

NINETY-SECOND SESSION

In re Evensen, Gråberg, Hjaltadóttir, Vidarsson and Volle

Judgment No. 2095

The Administrative Tribunal,

Considering the complaints filed by Mr Harald Evensen, Mr Lars Gråberg, Mrs Asthildur Hjaltadóttir, Mr Daniel Vidarsson and Mr Kjetil Volle against the Surveillance Authority of the European Free Trade Association (ESA) on 29 June 2000 and corrected on 9 October 2000, the ESA's reply of 19 February 2001, the complainants' rejoinder of 24 April and the Authority's surrejoinder of 22 June 2001;

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 none of the parties has applied for;

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

A. As from 1 January 1988 the European Free Trade Association (EFTA) applied a system for adjusting staff salaries based on the cost-of-living index for Geneva. In May 1992 in the course of discussions about establishing the EFTA Surveillance Authority (ESA) and the EFTA Court of Justice, the EFTA Council decided that conditions of employment in the two new bodies would, in principle, be governed by the same rules as the EFTA secretariat. In December 1993 the Council decided not to adjust pay in 1994 because of economic difficulties and budgetary restrictions in member States. Nor was there an adjustment the following year.

On 1 July 1995 a regulation was introduced into the ESA Staff Regulations providing for an annual salary review. Regulation 21 reads:

"Salary

1. The salary of a staff member shall be that specified in Appendix A to the Staff Regulations.
2. The ESA/Court Committee [i.e. the Committee of Representatives of the Contracting Parties to the Agreement between the EFTA Member States on the establishment of a Surveillance Authority and a Court of Justice] shall review Appendix A every year with a view to maintaining competitive employment conditions. ESA shall formulate proposals to this effect."

This regulation is still in force.

On 4 July 1996 the EFTA Council set up an ad hoc working group to review the competitiveness of EFTA employment conditions. In its report of 7 November 1997 the working group recommended adjusting pay as from 1 January 1998 to take account of inflation in the previous year, but made no recommendation as to the amount of the adjustment. The report also stated that the representatives of the ESA and of the EFTA Court, as well as the representatives of the staff of both institutions, intended to recommend to the ESA/Court Committee adjustment in full for inflation accrued since 1 July 1995. In a note of 14 November 1997 the Authority recommended to the ESA/Court Committee that salaries should be adjusted on this basis as from 1 January 1998. It noted that there had been 5.3 per cent inflation between 1 July 1995 and 31 December 1997 and that the cumulated inflation for the period 1993 to 1997 was 11.1 per cent. On 27 March 1998 the Committee decided on a 3 per cent increase with retroactive effect from 1 January 1998 for staff salaries at the ESA and the Court, in order to take account of inflation from 1 July 1995 to 31 December 1997.

In a memorandum of 9 July 1999 the Staff Committee of the ESA urged the Administration to suggest to the ESA/Court Committee ways and means of making salaries more competitive. It observed that an increase of 15.8 per cent would be needed to keep pace with the salaries of civil servants in member States. In a note of 15 September 1999 the ESA and the Court pointed out to the ESA/Court Committee that an adjustment of 23.5 per cent would be necessary to restore salary competitiveness to its 1993 level, and that purchasing power had dropped by 15 to 16 per cent in the last three years. As a remedy it recommended a 10 per cent pay adjustment with retroactive effect from 1 January 1999. At a session held on 15 December 1999 the Committee decided to increase the salaries of staff at the ESA and the Court by 3 per cent as from 1 January 2000.

At a meeting convened on 16 December 1999 pursuant to Regulation 45(6) of the ESA Staff Regulations, Staff Association representatives informed members of the Administration that they disagreed with the ESA/Court Committee's decision. In a letter of 2 February 2000 to the President of the ESA, the Chairman of the Committee of the ESA Staff Association gave notice of an appeal by members and former members of staff, including the complainants, alleging failure by the ESA to meet its obligations under Regulation 21. He accordingly asked the President to convene the Advisory Board under Staff Regulation 46. By a letter of 9 February the ESA President invited Norway, the member State holding the Chairmanship of the ESA/Court Committee and Iceland, as Norway's successor, to each appoint a member to the Advisory Board. The Board would have sixty days within which to report. By a letter of 11 April 2000 he informed the Chairman of the Committee of the Staff Association that, Norway having declined to appoint a member to the Advisory Board, he was not in a position to take any decision about the appeal. The complainants are now impugning the implied rejection of their appeal.

