



Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

SHAIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Miles Hastie, Office of Staff Legal Assistance

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a National Officer at the United Nations Assistance Mission in Iraq (UNAMI), contests the amount of the salary increases awarded to staff members of the United Nations common system serving in Iraq, including UNAMI. The new salary scales were decided by the Office of Human Resources Management (OHRM) in December 2010.

2. This increase followed an interim salary survey conducted by the Local Salary Survey Committee (LSSC).

The Issue

3. Most of the grounds for contesting the administrative decision in the Application relate to the use of the data collected by the LSSC in the 2010 survey. However, the Applicant also refers to “[t]he flawed methodology of the 2008 comprehensive survey” and “[t]he failure of the 2008 survey, compounded by the 2010 survey to adhere to the Flemming Principles.”

4. Article 8.1 of the Statute of the United Nations Dispute Tribunal (“the Tribunal”) states in part that “[a]n application shall be receivable if...an applicant has previously submitted the contested administrative decision for management evaluation, where required.” The Tribunal notes that the Applicant’s request for management evaluation made on 18 February 2011 related to the results of the interim salary survey of 2010 and that there was no timely request for administrative review of the 2008 survey. In the absence of a request for management evaluation, any substantive contest to the conduct and results of the 2008 survey is not receivable by the Tribunal.

5. Thus the principle issue for determination is whether OHRM lawfully determined the adjustments to the salary scale of the national officers at UNAMI following the 2010 interim survey commissioned on 21 April 2010. In particular, the Applicant alleges that the Administration breached its lawful obligations to properly consider the United States Embassy (US Embassy) salary data used in the survey; the entitlement to a spousal allowance; and whether the survey should have been based on a family expenditure survey. Each of these issues will be considered in turn.

Procedural History

6. In Case Management Order No. 054 (NBI/2012) the Judge to whom this case was initially assigned decided that the Tribunal would determine the matter on the pleadings filed by the parties. Both parties filed sworn witness statements and closing submissions. The case was then assigned to the undersigned Judge for determination on the papers.

Facts

7. The following facts are taken from the pleadings, including annexes, and the sworn witness statements filed by both parties.

8. The Applicant is a legal officer at UNAMI. In 2010, she was elected one of three members of the National Staff Union (NSU) in Baghdad and was appointed chair.

9. As a National Officer, her salary is determined by OHRM, which is assisted in determining the appropriate pay scale for National Officers by the LSSC. In contrast to international staff whose pay scale is determined directly by the International Civil Service Commission (ICSC) based on the prevailing conditions in the international labour market, the LSSC follows guidelines issued by the ICSC using local market conditions as their benchmark.

10. Salary rates for National Officers are determined by Comprehensive Salary Surveys held every three to five years. Between the comprehensive surveys the LSSC is required to monitor and update salary and benefit information by conducting interim or mini salary surveys. Interim adjustments are made on the basis of these surveys.

11. On 21 April 2010, the Compensation and Classification Section, OHRM, authorized the LSSC to conduct an interim salary survey in June 2010.

12. On 28 June 2010, an LSSC was established with 10 members, 6 of whom were in Baghdad and 4 in Erbil. All the Baghdad members of the NSU, including the Applicant, were on the Baghdad committee, which worked with the LSSC members in Erbil to submit one report reflecting the prevailing local market conditions in both locations.

13. The LSSC was responsible for the collection of facts and data to update the data used for the previous comprehensive salary survey conducted in 2008. The same “comparator”

employers at the date of the 2008 survey were used: the US Embassy and the International Committee of the Red Cross (ICRC).

14. On 8 September 2010, the LSSC presented its report, "Submission of Data Collected from Comparators" to the Chief of Mission Support, UNAMI. The report said that since the 2008 comprehensive salary survey, ICRC data showed an 8% increase and US Embassy data showed a cumulative increase of 23%. In relation to the US Embassy data the report explained that although the cover note from the Embassy referred to an increase of 11% since July 2008 the data attached to the cover note showed a 23.21% increase in the US Embassy scale since June 2008. The US data was in the form of a salary table dated 23 June 2010 stamped and sealed by the US Embassy and signed by a representative of the embassy. The LSSC certified that the higher figure was correct.

