

CONSEIL DE L'EUROPE—— ——COUNCIL OF EUROPE

COMMISSION DE RECOURS APPEALS BOARD

Appeal No. 8/1972 (Geneviève ARTZET (I) v. Secretary General)

The Appeals Board, sitting in private in Strasbourg, on 10 April 1973, under the Chairmanship of Mr E. HAMBRO, Chairman, and in the presence of:

MM. G.H. van HERWAARDEN, Deputy Chairman, and
H. DELVAUX, Member

assisted by:

MM. K. ROGGE, Secretary, and
T. GRUBER, Substitute Secretary;

Having deliberated.

PROCEDURE

1. The appellant, represented by Maître Gérard VIVIER, barrister at the Court of Appeal at Nancy, submitted her appeal on 28 September 1972, on which date it was registered as Appeal No. 8/1972.

The Secretary General, represented by Mr H. GOLSONG, Director of Legal Affairs, submitted his comments on 20 November 1972.

The appellant presented a memorandum in reply on 15 February 1973.

2. By letter of 9 March 1973, the Secretary of the Board duly informed the parties that the Chairman had decided to invite them to appear before the Board at 9.30 a.m. on 10 April 1973.

The public hearing took place as arranged at the Council of Europe in Strasbourg, in the presence of the appellant, assisted by Maitre VIVIER, and of Mrs M.-O. WIEDERKEHR, replacing Mr GOLSONG as the Secretary General's agent.

Having deliberated in private, the Board rendered the present decision.

THE FACTS

The facts not in dispute between the parties may be summarised as follows:

3. Madame Geneviève Artzet, born on 4 May 1939 in Strasbourg, of French nationality, took up employment with the Secretariat General of the Council of Europe in 1963. Her grade at present is 8/3 in the Directorate of Education and of Cultural and Scientific Affairs. The appellant is married and the mother of a child aged two years.

4. On 24 May 1972, the appellant requested the Secretary General that she be paid “(a) the two family allowances provided for in pursuance of Article 13 of the Staff Regulations, namely the allowance for heads of families and the allowance in respect of dependent children and (b) the rent allowance provided for in Article 9 of Resolution (69) 38”.

5. On 7 July 1972, Mr G. VAINEAU, Head of Establishment Division, sent the appellant the following memorandum:

“In a memorandum dated 24 May 1972, you applied to be treated as a head of family.

I regret to have to inform you that it is impossible, under the relevant provisions of the Staff Regulations at present in force, to grant your application.

The fact that your earnings are greater than your husband’s does not constitute a sufficient ground for you to be entitled to family allowances.

Only in cases where a husband’s earnings are manifestly insufficient to enable him to contribute normally to the support of the family can we accede, under present regulations, to a request such as yours. Cases in point include a husband doing his military service, or as a student unable to engage in reasonably remunerative employment, or one who is receiving a salary less than staff members employed in the lowest grade at the Council of Europe.”

6. On 5 August 1972, the appellant requested the Secretary General, “by virtue of Article 25, paragraph 1, of the Staff Regulations, kindly to amend the decision of 7 July 1972 refusing her request of 24 May to be granted the family allowances prescribed, in pursuance of Article 13 of the Staff Regulations, by Articles 2 and 3 of the Regulations of 28 November 1969 concerning salaries and allowances”.

7. On 1 September 1972, Mr A. DAUSSIN, Director General of Administration and Finance, replied in the following terms:

“In a memorandum dated 5 August you requested the Secretary General, by virtue of Article 25 of the Staff Regulations, to amend the decision of which you were informed on 7 July giving a negative reply to your request of 24 May that you be paid the head of family allowance and dependent child allowance provided for in Article 2 and 3 of the Regulation of 28 November 1969 concerning the salaries and allowances of permanent staff.

After having carefully examined this case, the Secretary General has decided that he cannot grant your application of 5 August.

He has instructed me to transmit this decision to you and to inform you of his regret at not being able to accede to your request.”

8. The present appeal is directed against the denial of head of family allowance, dependent child allowance and rent allowance.

SUBMISSIONS OF THE PARTIES

I. The **appellant's submissions** may be summarised as follows:

9. The appellant argues that Article 13 of the Staff Regulations has been misinterpreted. This provision is clear, general and contains no distinction or discrimination. In order to be entitled to the allowances it is enough to have a family actually dependent on one.

This article makes no distinction between different categories of staff. It does not say that the allowances are payable only to officials who are heads of families. It is a general principle of legal interpretation that, where the law makes no distinction, no distinction can be made. Furthermore, receipt of the allowances is a right. A particular staff member cannot therefore be refused a right which the Regulations provide for all.

