FORTY-EIGHTH ORDINARY SESSION

In re AZOLA BLANCO and VELIZ GARCIA

Judgment No. 507

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Southern Observatory (ESO) by Mr. Marcial Azola Blanco and Mr. Tomás Vé1iz García on 19 August 1981 and brought into conformity with the Rules of Court on 2 September, the ESO's single reply of 30 November, the complainants' single rejoinder of 29 December 1981 and communication of 27 January 1982, and the ESO's single surrejoinder of 3 March 1982;

Considering that the two complaints relate to the same matters and should be joined to form the subject of a single decision;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, the Staff Regulations Applicable to Members of the Personnel except Local Staff, particularly Articles R II 6.02, 10 and 11, the Regulations for Local Staff Members, particularly Articles LS II 5.01, 03, 04(10) and 05; LS VI 1.01, 05, 06 and 07; LS VIII 1.01 and Annex A 3 1.01;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. Mr. Azola Blanco joined the ESO in 1969 and Mr. Véliz García in 1968. They were employed on the local staff of the ESO's observatory at La Silla in Chile, Mr. Azola Blanco as a dutyman and Mr. Véliz García as a mechanic. In 1972 each was given an indefinite contract. By a letter of 6 March 1981 a personnel officer at La Silla informed the complainants and 16 others that for economic reasons the ESO had to reduce local staff and that their posts would be abolished on 9 March under Article LS II 5.04(10) of the Local Staff Regulations. Besides thirty days' salary provided for under LS II 5.03 (payment of salary in lieu of notice) and a special indemnity payable under Annex A 3 1.01, they were offered as ex gratia compensation their basic salary for the rest of March and for April 1981. Together with six of the other staff members the complainants addressed an appeal to the Director of the ESO in Chile in accordance with Article LS VI 1.06. Their letter was forwarded to the Director-General in Garching (Federal Republic of Germany), who in his reply dated 21 May rejected the appeals, except for a claim for retroactive salary adjustments, which he said was still under review. That letter, which the complainants state that they received on 15 June 1981, is the decision they are challenging.

B. The complainants contend that the dismissals should be quashed on the grounds that essential facts were disregarded. Under Article LS II 5.04(10) a contract may be terminated to meet the "functional requirements" of the organisation. This article was taken verbatim from the Chilean Labour Code, which the Chilean courts have interpreted as justifying termination only when there are permanent economic difficulties irrevocably affecting future operations. The terminations were not justified by any such difficulties. The 18 dismissals made savings of only 1 per cent of the budget. The organisation has since been recruiting staff, and the complainants believe that its real purpose was to replace permanent with short-term employees or to contract out work. The complainants' own functions are essential and are still being performed by other staff. The decisions were, in the complainants' view, also tainted with procedural flaws in that no period of notice was given: the ESO merely offered the indemnity provided for under Article LS II 5.03. There was also breach of Article R II 6.10, which states that no staff member shall be dismissed on grounds of abolition of post or staff reduction unless the Director-General has ascertained that he cannot be transferred. There is no evidence of the Director-General's having done so. Article R II 6.11 of the Staff Regulations applicable to international staff members, which prescribes periods of notice for such staff members, should be applied because otherwise there would be discrimination against local staff. They accordingly invite the Tribunal to quash the decision impugned and order their reinstatement in the ESO and payment of salary from 9 March 1981 up to the date of reinstatement; subsidiarily, to order payment of compensation for unjustified dismissal equivalent to six times their total gross remuneration from 1 January 1980 to 28 February 1981, plus

interest at 12 per cent a year from the date on which they filed their complaints; further subsidiarily, to order payment of the benefits provided for in the local Staff Regulations and offered in the letters of dismissal at "adjusted value". They make three further claims. One is that the ESO should make social security contributions for them in accordance with the Chilean social security system, i.e. take account of the five monthly payments made to them in the form of gratuities (aguinaldos). Another is that they should be entitled to any retroactive adjustment of salary up to the date of their dismissal in accordance with the local staff annual salary study. They also claim costs.

