

## EIGHTY-SEVENTH SESSION

### *In re* Guirao-Sanchez

#### **Judgment 1886**

The Administrative Tribunal,

Considering the complaint filed by Mr Carlos Guirao-Sanchez against the European Southern Observatory (ESO) on 11 December 1997 and corrected on 25 March 1998, the ESO's reply of 19 June, the complainant's rejoinder of 25 September and the Observatory's surrejoinder of 2 December 1998;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. In March 1996, the Administration of ESO submitted to the Standing Advisory Committee of the Observatory a draft revision of the Staff Rules and Regulations by which it intended to reduce by 0.5 per cent a year the amount of the expatriation allowance which the Observatory pays to international staff members, although within a certain limit. The document specified that the new revised rate of the allowance would apply from the signature of a new contract of indefinite duration, but that it would not apply to current fixed-term contracts, nor to their future renewal, nor to staff members already holding an indefinite contract. The ESO Council approved the amendment in December 1996 and it came into force on 1 January 1997. The staff were informed by a memorandum dated 7 January 1997 from the head of Personnel.

The complainant, who is of Spanish nationality, entered the service of the ESO in 1987 as a paid associate. He was given a fixed-term contract for one year, which was renewed on two occasions. In 1990, he obtained a contract as a member of the international staff for a duration of three years. This contract was extended on several occasions, for one year, two years and three years. His expatriation allowance amounted to 12 per cent of his basic monthly salary.

On 2 May 1997, an official of Personnel Services offered the complainant a contract of indefinite duration with effect from 1 July 1997. This letter specified that the contract was subject to the "provisions of the Combined Staff Rules and Staff Regulations, edition 1.4.1993, valid as of 1.1.1997". It also indicated that "with the granting of this new contract of indefinite duration, the expatriation allowance [would] be reduced as stipulated in [Article] RA 5.04 of the Staff Regulations". The complainant accepted the contract on 26 May and added the reservation "without prejudice of my acquired rights".

By a letter of 10 June, an official of Personnel Services drew the complainant's attention to the fact that the contract offered on 2 May was a "new contract" and not an extension of his current one, and that consequently it was governed by the Staff Rules and Regulations valid at the date of the signature of the contract. In a letter dated 8 July, another official of Personnel Services informed the complainant that the granting of the new contract of indefinite duration meant that his expatriation allowance would be reduced *pro rata* as stipulated in Article R A 5.04 of the Staff Regulations. Attached to this letter was salary action form No. 30, showing the expatriation allowance at the revised rate of 11.5 per cent from the effective date of 1 July 1997, amounting to a decrease of 0.5 per cent in relation to the previous rate.

On 6 August 1997, the complainant appealed directly to the Director General against the decision of 10 June 1997. In a letter of 16 September 1997, which is the impugned decision, the head of Administration informed the complainant that the decision to reduce his expatriation allowance had been maintained and that he could refer his case to the Tribunal.

B. The complainant has two pleas.

First, the impugned decision is based on a flawed classification of the contract offered on 2 May and signed on 26 May 1997. The complainant contests the classification of this contract as a "new contract" in so far as it would constitute a renewal of a contract of employment with the effect of interrupting the legal links with his previous contracts. In support of his plea, he cites an advisory opinion of the International Court of Justice of 1956 and various judgments of the Tribunal. He contends that by acting as it has the Observatory is denying him any benefit from the seniority acquired during his work with the ESO, and that its view infers that the conclusion of a new contract would annul the conditions of employment acquired previously. He contends that an employment relationship should go beyond the award of successive contracts to a member of staff.

Secondly, the impugned decision is a breach of the complainant's acquired right to the maintenance of his expatriation allowance. Basing his argument on the case law of the Tribunal, according to which a right may be classified as acquired when breach of it would impair the essential and fundamental conditions of employment of a member of staff, he contends that the expatriation allowance is one of those conditions. He adds that the changes made are not only unjustified, but can also be condemned on the grounds of the arbitrary and unequal criteria of their application, namely the effective date of the new contract, irrespective of seniority. He questions how the former more favourable rate can be maintained for staff members holding fixed-term contracts before 1 July 1997, and even for any future and unlimited renewal of their contract, while it is being refused to other staff members, like the complainant, who have benefited for nearly ten years from the very situation under the rules which is now pressed for by the Observatory. The Administration is therefore guaranteeing to some staff members what it is refusing to others by considering that a "new" contract concluded after a certain date impairs the fundamental and essential nature of conditions of employment which are nevertheless identical for all categories of the staff.

