Vienna (UNOV) on 2 November 1967. At the time of the events which gave rise to the present proceedings, she was serving on a permanent contract as an Editorial Assistant at the G-7, step XII level.

The Applicant Deon, a national of Brazil, joined UNOV on 23 May 1989. At the time of the events which gave rise to the present proceedings, she was serving on a fixed-term contract to expire on 31 December 2002, as a Statistical Assistant at the G-6, step III level.

The Applicant Jeffrey, a national of Germany, joined UNOV on 23 September 1991. At the time of the events which gave rise to the present proceedings, she was serving on a fixed-term contract to expire on 31 December 2002, as a Secretary at the G-4, step VII level.

The Applicant Weithaler, a national of Austria, joined UNOV on 26 April 1986. At the time of the events which gave rise to the present proceedings, she was serving on a fixed-term contract to expire on 31 December 2001, as a Language Reference Assistant at the G-5, step IX level.

In August 1992, at its 36th session, the ICSC decided to reaffirm the "Flemming principle", initially promulgated in 1949 by the Committee of Experts on Salary, Allowances and Leave Systems, the "Flemming Committee", which provides, inter alia, that to comply with the standards established under Article 101 of the Charter, as regards the employment of locally recruited staff,

"the organizations of the United Nations system must be competitive with those employers in the same labour market who recruit staff of equally high calibre and qualifications for work which is similar in nature and equal in value of the organizations. Remaining competitive ... requires that the conditions of service ... be determined by reference to the best prevailing conditions of service among other employers in the locality. ..."

On 19 December 1972, the General Assembly by its resolution 3042 (XXVII) established the ICSC "for the regulation and coordination of the conditions of service of the United Nations common system". Under Article 11 (a) of its Statute, the ICSC established a general methodology for the application of the principle, involving periodic review of the conditions by conducting surveys. Following some of the surveys conducted, it was decided in 1981 that adjustments should be made to take account of certain factors, such as for language in cities where the local language is not a working language of the Organization. Thus, in Rome and Vienna, where the local language is not an official language and staff are required to work in at least one official language, an adjustment factor was applied, adding 4-6 per cent to the overall survey results.

In its resolution 47/216 of 23 December 1992, the General Assembly, while endorsing the reaffirmation of the Flemming principle as the basis for the determination of conditions of service of the General Service and related categories, took note of the decisions of the Commission in respect of the modifications to the methodology, including the decision to "discontinue inclusion of the language factor at the time of the next survey. Should this lead to a freeze in salaries, the Commission should consider a phased approach to the elimination of this element." In 1994, the ICSC decided to phase out the language factor for Rome. On 7 October 1994, all staff at UNOV were informed, in information circular UN/INF.524, that the language factor would be phased out in four separate reductions, starting with the April 1996 salary scale.

On 6 December 1996, all four Applicants wrote to the Secretary-General, requesting a review of the administrative decision contained in the above-mentioned information circular. They also requested permission to appeal directly to the Administrative Tribunal, should the Secretary-General decide not to reconsider his decision. On 30 January 1997, the Applicants were informed that they could submit their case directly to the Tribunal.

On 29 April 1997, the Applicants requested the Secretary-General in a joint letter, to extend the deadline for submission of their application to the Tribunal until such time as the Administrative Tribunal of the International Labour Organization (ILOAT) had rendered a decision in the case concerning General Service staff members of the Food and Agriculture Organization of the United Nations (FAO) in Rome.

In its Judgment No. 1713, rendered on 29 January 1998 in the case of *In re Carretta* and others, the ILOAT recalled the general principles which in its view governed the matter and held that "For want of methodical collection of data on bonuses it would - to borrow a term from the 1988 methodology - have been 'reasonable' to keep a small adjustment to account for that fact". The ILOAT set aside the decisions which the Applicants had appealed and sent back their cases for FAO "to reckon the complainants' pay in line with" the aforesaid Judgment.

On 9 February 1998, the Applicants, in a joint letter, requested the Secretary-General, in the light of the aforesaid Judgment, to revise the decision rejecting their appeal. On 21 May 1998, the Chief of the Administrative Law Unit, replied to the Applicants that the contested decision could not be revised on the grounds that:

"ILOAT decisions are not binding on the United Nations, and the United Nations continue to stand by the recommendations of the ICSC with regard to its findings and recommendations vis-à-vis the survey of best prevailing conditions of employment at Vienna."

At its 48th session, in 1998, the ICSC decided to await the judgement of the ILOAT on a similar appeal lodged by staff of the International Atomic Energy Agency (IAEA) and to defer the review of the methodology regarding the language factor to a later date.

In its Judgement 1915 of 2 February 2000, *In re Abdur and others*, the ILOAT dismissed all complaints, concluding that

"the 1996 survey had been conducted properly and that it provided a basis for determining that, even though the majority of local reference employers in Vienna required their staff to have knowledge of and work in a language other than the local language, they paid no additional compensation for that requirement".

