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HUMAN RIGHTS COMMITTEE
Fifty-seventh session
(8 - 26 July 1996)

DECISIONS

Communication No. 608/1995

Submitted by:	Franz Nahlik
Victim:	The author
State party:	Austria
Date of communication:	24 February 1994 (initial submission)
Documentation references:	Prior decisions - Committee's rule 91 decision, transmitted to the State party on 17 July 1995 (not issued in document form)
Date of present decision:	22 July 1996

[ANNEX]

*/ Made public by decision of the Human Rights Committee.

ANNEX */

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights
- Fifty-seventh session -

concerning

Communication No. 608/1995

Submitted by: Franz Nahlik

Victim: The author

State party: Austria

Date of communication: 24 February 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 1996,

Adopts the following:

Decision on admissibility

1. The author of the communication is Franz Nahlik, an Austrian citizen, residing in Elsbethen, Austria. He submits the communication on his own behalf and on behalf of 27 former colleagues. They claim to be victims of a violation by Austria of article 26 of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 The author worked at that Social Insurance Board in Salzburg (Salzburger Gebietskrankenkasse) and retired before 1 January 1992. He states that he and his 27 former colleagues receive retirement benefits under the relevant schemes of the Regulations of Service for Employees of the Social Insurance Board. As of 1 January a collective agreement between the Social Insurance Board in Salzburg (Salzburger Gebietskrankenkasse) and the employees modified the scheme; the agreement provided for a linear pay raise of four percent starting on 1 January 1992 and a permanent monthly entitlement of 200,- ATS, which is regarded as a regular payment to be included in the calculation of employees' retirement benefits. The Salzburg Regional Insurance Board took the position that only active employees, but not employees retired before 1 January 1992 should receive this entitlement.

*/ The text of an individual opinion, signed by five members of the Committee, is appended to the present document.

2.2 The authors, represented by counsel, filed a lawsuit against the Board with the Salzburg Federal District Court sitting in labour and social matters (Landesgericht Salzburg als Arbeits- und Sozialgericht), which was dismissed on 21 December 1992. In the opinion of the Court, the parties to a collective agreement are free under federal labour law to include provisions stipulating different pension computation treatment of active and retired employees or even norms creating conditions to the disadvantage of retirees. The authors then appealed to the Federal Court of Appeal in Linz (Oberlandesgericht in Linz), which confirmed the District Court's judgment on 11 May 1993. Subsequently, the Supreme Court (Oberster Gerichtshof) dismissed the authors' appeal on 22 September 1993. It considered that although the sum of 200,- ATS was part of the authors' permanent income (ständiger Bezug), only part of the income would be considered as monthly salary (Gehalt), which is the basis for determining the level of retirement benefits to be paid. Moreover, since this was stipulated in the collective agreement, a different pension treatment of the income of active and retired employees was permissible.

The complaint

3.1 The author claims that the Republic of Austria violated the retirees' rights to equality before the law and to equal protection of the law without any discrimination. In particular, he states that the different treatment between active and retired employees and between pre-January-1992-retirees and post-January-1992-retirees was not based on reasonable and objective criteria, as the groups of persons concerned find themselves in a comparable situation with regard to their income and they face the very same economic and social conditions. It is further argued that the different treatment was arbitrary in that it did not pursue any legitimate aim and that the discretionary power of the drafters of the collective agreement, approved by the Austrian courts, violates the general principle of equal treatment under labour law.

3.2 It is stated that the matter has not been submitted to another procedure of international investigation or settlement.

State party's observations and the author's comments thereon

4. By submission of 18 September 1995, the State party acknowledges that domestic remedies have been exhausted. It argues however that the communication is inadmissible because the author challenges a regulation in a collective agreement over which the State party has no influence. The State party explains that collective agreements are contracts based on private law and exclusively within the discretion of the contracting parties. The State party concludes that the communication is therefore inadmissible under article 1 of the Optional Protocol, since one cannot speak of a violation by a State party.

5.1 In his comments of 19 November 1995, the author explains that he does not request the Committee to review in abstracto a collective agreement, but rather to examine whether the State party, and in particular the courts, failed to give proper protection against discrimination and thereby violated article 26 of the Covenant. The author contends therefore that the violation of which he claims to be a victim is indeed attributable to the State party.

5.2 As regards the State party's claim that it did have no influence over the contents of the collective agreement, the author explains that the collective agreement in the present case is a special type of agreement and qualifies as a legislative decree under Austrian law. Negotiated and concluded by public professional organisations established by law, the procedures and contents of collective agreements are set forth in federal laws, which stipulate what a collective agreement may regulate. Further, federal courts are entrusted with a full judicial review of the agreements. In order to enter into force, the collective agreement (and its eventual amendments) have to be confirmed by the Federal Minister for Labour and Social Affairs. The agreement is then published in the same manner as legislative decrees of federal and local administrative authorities.

5.3 The author therefore contests the State party's assertion that it had no influence over the contents of the collective agreement, and claims instead that the State party controls the conclusion of collective agreements and their execution on the legislative, administrative and judicial levels. The author notes that the State party has enacted legislation and delegated certain powers to autonomous organs. He observes however that article 26 of the Covenant prohibits discrimination "in law or in practice in any field regulated and protected by public authorities" (Broeks v. The Netherlands, communication No. 172/1984). The author concludes that the State party was thus under obligation to comply with article 26 and failed to do so.

6.1 In a further submission, dated May 1996, the State party explains that the amended collective agreement provides for a monthly bonus of AS 200 to employees of Austrian Social Security Institutions. This bonus is not taken into account when assessing pensions to which the recipients became entitled before 1 January 1992. In legal terms, the question is whether or not this bonus is a so-called "permanent emolument" (ständiger Bezug) to which not only employees but also pensioners are entitled. The State party submits that this issue has been examined by the Courts which concluded that the payment is not such a permanent emolument and that therefore pensioners are not entitled to it.

