Decision of the Appeals Board of 26 June 1992

Appeals No. 163/1990-JEANNIN (II) and No. 164/1990-BIGAIGNON (I) v.Secretary General)

The Appeals Board, composed of:

Mr Carlo RUSSO, Chairman,
Sir Donald TEBBIT, member, and
Mr Kåre HAUGE, substitute member,

assisted by:

Mr Michele de SALVIA, Secretary and
Ms Margaret KILLERBY, Deputy Secretary

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Ms V. Jeannin and Mr M. Bigaignon lodged their appeals on 5 July 1990. The appeals were entered in the Board's register on the same date under file Nos l63/1990 and l64/1990.

2. On 2 October 1990 the Secretary General submitted her comments.

3. The public hearing of this case was originally fixed for 25 January 1991. On 23 January 1991, the Chairman of the Board decided to postpone this hearing since one of the Board members was unable to attend, and the Committee of Ministers of the Council of Europe had not, at that time, taken any decision on the two substitute members it was required to appoint.

4. In a decision dated 21 November 1991 the Appeals Board joined the two cases, since they were related.

5. Ms A. Nollinger (grade B member of staff) and Mr A. Wack (grade C member of staff) submitted, under Article 10 of the Statute of the Appeals Board, a request to be allowed to intervene in the proceedings in support of the appellants. On 21 November 1991, the Board, considering that they had a sufficient interest in the case authorised them to make a written intervention.

6. The public hearing took place on 28 January 1992. The following were present at the hearing: the appellants, Ms V. Jeannin and Mr M. Bigaignon, assisted by Professor A. Pellet; for the Secretary General, Mr E. Harremoes, Director of Legal Affairs, assisted by Mr R. Brillat, Administrative Officer in the Directorate of Legal Affairs.

THE FACTS

A. System for the adjustment of salaries in the Co-ordinated Organisations [1]

7. The Co-ordinating Committee of government budget experts (CCG) adopts reports defining, for a period of several years, the method for the adjustment of salaries in the Co-ordinated Organisations.

8. These reports are then adopted by the committees, councils or other managerial bodies of these organisations.

9. Every year, or at every interval specified in the adjustment method, the O.E.C.D. Inter-Organisation Section dealing with salaries and prices, applying the principles set out in the method, calculates the new salary scales. The CCG adopts these scales in the form of a report, which is then submitted to the committees or councils or other managerial bodies of the organisations, which adopt it.

B. The circumstances of the present case may be summed up as follows:

10. At the 432nd meeting of the Deputies, held on 16 January 1990, the Committee of Ministers of the Council of Europe adopted the 255th report of the CCG, which applies the method set out in the 254th report, also adopted by the Committee of Ministers in January 1990. In adopting these reports, the Committee of Ministers approved a new procedure for the adjustment of the salaries of permanent Council of Europe staff, back-dated to 1 July 1989.

11. The CCG's 254th report provides as follows:

> Article 11:
>
> "The basic salaries of staff in categories B and C shall be calculated on the basis of:
> i) surveys conducted by the Inter-Organisations Section in Member countries, among the best employers in these countries, as defined in Annex IV."
>
> Annex IV (paragraph 31 of the salary survey procedure) states that:
> "Minimum salaries by grade are reduced:
>
> i) by the amounts of the employee's contributions to compulsory national social security and pension schemes;
>
> ii) by other compulsory deductions or deductions generally made by firms from salaries by virtue of complementary retirement, sickness schemes etc."

[1] Currently the Council of Europe, the Organisation for Economic Co-operation and Development, the North Atlantic Treaty Organisation, the Western European Union, the European Space Agency and the European Centre for Medium-Range Weather forecasts.

12. As from the beginning of February 1990, the salaries paid to staff were based on this new salary adjustment procedure.

13. On 13 March 1990 Ms Jeannin and Mr Bigaignon submitted administrative complaints to the Head of Establishment Division concerning certain deductions that had been made from their salaries as a result of the application of this salary adjustment procedure.

14. In a memorandum dated 11 May 1990, the Director of Administration, on behalf of the Secretary General, rejected the administrative complaints.