15. The LSSC report also included recommendations that a family expenditure survey should be conducted to determine local conditions and that consideration be given to the payment of a spousal allowance to the UNAMI National staff. It said that spousal allowance in Iraq was a common practice in Iraq based on local laws. It referred to the 2008 law of "Salaries of the state and Public Sector Employees" which provided for a sustenance allowance of an employee or spouse if one receives a pension or a functional salary.

16. On 7 November 2010, in response to a request from OHRM, the LSSC presented a memorandum detailing the effects of amendments to Iraqi tax law and staff members' purchasing power. In that memorandum it replied to questions from OHRM about the US Embassy data. It said there was a misunderstanding of the data from the US Embassy. It said that "at some point between 6 July 2008 and 23 June 2010 the US Embassy salary scale was increased by 11%. The exact date of such increase wasn't provided by the US Embassy as the data collection form requires the current salary scale only."

17. On 20 December 2010, the revised net salaries were announced. These reflected across the board increases of 8.2 percent for General Services and 9.9 percent for National Officer Categories. The effective date of these increases, or the day from which the new salaries scale was to be paid was 1 July 2010.

18. The LSSC and the National Staff Representatives (NSR)¹ in Iraq sent a memorandum dated 26 January 2011 addressed to the Chief of Compensation and Classification Section of OHRM in which they recorded their objections to these results, sought answers on particular queries and raised additional concerns. It stated: “adopting the final results of the Interim Salary Survey in the above mentioned form is unfair and need additional review for all the above related facts.”

19. By memorandum dated 9 February 2011, the Chief of Compensation and Classification Section of OHRM responded to the concerns raised by the LSSC and the NSR:

We have re-checked the processing of the data for the 2010 Interim Survey, particularly with regard to the data collected from the US Embassy. In processing the data we have compared the actual salary data effective 23 June 2010, job by job, against the salary data that was used in the establishing the June 2008 salary scale. In doing so, we noted a movement of 11% for US Embassy grade levels 3 to 9...

I would like to confirm to you that the salary scale is based upon the data that has been collected by the Local Salary Survey Committee (LSSC) from employers that have been nominated by the LSSC as representing some of the most attractive conditions of employment within the local labour market. Normally, we would retain 5 comparator employers in Iraq, however, in view of the economic and social conditions; a special measure was adopted whereby the survey is based upon the data of just two comparator employers, namely the Embassy of the United States of America and the Red Cross.

It is felt that conducting a family expenditure survey is not the appropriate measure to review the salary scale in Iraq because the fundamental principle of compensation for United Nations staff is embodied within the Flemming Principle which makes reference to best prevailing local as represented by other employers within the local labour market.

20. By memorandum dated 16 February 2011, the LSSC and the NSR responded to OHRM stating their disagreement regarding the salary data used from the US Embassy in Baghdad. They argued that the correct comparison of the US Embassy salary data should compare the 2008 data with the post 23 June 2010 data and not the pre-23 June 2010 data. They further stated that the methodology used for the interim survey should match that which should have been employed in 2008 and that the family expenditure survey was the most suitable methodology in Iraq as it would identify the most prevailing conditions.

¹ A National Staff Representative (NSR) is a member of the National Staff Union (NSU).

21. On 17 February 2011, OHRM advised the LSSC that it had requested clarification from the US State Department on the concerns raised about its salary data.

22. On 18 February 2011, the Compensation Officer in OHRM replied to NSU and the LSSC setting out the reasons for its decision. In that email, she disputed the certified information supplied by LSSC and referred to enquiries she had made including a web search to confirm the correctness of the OHRM calculation. According to her information, the US Embassy's second salary increase of 11% did not take effect until October 2010. OHRM was not in a position to use the October 2010 US Embassy salary rates in the interim survey analysis, because those rates were set after the salary review period.

23. On 28 February 2011, OHRM responded to the LSSC by conveying the clarification received from the US State Department. This comprised the Local Compensation Plan Salary schedule effective 6 July 2008 and the maximum authorised pay increase from Human Resource and United Nations Interim Salary Survey tabling the current salaries and benefits changes since June 2010.

24. The Applicant's witnesses gave some background to this dispute.

25. Mohammed Turkey was an LSSC member who participated in the salary survey in 2010. His sworn statement to the Tribunal was supported by a statement by another LSSC member, Hasam Akobi.

