

EIGHTY-NINTH SESSION

***In re* Allaert (No. 2) and Warmels (No. 5)
(Application for execution)**

Judgment No. 1995

The Administrative Tribunal,

Considering the application filed by Mr Eric Jaak Allaert and Mr Rein Herm Warmels on 2 August 1999 for the execution of Judgment 1821;

Considering the interlocutory order in Judgment 1908 delivered on 3 February 2000 as well as the submissions by the complainants and the European Southern Observatory (ESO) that are cited in the first paragraph of the preamble to that order;

Considering the further submissions filed, in accordance with the decision in Judgment 1908, by the Observatory on 16 March 2000; the observations on those submissions submitted by the complainants on 6 April and the ESO's comments on those observations of 28 April 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 1821 (*in re* Allaert and Warmels No. 3) delivered on 28 January 1999 the Tribunal ordered the ESO to recalculate the adjustment of the remuneration of its staff as from 1 January 1996. The complainants challenged the ESO's implementation of that order in an application for execution. In its reply to their application the Observatory relied on a decision taken on 23 September 1999 by the ESO Council to maintain the rate of adjustment for 1996 at 0.7 per cent. From the parties' observations, the Tribunal concluded that serious doubt existed as to the process whereby the "decision" in question was drafted, put to a vote and adopted. It accordingly decided in its interlocutory judgment, Judgment 1908 (*in re* Allaert No. 2 and Warmels No. 5), delivered on 3 February 2000 to defer ruling on the merits of the case and ordered the Observatory to submit:

"a brief giving an account of the circumstances in which the decision bearing the date 23 September 1999 was adopted and approved, and providing all relevant information on the procedure whereby the matter was put to the members of the Council, the procedure for the consideration of the amendments and the basis in law for the written procedure whereby the decision was taken."

2. From the explanations given by the ESO, the Tribunal concludes that the decision of 23 September 1999 was adopted properly. It nonetheless observes that, in view of the importance of the matter and the fact that the Tribunal quashed the decisions on pay adjustment taken in 1996, it is regrettable that the Observatory did not apply a more transparent procedure allowing thorough discussion of the issues raised by the execution of Judgment 1821.

3. In any event, Rule 8 of the Rules of Procedure for the ESO Council says:

"1. The Director General, with the agreement of the Chairperson, may submit matters to the Council for decision in the written procedure, if he considers that the matter is so urgent that it cannot be postponed to the next ordinary meeting of the Council but does, on the other hand, not justify an extraordinary meeting.

...

3. Decisions on matters submitted in the written procedure shall be subject to the same voting majorities as required by the Convention."

4. That was the procedure the ESO applied. Since the deadline for its reply to the application for execution was set at 15 October 1999, the Observatory deemed that a decision by the Council was urgent. The next ordinary meeting of the Council being scheduled for December 1999, it opted for the written procedure. The Tribunal cannot allow the complainants' plea that a written procedure would have been unnecessary if the Council had dealt with the matter at its meeting in June 1999. Although the situation was of the Observatory's own making, it may be taken as established that the matter was urgent.

5. The evidence submitted by the ESO shows that the head of Administration, acting on the Director General's behalf, informed the members of the Council on 10 September 1999 of a proposal to maintain the 0.7 per cent adjustment rate on the basis of criteria outlined in the ESO's draft reply to the Tribunal which pertained to the budgetary situation, maintenance of competitive levels of salary and maintenance of purchasing power. The members of the Council were asked to take a decision by written procedure on the understanding that it might be reviewed in the light of the talks with the staff. There is no evidence to suggest that the procedure was initiated without the Chairperson's agreement. Replies were sent in by Germany on 14 September, Sweden and the Netherlands on 15 September, Switzerland on 20 September, Belgium on 23 September. Replies were given by telephone by Denmark on 15 September and by Italy on 17 September which sent written confirmation on 28 September. France was the only member not to participate in the vote. According to the ESO, and there is no reason to doubt its assertion, all the delegations were in favour of the Administration's draft proposal though some asked for "minor amendments essentially to the presentation of the draft".