SUBMISSIONS OF THE PARTIES

The appellants' submissions

15. The appellants are requesting that the decision of 11 May 1990 rejecting their complaints be quashed.

16. The grounds for this request are based on the fact that the comparisons with the salaries paid by the best local employers, which are the basis for the salary adjustment method, took account of the unemployment insurance contributions and supplementary pension scheme contributions payable by French employees.

17. The appellants' submissions may be summarised as follows:

A. As to the failure to comply with paragraph 31 (i) of Annex IV of the 254th report

18. Paragraph 31 (i) of Annex IV of the 254th report restricts the deductions from minimum salaries to the employee's contributions to compulsory national social security and pension schemes. The appellants put forward the following submissions as to why unemployment insurance contributions should be excluded.

19. Firstly, the appellants referred to the provisions of Article 11 of the 254th report, concerning the basic salaries of B and C grade staff. Article 11 stipulates that the surveys conducted by the Inter-Organisations Section in the member states concerned shall be carried out country by country and that salaries shall be based on national surveys.

In the present case, the appellants contended that, as they are working in Strasbourg, it was necessary to consider the situation in France, and France alone, and that the lawfulness of the disputed decision and the validity of the way in which it applies paragraph 31 of Appendix IV of the 254th report should be assessed on the basis of that situation.

The appellants submitted that, under French law, unemployment insurance contributions came under labour law and were not part of the compulsory national social security scheme.

20. Secondly, the appellants noted that in France the unemployment insurance scheme was organised in a very different way from the compulsory social security schemes, especially as it was based entirely on collective inter-professional agreements.

21. In addition, the appellants stated that in the various social welfare systems that existed throughout the world, there was usually an independent unemployment insurance scheme.

22. Lastly, the appellants observed that Article 2, paragraph 1, of the European Convention on Social Security, which established the scope of the Convention, referred to legislation relating to the branches of social security. Unemployment benefit should not, in countries like France, where it was not part of the social security system, be taken into account, since this provision did not alter the nature of unemployment benefit. The appellants made the same point in connection with the provisions of the European Code of Social Security (Part IV).

B. As to the failure to observe the principle of striking a fair balance between contributions and benefits

23. First, the appellants claimed that the disputed decision was unfair.

They stated that, although in the national system these deductions from salaries were offset by advantages conferring rights on the employees, to certain benefits, this was not the case at the Council of Europe. Staff were in no way insured against unemployment, and the fact that supplementary pension schemes were taken into account was not offset by any equivalent advantage for staff.

They observed that this situation was criticised by the Secretaries General during the procedure for the preparation of the 254th report (see Addendum of 24 February 1988, p. 7).

24. Secondly, from a strictly legal viewpoint, the appellants referred to the decision of the Appeals Board in Appeals Nos 133-145/1986 (Ausems and others v. the Secretary General). The Board stated that "when it updates the Regulations governing Staff Salaries and Allowances ... the Committee of Ministers is required ... to ensure the observance of general principles of law to which the legal systems of international organisations are subject" like "the principle of good faith, which ... recognises the fact that the staff of international institutions and their representatives must be entitled to rely on the respect by the administrative authorities of the undertaking entered into by such authorities" (paragraphs 78 and 79); cf CJEC, case 81-72, Commission of the European Communities v. Council of the European Communities, 5 June 1973, Volume 73, ECR, p. 575.

The appellants pointed out that B and C grade staff at the Council of Europe, who had certain deductions made from their salaries but, unlike employees in the reference country, did not enjoy any advantages in return, were at disadvantage in comparison with the employees who served as a reference. Consequently, in applying the Ministers' Deputies decision, the Secretary General made an error of law.

25. The appellants further contended that the Secretary General's decision was in breach of the "Noblemaire principle", defined by the ILO Administrative Tribunal. The second rule of this principle was relevant to the present case:

> "The other rule is that in recruiting staff from their full membership international organisations shall offer pay that will draw and keep citizens of countries where salaries

are highest" (ILOAT, 825, Beattle and Sheeran v ILO).

26. The appellants noted that there was a reference at the Council of Europe to "salaries of the best local employers" in connection with B and C grade staff. They submitted that the salaries thus established were reduced by amounts which were deducted from salaries in the countries concerned because those contributions conferred certain rights on the employees, but that this did not apply to B and C grade staff at the Council of Europe, who did not enjoy any benefits in return, and that the concept of "best local employers" was therefore meaningless and the Noblemaire principle had been disregarded.