26. Mr. Turkey explained that most of the members of the LSSC had not received training due to a lack of budget and that the LSSC did not receive support from the salary specialist who could not come to the duty station to give training because of security issues. Instead Mr. Akobi went to Jordan for training. He said that although the LSSC wanted to consider other better comparator employers in the 2010 survey it was limited to updating the data from the two surveyed in 2008, the US Embassy and the ICRC. Thus the reference point for the 2010 survey was June 2008 survey. The LSSC was assembled in July 2010 and began its work then.

27. He believes that the OHRM response to the data and explanations supplied by the ISSC was based on a misunderstanding. This resulted in OHRM considering the wrong table in the calculation method. In his view, the OHRM response is non-compliant with the

methodology or the rules.

28. The Respondent submitted sworn statements from Cecelia Seaforth and Arnab Roy.

29. Ms Seaforth is a Human Resources Officer (HRO), Compensation and Classification Section in the Human Resources Policy Services (HRPS) in OHRM. She said that a family expenditure survey could not be undertaken or considered as a special measure as there were international and multinational companies in operation in the locality.

30. She also said that none of the criteria to establish a local practice of paying a spousal allowance was met.

31. Arnab Roy, the Chief Compensation and Classification Section in OHRM, stated in his witness statement that “ extreme conditions may develop where it is necessary to apply exceptional measures in the maintenance of local salaries...the application of special measures does not imply the suspension of the normal Methodology...they take place [as a] parallel and supplemental process.” He further stated that conditions that necessitate special measures are two-fold: acute economic distress and/or long-term economic/social instability.

Submissions

32. Given their technical nature, the specific submissions of the Applicant and Respondent in relation to each of the issues will be canvassed in the considerations. In summary the overall submissions of the parties are as follows.

Applicant’s submissions

33. An LSSC has sole responsibility for fact-finding and makes policy recommendations. The ISCS establishes criteria to determine whether survey data from local salary surveys is adequate and to establish what kind of benefits should be included in determining comparator’s salaries.

34. The 2008 comprehensive survey had a flawed methodology including, but not limited to, the lack of comparators in breach of paragraphs 1.5-1.9 of the Manual for Salary Survey for Non-Headquarters Duty Stations (the Manual) and the failure to adhere to the choice of comparator organisations. Having 2 instead of 5 comparators was exceptionally approved by the Administration despite the concerns raised by the LSSC and a request that it employ an

alternate method of determining salaries by using family expenditure surveys on the cost of living.

35. The 2010 survey updated the 2008 data and generated the same concerns by the LSSC plus a new one. The errors of methodology affected the salary of the Applicant and all other Iraqi General Service and National Officers. The decision to award her a salary increase of only 9.9% was flawed because:

- a. The administration erred in excluding a salary update from the US Embassy;
- b. A new Iraqi law relating to the payment of spousal allowances in keeping with local employment practice was excluded from consideration;
- c. The administration repeated its error in not commissioning a family expenditure survey in order to establish a base-line comparator as provided for in paragraph 8.23 *et seq* of the Manual.

36. The failure of the 2008 survey to adhere to the Flemming Principle was compounded by the 2010 survey and has left the Applicant at a significant disadvantage compared to others in the local job market. The continued disparity of salaries between staff recruited before 1997 and those employed thereafter was not addressed by the mini-survey in 2010, and offends against the principle of equal pay for equal work.

37. In light of the foregoing, the Applicant seeks a declaration that the impugned decision was arbitrary, based on flawed methodology and therefore unlawful. These errors warrant correction and compensation for any salary lost in the interim.

Respondent's submissions

38. The Applicant's contentions are not based on credible and reliable evidence. The statements from the two members of the LSSC are incorrect and should be given limited, if any, weight.

39. The Administration correctly fixed the salary scale for locally recruited staff members of UNAMI, effective 1 July 2010. The Administration correctly relied upon the data from comparator organisations in Iraq which was in effect within the survey review period. There is no basis for the Applicant's contention that the Administration relied upon out-dated data

from the US Embassy. The Administration's assessment was proper.

40. There was no reason for the Administration to conduct a family expenditure survey as a special measure in Iraq. A family expenditure survey is conducted in extremely rare circumstances, only after a complete collapse of the labour market, which did not occur in Iraq. Further, the Administration correctly determined that the criteria for the payment of spousal allowance to locally recruited staff were not met. Accordingly, the decision not to establish a spousal allowance for locally recruited staff of UNAMI was correct.