Finally, describing the effects which he says the decrease in the rate of the expatriation allowance has on him, the complainant contends that the change breaches his right that his remuneration should not be eroded substantially.

He asks the Tribunal to set aside the decision of 16 September 1997, refusing to grant him the "full expatriation allowance to which he is entitled", and to award him consequent redress and costs.

C. As regards the receivability of the complaint, the Observatory contends that the letter of 16 September 1997 from the head of Administration merely confirmed the decision of 8 July. The only new decision which it contained concerned the authorisation accorded to the complainant to appeal directly to the Tribunal. The ESO states that it expects the Tribunal to adopt the same approach for this case as for *in re Ansorge*.

On the merits, it submits that the contract offered to the complainant on 2 May 1997 is a "new contract" and that it is different in its "nature" from the previous ones. It explains that nothing in the Staff Regulations would permit the interpretation of a new indefinite contract as an extension of a previous fixed-term contract or series of fixed-term contracts. In other words, there are no grounds for assuming that the terms of the initial contract would remain in force. The opinion of the International Court of Justice cited by the complainant is not material to the case as, in that opinion, the Court ruled on facts which were different in nature and governed by a different set of staff regulations. The complainant's new contract is covered by the Combined Staff Rules and Regulations as in force on 1 January 1997. The new rules for the expatriation allowance are therefore applicable to him.

The Observatory states that the offer of the contract was without any ambiguity as to the amount of the expatriation allowance payable to the complainant. If the latter did not intend to accept the new contract, he should have made his position clear. Since he did not do so, he is presumed to have accepted the conditions offered and the reservation that he made when accepting the contract is without effect.

Finally, it refutes that it acted in an arbitrary manner. It says that an international organisation may make a distinction in entitlement to the expatriation allowance between staff members holding fixed-term contracts and those holding indefinite contracts.

D. In his rejoinder, the complainant submits that the decision of 16 September 1997 has to be interpreted not only as authorising him to appeal directly to the Tribunal, but also as having explicitly dismissed the appeal that he lodged on 6 August 1997. He cites in his support the ruling on receivability made by the Tribunal in Judgment 1739 (*in re Ansorge*).

He opposes the Observatory's view that the contract offered to him on 2 May 1997 was a "new contract", because that would have the effect of making it a first contract and placing the complainant in the same situation as a staff

member entering the service of the ESO for the first time.

He submits that he clearly expressed his position. It was evidently with the purpose of preserving his previous terms and conditions of employment that he added on 26 May 1997 a hand-written reservation to the contract offered to him.

Finally, he says that the Observatory does not contest that the former rate of the expatriation allowance is in the nature of an "acquired right" as it has recognised it as such for certain categories of the staff.

E. In its surrejoinder the Observatory notes the Tribunal's ruling on *in re* Ansoorge in Judgment 1739 and deems that no further discussion on receivability is necessary. It submits that, if the Tribunal accepted the complainant's plea, the conclusion would be that no agreement had been reached between the two parties on the indefinite contract and that consequently the complainant is still employed on the basis of his previous fixed-term contract, which will expire on 30 September 1999. It says that upholding the complainant's view would have the consequence of depriving the Observatory of its right to review the terms of a contract due to expire when renewing it or offering a new contract.

## CONSIDERATIONS

1. The complainant, a Spanish citizen, entered the service of the ESO on a fixed-term contract signed on 10 December 1987. This contract was successively extended for fixed periods until 2 May 1997, on which date he was offered a contract of indefinite duration with effect from 1 July 1997. In the letter accompanying the proposed indefinite contract, it was stated that the contract would be "subject to the provisions of the Combined Staff Rules and Staff Regulations, edition 1.4.1993, valid as of 1.1.1997". It was indicated in the same letter that the granting of the new contract would be accompanied by a reduction in the expatriation allowance, as stipulated in the revised text of Article R A 5.04 of the Staff Regulations.

2. On 26 May 1997, the complainant returned the ESO's proposal with his acceptance and the hand-written comment "without prejudice of my acquired rights".

By a letter of 10 June 1997, he was informed that the proposed contract was considered to be a new contract of indefinite duration and not an extension of his previous contract, and that this contract was therefore governed by the Staff Rules and Regulations in force at the date of its signature. The Administration consequently intended to apply to the complainant's contract the new rate of the expatriation allowance, at its lower revised rate established in January 1997. It sent the complainant a letter dated 8 July 1997 informing him that the granting of the new contract of indefinite duration meant that his expatriation allowance would be reduced in accordance with Article R A 5.04 of the Staff Regulations. Attached to the letter of 8 July 1997 was salary action form No. 30, showing the revised rate of the expatriation allowance, namely 11.5 per cent, or a reduction of 0.5 per cent of the rate applied to the basic salary in relation to the previous rate indicated on salary action form No. 29.