The appellant is a head of family. Her earnings are higher than her husband's and so she bears the larger part of the family expenses. She also has a dependent child. The fact that her husband is earning a salary is irrelevant, since both spouses must contribute to the expenses in proportion to their respective means and are under an obligation to maintain their children.

In her reply, the appellant admits that Article 13 merely poses a principle, which can only be given effect by means of regulation. But such a regulation must not restrict that principle, and still less conflict with it. Now, restrictive provisions are precisely what Resolution (69) 38 does contain.

10. The Secretary General is wrong to maintain that Articles 2 (head of family allowance), 3 (dependent children allowance) and 9 (rent allowance) of Resolution (69) 38 derogate from Article 13 of the Staff Regulations, and that it is by applying the provisions of this resolution that the appellant is denied the right to the said allowances. These restrictive provisions are contrary both to Article 13 of the Staff Regulations and to the fundamental principles of law.

Article 13 of the Regulations says nothing of the concept of head of family. The aforementioned provisions of the resolution institute a discrimination, since male officials, who are married with at least one dependent child are, automatically, recognized as head of family, which is the criterion for entitlement to the allowances in question.

In her reply of 15 February 1973, the appellant considers that there is a hierarchy in the relationship between the rule establishing the principle (Article 13 of the Staff Regulations) and that fixing the application procedure (Resolution (69) 38). An administrative regulation issued in application of the Staff Regulations is subordinate to them. It is of little consequence whether the two rules are in the same form. It is the intrinsic nature of the rule which is important. It is incorrect to say that the Staff Regulations have been "supplemented" by the resolution. If Article 13 of the Staff Regulations had been supplemented or amended, mention of it would have been made in the text itself of the Staff Regulations (see for example Article 16 concerning leave). Furthermore, the restrictive concept of head of family was introduced by Resolution (62) 37 of 6 December 1962; it was not embodied in any previous regulation (cf. Staff Handbook of 31 March 1951, page 30). Finally, the preamble to the resolution refers not to Article 13 but to Article 11 of the Regulations, which concerns salary scales.

11. The afore-mentioned provisions of Resolution (69) 38 are likewise contrary to fundamental principles of law as observed in the legal system of international organisations. The principle of nondiscrimination based on sex and that of equal pay for men and women, are such fundamental principles.

Those principles are affirmed in the European Social Charter (Article 4, paragraph 3), the European Convention on Human Rights (Article 14) and the Treaty setting up the European Economic Community (Article 119). Now, allowances, for family expenses are a component of remuneration.

Furthermore, in its Resolution 2263 (XXII) on the elimination of discrimination against women, the General Assembly of the United Nations has proclaimed the right of women not only to equal pay with men (Article 10, 1.b), but also their right to receive family allowances on equal terms with men (Article 10, 1.d.).

The appellant then referred to the case of Mrs Bertoni (decision 20/71) before the Court of Justice of the European Communities, which raised a problem identical with the present one.

Article 4, paragraph 3 of Annex VII to the Staff Regulations of Officials of the European Communities provides that an official loses the right to expatriation allowance “who marries a person who at the date of marriage does not qualify for the allowance, unless that official thereby becomes a head of household”. According to Article 1, that status is granted to every married male official but only to certain categories of female officials.

Hearing an appeal by a female official who, having married a Luxembourg subject, lost her expatriation allowance, the Court of Justice replied that by subordinating the maintenance of the allowance to the acquisition of the status of “head of household”... the regulations established an arbitrary difference of treatment between officials and consequently, the administrative decisions taken in the case of appellant were not founded on law and must be annulled.

12. Finally, the appellant points out that the concept of head of family is nowadays completely obsolete. The appellant refers to the new Article 213 of the French Civil Code which lays down that spouses shall jointly assume responsibility for the moral and material welfare of the family. The previous Article 213, stipulating that the husband was the head of the family was repealed in 1970 and the French Social Security Code make no reference to that concept.

Now, following the recommendations of the Committee of Experts on Privileges and Immunities of International Organisations, it is desirable that, in matters of social welfare, the system adopted by the Organisation should take due account of the rules laid down by the system of the State in whose territory the headquarters is situated (CCJ (68) 18).

