EIGHTY-SEVENTH SESSION

In re Haddad Salcedo

Judgment 1867

The Administrative Tribunal,

Considering the complaint filed by Mr. Nicolás Haddad Salcedo against the European Southern Observatory (ESO) on 25 May 1998, the ESO's reply of 17 August, the complainant's rejoinder of 17 September and the Observatory's surrejoinder of 28 October 1998;

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 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 was born in 1959 and is of Chilean nationality, joined the staff of the ESO in 1985 as an engineer at the astronomic observatory at La Silla in Chile. He has a permanent appointment as a local staff member.

At the beginning of the 1990s, the Observatory commenced a process of revising the Regulations for ESO Local Staff in Chile with a view to aligning the regimes governing local and international staff. By a circular dated 26 June 1991, the local staff in Chile were informed that the ESO's Council had approved their entitlement to an education grant for the years 1991 and 1992. A measure to this effect already existed in the Regulations applying to international staff. The award of this grant to the local staff was extended on an annual basis until 31 December 1996. In a memorandum addressed to local staff members, dated 3 April 1997, the Administration once again extended it until 31 December 1997. It nevertheless announced that for economic reasons the budget for the grant in 1997 would be frozen to the 1996 level of expenditure, and the maximum amounts reimbursable ("ceilings") would be reduced by approximately 25 per cent.

On 29 April 1997, the complainant submitted an appeal against this decision to the Director of ESO in Chile. The latter rejected it on 15 May. On 20 May, the complainant submitted a second appeal, this time to the Director General. In its report dated 12 March 1998, the Local Staff's Joint Advisory Appeals Board recommended rejecting the decision to reduce the ceilings of the education grant on the grounds that it had been taken unilaterally and in a discriminatory manner, and it recommended incorporating provision for the grant into the applicable texts. By a letter of 23 April 1998, which is the impugned decision, the head of Administration informed the complainant that the decision of 15 May 1997 had been maintained.

B. First, the complainant submits that the payment of the education grant had been regularly renewed until 1997 and deduces that it is henceforth an acquired right. The new Local Staff Regulations proposed in 1991 were never approved. If, as was originally envisaged, the education grant had been incorporated into those texts in 1991 local staff members who had reached the ceilings of the grant would not now be prejudiced in comparison with international staff, who are not affected by the reduction. Invoking the principle of equality of treatment, the complainant contends that the objective of reviewing the Local Staff Regulations was to eliminate the differences affecting local staff in relation to international staff.

He then emphasises the social nature of the grant. Assuming that this benefit would be included in the official texts, certain families were encouraged to place their children in more expensive schools. Allowing 8 per cent for inflation the 25 per cent reduction in the 1997 grant ceilings meant an overall reduction of 33 per cent compared to 1996. He considers that the withdrawal of the grant or a substantial drop in the amounts reimbursed could have damaging consequences for families, and particularly for children if they have to change schools and face a lower standard of education.

Finally, he recalls the unanimous opinion in his favour of the Local Staff's Joint Advisory Appeals Board.

The complainant asks the Tribunal to quash the decision of the Director General which was communicated to him

on 23 April 1998 and to declare that the grant in question forms part of his "remuneration package". He asks for costs to be paid by the Observatory.

C. In its reply, the Observatory contests the receivability of the complaint. It observes that the complainant has not provided supporting documentation and contends that he has not shown that an individual decision was taken against him.

Subsidiarily, it submits that the complaint is unfounded. It disagrees that the maximum reimbursement amounts of the grant were reduced by 33 per cent and, in this respect, prefers to refer to the "freezing" of the grant, rather than its "reduction".

The Observatory contends that the complainant has not demonstrated that his acquired rights were prejudiced. It submits that officials only have acquired rights when the benefits which they receive are recognised as fundamental. Citing the case law of the Tribunal, it contends that the amount and conditions of the education grant do not meet this condition. It emphasises that upon each renewal of the grant the local staff were informed that the measure was only temporary and that it could not be considered as an acquired right.