3. The complainant lodged an internal appeal against the individual decision contained in the letter of 10 June 1997.

On 16 September 1997, he was informed that his appeal had been dismissed and that he could bring his case directly to the Tribunal.

4. The complainant asks the Tribunal to order the quashing of the Director General's decision, as notified in the letter from the head of Administration dated 16 September 1997, refusing to grant him the "full expatriation allowance", and to award him consequent redress.

In support of his claim, he contends first that the impugned decision is based on a flawed classification of the contract of employment of 26 May 1997 and, secondly, that the decision in any case violates his acquired rights in relation to the expatriation allowance.

5. The Observatory is accused of wrongly considering the contract signed by the complainant on 26 May 1997 to be a new contract, governed by the Staff Rules and Regulations valid as of 1 January 1997, resulting in the application to the contract of the new rate of the expatriation allowance at its lower revised level.

6. With its offer of 2 May 1997, the Observatory certainly intended to offer the complainant a new contract of indefinite duration governed by the new provisions of the Staff Rules and Regulations which were in force on 1

January 1997. The nub of the matter is therefore whether this offer was accepted without modification by the complainant.

7. The complainant was aware that the contract of indefinite duration offered to him was considered by the Observatory to be a new contract, which would be covered by the revised regulations for the payment of expatriation allowances. Indeed, it was for this reason that he believed it necessary to affix the phrase "without prejudice of my acquired rights" upon signing the contract.

He could have declined the offer made on 2 May 1997, which would have had the effect of maintaining in force the fixed-term contract that he had signed previously and would have guaranteed him the payment of an expatriation allowance at the former rate. But, in so doing, he would have risked jeopardising his employment relationship with the Observatory since, after a number of years of service, he would no longer have been in a position to receive a fixed-term contract, with no guarantee that he would have been awarded a contract of indefinite duration.

8. The complainant preferred to sign the proposed contract with a reservation which, if the reservation had been more explicit, could have been interpreted as a refusal accompanied by a counter-proposal.

By confining himself to the phrase "without prejudice of my acquired rights", the complainant showed that he had no reason in principle to refuse the offer made to him, but that he merely wished to maintain his right to continue receiving the expatriation allowance at the former rate of 12 per cent of his basic salary.

In view of the above, and the fact that the Observatory neither modified, nor proposed to modify its offer, despite the complainant's reservation, it has to be deduced that the employment relationship between the complainant and the Observatory is based on a contract concluded after 1 January 1997. It is therefore a priori governed by the Staff Rules and Regulations which were in force at that date, unless it is considered that the complainant could enjoy rights deriving from the legal relationship existing between the parties before the conclusion of the new contract on 26 May 1997.

9. The complainant submits that he had acquired rights in relation to his terms and conditions of employment, which he considers to be essential and fundamental, including the guarantee of the previous more favourable rate of the expatriation allowance.

The Tribunal concedes that the complainant could have acquired rights in relation to his terms and conditions of employment since, contrary to the contentions of the Observatory, the fact of accepting the offer of a new contract of indefinite duration cannot deprive the complainant of the rights he acquired whilst he was in the service of the Observatory under successive fixed-term contracts.

However, as the Tribunal has indicated, among others, in Judgments 366 (*in re* Biggio No. 3 et al) and 371 (*in re* Mertens No. 2) the outright abolition of the expatriation allowance would violate an acquired right, although there is no acquired right to the amount and the conditions of payment of the allowance. Indeed, the staff member should expect amendments to be prompted by changes in circumstances if, for example, the cost of living rises or falls, or the organisation reforms its structure, or even finds itself in financial difficulty. In the present case, the complainant does not challenge the new system of the progressive reduction of the expatriation allowance over a certain period resulting from the Observatory's decision, taken in line with the Coordinated Organisations and for various reasons - principally related to budgetary restrictions - to decrease the rate of the expatriation allowance paid to members of the international staff.

Since it consists of a progressive reduction of the expatriation allowance, and not its outright abolition, resulting from general budgetary restrictions, the Tribunal finds that the impugned decision does not violate the right of the complainant to the maintenance of his acquired rights.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-

François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

*(Signed)*

Michel Gentot  
Jean-François Egli  
Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 7 July 2000.