Registry's translation of the dissenting opinion, the French text of that opinion being authoritative.

EIGHTY-FIRST SESSION

In re DEAKIN

Judgment 1539

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Lorraine Deakin against the European Free Trade Association (EFTA) on 7 November 1994 and corrected on 9 December 1994, EFTA's reply of 10 February 1995, the complainant's rejoinder of 17 March, the Association's letter of 27 March informing the Registrar that it would not be submitting a surrejoinder, and the further submissions communicated by EFTA on 28 November 1995 and the letter of 5 February 1996 from the complainant informing the Registrar she did not wish to make further comments;

Considering Article II, paragraph 5, 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, who is British, was employed by EFTA from November 1988 to May 1991 as a secretary at grade G.4 in its Trade Policy Affairs unit at headquarters in Geneva. She had local status. Learning that her post was to be transferred to the Association's office in Brussels, she had discussions in December 1992 with several officials about applying for it. At the time she was resident at Nyon, a few miles from Geneva, in the Canton of Vaud, in Switzerland.

In a memorandum of 16 December 1992 to the Deputy Secretary-General the Senior Personnel Officer suggested offering her the post, pointing out that she would be "willing to move to Brussels at short notice and on the basis of a local contract". The Deputy Secretary-General approved the appointment and by a memorandum of 17 December, of which she got a copy, the Senior Personnel Officer informed the Finance Office that she would be recruited locally. On 18 December she signed a letter of appointment, the period of the contract to be one year. The letter made no reference to her contractual status, but said that any modification of the allowances to which she was entitled under the Staff Regulations and Rules would be notified to her separately and in writing. She took up the post on 15 January 1993.

By a memorandum of 18 June 1993 she and two other staff members belonging to the General Service category asked the Secretary-General to grant them non-local status.

On 20 August she signed a further contract for one year, in substance the same as the first.

By a letter of 30 September 1993 the Secretary-General rejected her request of 18 June. By a memorandum of 16 February 1994 she asked him to reconsider on the grounds that since 30 September one of the two other staff members had been given some of the benefits of non-local status on the recommendation of EFTA's Advisory Board. By a letter of 31 March 1994 the Secretary-General replied that he was unable to grant her such status; her case was not on all fours with that of her colleague, who had not been clearly told that, though till then her status had been non-local, she was to be recruited locally for the appointment in Brussels.

By a memorandum of 12 April 1994 she referred the matter to the Advisory Board under Regulation 40, asking for the retroactive grant of non-local status, for installation allowance, and for repayment of the costs of removal and travel. In its report of 9 June the Advisory Board recommended rejecting her claims. It held that on signing the letter of appointment she had known full well that recruitment would be local. It did not say whether or not she had had a copy of the memorandum of 17 December 1992, but it suggested that to avoid dispute in future, a letter of appointment should mention status. By a letter of 15 September 1994 - the impugned decision - the Deputy Secretary-General rejected the complainant's appeal on the Secretary-General's behalf.

B.The complainant points out that the letter appointing her did not state that she was to be recruited locally. She never received her copy of the memorandum of 17 December 1992. Besides, benefits or allowances may not be withheld on the strength of a separate written communication. For one thing, payment of allowances is made directly under the Staff Regulations and Rules and requires no separate communication. For another, to admit the Association's argument would be to let it waive the rules, which it may not do here since they form part of the contract. There are criteria in the Regulations for determining status and the Secretary-General does not have discretion to refuse non-local status on recruitment.

The Association's sole reason for refusing the benefits she claims is her alleged concurrence in local status. She submits that, even were the Tribunal to accept the plea, her entitlement to the benefits would not be affected since payment of them is not contingent on non-local recruitment.

She seeks payment of the non-residence allowance under Regulation 16 from the date of her appointment, installation allowance in accordance with Regulation 19, repayment of the costs of travel to Brussels under Regulation 24 in the amount of 220 Swiss francs, and repayment of the costs of removal under Regulation 26 in the amount of 1,864 francs.

C.In its reply EFTA submits that when the complainant signed the two letters of appointment she knew full well that she was being recruited locally since the Senior Personnel Officer had told her so. It is "not likely" that she got no copy of the memorandum of 17 December 1992 "since the Finance Office did receive it". Her persistent attempts to get non-local status show that she knew that she had not been granted it.