The Tribunal is satisfied on the evidence that at 23 September a majority had endorsed the Administration's position by means of a procedure which was not in itself unlawful. Though probably not yet set out in the form it was given on 25 October 1999 with the number ESO/Cou-709 conf., the decision was indeed taken on 23 September 1999, with the reasons, which had been sent to all members of the Council.

6. What the Tribunal needs to determine therefore is whether, in the light of the reasons given for it, the decision constitutes proper execution of Judgment 1821, as defined in Judgment 1908.

7. The ESO's justification for not applying the Coordinated Organizations' adjustment rate - set at 1.3 per cent for 1996 - is as follows. The Council could properly depart from the orientation given by that index if it took account of relevant criteria. The factors the Council considered were first, the budgetary situation of the Observatory, which had to resort to borrowing money in order to finance ambitious scientific projects, and that of member States, which were subject to severe restraints. It concluded that a lower rate than that of the Coordinated Organizations was warranted. Secondly, it considered a review prepared for the European Organization for Nuclear Research (CERN) in 1995 comparing salaries in a number of research organisations and institutions which showed that

"the ESO salaries were on the average 7% above ... CERN and 8% above [the European Molecular Biology Laboratory (EMBL)] and substantially above those paid by national institutions - 28% above the German DESY."

The Council therefore decided to take into account "the need to align the ESO salaries and allowances with those of CERN and EMBL". Lastly, wishing to maintain competitive levels of salary, the Council noted that the net average salary of the ESO staff in 1996 was above that of German industry and that the adjustment granted in 1996 kept the compound index of the ESO salaries above the salary indices of German public research institutions and the national consumer price index in Germany. The Council also wanted to narrow the gap between the evolution of inflation in the Observatory's host State and the evolution of the ESO salaries. That could have led to an adjustment of less than 0.7 per cent, which would have sufficed to maintain the staff's purchasing power. The Council's conclusion was that "an overall appreciation of the above criteria warranted for 1996 the decision to apply the [Coordinated Organizations'] index in part only".

8. The Tribunal appreciates the Observatory's endeavour to set criteria which are as objective as possible for determining the index for adjustment of the ESO salaries. It is nonetheless bound to note that the reasons put forward by the ESO have served to justify maintaining the rate of 0.7 per cent, which the Tribunal censured, without giving staff any guarantee that the methodology used produces results which are stable, foreseeable and clearly understood, as Judgment 1821 required. It is clear from the criteria that the ESO considered in deciding to depart from the index of the Coordinated Organizations which is to be used as an "orientation" in accordance with

Article R IV 1.01 of the Staff Regulations, that it sought, in particular, to align its pay with that of CERN and the EMBL, and to reduce the gap between the above remuneration and the national consumer price index in Germany. The first of those criteria is unrelated to "the economic, budgetary and social situation prevailing in the Organization and in the member states" and appears to imply that the "orientation" taken by the Observatory is the pay adjustment index applied by other organisations - similar admittedly to the ESO - rather than the Coordinated Organizations' index. As to the second criterion, it can, as the complainants rightly point out, lead to the evolution of inflation in the host country being taken as the main basis for adjustment.

9. The Council's hastily adopted decision reflects the uncertainty created by a lack of any consistent methodology and of which the ESO itself is aware: in his letter of 10 September 1999 to the members of the Council, the head of Administration said that the decision he was submitting to them might have to be reviewed in the light of the results of talks with staff. It is worth noting in this connection that the salary reviews produced to show that the ESO pay was higher than that of some institutions and comparable sectors of German industry prompted objections on the part of the complainants, and that these objections, some of which are substantial, have elicited no reply from the defendant.

10. In these circumstances, the Tribunal is bound to conclude that the Observatory has failed to show that it took adequate steps to ensure full implementation of Judgment 1821, which ordered it to recalculate the adjustment of salary for staff in accordance with Article R IV 1.01 of the Staff Regulations, using a methodology that would lead to results which were stable, foreseeable and clearly understood. The complainants' claim concerning payment of a penalty in default is disallowed, but the Tribunal will send the cases back to the Observatory for it to review their entitlement to an adjustment of pay for 1996.