The Secretary General's submissions

27. The Secretary General asserts that there had been no violation of the provisions of the 254th report of the CCG, as adopted by the Committee of Ministers, and that the principle of striking a fair balance between contributions payable by staff members and advantages had not been disregarded.

28. The Secretary General's submissions may be summed up as follows:

A. <u>As to the failure to comply with paragraph 31 (i) of Annex IV of the 254th Report</u>

29. First, the Secretary General pointed out that the persons who had drafted the 254th report had firmly intended that compulsory unemployment insurance contributions should continue to be deducted, since, on the one hand, they had rejected the novel proposals put forward by the representatives of the Secretaries General during negotiations prior to the preparation of that report, to the effect that unemployment insurance contributions be excluded and they had done so because of the international context of the discussions and the possibility of reaching a general agreement and, on the other hand, they had expressly settled the matter in Annex IV, Appendix II, of the Report (salary survey procedure). Part B provided that the deductions from gross pay in respect of the "contribution of employee to national social security" included sickness, hospitalisation, work stoppage, death, invalidity, work accidents, unemployment and pension.

30. Secondly, the Secretary General stated that the concept of "compulsory national scheme" should be interpreted in the light of the international context in which it had to take effect and that it was not appropriate to seek to assess it with reference only to the country in which it had to apply.

As the current report was to apply to six organisations in fifteen countries where staff of the organisations were working, the meaning of the words should be independent of the country in which they were applied and there was therefore no case for considering the French system alone.

In addition, in some countries, though only a small number at present, unemployment protection was part and parcel of the social security system.

Moreover, this "all-embracing" conception appeared to be the objective of the European states: the European Code of Social Security and the European Code of Social Security (revised)

both contained a section on unemployment protection.

31. The Secretary General further observed that the employee did not have the option of forfeiting unemployment insurance protection, because the contributions were compulsory.

32. Lastly, the Secretary General noted that in France contributions payable by employers and those deducted from employees' salaries were paid to the "Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales" (Social Security Contribution Collection and Family Allowances Union), like all other social security contributions.

B. As to the failure to comply with the principle of striking a fair balance between contributions and benefits

33. The Secretary General pointed out that she in no way refuted the proposals put forward by the Secretaries General during the procedure for the preparation of the 254th report, but that the CCG had adopted another solution, which was considered now to be the rule.

34. According to the Secretary General, the solution adopted established a fair comparison between very different situations that of employees in the private sector and that of staff of the Co-ordinated Organisations.

35. The Secretary General submitted that even though the co-ordinated system had no unemployment insurance cover, that the actual risk of unemployment was extremely small, if it existed at all, in the civil service of the Co-ordinated Organisations.

This did not mean that the contribution taken into account in the calculation of staff salaries was not offset by any advantage, but, on the contrary, that the statutory provisions which gave staff permanent jobs were such that the risk in question was virtually non-existent. This was the best possible form of protection.

36. In the case of contributions to supplementary pension schemes, according to the Secretary General it was necessary, in order to make a fair comparison, to take account of all pension contributions (basic contributions and supplementary pension scheme contributions) in order to calculate salaries.

Unlike employees in the private sector, who have a two-tier pension scheme (basic pension plus supplementary pension) financed with two sets of contributions, the permanent staff of the Co-ordinated Organisations had a single pension scheme under which a single contribution was deducted from the salaries of serving staff and a single pension was paid to pensioners.

It should not be inferred from this that only the basic contribution was taken into account in the case of the permanent staff of the Co-ordinated Organisations.

37. Lastly, the Secretary General contended there had been no breach of the principle established in the Noblemaire case since:

- on the one hand, under the current system in the Co-ordinated Organisations, the

comparisons for B and C grade staff were made only with the best local employers;

- and, on the other hand, the permanent staff of the Co-ordinated organisations were not at a disadvantage in comparison with local employees since unemployment and supplementary pension contributions were also deducted from the gross salaries of the latter: it was only the form of the unemployment guarantee and the pension system which were different.