41. In view of the foregoing, the Application should be rejected.

Considerations

42. It is not for the Tribunal to substitute its decision for that of the Administration.² The role of the Tribunal is to review the administrative decision that has been challenged and to assess whether the applicable Rules and Regulations have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunal may review the exercise of any discretion. In *D'Hellencourt*³ it was held that

Admittedly no discretion can be absolute. The exercise of the discretion should not be exercised in an unfair manner. In the case of *Seaforth*, the UNAT recalled that, "only where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation.

43. To decide the main issue of whether OHRM lawfully determined the adjustments to the salary scale of the National Officers at UNAMI following the 2010 interim survey, it is necessary to establish the applicable legal framework and methodology to be followed by each of the entities engaged in the salary fixing process; and to evaluate the process followed by each of those entities in the light of the Applicant's allegations of breaches. The relevant entities in this case are the ICSC, OHRM and the LSSC.

Legal framework

44. The authority to fix the salaries of staff members lies with the Secretary-General.

² *Ljungdell* 2012-UNAT-265 at para 30. See also *Schook* 2012-UNAT-216, quoting *Sanwidi* 2010-UNAT-084 and *Abassi* 2011-UNAT-110.

³ *D'Hellencourt* UNDT/2010/018 at para 44-45. See also *Seaforth* former UN Administrative Tribunal Judgment No. 1163 (2003) para. X.

Staff regulation 3.1 states:

Salaries of staff members shall be fixed by the Secretary-General in accordance with the provisions of annex I to the present Regulations.

45. Paragraph 6 of Annex I of the Staff Regulations states:

The Secretary-General shall fix the salary scales for staff members in the General Service and related categories, normally on the basis of the best prevailing conditions of employment in the locality of the United Nations Officer concerned ...

46. The General Assembly established the ICSC in its resolution 3042 (XXVII) of 19 December 1972 and approved its Statute by its resolution of 18 December 1974.

47. Under art. 1 of its Statute and Rules of Procedure (ICSC/1Rev.1), the ICSC was established “for the regulation and coordination for the conditions of service of the United Nations common system” and “shall perform its functions in respect of the United Nations and of the specialised agencies and other international organisations which participate in the United Nations common system.”

48. The ICSC’s responsibilities with regard to the establishment of salaries for staff members in the General Service and related categories, including National Professional Officers are specified under articles 10,11 and 12 of its Statute:

d. Under art. 10(a) the ICSC shall make recommendations to the General Assembly on, *inter alia*, “the broad principles for the determination of the conditions of service of staff”;

e. Under art. 11(a), “[t]he Commission shall establish: the methods by which the principles for determining conditions of service should be applied”;

f. Under art. 12, at the “headquarters duty stations and such other duty stations as may from time to time be added at the request of the Administrative Committee on Coordination”, the ICSC is to establish “the relevant facts for and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories”.

49. The ICSC is responsible for the conduct of surveys of conditions of service at headquarters duty stations. At the majority of non-headquarters duty stations such surveys, and the establishment of salary scales, is carried out by the United Nations Secretariat on the

basis of the ICSC methodology (the methodology) supplemented by the Manual.

50. The Flemming Principle is the founding principle for setting compensation for locally recruited personnel. Conditions of service for locally recruited staff should reflect the best prevailing conditions found locally for similar work. The Principle was enunciated at the ICSC's fifteenth session as follows:

It is stated under Article 101 of the Charter of the United Nations that 'the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity'...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.

51. Section 7.4 of ST/SGB/2011/4 (Organization of the Office of Human Resources Management) provides that one of the core functions of the Compensation and Classification Section, HRPS, OHRM, is "to conduct comprehensive salary surveys at non-headquarters duty stations; and review, approve and promulgate salary scales and allowances for staff in the General Service and related categories."

52. Under the Manual, the Headquarters body (in this case OHRM), is responsible for convening the LSSC, selecting the comparator employers to be surveyed, and updating information on local taxation.

53. The LSSC is an ad hoc body convened to conduct salary surveys at the data collection phase of the process. The role of LSSC as defined in paragraph 15 of ICSC/57/R.15 (Review of the methodology for surveys for best prevailing conditions of employment at non-headquarters duty stations)⁴, is to "coordinate survey activities". It is a forum for "staff management and inter-agency consultations and is aimed at ensuring a broad participatory process for all the parties concerned."