11. The complainants are entitled to an award of costs, which the Tribunal sets at 30,000 French francs.

DECISION

For the above reasons,

1. The Tribunal declares that the decisions taken by the ESO following Judgment 1821 do not constitute proper execution of that judgment.
2. The cases are sent back to the Observatory for it to recalculate the salary adjustment to which the complainants are entitled for 1996.
3. The ESO shall pay the complainants a total of 30,000 French francs in costs.

DISSENTING OPINION BY JUSTICE CARROLL

1. I regret that I cannot agree with the judgment of my colleagues in this matter in relation to whether the decision taken on 23 September 1999 by the ESO Council constituted a valid execution of Judgment 1821 (*in re* Allaert and Warmels No. 3).

2. Following Judgment 1419 (*in re* Meylan and others), the ESO changed Article R IV 1.01 of the Staff Regulations - with effect as from 1 January 1996 - so that the Council was to use, "as an orientation", an index corresponding to the salary adjustments of the Coordinated Organizations, provided that, in assessing whether and to what extent the index should be applied, the Council should take into account relevant criteria including the economic, budgetary and social situations prevailing in the Observatory and in the member States.

3. On 10 and 11 June 1996, the Council agreed to a 0.7 per cent adjustment in pay as from 1 January 1996. That decision was set aside in Judgment 1821 on the basis that the ESO failed to establish any methodology or comply with its own Article R IV 1.01 of its Staff Regulations - the Observatory having failed to show any orientation towards the index or any evidence of taking account of relevant criteria. The matter was returned to the ESO to recalculate the adjustment of salary in accordance with Article R IV 1.01 and in the light of the judgment.

4. In August 1999 an application for execution of Judgment 1821 was made to the Tribunal. A decision was taken by the ESO Council on 23 September 1999 fixing a 0.7 per cent adjustment in pay as from 1 January 1996. An interlocutory order was made in Judgment 1908 (*in re* Allaert No. 2 and Warmels No. 5) concerning whether the decision-making process had been validly complied with. It is accepted by the Tribunal in the present judgment

under 1 to 5 that a decision was in fact made on 23 September 1999. I do not dissent from this finding.

5. The ESO, having previously failed to establish any basis on which it could do nothing but follow the Coordinated Organizations index (see Judgment 1821), has now clearly explained the basis on which the Council's decision of 23 September 1999 was reached. The Council considered: the budgetary situation of both the Observatory and the member States, which was and continued to be critical; and the budgetary appropriation of the member States for all international organisations active in science, research and development, the proper allocation of which required, *inter alia*, that the staff of comparable organisations such as CERN, the EMBL and the ESO be, in principle, treated equally in regard to salary. It considered a salary study revealing that the ESO salaries were on the average 7 per cent higher than those paid by CERN and 8 per cent above those of the EMBL and substantially above those paid by national institutions. It took note that only the European Space Agency and the Joint Research Centre of the European Union offered higher salaries but it held that those organisations were in principle in a different position. The Council therefore decided not to follow the index of the Coordinated Organizations without reflection but to take into account in a decision of its own, the need to align the ESO salaries and allowances with those of CERN and the EMBL. It intends to keep the ESO salaries and allowances at an adequate level in order to motivate staff and ensure the Observatory's competitiveness with regard to comparable employment in industry. The index of the Coordinated Organizations does not take into account the specific situation of scientific personnel employed in the public service or in industry. A review showed that the net average salary of the ESO staff in 1996 was above that of German industry. The adjustment granted for 1996 kept the ESO salary compound index over those paid by the German public sector. It decided that the purchasing power of the ESO salaries should be maintained as a minimum requirement for social reasons. The Council, in considering relevant data, found that the ESO salaries have developed over the years so as to result in substantially higher increases than the national consumer price index for Germany. It is endeavouring to reduce the resulting gap between inflation in the host state and the development of the ESO salaries. It intends to re-establish a more realistic basis for future adjustments. The salary adjustment for 1996 kept the index of the Observatory's salaries in that year above the German national consumer price index and the purchasing power of staff pay was therefore secured. The purchasing power of the remuneration could have been kept with a lower adjustment than 0.7 per cent but for social reasons, the increase of the contribution of the personnel to the CERN Pension Fund in 1996 was also to be taken into consideration by the Council.