B. The complainants submit that the decision of 15 December 1999 of the ESA/Court Committee is unlawful on three counts.

First, the latter's implied refusal to review the salary scales for 1999 is in breach of the statutory requirement of a yearly pay review, which is laid down in Regulation 21(2) and is a safeguard of stability for staff. In Judgment 1419 (*in re Meylan and others*) the Tribunal held that the use of the word "shall" in statutory provisions makes the latter binding in law.

Secondly, the Committee's decision is in breach of the obligation, also established in Regulation 21(2), to maintain competitive employment conditions. What is more, it disregards principles set by the case law in that, by eroding salaries, it substantially jeopardises the balance in contractual relations between the organisation and its staff. Precedent has it that in international organisations, when salary increases have been insufficient at previous adjustments, staff may claim the shortfall at a forthcoming adjustment. The complainants point out that the Administration itself acknowledged that the deterioration in employment conditions is making recruitment difficult.

Thirdly, the Committee gave no explanation whatsoever of its decision. It therefore failed in the duty laid on it by Judgment 1821 (*in re Allaert and Warmels No. 3*) to use a methodology which will ensure results that are stable, foreseeable and clearly understood. The complainants point out that the President of the ESA himself observed at the session of 15 December 1999 that the way the decision was made was "procedurally inadequate and insufficiently transparent".

The complainants want the Tribunal to quash the implied rejection of their appeal and to send the case back to the Authority for a new decision on salary adjustment for the period in question. They also claim interest at the rate of 8 per cent a year as from 1 January 1999 on any amounts awarded. They claim costs.

C. In its reply the Authority contends that the complaints are irreceivable because the decision of 15 December 1999 was taken by the ESA/Court Committee and so is beyond challenge. The ESA cannot be held responsible for a decision it did not take. Furthermore, the complainants' pleas are irreceivable because they were not made in the internal appeal.

The first plea is also time-barred. Not until July 1999 did the complainants protest against the failure to review salary scales every year, but they should have done so on receiving their first pay slips of 1999. The same applies to their second plea: it is too late now for them to challenge earlier decisions on salary adjustment.

In subsidiary pleas on the merits, the Authority asserts that the Committee did meet its obligations, since it awarded a 3 per cent increase both in 1998 and in 2000. The case law recognises that the adjustment of salaries is at an

organisation's discretion. In setting salary scales the Committee is not bound to follow the views of the President of the Authority. Besides, in seeking to maintain competitive employment conditions the Committee not only reviews salaries, but it considers other factors such as staff allowances. Lastly, the ESA points out that international civil servants do not have an acquired right to an automatic indexing of their pay.

D. In their rejoinder the complainants explain that, before appealing, they waited to receive their pay slips for January 2000 as being the first individual application by the ESA of the Committee's decision of 15 December 1999. They point out that they were unable to object until the Committee took its decision - which it did only in December 1999 - and applied it as from 1 January 2000 instead of 1 January 1999 as the Administration had proposed. As to the receivability of their pleas, citing the case law they point out that while new claims are irreceivable, new pleas are another matter.

On the merits the complainants observe that the administrations of the Court and the Surveillance Authority, particularly the latter's President, share their view that the adjustment was inappropriate. That, they say, is a fair indication that the decision was unlawful. Allowances are incidental to salaries, and besides they have not been increased. In the complainants' submission, if employment conditions are to remain competitive, salary adjustments must at the very least offset inflation. They describe the salary adjustment policy as "arbitrary in the extreme".

E. In its surrejoinder the Authority retorts that the staff regulations in force since 1995 do not allow the ESA/Court Committee to set pay arbitrarily: they require it to review the salary scales annually with a view to maintaining competitive employment conditions. Furthermore, the Committee must first study proposals put forward by the Authority, and the criteria used in determining pay are objective. Besides, the complainants have failed to show that the salary increase of 1 January 2000 was insufficient to keep their employment conditions competitive. According to the ESA, the complainants have put three new "claims" to the Tribunal: (1) that the Committee has not reviewed the salary scales every year; (2) that it has not maintained competitive employment conditions; and (3) that it has not used a method which ensures results that are stable, foreseeable and clearly understood. The ESA submits that within-grade step increments amount to a 4 to 5.5 per cent salary increase every eighteen months. The complainants overlook that fact and so their reasoning is fundamentally flawed. Lastly, any comments by the President or an official of the Authority "may not be regarded as conclusive evidence" since they come from "interested parties" who stand to gain financially from a salary increase.

CONSIDERATIONS

1. The complainants are employees or former employees of the EFTA Surveillance Authority. They are challenging the rejection of an appeal they filed on 2 February 2000 seeking an increase in their salaries as from 1 January 1999.
2. The salaries of the ESA staff are adjusted in accordance with Staff Regulation 21 which has been reproduced under A above.
3. Pursuant to this regulation, the ESA/Court Committee decided on 27 March 1998 to adjust the salaries of the staff of the ESA and the Court by 3 per cent with retroactive effect from 1 January 1998, whereas the Authority had proposed a larger increase to take account of inflation. Representatives of the staff objected to that decision because it offered to staff conditions of employment which were not competitive. However, it was challenged neither in an internal appeal nor before the Tribunal.
4. On 15 September 1999 the ESA and the Court recommended to the ESA/Court Committee a 10 per cent salary adjustment with retroactive effect from 1 January 1999. But the Committee decided on 15 December 1999 to apply a 3 per cent salary adjustment with effect not from 1 January 1999 but from 1 January 2000.
5. Once the decision was implemented several members of staff appealed, on 2 February 2000, against what they saw as a breach of their statutory rights. They asked the President of the ESA to refer their appeal to the Advisory Board in accordance with Regulation 46. They sought the quashing of the decision of 15 December 1999 and a salary adjustment of 18.4 per cent from 1 January 1999 and of 5.5 per cent from 1 January 2000.
6. The Advisory Board was unable to meet, one of the member States having declined to appoint a representative. The complainants have therefore come to the Tribunal claiming the quashing of the Committee's decision of

15 December 1999 and all due effects in law. They further ask the Tribunal to send the case back to the Authority for a new decision on salary adjustment for the material period. They claim interest at the rate of 8 per cent a year as from 1 January 1999 on any amounts awarded and costs.

7. In rebuttal, the Authority raises several objections to receivability. All of them fail.

8. It submits first that the decision of 15 December 1999, taken by the ESA/Court Committee, is beyond challenge and that the complaint, being lodged against the Authority - which is not the author of that decision - is irreceivable. What the complainants are in fact impugning is their pay slips for January 2000 as being the first individual application of the decision of 15 December 1999, which they may challenge insofar as it affects them adversely. The complainants are paid by ESA and so may challenge any individual decisions that affect their terms of employment, particularly salary, regardless of who has authority over such decisions.

9. Secondly, the ESA submits that the complainants' claim to have their pay adjusted as from 1 January 1999 is time-barred and so irreceivable.

It considers that the complainants' objection to the Committee's failure to carry out the annual review of salary scales in 1999 should have been raised upon receipt of their first pay slip for that year.

That argument overlooks the fact that the annual adjustment procedure for 1999 ended only on 15 December 1999, when the Committee refused by implication an adjustment for that year despite a proposal made by the Authority and the Court on 15 September 1999 for a 10 per cent adjustment as from 1 January 1999. Not until the contested decision of 15 December 1999 was actually implemented were staff informed that there was to be no adjustment for 1999. They may therefore challenge the application of that decision to them and claim a salary increase as from 1 January 1999 without committing any breach of good faith or of the rules on time limits for appeal.

10. Lastly, the Authority contends that the complainants' three main pleas, which underpin their whole line of reasoning, not having been submitted to the Advisory Board, are irreceivable for failure to exhaust the internal means of redress available under the Staff Regulations. As the complainants rightly observe, the case law draws a distinction between claims, which may be put to the Tribunal only if they have been made in the internal procedure, and pleas, which are not subject to that rule. In this case the complainants' claims to the Tribunal are not different from the ones they expected the Advisory Board to examine, and the Authority may not object to the receivability of pleas put forward in support of them.