54. Paragraph 0.11 of the Manual states that the LSSC "coordinates survey activities at the duty station under the guidance of the salary survey specialist from headquarters." Paragraphs 4.1 and 4.2 state that the LSSC strives to ensure that "their recommended scale reflects external labour market salary trends and that local remuneration for UN staff is fair, given the degree of complexity and skill required for their jobs". Chapter 6 of the Manual

⁴ Approved by the General Assembly in its resolution 58/251 of 23 December 2003.

states that LSSC “strives to recommend the optimal recommended salary scale.” In the end, the LSSC “reviews the survey findings and submits its conclusions and recommendations to Headquarters [of the designated agency] in a report.”

The Methodology

55. The guiding principles for the methodology to be used in salary surveys are contained in document ICSC/57/R.15. Paragraph 10 authorises the use of the Manual for guidance on the application of the methodology. It states:

The Methodology as adopted by the Commission and contained in the present document is authoritative and prevails in the event of any discrepancy between the operational manual and the methodology. It is however, intended that the operational manual reflect an authoritative representation of the Commissions’ methodology.

56. Paragraph 105 of the ICSC/57/R.15 explains that the methodology for non-headquarters duty stations was developed to be more flexible based on the considerable differences found among the duty stations and in light of administrative challenges and constraints. Furthermore;

It is emphasized that the methodology is not a rigid framework within which all situations can be resolved, but rather a central core around which local practice can be accommodated. Exceptions to and changes in the methodology will undoubtedly be required and have been anticipated, wherever possible. ... Where discriminatory practice is demonstrated to be prevalent in the determination of salaries, this should be investigated. Differentiation in remuneration due to such practices should generally not form part of the survey methodology, but could be dealt with exceptionally, should the conditions of the duty station so justify.

57. There are two types of surveys. Paragraph 21 of the methodology calls for a comprehensive salary survey to be conducted every three to five years. Section IX.C of the methodology envisages mini or interim surveys conducted to adjust salaries in the intervening period between comprehensive surveys. The United Nations Secretariat usually carries out such mini-surveys once a year.

58. The procedure for an interim survey follows the same four-step approach used in the comprehensive salary survey: preparation, data collection, data analysis and promulgation of a revised salary scale. The methodology for the conduct of surveys is set out in (paragraphs 1.5-1.9 of) the Manual as revised in July 2006.

The Issues

59. The Applicant alleged that OHRM made specific errors when determining the 2010 salary scales in three areas: The use of data from Comparator Employers; family expenditure survey; and spousal allowance.

Comparator employers

60. As defined by paragraph 0.14 of the Manual, these are local public and private sector employers representing a cross section of economic activity. Salaries for locally recruited staff are established through labour market surveys of the employers presumed to be the best in the locality. Over three to five years, comprehensive salary surveys are carried out to identify the employers who offer the best overall conditions against which to reference United Nations salaries. Interim surveys are conducted to update information on changes in salaries and benefits for the retained comparator employers since the last comprehensive survey.

61. In this case, although the NSU and the LSSC have continually expressed concern about the number of comparator employers used in the Iraq salary surveys, no express issue has been taken with the selection of the comparator employers but rather with the analysis and use of the data collected by the ISSC during the Interim survey from the ICRC and the US Embassy in Baghdad.

Submissions

62. The Respondent submitted that the LSSC relied on data from June 2008 to October 2010 but the correct survey period was June 2008 to June 2010 and the US data showed a salary increase of 11%.

63. The Applicant asserts that the salary review period for the interim survey ended on 1 July 2010. Data from the US Embassy applicable up to that date showed a “cumulated increase of about 23% since the comprehensive survey of 2008.”

64. The Applicant submitted: “Initially the Administration took the position that the salary scale data submitted by the Embassy of the United States was effective 23 June 2010.” She said that she “understood this to actually mean for survey purposes, 1 July 2010”. Later

the Administration said that the US second salary increase did not take effect until October 2010.

65. The failure to take such data into account is adverse and in breach of the methodology governed by the principles established in the ICSC, for example, ICSC/57/R.15, paragraph 68 and paragraph 6.14 of the Manual, which says that salary-survey data should be current.