6.2 The State party further submits that active employees and pensioners are two different classes of persons who may be treated differently with respect to the entitlement to the monthly bonus.

6.3 The State party reiterates that since a collective agreement is a contract under private law, which is concluded outside the sphere of influence of the State, article 26 is not applicable to the provisions of the collective agreement. As regards the Courts, the State party explains that they determine disputes on the basis of the collective agreement, interpreting the text as well as the intentions of the parties. In the instant case, the exclusion of pensioners from the monthly bonus was precisely the intention of the parties. Further, the State party explains that collective agreements are not legislative decrees and the courts had therefore no possibility to challenge the agreement before the Constitutional Court.

6.4 The State party maintains its position that the communication is inadmissible under article 1 of the Optional Protocol.

7.1 In his comments, the author notes that the State party's observations relate mainly to the merits of his complaint, and are irrelevant for admissibility.

7.2 As regards the State party's statement that the collective agreement is a contract under private law, the author refers to his previous submissions, which show the active involvement of the Government in the collective agreement covering the staff of the Austrian Social Security Institutions, which are institutions of public law.

7.3 As regards the State party's argument that active and retired employees are two different classes of persons, the author points out that his complaint relates to the difference in treatment between employees who retired before 1 January 1992, and those who retired after 1 January 1992. He emphasizes that the regular payment of 200 ATS is not taken into account when determining the pension of those who retired before 1 January 1992, whereas it is taken into account in the determination of the pensions of those who retired after 1 January 1992. He claims that this constitutes a discrimination based on age.

7.4 The author reiterates that, under the Covenant, the courts are obliged to provide effective protection against discrimination, and therefore should have overruled the provision in the collective agreement discriminating among pensioners on the ground of the date of their retirement.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has noted the State party's argument that the communication is inadmissible under article 1 of the Optional Protocol since it relates to alleged discrimination within a private agreement, over which the State party has no influence. The Committee observes that under articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment. The Committee further notes that the collective agreement at issue in the instant case, is regulated by law and does not enter into force except on confirmation by the Federal Minister for Labour and Social Affairs. Moreover, the Committee notes that this collective agreement concerns the staff of the Social Insurance Board, an institution of public law implementing public policy. For these reasons, the Committee cannot agree with the State party's argument that the communication should be declared inadmissible under article 1 of the Optional Protocol.

8.3 The Committee notes that the author claims that he is a victim of discrimination, because his pension is based on the salary before 1 January 1992, without the 200 ATS monthly entitlement which became effective for active employees on that date.

8.4 The Committee recalls that the right to equality before the law and to equal protection of the law without discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26. In the instant case, the contested differentiation is based only superficially on a distinction between employees who retired before 1 January 1992 and those who retired after that date. Actually, this distinction is based on a different treatment of active and retired employees at the time. With regard to this distinction, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the distinction was not objective or how it was arbitrary or unreasonable. Therefore, the Committee concludes that the communication is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion by Mrs. Elizabeth Evatt and Mrs. Cecilia Medina Quiroga and Messrs. Francisco José Aguilar Urbina, Prafullachandra Natwarlal Bhagwati and Andreas Mavrommatis

The author of this communication is challenging a distinction made between those employees of the Social Insurance Board who retired before January 1992 and those who retire after that date. The pension entitlements for each group are based on the current monthly salary of employees. Under a collective agreement between the Social Insurance Board in Salzburg and its employees, the salary of current employees can be supplemented by regular payments which do not form part of the monthly salary [para 2.2.]. By this means, it is possible to benefit current employees by payments which do not affect existing pensions in any way, but yet can be taken into account in calculating the pension for employees who retire on or after 1 January 1992.

The problem is to decide whether this distinction amounts to discrimination of a kind not permitted by article 26 of the Covenant.

To answer this question it is necessary to consider whether the aim of the differentiation is to achieve a purpose which is legitimate under the Covenant and whether the criteria for differentiation are reasonable and objective. The State party claims that the differentiation is based on reasonable grounds; the author, on the other hand, claims that the basis of differentiation is unreasonable and discriminatory. The author's claim falls within the scope of article 26 of the Covenant and raises a point of substance which cannot be determined without consideration of the issues outlined above, that is to say, without consideration of the merits of the case. The claim has thus been substantiated for purposes of admissibility.

Ideally, where the issues raised by the author involve claims of discrimination of this kind, and where there are no complex questions concerning admissibility (other than those concerning the substantiation of the claim of discrimination), the Committee should be able to call for submissions to enable it to deal with admissibility and merits in one step. However, that is not the procedure provided for in the rules and was not adopted for this case. In the absence of such a procedure, some cases such as this one are found to be inadmissible, because the Committee is of the view that the claim of discrimination has not been made out. This separate opinion emphasises that a claim of discrimination which raises an issue of substance which requires consideration on the merits should be found admissible.

A further reason to have declared this particular case admissible is the fact that neither the State nor the author were given notice that the Committee would decide on admissibility having regard to the substance of the matter. The author himself pointed to the fact that the State's observations to his communication related mainly to the merits and were irrelevant for

admissibility (paragraph 7.1). A finding that the communication is inadmissible would deny to the author an opportunity to respond to the submission of the State party.

For these reasons we consider the communication admissible.

F. J. Aguilar Urbina [signed]
P. N. Bhagwati [signed]
E. Évatt [signed]
A. Mavrommatis [signed]
C. Medina Quiroga [signed]

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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