The Observatory rejects the plea of inequality of treatment since it says that international organisations are free to apply different rules to different categories of staff. In the present case, it submits that the education grant is justified for international staff who might experience more financial hardship in the schooling of their children than local staff who live and work in their home country. It adds that this plea is even less justifiable since local staff benefit from allowances to which international staff are not entitled.

Considering the complaint to be irreceivable and, in any event, unfounded, it maintains that the complainant is not entitled to costs.

D. In his rejoinder, the complainant rejects the Observatory's argument that there is no decision affecting him individually: the letter of 15 May 1997 refers explicitly to the "reimbursement of the education expenses for [his] children".

He explains, with supporting figures, his increased expenses for 1997 as a result of the impugned decision which for two of his children he puts at 44 per cent of his net monthly salary in that year. His children go to a private school and he made this choice, not out of "snobbism", but because state schools in Chile provide a lower quality education.

The complainant rejects the other arguments and asks that, in accordance with Article LS VI 1.10 of the Local Staff Regulations, the costs be paid by the organisation.

E. In its surrejoinder, the Observatory still contests the receivability of the complaint. It observes that the general decision of 3 April 1997 was followed by individual decisions and that local staff members, including the complainant, did not appeal against those decisions in time.

With regard to costs, it notes that the Local Staff Regulations have been amended and that the provision to which the complainant refers is no longer in force.

CONSIDERATIONS

1. The complainant, a Chilean national, joined the ESO in 1985 on a permanent appointment as an engineer at the astronomic observatory at La Silla in Chile.

2. In the early 1990s the ESO began to revise the Local Staff Regulations with a view to bringing its provisions closer to those applicable to international staff. While the new Regulations were being discussed in draft, certain disputes arose which resulted in a delay in finalising those texts. New Local Staff Regulations were adopted and became effective only on 1 January 1998.

3. In 1991 the ESO decided to pay the local staff an education grant, on a temporary basis, for 1991 and 1992, and in its reply, the Observatory accepts that this payment was intended eventually to become part of the Local Staff Regulations that were then under review. However, staff members were informed that the education grant was a temporary measure and would therefore not establish an acquired right. The grant provided for reimbursement of 75

per cent of certain specified categories of expenses, subject also to overall monetary limits which varied according to the age of the child and the type of expense. The payment of the grant was thereafter extended annually from 1993 to 1996.

4. The Observatory submits that the cost of the education grant had increased from 160,000 German marks in 1991 to 220,000 marks in 1996, and was then estimated to increase to 290,000 marks in 1997. Due to financial constraints on ESO, its Finance Committee decided to "freeze" the expenditure on the education grant at the 1996 level adjusted for inflation.

5. By a memorandum dated 3 April 1997 the Observatory informed the local staff that it had approved the continuation of the education grant for the year 1997 subject to a revision of the conditions of payment in order to limit total expenditure to the 1996 level and that, consequently, the maximum reimbursement amounts ("the ceilings") had been reduced by approximately 25 per cent. The complainant appealed against that decision on 29 April 1997, requesting that the decision to reduce the ceilings be declared invalid, and that the education grant, under the conditions applicable in 1996, be declared a permanent benefit. The Director of ESO in Chile refused his appeal on 15 May 1997, and he then appealed to the Director General.

6. The Director General referred that appeal to the Local Staff's Joint Advisory Appeals Board. That Board recommended on 12 March 1998 that the Director General invalidate the reduction of the ceilings of the education grant, that any modification in the grant should be done uniformly for all staff, and that the education grant should be incorporated in the current Local Staff Regulations. By a letter dated 23 April 1998 the head of Administration informed the complainant that the Director General had decided to maintain the Director's decision of 15 May 1997. That is the decision impugned by the complainant.