66. It is the case for the Applicant that there was an 11% increase in the US Embassy on June 2008 and another in June 2010, which should have been included in the calculations making a total of 23%.

67. As a secondary point the Applicant also submitted that OHRM should have consulted with LSSC about the effective date of the salary change as per ICSC/57/R.15, paragraph 99.

68. The issues here are: what was the correct date range from which data could be collected and considered for the purpose of the interim survey and to what extent should OHRM take into account the results of the LSSC survey.

The Guidelines

69. ICSC/57/R.15, paragraph 60 states that “all salary data collected should relate to the totality of conditions in effect for a recent standard reference month.” Paragraph 68 states that “the use of a standard reference month that is both recent and convenient to the employers is the appropriate way to obtain the best prevailing rates at a specific time.” The reference month of the survey data collection, as per paragraph 104, is the “effective data of the salary scale following either an interim or comprehensive salary survey.”

70. Para. 6.14 of the Manual states that “retroactivity in the effective date of a scale prior to the reference month of the survey should not be considered.” As for the comprehensive salary survey, ICSC/57/R.15, paragraph 99 and paragraph 7.28 of the Manual base the effective date of salary adjustments following a mini survey upon the reference month of data collection for the mini survey. “Mini surveys should take place as close as possible to the date of revision of comparator salaries in order to ensure that UN salaries are adjusted [in] a timely manner.”

71. When LSSC has reviewed and finalised its report after the survey, it sends it to

Headquarters. Para 6.7 of the Manual states that at this point, the designated agency and responsible agency are involved in the review and approval of the salary survey results. The approval of the salary scale and other allowances marks the conclusion of the review. As per para 98 of the ICSC/57/R.15, the designated agency reviews the survey results and the appropriate decision on the levels of salaries and allowances to be established is made by the responsible agency.

72. During the review process, points where the designated agency disagrees with or modified the recommendations of the LSSC are looked into. At this point, the responsible agency may also request that additional data or explanations be provided (para 6.11 of the Manual). Para 6.12 states that

In completing its review, the responsible agency may introduce modifications to the survey results, which it considers justified, resulting in the approval of results different from those recommended by the LSSC. The responsible agency informs the LSSC of the reasons for the changes but is not expected to consult with the LSSC or request LSSC agreement.

73. The decision concerning the effective date of the scale rests with the responsible agency, in this case OHRM, following consultation with the LSSC.

Conclusion

74. The evidence presented to the Tribunal relating to the reference month for the data is that on 21 April 2010, the Compensation and Classification Section, OHRM, authorised an interim salary survey to be conducted by the LSSC in June 2010. The purpose of this survey was to update the survey carried out in June 2008. An LSSC was established on 28 June 2010. Data and information from June 2008 was collected from the comparator employers during July 2010.

75. The LSSC sent its report to OHRM in September 2010 and was required by OHRM to send more information about the taxation regime in Iraq and to justify its conclusion that there had been a 23% increase in the US Embassy salaries since 2008. The setting of the revised United Nations salary scales occurred in December with an effective date of 1 July 2010.

76. On the basis of this evidence the Tribunal finds that the reference month of data collection for the 2010 mini survey conducted by the LSSC in Iraq was the month of June

2010. This was the date given by OHRM in its referral letter of 21 April 2010 and is reflected in the data collected by the LSSC. In particular, the data from the US Embassy was dated 23 June 2010. At that stage the US Embassy salary increases proposed for 2010 were not effective.

77. The base line for the review was the data collected in June 2008. The Tribunal understands the position of the Applicant that the data collected in 2008 was flawed and unacceptable to her and the NSU but, as explained at the beginning of this judgment, it is not within the limited powers of this Tribunal to review that salary review at this late stage.

78. The Tribunal finds that the 11% increase in the US Embassy salaries from June 2008 were properly factored into the calculations, but the 2010 increase, whether it was effective 1 July 2010 (as alleged by the Applicant) or October 2010 (as alleged by the Respondent) falls outside the date range for the collection and consideration of data for the 2010 review. That date range ended on 30 June 2010. It is therefore outside the data in the reference month and cannot be taken into account. The LSSC recommendation was based in good faith on data from the US Embassy. Follow up investigations revealed this data to have been unclear and uncertain.

