

EIGHTY-EIGHTH SESSION

***In re Dekker* (No. 3)**

Judgment 1917

The Administrative Tribunal,

Considering the third complaint filed by Mr Hans Dekker against the European Southern Observatory (ESO) on 28 September 1998 and corrected on 23 December 1998, the ESO's reply of 15 March 1999, the complainant's rejoinder of 2 July and the Observatory's surrejoinder of 26 August 1999;

Considering Articles II, paragraph 5, and VII 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. The complainant's career and some of the material facts of the case are set out under A in Judgment 1916, delivered on this day on the complainant's second complaint.

When he learnt that the new health insurance contract concluded by the ESO and its insurers had only been signed by representatives of the insurers - the insurance brokers Van Breda - on 23 April 1998, the complainant filed a second internal appeal with the Director General. The internal appeal, dated 3 July, was against the application in his case, of the decision to amend the health insurance scheme, as reflected in his salary statement for the month of May 1998. In a letter of 7 July 1998, which is the impugned decision, the Head of Administration replied to him, on behalf of the Director General, that the second internal appeal was not receivable as it repeated the same points of substance as the first and a decision had already been reached on them.

B. Based on the case law of the Tribunal, the complainant contends that the impugned decision is in breach of his acquired right to safeguard his conditions of employment. He argues that the financial situation of the health insurance scheme did not warrant the adoption of the amendments resulting in the reduction of insurance coverage, and particularly the introduction of a reimbursement rate of 80 per cent for pharmaceutical expenses. He says that the ESO was merely seeking budgetary savings.

The complainant requests the Tribunal to set aside the Director General's decision of 7 July 1998 and to grant him all consequent redress and costs.

C. In its reply, the Observatory contests the receivability of the complaint. At the end of 1997, the complainant received the memorandum of 29 December 1997 informing him that the new reimbursement scheme would come into force on 1 January 1998. This general decision was applied to him for the first time in January 1998 on the occasion of the payment of his salary. It asserts that the complainant's internal appeal, dated 3 July, was therefore not lodged within the statutory time period of sixty days. His complaint is consequently not receivable under Article VII of the Statute of the Tribunal.

The ESO and the insurance brokers Van Breda reached agreement on the essential points of the contract at the end of 1997. They were therefore bound by a contract on 1 January 1998, since a contract is concluded when the parties reach agreement on the points which they consider to be essential.

Based on the case law of the Tribunal, the Observatory argues that there is no impairment of an acquired right "if the reduction of a benefit is set off by a corresponding advantage". In the present case, the reduction in the reimbursement rate for certain items is offset by the introduction of an additional reimbursement and a decrease in the annual premium for 1998.

The ESO adds that the complainant confines himself to general criticisms of the new health insurance scheme which, moreover, "has remained unchanged in principle".

Citing the case law once again, the Observatory contends that the costs and benefits of the health insurance contract do not constitute an acquired right, since they depend on variables.

In the same way as many countries, including Germany, the ESO has reduced the reimbursement rate with a view, among other objectives, to "enhance the awareness" of the staff of the cost of pharmaceuticals and thereby avoid unnecessary expenses.

D. In his rejoinder, the complainant contends that the complaint is receivable. He argues that the new contract only acquired binding force on 23 April 1998, the day it was signed by Van Breda. His salary statement for May 1998 therefore constituted the first application, in his case, of the new health insurance scheme.

He admits that he has only offered an "overall assessment" of the new health insurance scheme, but submits that the compensation mechanisms described by the ESO are not sufficient to make up for the "substantial deterioration" in comparison with the previous scheme. He fears that the "very principle" of health insurance has been prejudiced.

E. In its surrejoinder, the Observatory says that, over a period of one year, the reduction in the reimbursement rate can only affect the complainant within a limit of 1.6 per cent of his accumulated annual basic salary.

CONSIDERATIONS

1. The material facts are set out in Judgment 1916 (*in re Dekker No. 2*), delivered on this day, to which the Tribunal refers.

2. For the present complaint, the material facts may be summarised as follows:

When he learnt that the new insurance contract between the insurers represented by Van Breda and the ESO had only been signed on 18 March 1998 by the Observatory and 23 April by Van Breda, the complainant deduced that the new health insurance scheme for 1998 could only have come into force as of 23 April 1998, the date on which he considers that the parties accepted the new contract.

He therefore contends that the first salary statement issued by the ESO after the date of signature of the insurance contract, that is the salary statement for the month of May 1998, constituted in practice the first individual decision of application in his case of the new health insurance system.

On 3 July 1998, he filed a second internal appeal. He challenged the individual decision in his case constituted by the salary statement for the month of May 1998 in order, he said, to safeguard his rights for the future.

On 7 July 1998, this internal appeal was dismissed by the Director General on the grounds that it was not lodged within the time limit for internal appeals. It is this decision which is being impugned before the Tribunal.

3. The complainant contends that the impugned decision is unlawful because it violates his acquired rights to the safeguard of his conditions of employment. He considers that the substantial changes in the health insurance scheme and the detrimental effect that they will have on the benefits provided by the ESO would, from a financial point of view, negatively affect his contract of employment or impair the fundamental terms in consideration of which he accepted his appointment in the ESO.

4. It should be recalled, in the first place, that Article R V 1.01 of the Staff Regulations provides that the social security scheme shall include a health insurance scheme agreement approved by the Council of the ESO safeguarding staff members against the economic consequences of illness and accidents.

Article R D 2.01 of the Staff Regulations places the obligation on the ESO to insure staff members against

the contingencies of occupational illness and occupational accidents.

5. With regard to acquired rights, the Tribunal has applied a constant case law since Judgment 986 (*in re* Ayoub No. 2 and others), namely that:

"international officials may allege breach of an acquired right when there is impairment of an essential and fundamental term of conditions of employment; and that is so even where impairment is gradual and due to an accretion of final decisions which are no longer open to challenge and each of which, taken singly, would not itself have been deemed unlawful" (see Judgment 1514 *in re* Aymon No. 2 and others, at 12).

6. The complainant argues that the condition of employment consisting of a health insurance scheme governed by the Staff Rules and Regulations and the insurance contract concluded by the Administration are of an essential and fundamental nature and that the amendment of the contract to the detriment of staff members, without their consent, was such as to affect negatively from a financial point of view their contracts of appointment or impair their fundamental conditions of employment.

He contends that the financial situation of the Observatory's health insurance scheme was not such, in the circumstances, as to justify the substantial amendments made to the health insurance contract and that the Administration's actions were guided by considerations alien to the management of the Observatory's health insurance scheme.

Finally, the complainant submits that the new insurance scheme purely and simply reduces the insurance coverage available to staff members and therefore constitutes a significant breach of their legitimate right to the safeguarding of their conditions of employment.

7. The Tribunal observes that, since 1974, the health insurance contract has always been concluded for a period of one year. It could have been either tacitly renewed or amended. Indeed, it had been amended on several occasions.

The complainant has no absolute claim to a specific system of health insurance.

There is no evidence whatsoever that the new insurance system has the effect of substantially reducing the benefits available to him or of consequently impairing essential and fundamental aspects of his terms of appointment.

8. It may be deduced from the above that the complainant does not produce evidence of the impairment of his acquired rights, as they are admitted by the Tribunal (see 5 above).

9. The claims fail on the merits and it is therefore not necessary to rule on the Observatory's plea of irreceivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