In the Staff Regulations of Officials of the Communities, the head of family allowance has recently been replaced by a head of household allowance. This allowance is paid to any married official, except where the earnings of the spouse exceed a specific ceiling (Article 1 of Appendix VII); furthermore, “a ‘dependent child’ means a child who is

actually being maintained by the official” (Article 2, 2). A female official in the Communities receives the dependent child allowance even if her husband contributes equally to the household expenses. According to the Interim Report on the European Civil Service presented to the Consultative Assembly (Doc. 2835), the regulations in force in the Communities are of primary importance for the future harmonisation of the staff regulations of European organisations.

13. Finally, the appellant develops a subsidiary argument drawn from the non-application of Article 2 (iv) of Resolution (69) 38.

The appellant requested the Secretary General to take a decision in her favour by applying the above-mentioned article. She made the claim that she does in fact bear the responsibilities of a head of family. Though that point of fact was not disputed, she was told that it is required that the spouse engage in no reasonably remunerative occupation or, at least, that he receive a salary lower than that of officials in the lowest grades of the Organisation.

To demand that these conditions be fulfilled is to add to the regulations. The Secretary General’s refusal to accede to her request made under Article 2, paragraph iv, was therefore unlawful and erroneous.

In her reply of 15 February 1973, the appellant admits that the Secretary General has discretion in applying Article 2 (iv). But it was not a question of exercising discretion. It is arbitrary, therefore, in the absence of any pertinent text, to demand that for a female official to be recognised as having the status of head of family, her husband’s earnings must not exceed a specified ceiling.

II. The **submissions of the Secretary General** may be summarised as follows:

14. In reply to the appellant’s arguments concerning Article 13 of the Staff Regulations, the Secretary General points out that in the absence of any additional regulations this provision cannot be applied. It is hardly possible to claim that the provisions of Articles 2, 3 and 9 of Resolution 1691 38 are “quite superfluous”, and to ask, at the same time, for allowances which are not expressly provided for in Article 13 of the Staff Regulations.

Given such a general text, it was essential to specify which officials were to be considered as having family responsibilities. These were duly specified by Articles 2, 3 and 9 of Resolution (69) 38. The appellant cannot maintain that she is entitled, by virtue of Article 13 alone, to receive the head of family allowance, dependent children’s allowance and rent allowance.

15. As regards the appellant’s submissions on the relative ranking of the Staff Regulations and Resolution (69) 38, the Secretary General considers that the appellant’s interpretation is erroneous.

If, as the appellant observes, the Staff Regulations were adopted in the form of a resolution of the Committee of Ministers, the position is exactly the same in respect of Resolution (69) 38. It is clear from the preamble that this was a resolution adopted by the Committee of Ministers on the advice of the Secretary General. The Committee of Ministers was perfectly well entitled to supplement a provision of the Staff Regulations by a subsequent

decision taken in the same form (resolution). That possibility is moreover expressly provided for in Article 27 of the said Regulations.

16. In reply to the appellant's submission based on the non-application of Article 2 (iv) of Resolution (69) 38, the Secretary General points out that, in adopting this provision, the Committee of Ministers conferred upon him the power of deciding which officials actually carry the responsibilities of head of family. In the exercise of that discretionary power, the Secretary General established criteria for granting the head of family allowance, and those criteria were set out in the decision of 7 July 1972, particularly in the last paragraph.

Those criteria take into account the situation of officials who in fact assume family responsibilities, but do not call into question the distinction made between the various categories defined under points (i), (ii) and (iii) on the one hand, and (iv) on the other, since this was obviously not the intention of the Committee of Ministers.

17. The Secretary General does not express an opinion on the question of whether the disputed provisions of Resolution (69) 38 are or are not compatible with the fundamental principles of law. He merely observes that it is doubtful whether the Board is competent to settle this question.

18. The appeal is without foundation since the Secretary General has, by his decision of 7 July 1972, observed the provisions of the Staff Regulations, the administrative rules and the conditions of employment.

CONCLUSIONS OF THE PARTIES

19. The **appellant** asks the Appeals Board:

- to annul the decisions of 7 July and 1 September 1972;
- to rule that she is entitled to head of family allowance, dependent children's allowance and rent allowance;
- to decide as to costs.

20. The **Secretary General** asks the Appeals Board:

- to declare that the appeal is without foundation.

THE LAW

21. The appellant maintains that by denying her the three allowances in question the Secretary General has failed to take into account the provisions of Article 13 of the Staff Regulations which provides that: "the staff of the Council of Europe shall receive family allowances as part of their remuneration".

The Board notes that this is a general rule. It applies to all officials without exception and, in particular, makes no distinction between male and female officials.

22. The Secretary General considers that, in view of the general nature of this provision, it was essential to specify those officials who should be considered as having family expenses.