11. On the merits the complainants contend that the contested decisions; i.e. their pay slips for January 2000, were taken pursuant to a Committee decision which was in breach of the obligation to review salary scales every year, the obligation to maintain competitive employment conditions and the obligation to apply a methodology able to ensure results that are stable, foreseeable and clearly understood.

12. In rebuttal the ESA argues that in prescribing - as its terms of reference allow - a salary adjustment of 3 per cent, the Committee acted within the discretionary authority conferred on it by the rules. The fact that the complainants are unhappy with the level of their pay affords no basis in law for their claims. In its submission, their plea that the Committee failed to review the salary scales for 1999 is out of time. As to the plea that the ESA failed in its obligation to maintain competitive employment conditions, the Authority observes that, even if it were receivable, the complainants have failed to show that it is founded, particularly in view of the benefits and emoluments staff receive in addition to their pay. Lastly, it denies that it lacks a methodology able to ensure results that are stable, foreseeable and clearly understood, and contends that the complainants' claims are an attempt to have adjustments linked with the cost-of-living index for Geneva, when indexing - adopted in 1988 - was formally abandoned in 1995.

13. The Tribunal finds none of these arguments convincing. As precedent has shown time and again, although in international organisations the determination of salary scales is discretionary, that discretion must be exercised within a framework of rules drawn from both the relevant statutory provisions and the general principles of clarity, stability and foreseeability defined in the case law (see, for example, Judgment 1821).

In this case Regulation 21, cited above, says that salary scales are to be reviewed "every year" and that the decision-making authority must pursue the objective of "maintaining competitive employment conditions". It is plain on the evidence that although the ESA quite legitimately proposed to the Committee an adjustment for 1999 -

the previous one having been for 1998 - the latter took no decision for 1999 and prescribed an adjustment only for 2000. It thus failed to meet the obligation laid on it by Regulation 21.

What is more, the ESA and the Court recommended an adjustment of 10 per cent with retroactive effect from 1 January 1999; the President of the ESA specifically stated that a 3 per cent increase from 1 January 2000 was inappropriate; and the evidence shows that the purchasing power of staff had been seriously eroded and that the Authority was having difficulty in recruiting staff. Yet for all that the ESA offers not a shred of evidence to suggest that the contested adjustment was set at a rate capable of "maintaining competitive employment conditions". Quite clearly, the Authority neither developed nor used a methodology able to ensure results that are stable, foreseeable and clearly understood in deciding against an adjustment for 1999 and on an award of only 3 per cent from 1 January 2000. Nor has the Authority given any rational explanation of how it reached that figure although the President acknowledged that the decision process lacked transparency.

14. The conclusion is that the complainants are right in pleading a procedural flaw in the adjustment of their salaries from 1 January 1999. The Authority's contention that they are not entitled to have their pay automatically indexed to the cost of living may be right. But they are entitled to have the level of their pay set in accordance with the conditions laid down in the Staff Regulations and Rules and by means of a methodology which is in keeping with the general principles of international civil service recalled time and again in the case law. The Tribunal will not itself determine the methodology to be used nor the level to which pay must be adjusted in order to take account of all the allowances that may be due to the complainants. It therefore sends the case back to the Authority, as the complainants request, for a new decision on salary adjustment for 1999 and 2000. The amounts awarded to the complainants as an outcome of the adjustment shall bear interest at the rate of 8 per cent a year as from the dates on which they were due.

15. Since the complainants are successful, they are entitled to an overall award of costs, which the Tribunal sets at 6,000 euros.

DECISION

For the above reasons,

1. The decisions rejecting the complainants' appeals of 2 February 2000 are set aside.
2. The case is sent back to the Authority, which shall review their remuneration since 1 January 1999, in accordance with 14 above.
3. The Authority shall pay the complainants a total amount of 6,000 euros in costs.

In witness of this judgment, adopted on 2 November 2001, 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 30 January 2002.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