THE LAW

38. The appellants appealed against the decision of 11 May 1990 rejecting their complaint concerning the procedure for the adjustment of the salaries and scales applicable to B and C grade staff of the Organisation, as approved by the Committee of Ministers on 16 January 1990 and back-dated to 1 July 1989.

They submitted that the adjustment procedure should not have taken account of the deductions made in respect of unemployment insurance contributions or of contributions to supplementary pension schemes.

They contended that the disputed measures are unlawful and requested that the decision of 11 May 1990 rejecting their complaint be quashed, that the sums wrongfully deducted from their salaries since 1 July 1989 be reimbursed and that their "full costs" be reimbursed.

39. The appellants have put forward two grounds in support of their appeal. First, the deduction in respect of unemployment insurance contributions is in itself contrary to the provisions of the 254th Report of the Co-ordinating Committee of Government Budget Experts (CCG). Secondly, this deduction, together with the deduction in respect of contributions to supplementary pension schemes, breaches both the principle of a fair balance between contributions and benefits and the principle of good faith.

40. The Secretary General has submitted that nothing unlawful has been done, since the adjustment procedure detailed in the CCG's 254th Report and adopted by the Committee of Ministers has not been violated, and since the principle of a fair balance between contributions by staff and benefits accruing to them has been respected.

41. The Board notes that its jurisdiction in the present case has not been contested and is therefore established.

42. The Board observes that the current proceedings, through an objection concerning the adjustment of the salaries of grade B and C staff of the Organisation, raise the more general problem of the level of salaries of international civil servants. Moreover, the appellants and the Secretary General alike have referred in this connection to the "Noblemaire" principle as defined by the ILO Administrative Tribunal.

43. The Board is of the opinion that the determination of salary levels necessitates taking account of numerous political, legal and economic parameters. Quite evidently, such a matter falls, if not exclusively at least primarily, within the competence of the States which, through

their contributions, furnish International Organisations with the resources necessary for the pursuit of the co-operation objectives assigned them.

44. This being so, the competent authorities must be allowed broad scope to appraise all relevant parameters in order to determine salary levels. This particularly applies to the method, which refers to the salaries paid by the best local employers, used for the salary scales for B and C grade staff of the Co-ordinated Organisations.

45. However, it is incumbent on an international administrative tribunal to which questions concerning the application of such a method have been referred to ascertain not only whether the regulations made have been correctly applied but also whether the general principles of law to which the legal systems of International Organisations are subject (see CEAB, Ausems, paras. 77 and 78) have been complied with. For this purpose, taking into account the circumstances specific to each situation and the discretion allowed the competent authorities, the existence of a fair balance between the interests involved must be verified. This is the case in regard to the contributions and benefits resulting from a deduction from the minimum salaries which serve as the basis for calculating the salaries paid to staff.

46. The Board notes that in the present case the system for adjusting the salaries of B and C grade staff, a system common to the so-called Co-ordinated Organisations, is based on a method laid down by the CCG; the scales for these salaries are therefore calculated on the basis of the rules prescribed in the method so adopted.

Thus, in the context of the review of the salaries of B and C grade staff of the Council of Europe with effect from 1 July 1989, the Committee of Ministers, at its 432nd Meeting in January 1990, approved the CCG's 254th and 255th Reports and the scales of salaries and allowances.

47. By their first submission the appellants contested the lawfulness of the deduction of unemployment insurance contributions referred to in paragraph 31 of Annex IV to the CCG's 254th Report, which provides that minimum salaries by grade are reduced: "(i) by the amounts of the employee's contributions to compulsory national social security and pension schemes".

48. As a staff member's salary is part of the legal basis of his conditions of employment, it falls to the Board in the first instance to determine whether the appellants are entitled to the part of their salaries of which they claim to have been deprived.

49. There was much discussion before the Board concerning the interpretation which should be given of the concept of "compulsory national social security scheme", with the appellants contending that the deduction in respect of the unemployment scheme cannot be embodied in such a concept and is therefore illegal.

50. The Board has examined the submissions of the parties concerning this matter, especially as regards the "autonomous meaning" to be ascribed to the aforementioned concept. It considers it highly likely that the experts on the CCG intended to maintain the disputed deduction, as is indicated by the fact that the Report refers specifically to "unemployment" (Annex IV to the 254th Report, Appendix II, part B).

