

EIGHTY-NINTH SESSION

***In re* Dierickx, Franza and Warmels (No. 4)**

Judgment No. 1996

The Administrative Tribunal,

Considering the complaints filed by Mr Philippe Dierickx and Mr Francis Franza and the fourth complaint filed by Mr Rein Herm Warmels against the European Southern Observatory (ESO) on 2 December 1997 and corrected on 24 March 1999, the ESO's reply of 30 September, the complainants' rejoinder of 13 December 1999 and the Observatory's surrejoinder of 17 March 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The evolution of ESO policy on staff pay and facts relevant to this case are set out under A in Judgments 1419 (*in re* Meylan and others) and 1821 (*in re* Allaert and Warmels No. 3) delivered respectively on 1 February 1995 and 28 January 1999.

In November 1995 the ESO Council decided to amend Article R IV 1.01 of the Staff Regulations so that the index calculated by the Coordinating Committee on Remuneration of the Coordinated Organizations⁽¹⁾ would henceforth serve only as an "orientation" in reviewing the salaries and allowances paid to the ESO staff and that "the economic budgetary and social situation prevailing both in the Organisation and in the member states" would be taken into account by the Council "[w]hen assessing whether or to which extent this index [shall] be applied".

For 1997 the Coordinating Committee recommended adjusting pay by 1.6 per cent in Germany. The ESO Administration proposed to the Working Group of the Finance Committee that an adjustment of 0.6 per cent should be applied as from 1 July 1997 - i.e. an adjustment of 0.3 per cent for the whole of 1997 - so as to take account of Gross Domestic Product growth in the majority of ESO member States and the Observatory's "particularly difficult" budgetary situation. On 15 April 1997 the Working Group stated its preference for an adjustment of zero. By a letter of 29 April four staff representatives wrote to the members of the Council and the Finance Committee objecting to the fact that some delegations wished to reduce the entitlements of the ESO staff. On 8 and 9 May, the Finance Committee recommended to the Council an "adjustment [of] 0.0%". At its meeting of 4 and 5 June 1997 the Council decided not to adjust salaries for 1997.

On 6 August the complainants wrote to the Director General challenging their pay slips for July 1997, received on 14 July, as being the first individual decisions applying the Council's general decision. They asked him to waive the internal appeal procedure. By a letter of 4 September 1997, which is the impugned decision, the head of Administration authorised them on the Director General's behalf to put their case directly to the Tribunal, thereby rejecting their appeals by implication.

B. The complainants observe that, in determining the adjustments for 1997, the Observatory took as a basis the salaries paid to staff in 1996 although in Judgment 1821 the Tribunal had deemed them unlawful. The ESO therefore committed an error of fact in that the unlawfulness of the 1996 salaries "mechanically" affects the lawfulness of pay in 1997. Furthermore, the ESO disregarded the principles governing the limits on the discretion of international organisations to set adjustments in staff pay, which the Tribunal recalled in Judgment 1821. In particular, it has not changed the procedure criticised by the Tribunal and its reasons for refusing the adjustment are

unknown, revealing "the mere desire to save money at the staff's expense". Lastly, in Judgment 1821 under 10, the Tribunal found the ESO to be in breach of Article R IV 1.01 of its own Staff Regulations; and that finding also applies to the impugned decision.

They seek the quashing of the decision and an award of costs.

C. In its reply the ESO observes that in Judgment 1821 the Tribunal recognised that an international organisation is free to choose a system for determining salary adjustments and use its discretion to depart from an external standard provided that it states proper reasons for such departure. In its submission what needs to be determined therefore is whether the ESO Council had proper reasons for deciding not to apply the Coordinated Organizations index for 1997. It produces documents reflecting the discussions the Finance Committee held on the implementation of the criteria set out in Article R IV 1.01.