C. In its reply the ESO submits that the complaints are irreceivable. The complainants knew that the decision came from the Director-General himself since he had said so at a meeting with the Local Staff Association Committee in Santiago de Chile on the same day on which the decisions were notified to the complainants, namely 6 March 1981. They addressed their appeals to the Director of the ESO in Chile although they knew that there was no such Director. The letters of 6 March obviously embodied the Director-General's own final decisions, and since over ninety days elapsed between 6 March and the filing of the complaints, the complaints are time-barred. Subsidiarily, the ESO submits that they are unfounded. Chilean case law is irrelevant even if the ESO rules are identical to those of the Chilean Labour Code. The authority to dismiss the staff at La Silla is vested in the Director in Chile but since there was no such Director reverted automatically to the Director-General. The Director-General did not exceed the limits of his discretion. In particular he did not disregard the "essential facts" alleged by the complainants, namely the organisation's true financial position. The ESO's financial difficulties (due to such factors as the rate of exchange between the Chilean peso and the United States dollar, and the rate of inflation in Chile) warranted the dismissals. The complainants are mistaken in contending that their functions were essential and have been taken over by other officials. In fact their posts have been abolished and whatever is left of their functions has been absorbed by the remaining staff. The decisions did not violate the terms of their appointment. The allegations of procedural defects are also unfounded. The provisions on notice in Article LS II 5.03 were fully complied with, despite discrepancies between the English and Spanish versions of the text, since the most favourable treatment was given: payment of the salary in lieu of notice prescribed by the Spanish text and of the Annex A 3 severance pay required by the English text. The complainants are entitled to no more than the sums offered to them under the settlement of 6 March 1981, namely 204,303 Chilean pesos for Mr. Azola Blanco and 408,648 pesos for Mr. Véliz García, minus sums representing one month and 22 days of basic salar offered ex gratia (the ESO feels no longer bound by this offer). The Staff Regulations governing international staff expressly do not apply to the local staff and the complainants may not benefit under both LS II 5.03 and R II 6.11. It is also mistaken to allege that no efforts were made to reassign the complainants. Each case was thoroughly looked into, but because of a decrease in the workload and budgetary constraints reassignment proved impossible. The complainants were obviously not qualified for the posts advertised in the press after their dismissal; otherwise they could have applied. It is wrong to contend that their functions have been contracted out: the work contracted out is more menial. The ESO invites the Tribunal to dismiss the other claims. Its practice - fully supported by the local staff - has been to ignore the gratuities in calculating its social security contributions, and there is nothing in the complainants' terms of appointment which entitles them to be treated differently from other local staff. Nor may they claim retroactive salary increases: the matter being still under review, the claim is irreceivable under Article VII of the Statute of the Tribunal. The ESO is nevertheless willing to extend to the complainants for the period from 1 July 1980 to 6 March 1981 any such increases as may be granted to the rest of the local staff.

D. In their rejoinder the complainants reject the contention that their complaints are time-barred. They were entitled under Article LS VI 1.01 - and indeed required in order to exhaust the internal means of redress - to lodge an internal appeal by writing first to the Director in Chile, and they did so by their letter of 6 April 1981. Article LS VI 1.07 provides for further appeal to the Director-General, and accordingly it was his letter dated 21 May 1981 that constituted his final decision. As to the merits, the complainants point out a discrepancy between the English and Spanish versions of Article LS II 5.05 and submit that it is the Spanish which prevails: this text authorises dismissal which is required by the "functional needs" of the organisation, and they enlarge on their contention that no such needs justified their own dismissal. In particular they again observe that the ESO has been recruiting local staff and contracting out work. As to the period of notice, Article R II 6.02 distinguishes between notice and compensation for termination of contract. In fact the complainants got no notice at all. They repeat that no attempts were made to reassign them. As to their claim in respect of social security contributions they argue that the ESO is bound, as it has itself acknowledged, to apply Chilean law on social security. As to their claim to retroactive salary adjustments, while rejecting the contention that it is premature, they acknowledge the ESO's willingness to grant them such adjustments.

E. In its surrejoinder the ESO observes that there was no reason why the Director-General should confirm his own decisions of 6 March 1981 for them to become final. The decisions were obviously final, and no appeal lay against

them, and certainly not to an official of lower rank. As to the merits, the ESO sees no substantive difference between the Spanish and English versions of Article LS II 5.05: under both versions the dismissals were justified, and the ESO gives a further explanation of its financial situation. There is no merit in the arguments about recruitment and the contracting out of work. As to the claim for social security contributions, the contention that the ESO must comply with Chilean law betrays confusion between the policy of applying the law of the host state and an obligation to do so. The ESO again invites the Tribunal to declare the complaints irreceivable or, if held to be receivable, devoid of merit.

CONSIDERATIONS:

Receivability

1. On 6 March 1981 the complainants received letters signed by a personnel assistant of the organisation terminating their employments that very day because of "an extremely difficult economic situation". The complainants appealed forthwith to the Director-General who "upon careful consideration of your letter of appeal and the reasoning given therein" decided to refuse it. His letter of 21 May 1981 containing this decision is the decision impugned in the complaints.

