

EIGHTY-SEVENTH SESSION

In re Macchino Farías (No. 4)

Judgment 1853

The Administrative Tribunal,

Considering the fourth complaint filed by Mr Agustín Macchino Farías against the European Southern Observatory (ESO) on 2 April 1998, the ESO's reply of 8 July, the complainant's rejoinder of 31 July and the Observatory's surrejoinder of 16 October 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 the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Chilean who was born in 1947, has been a member of the local staff of the ESO in Chile since 1972. The ESO withholds at source and on behalf of the Chilean Government a tax on the income of the Chilean members of its local staff. Considering himself to be a victim of discrimination, the complainant requested on a date which has not been communicated to the Tribunal, but which is later than the delivery on 30 January 1997 of Judgment 1616 (*in re Echeverría Echeverría and others*), the retroactive reimbursement of the amounts which had been withheld from his salary. His request was rejected by a decision of 28 May 1997, against which the complainant filed an appeal to the Director General on 25 June.

In its report dated 24 November 1997, the Local Staff Joint Advisory Appeals Board noted that the 1963 Agreement between the Government of Chile and the European Organization for Astronomical Research in the Southern Hemisphere for the purpose of establishing an Astronomical Observatory in Chile did not oblige the ESO to withhold taxes from its Chilean staff members and recommended that the Director General review the regulation if he could not justify the measures taken. By a letter of 27 February 1998, which is the impugned decision, the head of Administration rejected the appeal on behalf of the Director General and observed that the 1963 Agreement and the Combined Staff Rules of 1993 provide for a differentiation between members of the Observatory's staff who are subject to Chilean taxation and those who are not.

B. The complainant, citing the case law of the Tribunal, contends that all the staff of an international organisation shall enjoy equal treatment. By virtue of the principle of the hierarchy of rules, the Regulations for ESO Local Staff in Chile cannot be in contradiction to the Combined Staff Rules applicable to all members of ESO personnel without distinction as to their status, and cannot be in contradiction to Article IV 2.03 of these Rules which states that taxes levied shall be reimbursed. The Director General therefore committed an error in law in issuing the Regulations for Local Staff.

According to the complainant, the 1963 Agreement provides that the privileges and immunities of the ESO are identical to those applied to the United Nations Economic Commission for Latin America. The local staff recruited by the Commission is not subject to Chilean taxation. He considers that if the ESO enjoys the same status as the Commission, its local staff cannot be treated differently as regards the taxation of their income.

The complainant asks the Tribunal to quash the impugned decision, to order the reimbursement of the taxes levied on his remuneration and the payment of an indemnity equivalent to all the sums deducted and, subsidiarily, to state that the Observatory is not entitled to withhold taxes from his remuneration and that it must therefore refrain from the practice. He claims costs.

C. In its reply, the Observatory contends that it is obliged by the Agreement signed with the Chilean Government to make a distinction between international staff members and local staff members and to withhold taxes from the latter. However, it denies that this amounts to discrimination, since the situation of the two categories of staff is different and the distinction applied is a result not of its own making, but of the differing wishes of its member States and Chile. It also recalls that international staff are subject to an internal tax.

The Observatory adds that the 1963 Agreement limits the granting of the privileges accorded to officials of the United Nations Economic Commission for Latin America on its territory to employees of the Observatory who are of foreign nationality. Furthermore, Article IV 2.03 of the Combined Staff Rules, taken in conjunction with its preceding provisions, only covers the situation where taxes are directly levied on remuneration despite a tax exemption provided in a bilateral or multilateral agreement, which is not the case of local staff members.

D. In his rejoinder, the complainant refutes the contention of the Observatory that it is under an obligation to withhold taxes from its local staff members. In his view, the failure to reimburse the amounts withheld constitutes a violation of the principle of equality of treatment.