At its 55th session in 2000, the ICSC decided that "at the time of the next survey at headquarters duty stations where the local language was not a working language of the organization, employers should be carefully surveyed to find out what, if any, bonus or other payments were made to staff members required to work in a working language of the organization" and that the results "should be appropriately reflected in the in the pay scales established by the survey".

On 12 July 2001, in Judgement No. 2059, *In re Carretta and others*, the ILOAT dismissed an application for review of Judgement No. 1915.

On 28 April 1999, the Applicants filed the above-referenced Application with the Tribunal.

Whereas the Applicants principal contentions are:

1. The contested decisions are tainted by the unlawfulness of the provision contained in the methodology relating to the abolition of the language adjustment.
2. The lack of clarity of one of the questions in the survey has had some impact on the quality of the data collected.
3. The elimination of the adjustment of the language factor is totally unjustified for three reasons:
 - (a) An analysis of the data collected in 1991 and 1996 shows that there was no significant change in the employment market during that period;
 - (b) A quantitative analysis of the 1996 data shows that there is no comparison between the General Service staff of the Organization and the staff of the reference employers. In particular, the Applicants maintain that all of the outside jobs that were matched with the ICSC benchmark jobs and for which salary data were collected were

jobs that did not require a knowledge of spoken and written English, and that thus the statement in Judgement No. 1915 that compensation for the use of a second language in these jobs (e.g., in the form of being placed in a higher occupational group) was fully taken into account is factually incorrect;

(c) From a qualitative point of view, the limited knowledge of the foreign language required by outside employers and the undemanding nature of the work carried out in that language by the employees in question should be noted.

Whereas the Respondent's principal contentions are:

1. The Tribunal should follow the jurisprudence of the ILOAT as pronounced in Judgement No. 1915. The ILOAT, in that Judgement, upheld the decision of the Director-General to apply the salary scale recommended by the ICSC based upon the data collected in the 1996 Vienna survey to the staff of IAEA. The Respondent submits that the Tribunal should uphold the decision of the Secretary-General to apply the same salary scale to the Applicants, on the basis that all staff serving at the same duty station should be treated equally.
2. The language in the 1996 Vienna survey did not lack clarity.
3. The change in the employment market in Vienna between the 1991 survey and the 1996 survey supported the phasing out of the language factor.
4. The proportion of employees of the reference employers in the 1996 survey required to use a language other than German was sufficiently high to offer a valid basis of comparison.
5. The usage of language other than German required of the employees of the reference employers was sufficiently similar to the usage of a language other than German required of the General Service staff of UNOV to offer a valid basis of comparison.
6. The provision of the revised methodology regarding the elimination of the language factor is not illegal.

The Tribunal, having deliberated from 16 November 2001 to 26 November 2002 in New York and Geneva, now pronounces the following Judgement:

I. This case has arisen as a result of the discontinuance of the language allowance from which United Nations staff members in the General Service category in Vienna had benefited until 1992.

II. The facts of the case are not in dispute. Organizations that are members of the "common system" administered by the International Civil Service Commission are required to offer their staff in the General Service category conditions of service, all aspects of which, including paid remuneration and other basic elements of compensation, are to be determined by reference to the best prevailing conditions of service in the local market. This principle, the so-called Flemming principle, was adopted in 1949 and governs the establishment of the salary scale for staff members in the General Service category.

III. The Tribunal, which has a duty to ensure that the rights of staff members are respected by the Administration, must carefully examine the determination of the conditions of service in headquarters cities, based on the surveys carried out using the methodology decided upon by the ICSC. On this point, the Tribunal wishes to express its complete disagreement with the statements made by the representative of the Secretary-General during the oral hearing to the effect that the Tribunal must give "due deference to the specialized expertise of the ICSC". It is precisely in the specialized areas, where staff members may be most vulnerable, that the protection granted to them by possible recourse to the Tribunal is most important. It is true that the Tribunal must not substitute its judgement for that of the ICSC by pronouncing on the correctness of this or the other approach or technical method. Nevertheless, it is not because the elaboration of the salary scale is a specialized matter that the Tribunal should refrain from exercising control over this operation, which is closely related to the conditions of service of international staff members in the General Service category, as it does with all acts by the administration that may have an impact on the rights of this category of staff members.

In every civilized judicial system, the courts are invested with the power to evaluate and assess all evidence, including the opinions of experts. There are frequently conflicting opinions of different experts and it is for the court to independently assess

which opinion or which parts of the evidence it prefers. Even where there is no such conflict it is for the court to accept or reject the evidence of experts in the same way as it evaluates other evidence. A judicial system which would require the court to unquestioningly accept expert opinion would not truly constitute a judicial system at all as the judging element would be absent and it would further offend against all principles of judicial independence. This is not to say that a court should set itself up as if it enjoyed expertise in the field in question. It is merely to say that the court examines the expert evidence as it examines all evidence, that is to say it chooses to accept the evidence if it is persuaded that it is correct to act upon it and rejects it if it is not so persuaded.

IV. It should be recalled that the question under consideration here has already been the object of three judgements of the ILOAT, namely, Judgements No. 1713 (*In re Carretta and others, ibid.*); No. 1915 (*In re Abdur and others, ibid.*); and No. 2059 (*In re Abdur and others, ibid.*), the first concerning FAO staff members in Rome and the other two concerning IAEA staff members in Vienna.