It has long been EFTA's policy to recruit General Service staff locally unless it needs special skills for which non-local recruitment must be considered. Even when the conditions for non-local status are met - such as the geographical requirements - it may still grant local status. That is borne out by Rule 24.5.1, which defines the designated home station of a staff member "who is considered as having been non-locally recruited": the Rule does not have to be applied to every staff member who meets the geographical requirements.

Where the Regulations or Rules allow a choice, as they did here, and the Association and prospective employee agree on one of the options, EFTA may set out the conditions so agreed in a distinct text. It may not of course thereby introduce any it likes, their purpose being to make the terms of employment quite explicit.

D.In her rejoinder the complainant maintains her own version of the facts and presses her pleas. She says she never got a copy of the memorandum of 17 December 1992 and the Association cannot show that she did or acquiesced in local status. The Senior Personnel Officer seems to have misunderstood that she was willing to accept such status.

CONSIDERATIONS:

1.The complainant Worked for the European Free Trade Association (EFTA) at its headquarters in Geneva from 1988 to 1991. The Association employed her as a secretary at grade G.4, step IV, under a letter of appointment for one year from 15 January 1993 at its office in Brussels. She signed the contract on 18 December 1992 at Geneva. At the time she was living at Nyon, in the Canton of Vaud, in Switzerland. On 20 August 1993 she signed a second letter of appointment at grade G.4, step V, for one year from 15 January 1994. She contends that she was not locally recruited and claims additional allowances and benefits which pertain to non-local status and which she says that the Association has wrongfully withheld from her.

2.Regulations 12, 16 and 37 of the Association's Staff Regulations read:

"12.The appointment of a staff member shall take the form of the signing of a contract between him and the Association. The Secretary-General, or the Deputy Secretary-General, shall sign for the Association. The contract shall set out, inter alia, the terms and conditions attaching to the appointment and provide that these regulations form an integral part of the contract."

"16.A staff member in the General Service category shall receive a non-resident allowance except when recruited locally."

"37.The Secretary-General may, in the case of a staff member assigned to a duty station outside Geneva, apply

such modifications to the Staff Regulations as he deems desirable to meet local conditions and in conformity with the prevailing practice of other international organizations in the same location."

3.In compliance with Regulation 12 both the letters of appointment that the complainant signed stipulated that her appointment was "in accordance with the terms and conditions specified" therein and "subject to the provisions of the Staff Regulations and Rules", which formed part of the conditions of service. Clause 7 of each letter was headed "Special conditions" and read:

"The conditions of employment in Brussels may in accordance with Staff Regulation 37 be modified to meet local conditions and in conformity with the prevailing practice of other international organizations. The employment conditions for Brussels have been specified in EFTA/ON 2/89."

Circular EFTA/ON 2/89 said under 2:

"The salaries and allowances for EFTA staff based in Brussels shall be ten per cent lower than those of the EFTA staff in Geneva. The salaries and allowances of EFTA staff in Brussels shall be adjusted in accordance with the Geneva scales applied for salaries and allowances."

4.The first letter of appointment - the one she signed on 18 December 1992 - further stipulated in clause 6:

"Any future changes in the terms and conditions of employment and any modifications of your statutory entitlements shall be notified to you in writing."

5.Both letters of appointment gave the amount of "Salary" and contained a clause, numbered 2 and headed "Allowances", which read:

"The salary ... does not include any allowances to which you may be entitled under the Staff Regulations and Rules. They will be communicated to you separately and in writing."

6.The complainant claimed payment of non-resident allowance under Regulation 16 and of installation, travel and removal expenses under Regulations 19, 24 and 26 on the grounds that she had not been locally recruited; she appealed against the Association's refusal; and the Secretary-General rejected her appeal on 15 September 1994 in the decision that she is now impugning.

7.Since the complainant was in Switzerland at the time of recruitment she was not locally recruited for employment at the Brussels office. It is true that the Association was free to incorporate in the letters of appointment a clause saying that she was nevertheless deemed to have local status. That is just what another organisation properly did in the case that the Tribunal ruled on in Judgment 1108 (in re Dahlqvist). For want of a clause expressly prescribing local status the presumption is that the parties did not agree that she should have such status. The conclusion is that the contracts, read together with the Staff Regulations, set out all the terms and conditions of employment, which conferred non-local status on the complainant and gave the Association no right or power to treat her as having any other. And even if there was doubt on that score it was the Association, which was the source of all the relevant documents, that had the duty to resolve it.

8.Were the terms and conditions of employment nevertheless later altered? Clause 2 of each letter of appointment confers no distinct power to determine, or to exclude or modify, the allowances to which the complainant was entitled: it provides only for the separate notification of information on such entitlements. It is clause 7 that refers to the power of modification in accordance with Regulation 37. But all that the Association did in accordance with that provision was to set salaries and allowances at Brussels at figures lower by ten per cent.

9.Regulation 12 means that the terms and conditions of the complainant's appointment must be as set out in the written contract, and oral agreements and understandings may not be introduced to derogate therefrom. Nor may the requirements of the Staff Regulations, which form part of the contract, be amended or excluded.

10.Under clause 2 - quoted in 5 above - of the letters of appointment the Association undertakes to notify to the complainant the allowances which it considers to be due to her under the Staff Regulations; it is not empowered to limit her entitlements under the Staff Regulations.

11.Moreover, as to clause 6 of the first letter of appointment, there is no proof that she ever received a copy of the

memorandum of 17 December 1992 from the Senior Personnel Officer to the Finance Office, and the letter is therefore the sole text governing her conditions of service or appointment.

12.The material issue is not what the complainant believed her status to be. Whatever she may have believed is immaterial to the meaning and effect of her contract. Her contract implicitly gave her non-local status and what she is asking now is that she be granted the benefits thereof.

13.Inasmuch as the letters of appointment say nothing of "local" or "non-local" status, the Tribunal will treat the facts of the case as decisive. A contractual provision on status would be necessary only if the matter were uncertain or if the parties had agreed that she should have a status different to the status that the facts determine. Since such agreement would involve a waiver by the complainant of her rights of non-local status, it may not be presumed in the absence of clear evidence of such waiver. The complainant was recruited in Switzerland, where she was resident, to serve in Brussels, and her entitlements under the Staff Regulations and Rules must be determined accordingly. The case must therefore be sent back to the Secretary-General so that he may determine those entitlements.

14.Under Rule 16.2 a staff member in the General Service category is entitled to receive the non-resident allowance "provided he was resident in a Member country other than Switzerland at the date of his first appointment to the Secretariat". The Association has not pleaded that rule and there is no evidence before the Tribunal on the practice of the Association in applying it to duty stations outside Switzerland. The Association will determine the complainant's entitlement to the non-resident allowance in accordance with its practice in relation to duty stations outside Switzerland.

DECISION:

For the above reasons,

1.The impugned decision of 15 September 1994 is quashed.

2.The case is sent back to the Secretary-General for determination of the complainant's entitlements under the Staff Regulations and Rules.

DISSENTING OPINION BY MR. JULIO BARBERIS

I regret I cannot agree with the other members of the Tribunal. My reasons are set out below:

1.The complainant joined the staff of the European Free Trade Association (EFTA) in Brussels as a secretary at grade G.4, step IV, under a one-year contract as from 15 January 1993 which she signed on 18 December 1992. On 20 August 1993 she signed a second one-year contract at grade G.4 step V as from 15 January 1994. At the time of signing her first contract she was living at Nyon, in Switzerland.

2.Both contracts indicated the amount of her salary and contained the following clause:

"The salary shown above does not include any allowances to which you may be entitled under the Staff Regulations and Rules. They will be communicated to you separately and in writing."

3.The first subject of dispute between EFTA and Mrs. Deakin concerns the terms of the employment contracts they concluded. The complainant maintains that, according to the Staff Regulations, a contract must be written and bear the signatures of both parties. She submits that her contractual ties with EFTA depend solely on the conditions she signed and, subsidiarily, the provisions of the Staff Regulations.

She observes that the only text she has signed is her contract, and it makes no mention of allowances. In the absence of any provision on the matter she argues that the Staff Regulations should apply on a subsidiary basis. Since she was living in Nyon when she signed her first contract she considers herself entitled under the Regulations to non-local status. She accordingly seeks the allowances payable to non-local staff and the refund of travel and removal expenses for her installation in Brussels. Her claims arise in law from Articles 16, 19, 24 and 26 of the Staff Regulations.

4.The Association, for its part, submits that when she signed her first contract she knew perfectly well she was to

have local status. It relies on a memorandum dated 17 December 1992 which the Senior Personnel Officer sent to the Finance Office stating that "Ms. Lorraine Deakin shall be granted local status in connection with her appointment". The memorandum also indicates "cc: Ms. Deakin". EFTA adds that according to established practice the memorandum constitutes the written communication to which the contracts she signed refer.

The Association cites a memorandum of 16 December 1992, which it says is in her personal file and purportedly shows that she was to be treated as a local recruit.

5.As to the memorandum of 17 December 1992 Mrs. Deakin denies receiving a copy of it but say that, even if she had, the document would not constitute the written notice on allowances provided for in her contracts; to form part of her contract a document must, she contends, bear her signature and the memorandum has no value in law because it was signed by an official who has no competence to take such a decision. The complainant denies any knowledge of the memorandum of 16 December.

6.EFTA has no doubt that she was aware when she signed the first contract that she was to be recruited locally: the series of meetings and discussions she had had with various members of its staff imply that Mrs. Deakin knew that she would not get non-local status at the time.

7.As stated above the complainant denies having got a copy of the memorandum of 17 December 1992, and EFTA offers no proof that she did. Nor does it give evidence of its alleged practice of giving officials notice of their entitlements to allowances in internal memoranda. To allege a practice before a court of law, save one so obvious as to be generally acknowledged, requires proof.

8.However, I take the view that the ruling should depend on the evidence and material put forward by the complainant and her conduct as from December 1992 deserves special weight.

9.She sums up meetings she had with various officials starting in December 1992. It is plain from this and other documents submitted with her complaint that on 18 December 1992, when she signed her contract, she was aware that EFTA had not granted her non-local status. What is more, all her efforts to obtain non-local status after signing her contract show convincingly that she knew she had been recruited locally.

10.There is evidence in a document she produces that EFTA paid her 1,200 Swiss francs in compensation for the penalty she owed the landlord of her flat at Nyon for breaking her lease before its expiry. The Association also assisted in bringing down the cost of her removal.

EFTA's payment of compensation and helping to lower her removal costs are at odds with non-local status. In other words by accepting a payment and assistance from the Association she implicitly acknowledged having non-local status. The allowances for non-local officials in the Staff Regulations are intended to cover the very expenses for which the complainant received the aforementioned payment and assistance. Had EFTA further granted her non-local status she would have got double payment under the same heads: the amount it already paid her plus the allowances provided for in the Staff Regulations. That is why her accepting payments from EFTA now prevent her from claiming the allowances accruing from non-local status. From a legal standpoint hers is a typical case of estoppel, a universally recognised principle: non venire contra factum proprium.

11.The second subject of the dispute concerns the legal nature of local recruitment.

According to the complainant, it is a matter of objective fact: someone recruited on the spot has local status and someone recruited from elsewhere will necessarily have non-local status. The determining factor is the official's residence at the time of recruitment.

EFTA, on the other hand, submits that the question of whether an official is to have local or non-local status is determined not by the actual situation but by the wishes of the parties. In support of this argument it points out that in international organisations it is common and consistent practice to conclude employment contracts with someone residing outside the place of the organisation's headquarters, in which it is stipulated that he has local status.

12.As for the distinction between local and non-local status, an international organisation is ordinarily free to come to an agreement with the official concerned on what status he is to have. What matters is not his residence at the time of recruitment but the terms agreed to by the parties: see Judgment 1108 (in re Dahlqvist). Insofar as EFTA applies this rule there was nothing improper in conferring local status on an employee whose residence was at

Nyon.

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

Delivered in public in Geneva on 11 July 1996.

William Douglas
Mark Fernando
Julio Barberis
A.B. Gardner

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