

## TIP OF THE MONTH

June 2007

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### Vienna: Long Live the Language Factor

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The language factor refers to a salary adjustment given to GS staff members in duty stations where the working language of the organization is not the local language, e.g., in Rome and Vienna, to compensate for the value of the language skills. It was originally granted in 1964 in the amount of 6% of net base salary and reduced to 4% in 1981. The IAEA (based in Vienna) reduced the language factor to 2% in 1990 although UNIDO, also based in Vienna, maintained it at 4%. Thereafter, in 1992 the ICSC decided it would phase out the language factor entirely based on the argument that the ability to recruit GS staff with sufficient language skills was no longer a problem for these organizations. In reality, it was a cost-savings measure. The ILOAT originally rejected that argument in setting aside the FAO's decision not to pay the language factor following the ICSC 1994 salary survey in Rome. In that appeal, the argument was raised that the phasing out of the language factor breached the Flemming principle, which requires that the pay offered to staff members be among the best offered by local employers. The ILOAT held that compliance with the Flemming principle did not turn on variables such as whether it was easy to recruit staff members.

Since that landmark decision, the ILOAT changed course in subsequent rulings demonstrating that the issue had increasingly become political: no doubt in part because of the significant financial (salary and administrative) costs taxed to the FAO following the ILOAT's ruling. For example, the 1996 salary survey in Vienna was contested, but the Tribunal rejected the arguments even though the evidence was overwhelming that the language factor should still be paid. The Tribunal then issued a second ruling involving the 2000 salary survey in Rome in which it adopted in part the original argument advanced by the ICSC for phasing out the language factor, i.e., that it was not difficult to recruit GS staff members with adequate language skills.

There was still hope and evidence that the ILOAT would nonetheless return to sound legal principles and give the language factor back to GS staff following a ruling by the UNAT involving the 2002 Vienna survey (contested by the UN Vienna). The dissenting opinion in that case set forth a detailed analysis of the survey evidence and cogent legal arguments why the language factor should continue to be paid in Vienna.

The IAEA staff members therefore decided to challenge the 2002 salary survey and the decision not to pay the language factor. The IAEA dragged out the internal appeal which lasted some two and a half years. In the submissions to the ILOAT, the staff members showed that the questionnaire and the methodology were flawed. The questionnaire, for example, did not in one part differentiate between P and GS staff, thus any answers were useless. The data from local employers that was collected did show that the number of incumbents required to perform the duties outlined in the job description continuously in a

foreign language without additional compensation was 363 out of 1,748, or approximately 20%. That was not significant since the data also showed that only 6 out of the 20 employers surveyed (or 30%) required their staff to work continuously in a language other than German, so the issue of paying a bonus was irrelevant to these employers. The flaw in the ICSC methodology was that it did not account for the fact that a vast majority of local employers do not require their employees to work continuously in a foreign language as the Vienna based organizations require. The staff members therefore argued that it would be appropriate to consult the collective bargaining agreements covering all industries in the survey. The agreements showed that employers were required by Austrian law to pay a higher salary for positions which required work in a foreign language. In this respect, the local labour market pays a bonus for working in a second language even if only 30% of the local employers require employers to work in a second language, which is the type of evidence supporting the language factor adjustment.

In upholding the ICSC decision not to recommend the payment of the language factor, the ILOAT put blinders on and did not undertake a review of the salary survey data itself (see no evil, hear no evil, do no evil), in contrast to the keen analysis provided by the dissenting Judge in the UNAT opinion. It merely rephrased the ICSC's statement that the survey showed that none of the employers surveyed paid additional compensation for the use of an additional language, a finding which was contrary to the survey data itself. The ILOAT was not troubled by the fact that "some replies were imprecise or incomplete and that others concerned employees whose jobs did not match those of the Agency's General Service staff".

The ILOAT has sent a clear signal to the staff of international organizations that the language factor became a political issue and hence for all intents and purposes was officially dead. The new ICSC methodology does not even mention the language factor. Long live the language factor – which survived some 30 years.

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