2. Article VII of the Tribunal's Statute provides that a complaint shall not be receivable unless the decision impugned is a final decision and the complaint is filed within ninety days of it. The complainants filed their complaints within this period. The organisation, however, contends that the final decision was contained in the letter of 6 March and that the complaints, as must be admitted, were not filed within ninety days of that letter. The organisation bases this contention upon the allegation that the complainants knew that the letters of 6 March were written upon the instructions of the Director-General. It does not, however, follow from this, assuming it to be so, that the letter of 6 March was a final decision. it would not so follow even if that letter had been signed by the Director-General himself. Not every decision of the Director-General is a final decision. The complainants assumed rightly that the Director-General would not reach a final decision until after he had considered carefully what they had to say. His letter of 21 May was not, as the organisation contends, "purely confirmatory" of the letter of 6 March and it contains the final decision. The objection to receivability is overruled.

Wrongful dismissal

3. This is the first claim made by the complainants. The organisation contends that the dismissal was justified by LS (Local Staff Regulations) II 5.04, which sets out fourteen reasons for dismissal of which the tenth is "Las que sean determinadas por las necesidades del funcionamiento de la impresa, establecimiento o servicio". The parties are not agreed upon a verbatim translation of these words. The organisation suggests that there is no difference between "the functional needs of the organisation", which is the factor which the complainants say must justify dismissal, and "the functional change in the operational structure of employment of the organisation", the version which apparently it prefers. LS II 5.04 from beginning to end reproduces exactly Article 2 of the Chilean Labour Code. The Supreme Court of Chile has several times interpreted paragraph 10. The text of the Court's decisions is not given in the dossier, but the effect of them is summed up in the complainants' argument in terms which the organisation does not dispute. "Summing up, when the decision is taken due to economical reasons, the Court has invariably indicated that these (the economical reasons) must be economic problems of a permanent kind, not casual or transitory, which irremediably affects the future operation of an organisation."

4. The organisation argues for a wider interpretation. The necessity to "trim the fat", as it puts it, that is, to eliminate all surplus expenditure, for financial reasons, would, it submits, justify the application of paragraph 10. "In times of prosperity", the argument runs, "and bountiful operational budgets, an organisation, whether private or governmental, can afford to apply less stringent budget guidelines. On the contrary, in times of difficulties, operational budgets are generally reduced due to a decrease in revenue", etc. In arguing for the wider interpretation the organisation objects to the reference to the rulings of the Supreme Court on the mistaken ground that this is to apply the law of Chile to which the organisation is not subject. The decisions of the Supreme Court are not of course binding on the Tribunal, but this does not mean that they cannot be used as an aid to interpretation. When a court or tribunal has to interpret a clause it is always permissible for it to consider how the same clause has been interpreted by other courts and tribunals who can speak with authority. Having regard to the fact that the clause is in Spanish, a language with which the Tribunal is not familiar, and has to be applied to conditions in Chile with which likewise the Tribunal is not familiar, the Tribunal would be foolish if it did not attach great weight to the observations of a Supreme Court which is familiar with both. Moreover, the basic idea of the Supreme Court's

interpretation, namely, that the problems which the organisation is endeavouring to solve by a reduction of its labour force must be problems of a permanent rather than a transitory character, is one which appears to the Tribunal to accord very well with the object of the clause. A dismissal may result, as indeed it does in this case, in the summary termination of employment after long service of men whose contracts apparently gave them security of tenure. It seems unlikely that the object of such a clause is to allow for the usual fluctuations in prosperity, to eliminate surplus expenditure one year and maybe to put it back a year or two later. This is, as will be seen from an examination of the facts in the next following paragraphs, a very good description of what the organisation was doing in this case. But it is not in the Tribunal's opinion an exercise within the description of the clause.

5. The difficulties which the dismissal of the complainants, together with 16 others in similar employment, were intended to alleviate was created, the organisation says, on 30 June 1979. At that date there was, and had been for some time, severe inflation in Chile with the result that the wages in pesos of the organisation's labour force in Chile were constantly increasing. This did not trouble the organisation, whose income was in Deutschmarks, because the peso was constantly being devalued. But on 30 June the Government of Chile pegged the peso to the US dollar. This was a measure designed to stop inflation as eventually it did, but not at once. When the organisation's Finance Committee reviewed the situation in November 1980 it found that inflation for the year July/June 1979-80 had been 38 per cent and was still running around 30 per cent. The cost in Deutschmarks of the workforce in Chile had risen very substantially. Exact figures were not before the Finance Committee, but the organisation states that the cost in the calendar year 1980 had risen to DM 4.2 million from DM 2.7 million in 1978. This increase of DM 1.5 million has to be assessed in relation to a budget of DM 41.7 million, so that it represents an increase in total expenditure of about 4 per cent. The Committee noted: "It is the purpose of the cost variation reserve to meet such situations and it is expected that the reserve foreseen is adequate." No special measures were then contemplated. Nevertheless, the dismissals occurred on 6 March 1981.