7. The complainant states that reducing the maximum amounts reimbursable by 25 per cent was equivalent to a 33 per cent reduction taking into account an annual inflation rate of 8 per cent. In order to implement the budget "freeze" decided on by ESO he accepts that:

"... there were several possibilities, all of them affecting in a certain degree all or some of the staff. It was decided that the modification of the ceilings was the alternative that would cause less impact, since it would only affect those officials whose children are in the most expensive schools (in 1996, approximately 10% of the staff reached the grant's ceilings)."

8. The complainant pleads:

(i) that he has an acquired right to the payment of the education grant, even though it was originally given as a temporary measure for two years, because it had been granted continuously for a period of seven years and it had been intended to incorporate it into the revised Local Staff Regulations;

(ii) that children's education is usually planned in the medium or long term; for a grant of this nature to be effective, it must continue for the required period, i.e. the duration of their education; a considerable reduction in its amount causes serious economic damage to the family, and may affect the children if the parents are compelled to send them to a school of a lower standard.

(iii) that the education grant ceilings for international staff were not modified, although the same reasons existed for reducing them, and there was thus unlawful discrimination against local staff (Judgment 1616, *in re* Echeverriá Echeverría and others).

He asks that the decision of 23 April 1998 be quashed, that the Tribunal declare the education grant to be a permanent benefit included in his remuneration package, and asks for costs.

9. In its reply the Observatory maintains that the complaint is irreceivable as the complainant has not alleged that he was individually affected by the general decision communicated on 3 April 1997; it adds that if the complainant were to allege in his rejoinder that he was individually affected, the question would then arise as to whether he had challenged the relevant decision within the applicable time limit.

10. The Observatory argues further that the complainant does not explain how and to what extent the decision to reduce the ceilings of the grant affected him, but merely states that, in general, there was a reduction of 33 per cent. It contends that the complainant did not suffer a reduction of 33 per cent.

11. The Observatory submits that:

(a) Having regard to the circumstances in which the education grant was originally given as a temporary measure, and then extended, it was not a right "which both parties [intended to] be inviolate" (see Judgment 366, *in re* Biggio No. 3 and others, under 6), nor was there any guarantee given by the Observatory as to its continuance (see Judgments 366; 369, *in re* Nuss; and 372, *in re* Guyon No. 2).

(b) In any event, staff members of international organisations have no acquired rights to the amount and the conditions of payment of an education allowance (Judgment 368, *in re* Elsen and Elsen-Drouot).

(c) Before accepting a plea of breach of acquired rights, the Tribunal must consider what effect the change in the education grant had on the staff members' pay and benefits (Judgment 832, *in re* Ayoub and others); and the complainant has failed to place necessary evidence of that before the Tribunal.

(d) There is no discrimination against local staff, because the payment of an education grant to international staff is legitimate compensation for the difficulties of living and working in a foreign country, and in a different cultural environment, which local staff do not face. In any event, a proper comparison is not possible without considering the entire remuneration package, because there are some benefits which only local staff receive.

12. In his rejoinder, the complainant pleads that in 1996 in respect of his elder daughter he received 961,051 Chilean pesos, but only 706,815 pesos in 1997; and that in respect of his two daughters he had to spend 634,000 pesos more in 1997 than in 1996 - and that, he says, amounted to "approximately 44% of his net monthly salary during 1997". The complainant has given some details of the amounts received by him in 1996 and 1997, in an endeavour to establish that the changes made in 1997 affected him seriously.

13. As the Observatory correctly submits in its surrejoinder, in his internal appeal the complainant had only challenged the abstract and general decision contained in the memorandum of 3 April 1997; that decision did not affect all local staff members alike, but only those whose expenditure exceeded or was near the ceilings. The complainant did not question the application of the memorandum to himself, either in the internal appeal or even in his complaint to the Tribunal. The Tribunal therefore holds that his complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Mark Fernando, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot
Mella Carroll
Mark Fernando

Catherine Comtet

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