51. Nevertheless, the Board is of the opinion that, when all the facts are weighed up, and especially in view of the somewhat ambiguous wording, it does not need to rule on the question as to whether the aforementioned deduction is or is not prescribed as such by the relevant texts since the disputed decision is unlawful in a different respect.

52. Indeed, the appellants also contended, in the first part of their second submission, that the deduction in respect of unemployment insurance contributions failed to comply with the principle of striking a fair balance between contributions and benefits and also violates the principle of good faith.

53. In the present case, the Board finds it necessary to adopt a global appraisal method for assessing the relevant facts. Such a method in fact appears best suited to the nature of the problem raised and to the difficulties inherent in any comparison of the situation of international civil servants with that of private-sector workers and national civil servants.

54. The Board found one fact to be decisive in this case, viz the absence of any element of comparison between the situation in respect of unemployment insurance of B and C grade staff at the Council of Europe and that of employees in the reference sector.

55. In fact, as the Inter-Organisations Section itself stated in its comments of 18 March 1992, the co-ordinated system as also applied to the Council of Europe "offers no protection against the risk of unemployment".

56. Even if due account is taken of the competent authorities' discretionary powers as regards the fixing of salaries, including the salary adjustment procedure, the Board believes that the deduction in respect of unemployment insurance from the minimum salaries of B and C grade staff at the Council of Europe confirms a differing form of treatment that cannot be justified on the basis of the elements in the file.

57. This being so, such a deduction violates the principle of striking a fair balance between contributions and benefits since Council of Europe staff are in no way covered against a risk in respect of which they have to pay contributions without receiving any benefit in return. The compensation for loss of employment cannot be deemed to constitute such benefit since it pursues different objectives and is based on premises not related to the present case.

In addition, the Board noted with interest that the Secretaries General themselves had called, albeit unsuccessfully, for the ending of the aforementioned deduction.

58. The Board also wishes to point out that the submission that there is virtually no risk of unemployment for Council of Europe staff is not relevant in the present case. It need only be recalled that even the highly improbable is nevertheless always possible and that, in law, decisions cannot be founded on considerations which are based more on conjecture than on facts.

59. The deduction in respect of unemployment insurance is accordingly unlawful.

60. As regards the alleged unlawfulness of the deduction in respect of the supplementary pension scheme (second part of the second submission), the Board notes that the information

and figures submitted by the parties concern situations that are difficult to compare or, at the very least, require refinement to allow them to be considered representative. Here too, it is necessary to examine the problem in the light of a global method of appraisal.

61. As regards the "pension" scheme, the situation of Council of Europe staff differs considerably from that of other categories of employees at national level. As stated by the Secretary General, the Organisation has a "single pension scheme where one contribution is deducted from the salaries of serving officials and one benefit is paid to retired officials". Moreover, special provisions have also been made, such as the tax adjustment paid to retired staff members in addition to pensions.

62. In the light of these various factors and the specific nature of the Council of Europe staff pension scheme, the Board is of the opinion that the facts of the case do not indicate that the deduction in respect of the supplementary pension schemes imposes an excessive and disproportionate burden on the appellants.

63. In this same connection, and for the same reasons as have just been mentioned, it also does not seem that the principle of good faith has been violated. Nothing can be found in the commitments made by the Organisation to suggest that the persons concerned had been given grounds for legitimate expectations in this respect.

For these reasons,

the Appeals Board:

Declares that it is not necessary to take a decision on the first submission of the appellants;

Declares the appeals founded in respect of the deduction, from the salaries of B and C grade staff, of the amount of contributions paid by employees of the best local employers to cover the risk of unemployment;

Sets aside the individual decisions in which the Secretary General applied to B and C grade staff the Committee of Ministers' decision concerning the procedure for adjustment of the salaries of staff in these grades subject to this deduction;

Orders reimbursement of the sums thus wrongfully deducted;

Declares the appeals ill-founded in respect of other matters;

Decides that the Council of Europe shall refund the costs incurred by the appellants, up to the sum of 13.000 FF.

Done and decided in Strasbourg on 26 June 1992, the French text of the decision being authentic.

The Secretary of the Appeals Board	The Chairman of the Appeals Board
M. de SALVIA	C. RUSSO