79. Although the LSSC expected to be consulted about the matters on which they disagreed with OHRM, the Manual makes it clear that where there are changes to the recommendations to the LSSC it will inform the LSSC of the reasons for the changes but is not expected to consult with the LSSC or request LSSC agreement.” In fact the correspondence shows that the OHRM did request explanations from the LSSC on this contentious point before reaching its decision.

80. The Applicant bears the onus of demonstrating that a decision is ill motivated and has not provided any evidence of such motivation. It is clear to the Tribunal that there was deep dissatisfaction by the Applicant, the NSU and the LSSC members about the results of the 2008 comprehensive survey which were compounded by the results of the 2010 update. However there is no evidence of ill motivation or breaches of the relevant rules and guidelines by the Administration in relation to the 2010 interim survey.

Family expenditure surveys

81. During the conduct of the 2010 interim survey, the LSSC requested that a family expenditure survey be undertaken as a special measure in lieu of a survey of comparator employers.

The Guidelines

82. Section 0.19 of the Manual notes that flexibility is built into the methodology to address the wide range of labour market conditions found around the world. In extreme circumstances it may be necessary to go beyond the approach found in the methodology and these are detailed in special measures. These apply in volatile economic and or social conditions.

83. In extreme conditions where comparator employers may have closed, one of the methods available to the LSSC to assess local market conditions is a family expenditure survey designed to construct a simple mechanism for measuring local cost of living.

84. In the Special Measure provisions in part III of the Manual, paragraphs 8.23 to 8.32 deals with the family expenditure survey in response to civil unrest and the breakdown of the labour market. This type of survey is envisioned to take place in circumstances of warfare where the labour market activity ceases and where staff is in difficult and hostile conditions. In these instances, as reflected in para 8.23 of the Manual, “special measures aim to provide relative stability in salaries through extremely volatile social and economic conditions.” In these cases, the first step of the LSSC is to report on the situation of comparator employees. Where comparator organizations have closed and therefore rendering the collection of accurate statistics difficult, the LSSC constructs a simple mechanism for measuring local cost of living: the local Family Expenditure Survey (FES).

85. Paragraph 8.30 of the Manual states that a special measure option is used “extremely rarely and only after the complete collapse of the labour market.” Para 8.32 further states that “conditions where special measures are warranted...the LSSC must contact the Headquarters of the designated agency for guidance concerning the approach to be taken in each specific situation that arises.”

86. The Applicant contends that a family expenditure should have been conducted in

order to establish “a base-line comparator” as an alternative approach to a salary survey. She refers to three indicia in the Manual that can be used to determine if there has been a sufficient collapse in the labour market to warrant a family expenditure survey.

87. First, the Manual contemplates a minimum of five comparator employers. However the Applicant pointed out that in the case of Iraq there were only two comparator employers who could be surveyed because of economic and social conditions. It is unlikely data obtained from just two employers can accurately be called a survey.

88. Second, the comparators who were surveyed did not meet particular characteristics such as representing a broad cross-section of competitive economic sectors, the two employers lacked continuity and all the employers should be located within commuting distance of the duty station. The Applicant pointed out that paragraph 27(b) of the Methodology states that no exception shall be made to this last requirement and the ICRC was 400 kilometres away from Baghdad.

89. Third, choosing only two comparators, the US Embassy and the ICRC, because no others could provide sufficient data, represents the fact that war had broken out and there were extremely volatile social and economic conditions.

90. In reply, the Respondent submitted that the Manual does not create an entitlement to adjust salary scales based on an FES, but rather creates an option for such a survey to be used at the discretion of the agency in extremely rare circumstances and “only after the complete collapse of the labour market.” As OHRM was able to survey the two employers, the ICRC and the US Embassy, which were used to establish the Iraqi salary scale in 2008 then the labour market was not considered to be a “complete collapse.” For this reason the FES was not justified in this case.

Conclusion

91. While it is undeniable that in 2010 Iraq was at the very least, suffering from challenging social and economic conditions, the Manual sets a very high threshold for the special measure of conducting a family expenditure survey. This is demonstrated in the use of words such as ‘extremely rare’ and “complete collapse of the labour market.

