

Registry's translation, the French text alone being authoritative.

SIXTIETH ORDINARY SESSION

In re TIMMERMANN (No. 2)

(Application for review)

Judgment No. 795

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 731 filed by Mr. Gero Timmerman on 24 April 1986, the reply of the European Southern Observatory (ESO) of 20 May, the applicant's rejoinder of 16 June and the observatory's letter of 21 July 1986 informing the Registrar that it did not intend to submit a surrejoinder;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal, and Article LS VI of the Regulations for Local Staff Members of the ESO;

Having examined the written evidence;

CONSIDERATIONS:

The background

1. Mr. Agustin Macchino Farias filed a complaint on 31 May 1983 impugning a decision the Director-General of the Observatory had taken on 3 April 1983. The Director-General had rejected a request for monthly adjustment of salary and allowances to the official consumer price index in Chile. By Judgment 608, which it delivered on 12 April 1984, the Tribunal quashed the decision and remitted the case to the Director-General for a new decision. The complainant was an intervener in that case.

2. On 1 June 1984 the Director-General informed Mr. Macchino Farias that in his view quarterly adjustment had given the staff adequate protection in November and December 1981 against the effects of inflation and he therefore refused monthly adjustment.

There was no internal appeal against that decision nor any complaint to the Tribunal.

3. The complainant wrote to the Director-General on 8 January 1985 asking that he switch to monthly adjustment should the rise in the cost of living go above a particular rate; if not, he would appeal to the Tribunal.

The Head of Administration answered on behalf of the Director-General on 29 January that unless there were exceptional circumstances quarterly adjustment would continue.

The complainant lodged a complaint directly with the Tribunal on 30 April 1985. In Judgment 731 of 17 March 1986 the Tribunal declared his complaint irreceivable on the grounds that he had failed to exhaust the internal means of redress: the impugned decision had been taken by the Head of Administration and there had been no appeal under Article LS VI of the Regulations for Local Staff Members.

The pleas in favour of review

4. In support of his application for review of Judgment 731 the complainant alleges that there were facts the Tribunal failed to take account of: it found that it was the Head of Administration who had taken the decision of 29 January 1985, and it held that the complainant should have made an internal appeal.

5. Under Article VI(1) of the Statute of the Tribunal judgments are final and without appeal: they carry the authority of *res judicata*. Although there is no express provision for review, it is not ruled out altogether. But it is admissible only in exceptional cases since otherwise a judgment might be constantly under challenge, in disregard of the *res judicata* rule. Precedent makes it plain that, for one thing, a mistake of law does not afford admissible grounds for review.

6. The complainant contends that the Tribunal's references in Judgment 731 to the author of the decision of 29 January 1985 and to his right of appeal show failure to take account of essential facts. The plea is mistaken. The Tribunal made, not just findings of fact, but rulings on questions of competence and procedure, that is to say, issues of law in holding that the decision of 29 January 1985 was taken not by the Director-General but by the Head of Administration and that the complainant failed to exhaust the internal means of redress. The plea being inadmissible, the application fails.

7. Besides, even if the plea for review were admissible the Tribunal would reject it.

As originally worded, Article LS VI 1.06 of the Local Staff Regulations empowered the Director of the ESO in Chile to hear an appeal at first instance. An appeal would then lie to the Director-General under LS VI 1.07. The post of Director in Chile was abolished in 1977 and the Regulations were amended in 1984 to empower someone appointed by the Director-General to hear an appeal at first instance. It was right to infer that the Head of Administration was the appointee under the rule and that he took the decision of 29 January 1985. It is immaterial that he said he was answering on behalf of the Director-General, to whom, after all, the appeal of 8 January 1985 had actually been addressed.

Even if the Director-General were deemed to have taken the decision, that does not mean that the complainant lost his right to appeal at second instance. As the Tribunal held in Judgment 507, under 2, not every decision of the Director-General's is final. In fact the Director-General may be asked to reconsider and change an earlier, perhaps summary decision. Accordingly, even if he did take the original decision, the complainant was still required to address an appeal to him.

8. Since the application is rejected the complainant is not awarded costs.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 December 1986.

(Signed)

André Grisel

Jacques Ducoux

Mohamed Suffian

A.B. Gardner