V. The Respondent maintains that the Tribunal should follow the jurisprudence of ILOAT, or more specifically the Judgements *In re Abdur and others*, in order to preserve the consistency of international administrative jurisprudence.

"In the interest of preserving the United Nations common system, it is of paramount importance that the jurisprudence of the UNAT and the ILOAT be consistent. In the present instance, for UNAT to follow ILOAT Judgement 1915 would not only constitute following its jurisprudence but actually following the Judgement itself, for although the parties are different, the case is factually precisely the same ... Although, as stated above, in the view of the Respondent, the Tribunal should apply ILOAT Judgement 1915, *In re Abdur and others*, the Respondent has in its answer, responded to all arguments put forward by the Applicants in their Applications."

This invitation to blindly follow the decision of the ILOAT was reiterated by the representative of the Secretary-General during the oral proceedings.

VI. While the Tribunal is aware of the importance of consistency in the jurisprudence of the different international administrative tribunals, in particular that of the United

Nations Administrative Tribunal and of the ILOAT, it wishes to state that it can in no way be bound by a decision of the ILOAT, even if the case before it concerns exactly the same situations. Just as the "ILOAT decisions are not binding on the United Nations", as the Chief of the Administrative Law Section pointed out to the Applicants in justifying the refusal to review the decision to discontinue the language factor after the Judgement *In re Carretta and others*, in the same way this Tribunal is a sovereign body whose judgements cannot be dictated to it from outside. Evidently, however, all of the members of the Tribunal have taken due account of the Judgements handed down by ILOAT in similar cases.

VII. A final preliminary observation must be made here. The organizations representing the staff were criticized on more than one occasion in the written submissions of the Administration or of the ICSC for not having participated in the 1996 Vienna surveys. For example, in its statement to the Tribunal on 31 May 2002, the ICSC stated:

"The Commission wishes to reiterate that the Applicants could have raised these issues through their staff representatives at the time of the survey. However, the staff declined to participate in the survey process in 1996. If staff had participated in 1996, any and all matching issues could have been raised ...".

Similarly, in its observations of 24 July 2001, the ICSC criticized the staff representatives for refusing to participate in the survey, stating:

"With respect to submissions that attempt to clarify or revise the replies submitted by certain employees in response to the 1996 survey, it should be recognized that these clarifications could and should have been obtained during the survey process, at which time they could have been appropriately taken into account ...".

VIII. The same criticism was made during the oral pleas, with the representative of the Secretary-General going so far as to suggest that the Application should be deemed inadmissible, when he declared:

"The staff representative bodies, having refused to participate, cannot now complain that the survey was not properly carried out ... If individual staff members have a complaint about the manner in which the survey was conducted, their complaint is not with the Respondent or the ICSC, but with their staff representatives."

Even if it is highly desirable for the staff representatives to discharge their functions in collaboration with the Administration and to use the joint mechanisms available to them for promoting respect for their rights, it should be made abundantly clear that their refusal to participate in a process with which they strongly disagreed can in no way justify the poor handling of the staff's interests by the Administration or any lessening of the Administration's obligations to respect the procedural and substantive guarantees to which international staff members are entitled.

IX. In deciding this case, the Tribunal first must take note of the Flemming principle, enunciated by the ICSC at its fifteenth session, reaffirmed at its 36th session in 1992, and endorsed by the General Assembly in its resolution 47/216 of 23 December 1992. It reads as follows:

"It is stated under Article 101 of the Charter of the United Nations that 'the paramount consideration in the employment of staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. To comply with the standards established by the Charter as regards the employment of locally recruited staff, the organizations of the United Nations system must be competitive with those employers in the same labour market who recruit staff of equally high calibre and qualifications for work, which is similar in nature and equal in value to that of the organizations. Remaining competitive in order to both attract and retain staff of these high standards requires that the conditions of service for the locally recruited staff be determined by reference to the best prevailing conditions of service among the other employers in the locality. The conditions of service, including both paid remuneration and other basic elements of compensation, are to be among the best in the locality, without being the absolute best."

X. The relation between the Flemming principle and the United Nations Charter must be underscored: the recommendations of the Flemming Committee are subject to and must be seen in the context of the provisions of Article 101.3 of the Charter, which establishes

as *paramount consideration* "securing the highest standards of efficiency, competence and integrity" both in the local recruitment of staff and in the "determination of the conditions of service". That is the real objective of Article 101.3 of the Charter: securing the highest standards of efficiency, competence and integrity of United Nations staff. This is what the Organization must accomplish and to that end, the Organization must apply the mechanism recommended by the Flemming Committee.

XI. This is the true nature of the mechanism recommended by the Flemming Committee: the primary goal is established by the Charter, the Flemming principle is but a device to achieve the superior objective. This is clearly confirmed by the words:

"To comply with the standards established by the Charter as regards the employment of locally recruited staff, the organizations of the United Nations system must be competitive with those employers in the same labour market who recruit staff of equally high calibre and qualifications for work, which is similar in nature and equal in value to that of the organizations." (Emphasis added.)