6. When the situation was reviewed again in November 1981 inflation had been reduced to 12 per cent or below and the organisation had not found it necessary to touch the cost variation reserve. The very substantial general reserves of the organisation had, however, been somewhat diminished. This was not surprising since the organisation had taken DM 3 million from them to invest in a new telescope and was moreover operating on subscriptions from members whose rate had not been raised since 1976. Three-quarters of the organisation's income comes from subscriptions from members and the real value of these dropped by nearly 20 per cent between 1976 and 1982. The Director-General did not, however, propose any increase in the contribution level for 1982 because of contributions awaited from two new countries which were expected to join the organisation. This was approved by the Committee and subsequently by the Council, the only economies resolved upon being in relation to the Chile staff, one as to their cost-of-living adjustment and the other that "further reductions in the areas of staff be made".

7. This case is concerned not with the further reductions but with those accomplished in March 1981. What took place between November 1980 and March 1981 to change the situation from one which could be met by the cost variation reserve into one which, to quote from the Director-General's letter of 21 May 1981, made a reduction in the operational structure of employment unavoidable, is not explained in the dossier. So long as the organisation continued to operate on an income which was diminishing in real value, the trimming of staff would obviously be a prudent measure. But this is not enough to bring LS II 5.04(10) into operation. In supposing that it was the Director-General must have misconstrued the regulation and thus been led to exceed his powers. The decision impugned was outside his authority and must be quashed on that ground. This conclusion makes it unnecessary to examine the alleged procedural defects embodied in the decision.

Social security

8. LS V 1.01 states that: "For the employees of all grades or positions the organisation will contribute to a National Social Security System". Under the scheme in force in Chile, employers make payments in respect of each employee based on his salary and consisting partly of their own contributions and partly of deductions which they make from the salary. The complainants' contracts provide that their contributions will be deducted from their monthly remunerations. Part of the complainants' remuneration consisted of payments known as aguinaldos. The Local Staff Regulations provide that staff members "are entitled to receive three basic salaries (sic) per year as a special gratification"; these gratifications are called aguinaldos. The Chilean scheme provides that "sums paid as legal, contractual or voluntary gratifications ... shall be subject to the same contributions as monthly salaries".

9. The organisation has never itself made contributions on aguinaldos nor deducted in respect of them contributions

from aguinaldos paid to its employees. It claims that, since the law of Chile is not binding upon it, it can adopt what parts of the scheme it chooses. This is mistaken. Having voluntarily decided to contribute to the scheme and to require its employees to do likewise, the organisation has put itself under the contractual obligation to the complainants to comply fully with the scheme.

10. The relief sought by the complainants is an order or declaration that the organisation is liable to contribute to the scheme in respect of the aguinaldos paid to the complainants. It is unusual for the Tribunal to give relief in this form, especially where third parties such as the Chilean authorities are involved. The normal method of relief would be an order against the organisation that it should compensate the complainants for the loss they have sustained. The organisation, however, relies on LS VIII 1.01,which requires that a claim by a staff member shall be made within six months from the date on which he is entitled to raise it; and contends that under this provision the only non-payment on which the complainants can rely is the one that relates to the aguinaldos payable in December 1980. This contention is nowhere challenged by the complainants. In the circumstances of this case the compensation can reasonably be fixed as the difference, if any, between the contribution which the organisation was itself liable to provide in December 1980 and the like contribution from the complainants which the organisation failed to deduct.

Retroactive adjustment

11. The complainants say that as a result of collective bargaining a salary study is made annually and followed by a general improvement in the salary levels. They do not, however, allege that there is any contractual obligation on the organisation to increase salaries in this way. The organisation agrees that, if any improvement is made, it must be paid to all, including the complainants, in the same position. The compensation payable to the complainants for their wrongful dismissal should be assessed accordingly.

DECISION:

For the above reasons,

1. The decision of the Director-General dated 21 May 1981 is quashed.

2. The Tribunal, finding reinstatement to be impossible or inadvisable, orders that the organisation pay to each complainant as compensation for wrongful dismissal a sum equal to three times the total gross remuneration paid to ' him in respect of the period 1 March 1980 to 28 February 1981 and as improved by any retroactive adjustment granted by the organisation.

3. It is ordered that the organisation shall ascertain the sum which ought to have been contributed to the National Social Security System in respect of the aguinaldos paid to each of the complainants in December 1980 and shall further ascertain the amount of such contribution which should have been provided by the organisation and the amount which the organisation should have deducted from each complainant's monthly remuneration: if the former be found to exceed the latter, the organisation shall pay the excess to each complainant.

4. All the sums payable as above shall bear interest at the rate of 12 per cent per annum from the date of the complaint.

5. The organisation shall pay US$1,000 to each complainant as costs.

6. All the other claims of the complainants are dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 June 1982.

André Grisel

J. Ducoux

Devlin

A.B. Gardner

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