6. In my opinion, the Observatory has fully complied with the principles set out under 7 of Judgment 1821. While the ESO still has a standard of reference, namely, the index of the Coordinated Organizations, it no longer blindly applies it and the Staff Regulations have been altered to allow a departure while taking certain criteria into account. It is explained how these criteria were applied and the Observatory's intentions into the future. The ESO staff can look forward to salary increases in which the index of the Coordinated Organizations will be considered as also the salary levels of the EMBL and CERN. They can expect salaries to come more into line with those of the aforementioned two international organisations. The consumer price index in Germany will be taken into account so as to consider the purchasing power of the ESO salaries; and comparable employment in industry and in the public sector in Germany will also be looked at so as to ensure that salaries remain competitive. Such a methodology for determining salary adjustments is certainly easily understood. It is foreseeable in that the future is mapped out and it is stable in that salaries will keep pace with the cost of living while the budgetary situation of the organisation is kept on a sound footing. The discretion to depart from the index of the Coordinated Organizations has been clearly explained so that it cannot be said that the Observatory has failed to give proper reasons.

7. Another international organisation, the EMBL, adopted a new Article R 4 1.01 of its Staff Regulations very similar to Article R IV 1.01 of the ESO. The salary adjustment for 1996 and 1997 that the EMBL had made under the new article came under scrutiny in Judgments 1912 (*in re* Berthet No. 2 and others) and in 1913 (*in re* Dauvergne and others). In both cases, the EMBL departed from the index of the Coordinated Organizations. In both cases, the Tribunal dismissed the complaints as being without merit.

8. In Judgment 1912, the Tribunal held that the complainants had not demonstrated how the evaluation of the budgetary situation of the Organisation and the member States had been based on wrong factors. The complainants had given no indication that the salary adjustments in question had the effect of keeping their salary at a level that would be manifestly inadequate. There was no acquired right to have their salaries index linked.

9. In Judgment 1913, a challenge to the system adopted under the new Article R 4 1.01 on the grounds that it left the door open for arbitrariness, was dealt with in full under 14 of that judgment.

10. I can distinguish no difference in principle between the issues arising in Judgments 1912 and 1913 and the issues in this case.

11. With regard to particular reasons given in this judgment of the Tribunal, I have the following comments:

(a) The figure of 0.7 per cent was not in itself condemned in Judgment 1821. What was condemned was a failure to explain how it was arrived at. In my opinion, there can be no criticism directed to the finding of the same percentage which is now explained.

(b) Concerning the reference to the "alignment" of the remuneration of the ESO with salaries of CERN and the EMBL, there is nothing in Article R IV 1.01 of the Staff Regulations which would prevent the Council from referring to indices for salaries in CERN and the EMBL as well as considering the index of the Coordinated Organizations. It is not true, in my opinion, to say that the "alignment" of the ESO salaries with those in CERN and the EMBL does not concern the budgetary, economic and social situation in the Observatory and the member States. On the contrary, the member States, for example, are very aware of the relationship between the three organisations and the necessity to treat them equally.

(c) In view of the fact that the ESO specifically rejects the allegation that it wishes to limit the increase in salaries in the future to the increase in the German consumer price index, I cannot see how the Tribunal is justified in saying that the consumer price index could lead to becoming the principal criterion for adjustment.

(d) The letter of 10 September 1999 from the head of Administration to the Council members - which predated the Council decision - saying that the decision presented to them was subject to a possible revision in the light of the outcome of the talks with staff members, should not be interpreted by the Tribunal as uncertainty about the methodology. Efforts to reach a settlement are to be encouraged and a willingness to talk and negotiate should not be viewed as a sign of weakness or "uncertainty". The fact that no agreement was reached and that the Council had to make an executive decision is immaterial. The validity of the Council decision depends on objective criteria and has nothing to do with the willingness of the Observatory to negotiate with staff.

12. To sum up, I am of the opinion that the ESO has adequately explained how the Council had reached its decision of 23 September 1999 and has respected the principles set out under 7 of Judgment 1821. Accordingly, in my opinion, the application for execution should be dismissed on the merits.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet