Registry's translation, the French text alone being authoritative.

SEVENTY-SIXTH SESSION

In re GUERRA ARDILES

Judgment 1311

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Sergio Guerra Ardiles against the European Southern Observatory (ESO) on 19 April 1993, the ESO's reply of 4 July, the complainant's rejoinder of 5 August and the Observatory's surrejoinder of 15 September 1993;

Considering the applications to intervene filed by Mr. Ricardo Otto Escobar and Mr. Enrique Scherer Saavedra on 6 June 1993 and the ESO's comments thereon of 2 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 17, paragraph 2, of the Rules of Court, and Articles LS II 5.06 and LS VI 1.05 of the Regulations for ESO Local Staff in Chile and Articles 1.01 and 1.02 of Annex 3 and Article 1.01 of Annex 16 to those Regulations;

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 main rules relevant to this case are in Articles 1.01 and 1.02 of Annex 3 and Article 1.01 of Annex 16 to the Regulations for ESO Local Staff in Chile and they are reproduced in full in 3 below. They provide for paying to such staff on termination a service indemnity which, where the period of service exceeds two years, amounts to one month's salary for each year up to a total of eighteen, "salary" denoting "basic salary without considering overtime or special allowances". All local staff are also entitled to "5 basic salaries" a year known as "aguinaldos" or "gratifications", and any who are stationed at the ESO's astronomic observatory at La Silla in the Chilean Andes get "one basic salary as a mountain compensation" each year.

The complainant, a Chilean citizen born in 1928, joined the local staff of the ESO in November 1964 as an assistant mechanic at La Silla. His appointment ended on 28 February 1993 when he reached the retirement age set in Article LS II 5.06 of the Regulations for ESO Local Staff. His original contract, which came into force before the Observatory had its own regulations for local staff, was governed by Chilean labour law. On 23 June 1972 he signed a contract to which the Regulations for ESO Local Staff in Chile were to apply from 1 January 1972.

On 7 January 1993 the Administration sent him a reckoning of his terminal entitlements based on "basic salary" and 18 years' service. On 12 January he objected on the grounds that it should have taken account of the "gratifications" paid under Annex 16 to the Regulations for ESO Local Staff and should have covered his almost 29 years' service at the Observatory. The Head of Administration replied in a letter of 11 February on the Director General's behalf that the reckoning was in keeping with the material provisions.

In a letter of 24 February he appealed to the Director General under Article LS VI 1.05 of the Regulations. The Director General rejected the appeal in a letter of 25 March 1993, the decision he is impugning.

B. The complainant submits that the ESO's reckoning of his terminal entitlements was unlawful. The Observatory was wrong to exclude from the reckoning the six basic salaries he received under Article 1.01 of Annex 16 to the Regulations: five of them as "aguinaldos" and the sixth as "mountain compensation". He also contends that the ESO erred by limiting the reckonable period of his service to 18 years.

Salary" within the meaning of Article 1.01 of Annex 3 includes the allowances prescribed in Annex 16. Unlike overtime payments and such special allowances as language, nightwork and family allowances, they form part of basic pay and count in reckoning social security contributions.

The ESO's exclusion of one-third of his earnings from the reckoning is also in breach of his acquired right to the terminal indemnity due under Chilean labour law, which governed the contract he got in 1964. Under that law he was entitled to a terminal indemnity reckoned on the basis of the full period he spent in the ESO's employ, not just 18 years. The ESO discriminated against him by discounting each year of service beyond the eighteenth. Besides, it granted indemnities ex gratia to another official for 28 years of service even though the complainant had served just as long.

He asks the Tribunal to quash the impugned decision and to order payment to him of a terminal indemnity equivalent to 29 months' salary, including the allowances due under Annex 16. He also seeks costs.

C. In its reply the ESO contends that no provision of Annex 3 warrants taking "salary" to mean anything but the "basic salary" as shown in the salary scales. Had the draughtsman intended that the reckoning be based on one-twelfth of all the basic salaries an official received the text would have said as much.

As to the complainant's reliance on an acquired right to 29 months of salary under Chilean law, the ESO points out that the parties signed a contract to be governed by the Regulations for ESO Local Staff as from January 1972. Having had the benefit of those Regulations for some twenty years, the complainant may not now turn to national law to secure a benefit that they do not afford. The rule limits the indemnity to "eighteen salaries": it is immaterial that at his discretion a former Director General awarded another official 28.

D. The complainant rejoins that if the draughtsman had intended Article 1.02 of Annex 3 to cover only "basic salary" he would have said so. The amendment which was made in May 1972 in the complainant's contract of service and which said that the Regulations for Local Staff were to apply as from January 1972 did not affect acquired rights: by stating the date on which he had originally joined the staff the contract implied "an obvious reserve of rights". So the complainant presses his claims to an indemnity based on 29 monthly salaries. What the ESO calls "discretion" was actually misuse of authority since it put another official's indemnity at 28 months' pay, whereas he gets only 18.

E. In its surrejoinder the ESO develops its earlier pleas and points out that the decision on the other official's indemnity was an exceptional one: it related to an individual case and constituted neither an affirmation of policy nor a binding precedent.

CONSIDERATIONS:

1. The European Southern Observatory employed the complainant from 1964 as a member of its local staff in Chile. He retired at the prescribed age of retirement, which is 65, in 1993. He had by then been serving for 29 years and the dispute is over the amount of his terminal indemnity. The Regulations for ESO Local Staff determine that amount by reference to the total period of the staff member's service and reckon it at the rate of one month's salary, up to a maximum of 18, for each year of service.

2. The complainant is challenging a decision of 25 March 1993 by the Director General insofar as in reckoning his terminal indemnity it discounted the additional payments known as aguinaldos and the full period of his service, namely 29 years and not just 18. He has duly followed the internal appeal procedure and the receivability of his complaint is not at issue. Two other former members of the local staff who retired earlier than he in similar circumstances have applied to intervene.

3. The provisions on service indemnity in Annexes 3 and 16 to the Regulations for Local Staff read:

"Indemnities for years of service with ESO

A 3 - 1.01

In case the Organisation or a Local Staff Member terminate the contract, the following indemnities shall be paid:

- for the two first years of service: 15 days of salary per year;

- for service longer than two years: 1 month salary for each year of service;

...

- salary in the meaning of the text above shall be the basic salary without considering overtime or special allowances.

A 3 - 1.02

The indemnity paid may not exceed the amount of eighteen salaries of a Local Staff Member. ...

Aguinaldos

A 16 - 1.01

All Local Staff Members are entitled to receive 5 basic salaries per year as a special gratification.

These gratifications shall be paid in February, July, September and December of every year.

In addition, Local Staff Members working on La Silla shall receive one basic salary as a mountain compensation ..."

4. The Observatory argues that the rules are explicit: Article 1.01 of Annex 3 says that the amount that is to count in determining the indemnity is "the basic salary without considering ... special allowances" of any kind. The aguinaldos are said in Article 1.01 of Annex 16 to be "a special gratification". So, a fortiori, is the so-called "mountain compensation" that is paid in the form of an aguinaldo equivalent to one month's basic salary. The rules are no less explicit about the number of monthly payments to be granted for years of service: the maximum is 18.

5. On the definition of "salary" the complainant points out that aguinaldos are identical to basic salary in that they are the equivalent of monthly payments and are paid at set dates. So in his submission the monthly payments of salary made in accordance with the pay scales and the aguinaldos have to be combined to give the actual figures of monthly pay that count in reckoning the indemnity. That, he says, was indeed the thrust of Judgments 507 (in re Azola Blanco and Véliz García) and 508 (in re Acosta Andres), which declared that aguinaldos were to count in reckoning contributions the ESO was bound to make for local staff under a national social security scheme.

6. As to the reckonable period of service the complainant has two arguments. The first is that he was originally appointed under a contract that was subject to Chilean law, and that law says that for such a contract the service indemnity shall depend on the total number of years of service. Secondly, he cites the case of someone in the same position as he who was recently granted a service indemnity based on the full period of his service. So it would, he maintains, be only fair to put him on a par.

The meaning of "salary" under the Regulations

7. The term "salary" is to be so construed that there is proper consistency between the various relevant provisions of the Local Staff Regulations. The main one is the last clause of A 3 - 1.01, which distinguishes between "the basic salary", which is to count in reckoning the service indemnity, and "special allowances", including payments for overtime, which are not to count for that purpose.

8. The hallmark of "basic salary" is that it takes the form of regular and uniform payments to local staff by virtue of their status as such, according to prescribed scales and at set dates. The "special allowances" are distinguishable by being due only in particular circumstances that are usually peculiar to each staff member: examples are the family, language, transport, holiday and death allowances and - an example the Regulations actually give - payments for overtime.

9. In determining the amount of basic salary as so defined as against the special allowances what counts is sums actually paid in salary, whatever they may be called and whatever method of accounting may be applied. So it is quite wrong of the Observatory to reduce the staff's financial entitlements by arbitrarily treating as a "gratification" what is in fact an item of regular pay due under the Regulations.

10. True to the spirit of its rulings in Judgments 507 and 508 on social benefits, the Tribunal concludes that aguinaldos form part of the basic salary that counts in reckoning the service indemnity where they are a regular additional item of pay. Being such an additional item, the "5 basic salaries" referred to in Article 1.01 of Annex 16 must be added to the yearly total paid according to the scales for the purpose of determining the "basic salary" that

is relevant in reckoning the indemnity.

11. A further conclusion is that the "mountain compensation" prescribed in the third clause of Article 1.01 of Annex 16, being due only in particular circumstances of the kind mentioned in 8 above, is a special allowance within the meaning of Article 1.01 of Annex 3 and is therefore irrelevant in reckoning the indemnity.

The reckonable period of service

12. The complainant puts forward two pleas in favour of counting his full 28 years' service, instead of the maximum of 18 set in the Regulations, for reckoning his indemnity.

13. He first points out that when he was recruited in 1964 his contract of service was subject to Chilean law. He therefore claims the benefit of a Chilean Statute, No. 19.010 of 29 November 1990, which guarantees payment of severance indemnity to workers recruited before 14 August 1981 without setting any limit on the reckonable period of service.

14. The Observatory's answer is that in 1972 the complainant signed a new contract that was based on the Local Staff Regulations and so the provisions of those Regulations replaced national law.

15. The defendant's plea is sound on that issue. As a rule the conditions of employment of staff are subject exclusively to the ESO's own Staff Regulations and to the general principles of the international civil service: see Judgments 322 (in re Breuckmann (No. 2)) under 2; 473 (in re Haas) under 2 and 3; and 493 (in re Volz) under 5. National laws, and in particular those of the host country, apply only where there is express reference thereto. In this instance the terms of the complainant's appointment have clearly been subject to the ESO's own rules since 1972.

16. The complainant's second plea is that the Director General recently granted another staff member "as a discretionary measure" a service indemnity that took account of the full period of service and amounted to 28 monthly payments instead of the maximum of 18 set in Article 1.02 of Annex 3. So he wants to be given the same treatment.

17. The ESO does not deny that allegation but explains that the other staff member was so treated as a favour by the Director General's predecessor a few days before he himself left. The Director General could do nothing about it but has no intention of making that favour a general rule.

18. An indulgence of that kind, which reveals that there was no, or no proper, process of internal auditing in the ESO, is deplorable. Yet the consecration of such blatant dodging of the rules of social justice would be inadmissible and the complainant's claim to like treatment must therefore fail.

The applications to intervene

19. Two former staff members, Mr. Escobar and Mr. Scherer Saavedra, who are engineers and were locally recruited to serve the ESO at La Silla, have applied to intervene in the complaint. They say that they are in the same position as the complainant in that when they left they had their service indemnities reckoned in the same way and therefore without counting the aguinaldos, five of them being basic salary and one the "mountain compensation".

20. The ESO replies that the applications are irreceivable because it determined the interveners' entitlements when they left and appeal is now out of time. Moreover, they fail to give the details and evidence the Tribunal would need to make a proper ruling on their entitlements.

21. The ESO's objections are sound. According to Article 17(2) of the Rules of Court "Any person to whom the Tribunal is open under article II of its Statute may apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given". It appears from the wording of the applications that the interveners' cases were settled once and for all when they left the ESO. Their entitlements are therefore beyond challenge and this judgment may neither reduce nor increase them. The applications fail.

DECISION:

For the above reasons,

1. The Director General's decision of 25 March 1993 on the complainant's service indemnity is set aside.

2. The case is sent back to the Observatory for a new decision in line with the above considerations.

3. The complainant shall be paid 2,000 United States dollars in costs.

4. His other claims are dismissed.

5. The two applications to intervene are dismissed as irreceivable.

In witness of this judgment Sir William Douglas, Vice- President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

William Douglas
P. Pescatore
Mark Fernando
A.B. Gardner

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