E. In its surrejoinder, the ESO observes that it has always levied taxes on its local staff on behalf of the Chilean authorities without objection from the staff, and it considers that the complainant shows bad faith in requesting tax reimbursement now. It adds that the Chilean Government has never requested that ESO refrain from applying this practice, proving that it interprets the 1963 Agreement in the same manner as the Observatory. The complainant does not demonstrate that he has suffered any damage and is therefore not justified in claiming an indemnity.

CONSIDERATIONS

1. The complainant, a Chilean national, is a member of the "local staff" of the European Southern Observatory (ESO) in Chile. The Chilean government and the ESO have always considered these staff members as being subject to Chilean national income tax. By contrast, members of the "international staff" are treated as international civil servants and are exempt from income tax both in the countries of which they are nationals and in Chile where the Observatory has established some of its facilities.

2. The "Combined Staff Rules" adopted by the Council of the Observatory govern generally the legal relationship between the ESO and its personnel. They are applicable to both local and international staff (see Judgment 1616, *in re Echeverría Echeverría* and others).

3. Chapter IV, section 2, deals with the subject of taxation as follows:

"IV 2.01 Members of the personnel shall comply with national tax laws and regulations applicable to them.

IV 2.02 The application of tax exemptions which are granted to certain categories of members of personnel by member states or states where ESO has established its facilities, shall remain restricted to members of the personnel concerned.

IV 2.03 The Staff Regulations shall lay down the conditions and terms under which taxes levied directly on remunerations and benefits paid by the Organization shall be reimbursed.

IV 2.04 Members of the personnel may be subject to an effective system of internal taxation on their emoluments. The details shall be set out in the Staff Regulations."

4. A good deal of the argument by both parties before the Tribunal has been devoted to the precise meaning to be given to various Articles of the Agreement between the Government of Chile and the ESO. The Tribunal will not enter into this debate which, in any case, is irrelevant.

5. The Tribunal does, however, have jurisdiction over the complainant's claim for reimbursement of taxes pursuant to Article IV 2.03 of the Combined Staff Rules. That claim was refused by the Administration on 28 May 1997. His appeal to the Director General was, notwithstanding a favourable recommendation from the Local Staff Joint Advisory Appeals Board, dismissed on 27 February 1998. That is the impugned decision.

6. The complainant raises two points. The first is that Article IV 2.03 of the Combined Staff Rules creates a right to a reimbursement of taxes and an obligation on the Administration to adopt regulations governing such claims. The short answer to this point is that a reading of the remainder of Chapter IV makes it plain that while only certain members of staff are entitled to tax exemption, all of them must comply with national tax laws relating to them. To the extent that the complainant bases his claim to reimbursement on the Administration's obligation to adopt a regulation pursuant to Article IV 2.03, that obligation has been met by the adoption of Local Staff Regulation LS IV 2.01 which reads as follows:

"Local Staff Members who are subject to taxation on the basis of national laws on tax payment cannot receive any compensation from the Organisation."

7. Article R IV 2.01 cited by the complainant does not apply to him; it forms part of the Staff Regulations applicable to staff other than local staff engaged in Chile.

8. The complainant's second point is that Article LS IV 2.01 quoted above discriminates against him by making him subject to tax while members of the international staff are not. This plea fails since the Tribunal has already ruled that different treatment of national and international staff is not discrimination. In Judgment 1196 (*in re Andrews and others*) it was said:

"As for the second part - the argument about discrimination in favour of local staff - all that need be said is that according to consistent precedent the distinction between international and local staff is a fundamental one inherent in the very nature of an international organisation. It is due to the peculiar circumstances in which such organisations work and it is concurred in, with both its advantages and its drawbacks, by anyone who seeks employment with them, be it in one category of staff or in the other. Each category of staff offers career prospects and conditions of recruitment and pay that differ according to its own requirements, and a staff member may not plead breach of equal treatment if treated differently because he belongs to one category rather than to the other."

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot
Mella Carroll
James K. Hugessen

Catherine Comtet