It notes that the Council considered the following criteria in coming to its decision: the economic and budgetary situation prevailing in the ESO and its member States; the need to maintain competitive levels of salary; and the need to consider the social situation of staff and maintain the purchasing power of their salaries. First, the Council found that the Observatory's budgetary situation remains critical as the member States are faced with budgetary restraints, which is why it decided to align ESO salaries and allowances with those of other scientific international organisations. Secondly, the Council compared the evolution of ESO salaries with that of German high-tech industries and public research institutes "in order to motivate the staff and to assure the organisation's competitiveness with respect to comparable employment in industry". Thirdly, the Council wanted to reduce the gap between the evolution of inflation in the host country and the evolution of the ESO salaries. The Council's decision was therefore based on proper reasons and warranted.

D. In their rejoinder the complainants question the goodwill of the Observatory and accuse it of resorting to dilatory tactics. In their view, the documents produced cannot be regarded as evidence since they came from the Finance Committee and not the decision-making body, which is the Council. The positions - and even more so the reasons - that delegations put forward may vary depending on whether they are on the Finance Committee or the Council. Furthermore, the ESO said that the member States expressed their positions in restricted sessions and meetings for which there were no complete minutes or records. That prevented the Tribunal from fulfilling its role as a review body. They add that there are limits to the discretionary authority that the Tribunal allows the governing bodies of international organisations.

In subsidiary pleas the complainants contend that the arguments the ESO submitted in its reply as being the ones which led to the adoption of the decisions indirectly challenged afford no legal basis for those decisions. First, they contest the assertions concerning the ESO's financial situation. In their view, the argument that member States wished to align ESO salaries with those of other scientific international organisations is not "legally admissible" and besides, it was based on wrong figures. Secondly, they object that comparisons were made only with German employers whereas Article R IV 1.01 stipulates that the situation in the member States must be considered. Furthermore, the national civil servants to whom they are compared have job security, are not generally expatriates and do not have to work in one or more foreign languages and a multicultural environment. The ESO produced only abridged versions of the studies to which it refers; in particular, it omitted the passages indicating that expatriate compensation was lower at the ESO than in German industry and that the limited duration of contracts at the ESO was disadvantageous. The fact that staff have challenged all salary adjustments since 1996 shows that the objective of "motivating the staff" has not been attained. Thirdly, the Observatory's reply states clearly that the Council wished to index the adjustment of ESO staff pay to the evolution of inflation in Germany - yet the rules in force make no such provision.

They conclude that in taking the decision on pay adjustment for 1997 the ESO used no methodology which would "produce results that are stable, foreseeable and clearly understood" as the Tribunal requires.

E. In its surrejoinder the ESO gives an account of the constraints it has been under in resolving pay adjustment disputes since 1996. It considers that it has given a satisfactory explanation of its decisions, particularly in its reply to the present complaint which "truly expresses the position of the ESO Council". It submits that the application of the criteria set out in Article R IV 1.01 necessarily involves the recognition of the Council's discretionary authority.

In response to the complainants' pleas, it notes that scientific personnel employed by German public research institutions do not have security of employment as they are not civil servants and that the ESO compensates

expatriate staff by entitling them to an expatriation allowance. Lastly, it denies that its arguments are based on wrong figures and that the only criterion it considers is the evolution of inflation in Germany, though, it adds, that criterion does afford protection against the erosion of the staff's purchasing power.

CONSIDERATIONS

1. The complainants are asking the Tribunal to quash the Director General's decision of 4 September 1997 which rejected their appeal challenging the adjustment of their pay as being in breach of the rules and their acquired rights, and to award them full redress.
2. The Tribunal has already addressed the issue of the annual adjustment of the ESO staff pay in connection with the adjustment procedures applied by the Coordinated Organizations. In Judgment 1821, among others, it ruled on the evolution of ESO policy on staff pay over recent years and recalled the principles governing the limits on the discretion of international organisations to set the pay of their staff.
3. In this case the complainants are objecting to a decision taken by the ESO Council not to adjust staff salaries for 1997 although the Coordinated Organizations had recommended an adjustment rate of 1.6 per cent for Germany for that year.
4. The complainants allege that the Observatory made a mistake of fact by taking account of the salaries paid to staff in 1996 in determining pay for 1997 despite the fact that in Judgment 1821 the Tribunal ordered the ESO "to recalculate the adjustment of salary for staff as from 1 January 1996 in accordance with Article R IV 1.01 of the Staff Regulations and in the light of this judgment".

The plea fails. When the Council decided on 4 and 5 June 1997 not to adjust pay for 1997, the only factor it could take into account was the salaries actually paid to staff in 1996. Not until 28 January 1999, the date on which Judgment 1821 was delivered, was the Observatory ordered to recalculate the pay adjustment to be applied from 1 January 1996.

5. The complainants accuse the ESO of disregarding the principles governing the limits on the discretion of international organisations to set adjustments in staff pay and of offending against Article R IV 1.01 of the Staff Regulations. That article says:

"When reviewing remuneration and allowances, the Council shall use as an orientation an index which shall correspond to the adjustment rate calculated according to the salary adjustment procedure of the Coordinated Organizations with respect to adjustments of the basic salary scales of the Coordinated Organizations in Germany.

When assessing whether or to which extent this index shall be applied as the actual salary increase, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organization and in the member states.

The basic salary scales and the allowances for international staff in Germany and Chile shall be approved by the Council.

*) The remuneration and allowances for members of the personnel at duty stations outside Germany shall be adjusted by applying a cost of living differential in order to obtain equal purchasing power using Munich as lead town.

*) Applicable as of June 8, 1995"

6. In Judgment 1821 the Tribunal recalled that where a methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure (see Judgment 1682, *in re* Argos and others). It accordingly acknowledged that the ESO could depart from the external standard of reference but was bound to give reasons based on relevant criteria justifying its departure from the external standard.

7. Citing Judgment 1912 (*in re* Berthet No. 2 and others), the Observatory asserts that it had proper reasons in deciding not to apply the index resulting from the decisions of the Coordinated Organizations.

However, departure from the index given as an orientation in the Staff Regulations requires more than just a statement of proper reasons. In order to protect staff against arbitrariness, the criteria relied on to deviate from the orientation suggested by the external index must be objective, adequate and known to the staff (see Judgment 1912, under 15).

8. In Judgment 1912 the Tribunal found, on the strength of the evidence produced, that another organisation had demonstrated that "the automatic application of the index resulting from the relevant decisions of the Coordinated Organizations would have led to increased disparity of purchasing power between the staff according to the salary scales applicable to their duty station". But the Tribunal finds that, unlike the defendant in that case, the ESO has failed to provide it with reliable means of objectively reviewing the reasons adduced to justify the impugned decision.

The ESO cites, among other reasons, the need to borrow owing to financial difficulties - of which it provides no evidence - the reduction or deferral of adjustment rates in some countries, and allowance for inflation. But it provides no cogent evidence in support, particularly as some of the issues were discussed by the Council in restricted sessions, of which there were no full records. As the Tribunal notes in Judgment 1995 (*in re* Allaert No. 2 and Warmels No. 5) delivered this day, the Observatory fails to show that it used a methodology that took account of objective criteria that would produce results that were stable, foreseeable and clearly understood.

9. The conclusion is that the ESO complied neither with the principle cited under 6 above nor with the provisions of Article R IV 1.01 of its Staff Regulations as construed by the Tribunal in Judgment 1821.

10. The decision not to adjust the complainants' remuneration for 1997 must therefore be set aside and the cases sent back to the Observatory for recalculation of the adjustment of their remuneration for 1997.

11. The complainants are entitled to an award of costs, which the Tribunal sets at 15,000 French francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The cases are sent back to the Observatory for recalculation of the adjustment of the complainants' remuneration for 1997 in accordance with Article R IV 1.01 of the Staff Regulations and in the light of this judgment.
3. The ESO shall pay the complainants an overall amount of 15,000 French francs in costs.

In witness of this judgment, adopted on 12 May 2000, 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 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

1. They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