92. While it was for the LSSC to recommend an FES on the basis of the conditions it

observed and information it gathered on the ground, ultimately it was for OHRM to exercise its discretion to make the final decision. It cannot be said that the decision to exclude a family expenditure survey was unfair or was tainted by extraneous factors. Although, exceptionally, there were only two comparator employers these were stable organisations that continued to function in Iraq. The special measures section of the Manual contemplates a situation where the collection of accurate statistics is compromised because comparator organisations have closed.

93. In the present case the comparator employers remained operational and were able to provide detailed data sufficient to base a decision on. The methodology is expressly stated to be flexible to take account of different labour markets. In this case OHRM decided that the conditions were not extreme enough to warrant a family expenditure survey because data could otherwise be obtained.

94. The Tribunal concludes that the Administration did not breach any of the provisions of the Manual when it reached that decision.

Spousal allowance

95. These are provided for in Chapter 5 of the Manual as one of several allowances that may be established for General Service staff. It is created where supported by local practice. There is no guaranteed minimum or floor amount established by the United Nations for a dependent spouse allowance. The LSSC determines what amount, if any, is paid for a dependent under local legislation.

The Guidelines

96. In its Annual Report for 1982, ICSC determined that spousal allowance should be tied exclusively to local practice. To determine the allowance, the ICSC takes into account legal allowances, tax abatement rates and the practice of surveyed employers.

97. According to paragraphs 5.3 and 5.4 of the Manual, a spouse allowance is established in accordance with local practice in relation to national income tax abatement and/or the practice of comparator employers that are retained during the comprehensive study. Paragraph 5.4 states: “in considering these allowances the LSSC ascertains whether they are set by reference to local practice based on tax abatement, given as a “social benefit “ through

local legislation, and /or created by direct payment of comparator employers

98. The Applicant acknowledges that the spousal benefit was not made directly by the comparator employers but alleges that OHRM did not take into account local practice common to employees of the state and public sector on spousal allowances and misapprehended the issue. The failure of the 2010 survey to award a spousal allowance is therefore “not in keeping with common employment practice.”

99. The Respondent submits that the requirement of payment of a spousal allowance in Iraq is applicable to some, but not all employers. Furthermore, there is no tax abatement. Neither of the comparator employers surveyed had established a spouse allowance. As the requirements to establish a spouse allowance had not been met, OHRM determined that the payment of a spousal allowance was inappropriate within the context of Iraq.

Conclusion

100. Spousal allowance may be created where it is supported by local practice. Pursuant to paragraph 5.4 of the Manual, the LSSC gathers evidence about dependency allowances to ascertain if they are set by a reference to local practice. Local practice can be evidenced by tax abatement, if it is given as a special benefit, and/or created by the direct payment of comparator employers.

101. The evidence provided to OHRM by LSSC on this point was the 2008 Iraq statute, which entitled state employees to receive spousal allowances. There was no evidence of relevant tax abatements in Iraq or that the comparator employers paid spousal allowance.

102. On the basis of paragraph 5.4, OHRM was entitled to take any or all of these factors into account in the exercise of its discretion to create a spousal allowance. In this case it took a restrictive approach by discounting the Iraq statute on the basis that it did not apply to all Iraq employees. It focused mainly on the lack of spousal allowances for the comparator employees.

103. The Tribunal holds that the OHRM used the correct criteria for deciding if a spousal allowance should be created. Although these criteria were applied restrictively, OHRM did not stray outside the proper exercise of its discretion and accordingly there are no grounds to justify the interference of the Tribunal in the exercise of that discretion.

Findings

104. The Tribunal finds that the reference month of data collection for the 2010 mini survey conducted by the LSSC in Iraq was the month of June 2010. The base line for the review was the data collected in June 2008.

105. The Tribunal finds that the 11% increase in the US Embassy salaries from June 2008 were properly factored into the calculations, but the 2010 increase falls outside the date range for the collection and consideration of data for the 2010 review.

106. There is no evidence of ill motivation or breaches of the relevant rules and guidelines by the Administration.

107. The Administration did not breach any of the provisions of the Manual when it reached that decision concerning family expenditure surveys.

108. OHRM used the correct criteria for deciding if a spousal allowance should be created. There are no grounds to justify the interference of the Tribunal in the exercise of that discretion.

Conclusion

109. In view of the foregoing, the Application is dismissed in its entirety.

(Signed)

Judge Coral Shaw

Dated this 3rd day of July 2013

Entered in the Register on this 3rd day of July 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi