EIGHTY-SIXTH SESSION

In re Allaert and Warmels (No.3)

Judgment 1821

The Administrative Tribunal,

Considering the complaints filed by Mr. Eric Jaak Allaert and Mr. Rein Herm Warmel - his third - against the European Southern Observatory (ESO) on 8 August 1997 and corrected on 17 November 1997, the ESO's reply of 4 February 1998, the complainants' rejoinder of 11 May and the Observatory's surrejoinder of 31 July 1998;

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. Judgment 1419 (*in re* Meylan and others) of 1 February 1995 describes trends in ESO policy on staff pay. By a decision which the Council of the Observatory took in December 1982 the periodic adjustment of salary and allowances paid to the international staff followed procedures applied by the Coordinated Organizations.[(1)] In July 1991 the practice was embodied in Article R IV 1.01 of the Staff Regulations. In 1992 the ESO decided to refuse its staff the full adjustment granted by the Coordinated Organizations. The matter came to the Tribunal and in Judgment 1419 the Tribunal declared the decision to be arbitrary.

In March 1995 the ESO embarked on the review of the wording of R IV 1.01 to take account of what the Tribunal had said in Judgment 1419. The upshot was that at its session on 28 and 29 November 1995 the Council adopted a new provision: the Council was to use "as an orientation" an index corresponding to "the adjustment rate" calculated according to the procedure of the Coordinated Organizations; in assessing whether the index was to be applied the Council would take into account such criteria as the economic, budgetary and social situation in the Organization and in member States. The new text came into force on 1 January 1996.

At a meeting of the Finance Committee on 6 and 7 May 1996, the Director General proposed a 0.7 per cent adjustment in pay at 1 January 1996. The paper that it put to the Committee said that the rate of adjustment recommended by the Coordinating Committee on Remuneration in the Coordinated Organizations was 1.3 per cent in Germany and that that figure was lower than the national index for Germany, which was 2.4 per cent. The Committee recommended that the Council approve a 0.7 per cent adjustment and on 10 and 11 June the Council agreed.

On 15 July 1996 the complainants got their pay slips for that month. On 12 September they appealed to the Director General against the pay slips, treating them as the individual decisions applying the Council's general decision to grant them only a 0.7 per cent adjustment in pay. The matter went to the Joint Advisory Appeals Board, which reported on 30 April 1997. In its report it said that it was in favour of allowing the appeals on the following grounds: it held that, though competent to set pay policy, the Council was not free to ignore such policy or to act arbitrarily; moreover, pay policy at the ESO was still the same as in the Coordinated Organizations; and there was no justification for a 0.7 per cent adjustment. By letters of 13 May 1997, which are the impugned decisions, the head of Administration told the complainants that the Director General was upholding his decision.

B. The complainants have four pleas.

The impugned decisions break the rule against retroactivity. The adjustment granted on 1 January 1996 affects the salary paid to staff for the period from 1 January to 31 December 1995.

The process whereby the impugned decisions were adopted is unlawful. It leaves the way open to uncertainty in law, since it rejects the whole principle of adjustment, and so is arbitrary too. It makes Article R IV 1.01 meaningless. It offends against the principles applicable to any system of pay as the Tribunal defined them in Judgment 1419 and against the Noblemaire principle.

Even supposing that the text of R IV 1.01 as in force at 1 January 1996 empowers the Council to stop adjusting staff pay, the impugned decisions are in breach of two essential conditions of service of the complainants, to wit their acquired right to the adjustment of pay and their general right to conserve their pay.

Lastly, the impugned decisions were in double breach of the independence of international civil servants. First, the Administration bowed to the wishes of a member State, Germany, without questioning the aims that State was pursuing. Secondly, the real grounds for the decision it took are tantamount to breach of the principle of independence by that member State and on that score ESO was guilty of abuse of authority.

The complainants ask the Tribunal to order the quashing of the decisions of 13 May 1997 insofar as they granted only a 0.7 per cent adjustment in pay as from 1 January 1996 and to award them costs.

C. In its reply the ESO says that it finds the complainants' attitude regrettable and their criticisms of a member State especially inadmissible.

On the merits it rebuts their plea that the impugned decisions broke the rule against retroactivity. The proposal for adjusting pay was to come into force on 1 January 1996 and the Council's decision of 10 and 11 June 1996 was applicable from the same date.

The defendant says that the process whereby the impugned decisions were taken was not unlawful. Judgment 1419 makes it plain that the policy decision taken in 1982 was to lapse so that the Observatory's intent could be fulfilled, and that intent consists nowadays in ensuring its very survival. On 28 and 29 November 1995 the Council therefore revoked that decision for the explicit purpose of restoring the Observatory's sovereign and autonomous authority to decide on its own pay policy. That decision was taken in compliance with the proper procedure.

The Council is by no means asserting the right to take arbitrary decisions on the adjustment of staff pay. But since the policy decision of 1982 was set aside it has wider discretion in the matter.

The system adopted in 1995 does not offend against any general canon of law. It is doubtful whether the Noblemaire principle applies to the ESO, and there is no reason in any event to suppose that it was infringed here. The complainants' plea of breach of acquired rights rests on the mistaken belief that the Council wanted to do away with the salary adjustment process. All it did was to discard for the future the automatic application of a particular method of adjustment. Actually in this instance the complainants' pay went up.

The ESO's independence may be compromised only if a member State tries to influence the Administration in disregard of ESO's Staff Regulations and Rules. Here there was no such attempt.

D. The complainants point out in their rejoinder that the ESO sent them letters about the remarks in their complaints which the Administration regarded as critical of the Observatory and its member States. They see that as undue pressure while the case is pending.

They press their pleas on the merits.

They maintain that the new system of adjustment is unlawful and that the ESO may not justify its decision on merely financial grounds. As for the breach of their acquired rights, Judgment 1419 expressly laid down obligations for the Observatory and those obligations are no longer embodied in the rules.

E. In its surrejoinder the defendant explains that its member States are especially concerned about the discrepancy between the pay of its own staff and that of staff at counterpart national institutes for research, and the whole point of the decision under challenge is to remove those discrepancies. The new system of adjustment of pay is lawful and is in no way arbitrary.

CONSIDERATIONS

1. At issue in these complaints is the salary adjustment granted by the European Southern Observatory to its employees for 1996.

2. The complaints attack decisions of the Director General refusing to endorse a favourable recommendation which the complainants had obtained from the Joint Advisory Appeals Board. The Board had held that the decision of the

ESO Council to grant a salary increase of only 0.7 per cent for 1996 - rather than the 1.3 per cent recommended by the Coordinated Organizations - was invalid because the ESO's salary policy did not provide for a methodology that would lead to stable, foreseeable and clearly understood results.

3. Notwithstanding the very clear basis upon which the Board found in their favour, the complainants have chosen to present again, and at length, all the arguments which they had urged unsuccessfully before the Board. As will appear in due course, those arguments are entirely without merit. The complainants have really only one valid point to make and it is decisive.

4. Article R IV 1.01 of the ESO's Staff Regulations reads as follows:

"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"

5. At a meeting of the Observatory's Finance Committee on 6 and 7 May 1996 the Director General presented a report recommending a salary adjustment of 0.7 per cent. This figure was well below not only the one of 1.3 per cent established by the Coordinated Organizations but also the rise of 2.4 per cent in the German consumer price index. The only explanation given for the discrepancy appears to be a desire to follow "the practice of salary increases based on merit and of salary adjustments for individual staff members". There is no detailed analysis of the reasons why the figure of 0.7 per cent was chosen rather than any other. Nonetheless the Finance Committee approved the report. Salary increases based on merit or other individual considerations are of course the antithesis of salary adjustments to the scale, which are designed to keep *all* salaries from losing purchasing power.

6. At its meeting of 10 and 11 June 1996 the Council adopted the Finance Committee's recommendation. The minutes do not reflect what, if any, "relevant criteria" were taken into account.

7. The principles governing the limits on the discretion of international organisations to set adjustments in staff pay have been well established in a number of judgments. Those principles may be concisely stated as follows:

(a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law: Judgment 1682 (*in re* Argos and others) in 6.

(b) The chosen methodology must ensure that the results are "stable, foreseeable and clearly understood": Judgments 1265 (*in re* Berlioz and others) in 27 and 1419 (*in re* Meylan and others) in 30.

(c) Where the 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: Judgment 1682, again in 6.

(d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (*in re* Ball and Borghini) in 21), the mere desire to save money at the staff's expense is not by itself a valid reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (*in re* Cuvillier No. 3) in 6.

8. Merely stating the above principles is enough to lead the Tribunal to conclude without hesitation that the complaints must be allowed. Even if it were possible to dignify the process adopted by the ESO by calling it a methodology for salary adjustment, it obviously fails to produce results that are stable, foreseeable and clearly understood. The rule laid down by the Tribunal is simply an extension of the general principle that an organisation may not act arbitrarily and must adopt an objective methodology for salary adjustment. In the case at bar the ESO has failed to demonstrate that the decision was not simply arbitrary.

9. At the hearings of the Appeals Board the Observatory was asked repeatedly to explain exactly what factors were involved in the decision but was unable to provide any adequate explanation. The nearest thing to an objective standard was the suggestion that ESO salaries "should be at a level which is compatible with the German high-tech industries". There is, however, not one iota of evidence before the Tribunal to demonstrate that salaries in "German high-tech industries" were actually compared. Nor at any time did the ESO offer any explanation of the factors or statistics that it considered in lowering the salary adjustment from 1.3 to 0.7 per cent. There is simply no evidence at all on the matter: the discussion during the Council meeting was not recorded and the Observatory, though given ample opportunity to do so, did not present any evidence to the Appeals Board and has not attempted to rectify that omission before the Tribunal.

10. The ESO has failed not only to establish any methodology, let alone one which complies with the above-stated requirements of international civil service law, but also to show compliance with Article R IV 1.01 of its own Staff Regulations, quoted in 4 above. That article requires the use of the Coordinated Organizations' index as an "orientation". It is simply impossible to see any orientation towards that index in the impugned decisions. Likewise, though the article requires the Council to take account of "relevant criteria", there is no evidence that it did so.

11. In these circumstances, and because of the ESO's total failure to establish any basis upon which it could do anything but follow the Coordinated Organizations' index, the Tribunal can only set aside the impugned decisions and return the matter to the ESO for recalculation of the salary adjustment for 1996.

12. As stated in 3 above, the complainants have raised other arguments which were deservedly unsuccessful before the Appeals Board. For the sake of completeness they may be summarily mentioned here.

13. The complainants argue that the impugned decisions are retroactive. This argument apparently rests on the requirement in Article R IV 1.01 of the Staff Regulations that the adjustment for 1996 be based on the accumulated statistics of the Coordinated Organizations for 1995. To adjust salaries in one year so as to reflect conditions in the preceding year is a wholly prospective operation. The adjustment has no effect on any past salary or payment due. The adjustment made in 1996 is not a payment in respect of the 1995 salary. Employees who left before the end of 1995 have no entitlement to it, while those who joined after 1 January 1996 receive the full benefit of it. There is nothing retroactive about it.

14. For much the same reason the complainants' argument that the impugned decisions adversely affected their acquired rights is wholly unfounded. The salary adjustment was applied prospectively to their salaries for 1996. They have acquired rights neither to a particular level of adjustment nor to a particular methodology. They have, of course, a legal right to a methodology for salary adjustment which meets the criteria outlined and discussed above, but that is not the same thing as an acquired right.

15. The complainants' final argument is a long and diffuse attempt to demonstrate that member States exercised an undue influence upon the ESO's decisions regarding salary adjustment. It is misconceived to the extent that it suggests that member States attempted to influence management in some unlawful way outside the system of democratic participation in the various committees and governing body. There is simply no evidence of any kind to support such an argument. All comments and statements by member States were made within the context of the proper decision-making organs of the ESO's structure. To the extent that the complainants are attempting to show that member States tried to influence the decision through the committees or the governing body to which they belonged, it was perfectly proper for them to do so. An international organisation would not exist without its member States and the proper means for them to exert influence over an organisation they create is precisely that of debate, discussion and persuasion within the committees and governing body of the organisation itself. This argument suggests some misunderstanding of precepts of international law.

16. The Tribunal awards the complainants 10,000 French francs in costs.

DECISION

For the above reasons,

1. The Tribunal sets aside the impugned decisions.

2. It orders 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.

3. It awards the complainants 10,000 French francs in costs.

In witness of this judgment, adopted on 6 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

Michel Gentot

Mella carroll

James K. Hugessen

A.B. Gardner

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).

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