Being competitive, then, is the way suggested in order to obtain staff among the best in the local labour market.

XII. The organizations must remain competitive "in order to both attract and retain staff of these high standards" which requires that the conditions of service for the locally recruited staff be determined by reference to the best prevailing conditions of service among other employers in the locality. The conditions of service, including both paid remuneration and other basic elements of compensation are to be "*among the best in the locality, without being the absolute best*".

XIII. In the Tribunal's view, the second imperative contained in the Flemming principle is that the organizations of the United Nations system must be competitive with employers in the local labour market, both to attract the best people and to retain them once they are in the organizations. This is not an implicit condition or an inference from other texts: it is expressly stated in so many words in the text itself. One cannot take this language out of context to make it say what it does not say, as its real meaning is *precisely this part of the*

text. The *principal aim* is set out in the Charter, the operative mechanism in the text of the Flemming principle.

XIV. The Tribunal finds that the true meaning of the Flemming principle is that in order to be competitive - a means to an end: that of obtaining the best people - the Organization must have the resources to be competitive: namely, it must be in the position to offer conditions of service (among which remuneration, and other basic elements of compensation) which are to be determined *by reference* to the best prevailing conditions of service in the locality. They are to be *among the best* in the locality, *without being the absolute best*. Offering the best prevailing conditions, or rather, *conditions of service among the best in the locality, without being the absolute best*, is an intermediate goal and a means to achieve a superior goal, that of being competitive, and this goal is, in its turn, a way to achieve the paramount objective of "securing the highest standards of efficiency, competence and integrity" of United Nations staff.

XV. The words "without being the absolute best" could not express in a more eloquent manner the flexibility of the mechanism devised in order to comply with the goal of the Charter. This use of language, expressing a policy of the organizations, undoubtedly benefits their staff members and, more importantly, this policy obtains, by its application, the desired results. As long as the results are so obtained, the organizations are free to employ the necessary means. The phrases "with reference to" and "among the best, without being the absolute best" clearly express the notion that the conditions of service of employment with the United Nations do not need to correspond exactly to those prevailing in the local market.

XVI. The Tribunal is satisfied that, in comparing United Nations and local conditions of employment, looking for identical conditions of employment would have been an impossible task. It has clearly emerged from the written submissions of the parties and from the oral hearing conducted by the Tribunal on 30 October 2002 that neither the titles nor the functions of the posts in the Organization and those in the local market are the same: at best they are similar, sometimes only remotely similar. Likewise, it is impossible

to measure, with any degree of precision, the actual duties performed by both groups of employees. It is important to remark, however, that the result of recruiting and keeping the best staff may be achieved even if jobs in the local market offer some advantages not matched by the compared United Nations posts, if some other advantages of the latter make them more attractive, all things considered, to the persons applying. This would allow the organizations to achieve the desired results while meeting their objective of offering best prevailing conditions.

XVII. The decision appealed by the Applicants, following a recommendation of the ICSC, was aimed at phasing out the language supplement in the Rome and Vienna organizations. In *In re Carretta and others*, the ILOAT ordered the reinstatement of the language supplement in the Rome organizations, mainly because the 1994 Rome survey had not included any question relating to the language factor, i.e., whether or not the local employers paid a supplement for the use of a language other than Italian. The ILOAT considered that it would have been reasonable to keep a small adjustment, no doubt to account for the uncertainty left by the omission of the question. A similar case was brought to the ILOAT by the Vienna staff members of the IAEA resulting in Judgement 1915 (*In re Abdur and others, ibid.*). In this Judgement, the ILOAT agreed with the phasing out of the language factor mainly on the basis that the survey conducted by the ICSC had methodically collected data about the language factor and it had shown that employers in the local market did not pay any supplement when the use of the English language was required of their employees.

XVIII. In the light of the previous paragraphs, the reasoning behind the change of the methodology employed by the ICSC, as well as the introduction of a new methodology appears to be entirely correct. The Tribunal notes in particular the following provision of the ICSC report on the work of its thirty-seventh session:

"71. In cities where the local language is not a working language of the organizations, an adjustment was made previously to recognize, inter alia, that the outside rates relate to outside staff who work only in one language and consequentially the difficulty in recruiting local staff with appropriate language

skills. *As this difficulty has gradually been diminished, such amendments are no longer to be included.* Should this change lead to a freeze of salaries at the two locations (Vienna and Rome) where a 'language factor' is currently granted, the Commission will consider a phased approach to elimination of this element." (Emphasis added.)

XIX. In order to better understand the decision to phase out the language factor, the 1996 survey must be seen in the context of the globalization of the labour market in Europe and, for the United Nations, in the world. At present, any city of the European Union (EU) is the site of a much wider universe in the field of labour. Any citizen of the EU may seek employment in Vienna, as in any other city of the member countries of the EU, and in fact the movement of labour forces through the now vast territory of the EU is a perceptible phenomenon. The United Nations, therefore, is able to recruit staff from a labour market including many persons, both European and non-European, with English as their native tongue or with working knowledge of English or another official United Nations language. In fact, the United Nations increasingly recruits as local staff nationals from countries outside of Austria who happen to reside in Vienna.

XX. The language factor was introduced in 1982, that is to say, twenty-one years ago, when the conditions prevailing in the labour market in Vienna were clearly different from what they are today. Already in 1991, that is twelve years ago, the above trend was manifesting itself rather clearly. A Working Group established by the ICSC which included members of the Federation of International Civil Service Associations and of the Co-ordinating Committee of Independent Staff Unions and Associations, reported in 1992 that

"the composition of the General Service staff consisted of a large percentage of non-nationals (54 per cent (Vienna) and 45 per cent (Rome)) and that ... the earlier problems to recruit staff with language skills had gradually diminished. In view thereof, some members considered that the language factor was no longer necessary. ..."

That is why, in 1992, the ICSC changed its methodology and decided to phase out the language factor. The growing existence of a multilingual work force in Vienna is

confirmed today, as the above-mentioned proportion of 54 per cent non-nationals has grown to reach two-thirds (about 64 per cent) of the members of the General Service staff in Vienna. It was also established that 20 percent of the General Service staff in IAEA were of English mother tongue and were, naturally, benefiting from the language supplement.

XXI. As mentioned above, in the Tribunal's view, a comparison of the prevailing conditions, even if it is made job by job as is done by the ICSC, does not mean that *all the conditions* of one job have to be matched by *all the conditions* of the comparator job. The Tribunal recalls the original Flemming text, in the sense that

"the conditions of service for the locally recruited staff be determined *by reference to* the best prevailing conditions of service among other employers in the locality. The conditions of service, including both paid remuneration and other basic elements of compensation are to be *among the best in the locality, without being the absolute best.*" (Emphasis added)

The phrase "*by reference to*" surely indicates that the local market conditions are to be taken as a general guide, not as a rigid pattern. Moreover, it must be added that "in this type of survey, there can be no perfect match and that such a match is not necessary to reach sound conclusions" (see *In re Abdur and others, ibid.*). The element of flexibility contained in that text is hardly compatible with the rigidity of considering each and every survey incomplete without a language factor. Particularly so when the organizations do not seem to experience difficulty in recruiting from among the best in the labour market without the incentive of the language supplement and given that, even without that supplement, the average salary in the United Nations for comparable jobs was already higher.

XXII. In view of the foregoing, the Tribunal does not need to enter into a detailed examination of the 1996 survey. The list of 22 employers to be interviewed was drawn up in accordance with the usual methods, and may be considered as representative as previous surveys. The questions posed regarding the language factor were sufficiently clear - even if they were contained in a foot note - so as not to mislead the employers answering the

questionnaire as to the main thrust of the question, i.e., if a supplement was paid for the use of a foreign language. The answers did not have the precision that was to be desired and because of that the level of the language factor required of the employees as well as the extent to which the foreign language was used remained in some of the answers somewhat vague. But one issue seemed to be very clear, and also decisive: out of 22 employers, 21 answered that they did not pay a supplement for the use of a foreign language, not even those who said that a substantial percentage of their employees were required to be fluent in English. If the objective pursued by the survey was to establish not that the conditions of work of the United Nations were identical to those of the outside market, but that United Nations' conditions of work were among the best in that market, the questions and answers regarding the language factor were sufficient.

The result of the 1996 survey seemed to confirm the globalization of the Vienna labour market and the relative abundance in that market of people either fluent in or with a working knowledge of English from which the United Nations organizations could recruit adequate staff. Thus, the organizations of the United Nations experienced no difficulties in the recruitment of staff with the necessary language skills and consequently the inclusion of a language supplement was made unnecessary.

XXIII. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Spyridon FLOGAITIS
Member

New York, 26 November 2002

Maritza STRUYVENBERG
Executive Secretary

DISSENTING OPINION — MS. BRIGITTE STERN

I. The crux of this important case is the manner in which the Flemming principle should be interpreted. When questioned by the Tribunal members during the oral proceedings on 30 October 2002, the various parties involved unanimously confirmed that the ultimate goal of the Flemming principle was to meet the requirements of Article 101.3 of the Charter and permit the recruitment of persons meeting the highest standards, and that this meant offering United Nations staff "the best prevailing conditions of employment", to use the terminology employed by the ICSC representative during the oral pleadings. The two objectives - recruiting the best people and offering the best conditions or more specifically, according to the actual text of the Flemming principle "the best in the locality, without being the absolute best" - were considered by all who spoke to be inextricably linked.

II. It is the Secretary-General who sets the salary scale for General Service staff. He is assisted in this task by the ICSC, which determines the *principles* applicable to the determination of terms of employment as well as the *general methods* used to apply these principles, through a *survey* which the ICSC is required to conduct every five years to enable it to set the salary scale in the light of the best prevailing conditions at the locality where the Organization is situated.

III. In 1982, the ICSC evolved a general method for issuing guidelines on the manner of conducting surveys on the best prevailing terms of employment in the various headquarters cities. In order to take into account the fact that certain cities, such as Rome or Vienna, are headquarters cities in which the national language is not one of the six official languages of the United Nations, it was arranged that, in application of this method, the salaries of concerned General Service staff working in those cities would be

increased in an amount ranging from 4 to 6 per cent, in order to take into account the need for them to know a foreign language, which was not required for the local employees with whose terms of employment they were matched.

IV. This situation was altered completely in 1992, when the ICSC radically changed this general method and, in particular, abolished the language adjustment. It justified the new policy in these words:

"A language adjustment was made previously to recognize inter alia that the outside rates relate to outside staff who work only in one language and consequently the difficulty in recruiting local staff with appropriate language skills. As this difficulty has gradually been diminished, such amendments are no longer to be included."

However, this change was not designed to question the Flemming principle, as can be seen from resolution 47/216 adopted on 23 December 1992 by the United Nations General Assembly.

V. Like the Tribunal, I am in complete disagreement with the statements by the representative of the Secretary-General to the effect that he should not exercise any detailed control over technical areas. I wish, in the first place, to emphasize that I am fully in accord with the majority and with ILOAT regarding the extent of the control to be exercised in this case, which gives the Administration some leeway, while ensuring that staff rights are protected. In this case, in order to ensure that staff rights are respected in the salary scale, it is necessary to verify, on the one hand, the *theoretical validity* of the method evolved by the ICSC and, on the other hand, its *specific application* in the case in point.

VI. In connection with this control, it is necessary first to consider *the theoretical validity of the new approach* adopted in 1992, consisting of abolition of the language factor, without any verification of the state of the local market. In this initial stage, therefore, consideration is focused on the simple abolition of the language adjustment in relation to the Flemming principle. I wish at the outset to state that, whatever the method

elaborated and whatever the justifications given for the method evolved by the ICSC for setting salary scales, this method cannot result in a questioning of the Flemming principle. On this point, I am in complete accord with ILOAT.

VII. The Tribunal, however, does not endorse this ILOAT analysis and accepts the interpretation given in the United Nations written submissions. The Administration seems to be putting forward a multi-staged reasoning: first stage, in order to recruit locally, it is necessary to pay slightly more than local employees are paid, because the United Nations also requires a knowledge of English (hence the introduction of the language adjustment); second stage, now that it is easy to find people with a knowledge of English non-locally, there is no need to pay slightly more (hence the abolition of the language adjustment). One of the main reasons for my disagreement with the majority is this interpretation of the Flemming principle which subordinates the guarantees given to staff to the degree of fluidity of the labour market. In this case, the premises - or the ultimate outcome - of the Tribunal's decision are that the point is for the United Nations to recruit high-quality staff and that ultimately the conditions offered are unimportant, provided that they do not prevent such high-quality recruitment. This interpretation of the Flemming principle seems to nullify the guarantees that it is supposed to provide for United Nations staff. I wish clearly to state that, in my opinion, *the principle of simple abolition, with no serious and reliable verification of the conditions on the local labour market, is contrary to the Flemming principle*, precisely because it does not allow the characteristics of the local labour market, on which the Flemming principle is entirely based, to be taken into account.

VIII. However, after abolishing the language adjustment, the Administration conducted a survey *a posteriori*, although one should have been conducted before the abolition. Nevertheless, the result of the survey might have validated the Administration's action retroactively. In any event, this is what the Respondent maintains. The second issue to be considered therefore concerns *the specific implementation of the salary surveys* which are supposed to permit implementation of the Flemming principle.

IX. I am fully aware that ILOAT has already considered the salary surveys conducted in Rome and Vienna. It was because no survey using a methodology revealing the extent of the use of a foreign language had been conducted in Rome that ILOAT criticized the established scale in the Judgement *In re Carretta* and others; similarly it was because it believed that such methodology had been correctly followed during the survey conducted in Vienna in 1996 that the same ILOAT did not criticize the salary scale established following that survey, in the two Judgements *In re Abdur* and others. The present Tribunal, for its part, is concerned only with the salary survey conducted in Vienna in 1996.

X. I consider that, because of their vague and fragmentary nature, the data provided by the survey were wrongly interpreted by the ICSC and that the situation is precisely the one envisaged by ILOAT, in which "specific factors are disregarded or poorly evaluated", justifying criticism by the Tribunal. In reaching this conclusion, I do not believe it is necessary to hold elaborate debates on whether collective agreements were taken into account or on other debates concerning the choice of the sample used for the salary survey. Not because such debates are too "technical" for the Tribunal members, but because the elements emerging from the survey are "sufficient" unto themselves; more precisely, they are sufficient to lead to the conclusion that the survey itself is totally inadequate to provide relevant and usable data on the linguistic knowledge of Viennese employees, so that results are produced that are obviously in contradiction with the Flemming principle.

XI. I consider that, in view of the amount at stake - 3.2 per cent of their salary for hundreds of staff members - the survey designed to establish the salary scale, which was supposed to take into account jobs requiring a second language, was by no means sufficiently rigorous to justify (*a posteriori*, moreover) simple abolition of the language factor, as will be explained below. Indeed, the Tribunal is not in profound disagreement with this point, even if - because of its affirmation regarding the "flexible" character of the Flemming principle - it does not draw from it the same conclusions. With regard to the survey conducted in Vienna in 1996, the shortcomings with regard to the manner in which

linguistic knowledge was taken into account are obvious both in the questionnaire and in the interpretation of the replies.

XII. It appears, first of all, that in the *questions asked* there was insufficient emphasis on the importance of language, so that the ICSC did not have tools sufficient to measure the impact of linguistic knowledge, and more specifically of use of a second language, on salary level. I wish to stress that specific information on foreign language usage was requested only in a footnote, which is obviously not the place to highlight this issue of crucial importance to respect for the Flemming principle. It should be mentioned that the ICSC itself, in the replies dated 31 May 2002 to the questions put to the parties by the Tribunal, draws attention to the fact that in 1991 the language question "was posed in three places in the questionnaire", whereas in 1996 this information was requested incidentally and marginally, in only one place. In addition, it appears from a study of the documents in the file that the employers which replied to these requests made in a footnote had to do so in the margin, since no specific space was provided for these replies, although they were crucial to the qualitative and quantitative importance of the use of a second language, namely English. Lastly - and this point is undoubtedly very important - the questions on languages were posed in the first part, the general part, and not in the more specific part concerning the precise jobs surveyed: there is therefore no guarantee that the information concerning language usage, given in a general manner, relates to the jobs used in the comparison.

XIII. With regard to the *conclusions drawn* by the ICSC from this hasty — on this specific point — survey, I cannot help expressing astonishment at the surprising interpretations of the replies and at the conclusions drawn from them by the ICSC regarding the (retrospective) legality and legitimacy of abolition of the language factor. For, even assuming that the respondents constitute a sufficiently significant sample, it must nevertheless be noted that a study of the replies leaves one somewhat perplexed about the way in which they were interpreted; this is true as regards global comparability, proportion of employees using a second language, amount of time during which a language other than German is used and language proficiency required.

XIV. Firstly, as regards global comparability, it is difficult to believe, as ILOAT did, that out of 22 reference employers 21 "require" use of another language. Even a cursory reading of the questionnaires does not lead to a categorical conclusion of this kind: many employers emphasized the fact that English was used very little in their firms.

XV. Secondly, with regard to the proportion of employees using English, the data from the 1996 questionnaire are too imprecise to permit significant conclusions but in any case would rather tend to indicate that relatively few employees in Vienna use a language other than German: six reference employers did not reply to the question on the number of employees using English, three gave an extremely imprecise reply — "a number of posts" (employer 112); "a number of jobs" (employer 113); "for some staff" (employer 125); lastly, three specified that English was virtually not required — "very few staff required to work in English" (employer 109); "very limited number of posts" (employer 115); "10 to 20% of the jobs" (employer 119). It is clear that such replies do not indicate that the proportion of employees using English is sufficiently significant for the comparison to be valid.

XVI. Thirdly, as regards the amount of time that a language other than German is used, the data are even more sparse: 18 reference employers did not reply at all to this question, two gave a completely vague reply (employers 102 and 105): in other words, for 20 out of 22 reference employers, the survey conducted in Vienna in 1996 gave no information on the amount of time that English was used by employees. Needless to say, such data can lead only to the conclusion that use of a language other than German is not sufficiently proved for there to be a valid basis for comparison.

XVII. Lastly, as regards language proficiency, a study of the questionnaires shows that no reply requires a fluent knowledge of English, only two replies require an intermediate/fluent knowledge, and the vast majority of the replies require only an intermediate and sometimes only a basic knowledge of English. As a result, unlike ILOAT, I believe that the comparison between the level of knowledge required of a United

Nations General Service staff member and that required of employees working in Vienna is not relevant.

XVIII. In my opinion, it emerges from all the preceding findings that there are major differences, from the qualitative as well as the quantitative viewpoint, regarding the foreign language usage required of the reference employees in Vienna and the daily and permanent use of one of the languages of the Organization required of its staff. This viewpoint is based on a combination of several factors: it is difficult to draw valid conclusions if one compares an Organization where all staff permanently use a working language other than German, of which they also need to have a very good knowledge, with reference employers some of whose staff occasionally use another working language, of which they have only a rudimentary knowledge. Thus the manner in which the survey was conducted in Vienna in 1996 and the results which emerged therefrom do not in this case justify simple abolition of the language factor. *The data collected do not guarantee that the Flemming principle is respected in the establishment of the salary scale that neither incorporates a language factor nor takes into account Viennese salaries of employees using English in a manner sufficiently comparable to United Nations staff members to be relevant.*

XIX. It is especially significant that, in document A/55/30, the ICSC itself indirectly acknowledges that the previous surveys were not conducted properly as regards reflection of language skills:

"The Commission recalled that during the Rome and Vienna surveys it had matched comparable jobs. *The focus of the job matching had been on duties and responsibilities, not on languages.* However, in the light of the two judgements, the Commission considered that at the time of future surveys at those duty stations not only should duties and responsibilities be matched, but also, *for each job*, the question should be posed whether the outside employees were required to work in a working language of the organizations ..." (Emphasis added.)

Thus the ICSC itself recognizes that the language factor was not correctly taken into account in previous surveys — including, in other words, the one considered by the Tribunal — but that it should be in future surveys.

XX. Although the Tribunal was not asked about the validity of a survey other than the 1996 Vienna survey, it requested certain information from the parties about the surveys conducted in Rome in 2000 and Vienna in 2001, which may be useful as factual data. The information on the survey conducted in Rome in 2000 deserves particular mention. A note by the Rome Local Salary Survey Committee (ICSC/53/CRP.5) gives the following information:

"A question asking whether the staff actually in service were required to work continuously on a full-time basis in a language other than Italian was added to the questionnaire. ... *The findings show that, of the 21 employers participating in the survey, only two have language requirements similar to the Rome-based organizations.* ... Such findings clearly demonstrate that the situation of the Rome labour market vis-à-vis the use of foreign languages is substantially stable". (Emphasis added.)

On the basis of these findings, the Local Committee composed of representatives of the Administration and of the staff "supports the continuance of the payment of the language adjustment factor in the same form and according to the same procedures as currently applied". It is not clear how the ICSC, contradicting its local body, whose decisive role was recalled by the Commission during the oral hearing, could draw conclusions diametrically opposed to those of the Local Committee and could indicate that in Rome, although only two out of 21 employers stated that they required considerable use of English, the situation had changed and had become comparable to that prevailing in the United Nations.

XXI. I should be most surprised if the situation in Vienna were basically different from that prevailing in Rome, even if the ICSC report of 12 August 2002 (ICSC/55/R.15, para. 40) states that "(t)he data collected also showed that, since the last survey, an increased number of employers surveyed had English as the working language of their company".

The Tribunal is not considering the 2001 survey in Vienna, but I note that this remark tends rather to indicate that this was not in any case the situation in 1996, since there was indeed a change.

XXII. In any case, I do not believe that the Administration has proved that the survey conducted in Vienna in 1996 surveyed employees "required to work continuously on a full-time basis in a language other than German", which is essential in order to ensure respect for the Flemming principle. If it wishes to reduce the entitlements of its staff, the Administration bears the burden of proving that it is within its rights to do so.

XXIII. I wish to state that my analysis diverges from that of the Tribunal *insofar as concerns principles*, more precisely the interpretation of the Flemming principle, and from that of ILOAT *insofar as concerns evaluation of the factual elements* underlying the salary survey. On the other hand, I agree with ILOAT that the sole purpose of granting the language adjustment was to guarantee the right of General Service staff to the best conditions of remuneration and that it could not be used to promote other policies.

XXIV. I wish to make an additional remark: I am aware that discussions have been held for years on the relevance of maintaining a language coefficient. As early as 1992, a Working Group was established which was hesitant about the solutions to be proposed for the future. For example, it asked the ICSC to consider the following three options:

- "(a) Maintain the language coefficient;
- (b) Abolish the language coefficient;
- (c) Phase out the language coefficient."

The language coefficient is perhaps not the best way of implementing the principle that employees must enjoy conditions that are among the most favourable. In drawing up the salary scale, it would probably be appropriate to take into account the undeniable fact of globalization, emphasized by the Respondent in his submissions and by all participants in the oral pleadings, and the increasingly frequent use of English, as well as personal

mobility, even outside international organizations: in particular, I take careful note of the comment made by the Respondent in his submissions "that the composition of the General Service staff consisted of a large percentage of non-nationals (54 per cent (Vienna) and 45 per cent (Rome))". (See ICSC/36/R.11 of 13 July 1992.) However, this situation may indeed result from the difficulty of finding staff locally, and is not necessarily an argument against abolition of the language factor. In addition, it should be emphasized that one of the ideas underlying the Flemming principle, as revealed by a careful reading thereof, is precisely the need to attract to the Organization high-quality local recruits and, for this purpose, to pay them slightly more than local employees if the latter do not use English in their daily work and even if they are able to work fluently in two languages. In other words, the Tribunal considers that the point of the Flemming principle is to facilitate recruitment for the Administration, whereas I personally believe, as does ILOAT, that the point of the Flemming principle is, on the contrary, to guarantee certain conditions of employment favourable to local recruits, in order to attract the best. The fact that the Organization finds people from all over the world is therefore no reason to abolish these favourable conditions of employment that attract local staff to work for international organizations. In addition, it is not clear why persons of English mother tongue residing in Vienna, who could work outside the Organization in Vienna, should not be able to enjoy in the United Nations conditions as favourable as those which they would have if they worked in a Viennese firm requiring a knowledge of English.

The principle should therefore no doubt be followed by including in the salary survey only completely bilingual staff, speaking the language of Vienna (or Rome) and one of the languages of the United Nations. *It is clear, however, that one cannot both abolish the language coefficient and conduct a salary survey referring to jobs which do not require substantial use of a United Nations language in addition to the local language and at the same time respect the Flemming principle.*

(Signatures)

Brigitte STERN
Member

New York, 26 November 2002

Maritza STRUYVENBERG
Executive Secretary