This was done by Article 2 of Resolution (69) 38, in the version of Resolution (71) 11, which provides as follows:

“Article 2 - Allowance for heads of families

1. An allowance for family expenses shall be payable to staff who are heads of families. It shall be ‘equal to 6 % of their basic salaries but in no case be less than 6 % of the basic salary for grade B3, Step 1.

2. The following shall be regarded as heads of families:

“(i) male married staff;

(ii) female married staff

a. who are separated de jure or de facto from their husbands and have one or more dependent children as defined in Article 3 (1) below; or

b. whose husbands cannot carry on a remunerative activity permitting them to support their families because of permanent disablement certified by a doctor approved by the Council of Europe; or

c. who have head of family status by virtue of a judicial decision;

(iii) widowed, divorced or unmarried staff of either sex who have one more dependent children as defined in Article 3 (1) below;

(iv) by a special decision taken by the Secretary General, on the basis of documentary proof, staff members who, although they do not satisfy the conditions laid down in sub-paragraphs (i), (ii) and (iii), above, in fact assume the responsibilities of heads of families.”

That provision establishes a distinction between male and female staff. In the first paragraph, in place of the concept of family allowances expressed in Article 13, it introduces the concept of an allowance for heads of families. In the second paragraph, it stipulates that male married staff are always regarded as heads of families whereas that status is recognised for female married staff only in specifically mentioned cases, i.e. in exceptional cases.

23. The appellant considers that those provisions of Resolution (69) 3 8, insofar as they are restrictive, in regard to women, of the principle in Article 13 of the Staff Regulations, should be set aside. The Secretary General, on the other hand, maintains that the two instruments-both the Regulations and the resolution-carry equal legal weight, because both emanate from the Committee of Ministers of the Council of Europe and, as such, should both be applied.

The Board considers that, in the case in point, it is not necessary to settle that question. In performing its function as a judicial body, the Board is obliged also to take into account the general principles of law which must prevail in the legal system of international organisations. Furthermore, as an institution of the Council of Europe, the Appeals Board is also bound by the Statute of that Organisation.

24. The absence of discrimination based on sex, and equal pay for workers of either sex constitute, at the present time, one of the general principles of law. Without wishing to go into the question of the national laws of member States of the Council of Europe, in particular that of the State in which the Council’s headquarters are situate, the Board notes that Article 14 of the European Convention on Human Rights prohibits, in regard to the rights guaranteed by that Convention, any discrimination based on sex. Moreover, under Article 4, paragraph 3, of

the European Social Charter, the Contracting Parties undertake “to recognise the right of men and women workers to equal pay for work of equal value”.

Now both those texts were drawn up with a view to achieving the aim set forth in Article 1 (b) of the Statute of the Council of Europe, one of the means of so doing being precisely the protection and development of human rights and fundamental freedoms. Again, under Article 3 of the Statute, every Member of the Council of Europe “accepts the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”.

The Board adds that the principle of the absence of discrimination based on sex is proclaimed both in Article 26 of the Universal Declaration of Human Rights and in Resolution 2263 (XXII) of the United Nations’ General Assembly on the “Elimination of Discrimination with regard to Women”.

25. The Board finds that the distinction of which the appellant complains constitutes discrimination contrary to the principles set forth above. It follows that the Board cannot approve the disputed decision based on Resolution (69) 38, since that decision is compatible neither with the Statute of the Council of Europe nor with the general principles of law, whose legal weight is greater than that of the resolution in question.

Finally, the Board cannot agree that an intergovernmental organisation should ignore in its internal administration the principles which are proclaimed in its own Statute as being the aims of the Organisation, and confirmed in other Conventions adopted within the Organisation for application, by its Members. This last principle has been moreover been adopted by the Administrative Tribunal of the United Nations in its Judgment No. 15 of 11 August 1952 (Robinson Case) and by the Court of Justice of the European Communities in its Judgment of 7 June 1972 (Case 20/71-Mrs Bertoni).

26. The Board therefore allows the present appeal.

27. The Board considers that, in accordance with Article 6, para. 4, of its Statute the expenses incurred by the appellant should be refunded to her.

Now therefore,

the Appeals Board decides:

1. that the disputed decision of 7 July 1972, confirmed by the decision of 1 September 1972, confirmed by the decision of 1 September 1972 is hereby declared null and void;
2. that the expenses incurred by the appellant shall be reimbursed to her by the Council of Europe up to a maximum of one thousand five hundred French francs.

Chairman

E. HAMBRO

Secretary

K. ROGGE