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

SEVENTY-EIGHTH SESSION

In re DEKKER and VON DER LÜHE

Judgment 1420

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Hans Dekker and Mr. Oskar von der Lühe against the European Southern Observatory (ESO) on 27 October 1993, the Observatory's reply of 10 August 1994, the complainants' rejoinder of 28 September and the ESO's surrejoinder of 3 November 1994;

Considering the applications to intervene filed by:

M. Albrecht

E. Allaert

W. Ansorge

H. Attersjö

G. Avila

D. Baade

K. Banse

J. Beletic

P. Biereichel

P. Bouchet

J. Brynnel

M. Comin

P. Crane

M. Cullum

A. da Costa Campos

S. D'Odorico

M.-H. Demoulin-Arp

B. Delabre

C. Dichirico

P. Dierckx

P. Dierickx

W. Eckert

D. Enard

D. Ferrand

G. Filippi

G. Finger

P. Fischer

R. Fischer

F. Franza

B. Gilli

M. Grössl

P. Grosbol

C. Guirao Sanchez

B. Gustafsson

T. Höög

M. Hoffmann-Remy

R. Hook

N. Hubin

G. Huster

H. Käufl

F. Koch

B. Koehler

M. Kraus

G. Kretschmer

P. Le Saux

J.-L. Lizon a l'Allemand

M. Maugis

M. Meyer

A. Moorwood

L. Noethe

C. Ounnas

F. Palma

M. Peron

B. Pirenne

M. Quattri

G. Raffi

M. Ravensbergen

R. Reiss

G. Rupprecht

M. Sarazin

M. Schneermann

P. Shaver

J. Spyromilio

S. Stanghellini

E. Swinnen

M. Tarenghi

J. van de Spreng

A. Van Dijsseldonk

A. Wallander

J. Wampler

R. Warmels

R. West

G. Wiedemann

G. Wieland

K. Wirenstrand

M. Ziebell

Considering Articles II, paragraph 5, VII and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the complaints, being identical and treated as such by the parties, may be formally joined for the purposes of this judgment;

Considering that, the substantive purpose of the present complaints being the quashing of a decision by the ESO not to apply to its staff in grades 9 to 14, as from 1 July 1992, the 4.1 per cent five-year adjustment made by the

Co-ordinated European Organisations and calculated to ensure parity in the purchasing power of staff pay between Brussels and Munich, the parties' claims are as follows:

The complainants:

1. To quash the impugned decision insofar as it affected their pay slips;

2. to give all due effect in law to such quashing by awarding the complainants as from 1 July 1992 the 4.1 per cent five-year adjustment in the parity of purchasing power between Brussels and Munich;

3. to order the ESO to meet the complainants' costs.

The defendant:

1. To dismiss the complaints as irreceivable for want of an appealable decision;

2. in any event, to dismiss as irreceivable their claim to a financial award equivalent to the disputed adjustment inasmuch as it exceeds the competence vested in the Tribunal by Article VIII of its Statute;

3. failing that, to dismiss the complaints as devoid of merit.

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Mr. Dekker, an official at grade 10, and Mr. von der Lühe, an official at grade 9, belong to the ESO's international staff and are stationed at headquarters at Garching, near Munich. On 2 December 1982 the ESO's Council decided to base periodic adjustments in the salaries and allowances of international staff on the procedures for adjustment that were followed in the Co-ordinated European Organisations. Such practice was codified with the adoption of Article R IV 1.01 of the Staff Regulations. The Co-ordinated Organisations decided on a five-yearly adjustment of salary of 4.1 per cent as from 1 July 1992 to ensure parity in purchasing power between Brussels and Munich. The Council of the ESO refused, however, in June 1993 to apply that adjustment to staff in grades 9 to 14. The complainants lodged appeals against their pay slips for August 1993. In letters dated 11 October the Administration gave them leave to put their case directly to the Tribunal.

B. The complainants submit that the impugned decision is in breach of Article R IV 1.01 of the Staff Regulations. In their view the Council was not free to depart from the policy it had adopted unless it made an express amendment to that effect. The ESO infringed the rule against retroactivity by choosing in 1993 not to apply the full adjustment due for a period that had already lapsed. It failed to discharge its duty to give reasons for its decision. A desire to save money did not suffice to warrant the Council's decision.

C. In its replies the ESO questions that the complaints are receivable and submits that the impugned decisions merely relieve the complainants of having to exhaust the internal means of appeal. On the merits it observes that the Council has not waived its authority to decide on salary and is not bound by recommendations of the Co-ordinated Organisations. There was no breach of the rule against retroactivity.

D. In their rejoinders the complainants point out that the letters of 11 October 1993 reject their claims by implication and so allow them to go to the Tribunal. As for the Council's allegedly unfettered authority to decide on staff pay, they contend that the Observatory agreed to follow the procedure in the Co-ordinated Organisations.

E. In its surrejoinders the ESO maintains that the complaints are irreceivable and restates its position on the merits.

CONSIDERATIONS:

1. The complainants, who are on the ESO's staff at Garching (Munich) and hold grades 9 and 10, seek the quashing of the implied rejection of their claims. They put those claims to the Director General on 6 October 1993 after receiving their pay slips for August 1993. Following a decision taken by the ESO Council at its session of 1 and 2 June 1993 they are objecting to the ESO's refusal to grant them a 4.1 per cent adjustment in pay which had been decided by the Co-ordinated Organisations and which was calculated to ensure parity in the purchasing power of pay between Brussels and Munich.

2. The general background to the case is as set out in Judgment 1419 (in re Meylan and others), also delivered this day. According to the evidence, by document ESO/FC 979 of 22 April 1993 the Administration put to the Finance Committee a proposal intended to apply as from 1 July 1992 the new parities in purchasing power between Brussels and Munich which the Co-ordinated Organisations had set on the strength of the finding of a study by the Organisation for Economic Cooperation and Development (OECD).

3. The Finance Committee examined that proposal at its session of 10 and 11 May 1993. Several delegations were fairly strongly opposed to the proposal. They took the view that continual adjustments were to blame for the excessive rise in the cost of international organisations; the economy in general gave cause for anxiety; unemployment was high among graduates; national civil services were reducing staff, dismissing employees and facing budget cuts; and, lastly, pay differentials for scientists between national and international institutions should not be allowed to widen further. The delegations had instructions from their ministries to reduce the budgets of international scientific organisations; the ESO was only the first to suffer and others would follow: it was time to let the staff see what life was like in the real world "outside".

4. Two delegations, the Dutch and the German, went into the legal issues. They pointed out that when the latest version of the rules had been drafted in 1991 especial care had been taken over the wording so as not to give the impression that delegations were automatically bound by recommendations from the Co-ordinated Organisations, which were mere "guidelines".

5. In the end the Administration's proposal was rejected by a vote of three against (France, Germany and the Netherlands) to one in favour (Belgium), with four abstentions (Denmark, Italy, Sweden and Switzerland). The Administration's representative having said he would put the matter to the Council, the German delegate said in explanation of his vote that he was not convinced that that could help the Administration, even though he agreed with it "that the decision was illogical and had no rationale behind it".

6. The question gave rise to full discussion at the Council's session of 1 and 2 June 1993. The chairman of the Finance Committee observed that the Committee's discussions had been consistent with the Council's decision of 1 April 1993 to reduce annual salary adjustments by a third. The Dutch and German delegates said that in any event the Committee's proposal was part of a package deal that should be approved in its present state. In the end the Administration's proposal was rejected by a vote of six against to two in favour (Belgium and Switzerland). The Swiss delegate commented that the Council had decided some time ago to align itself with the Co-ordinated Organisations: until there was a change in policy it was not for the Council to depart from it.

7. The complainants filed claims on 6 October 1993, and sixty other officials signed a "statement of support" for them. The complainants' reasoning is in substance the same as what was said about the reduction of the annual adjustment. In keeping with their position in those cases they again offered to forgo the formality of internal appeal. The head of Administration agreed to waive the internal procedure in letters dated 11 October 1993, the last sentence of which said that the Administration would in any event have had to confirm the Council's decision and reject an internal appeal.

8. The parties' pleas on receivability and on the merits are in substance identical to those on which the Tribunal rules this day in Judgment 1419 (in re Meylan and others), and the Tribunal's conclusions are the same as those set out in that judgment.

9. But it must add two sets of comments peculiar to this case.

10. In its surrejoinder the ESO raises a new objection to receivability: that the complainants challenged the wrong decisions, those of 11 October 1993 having merely brought the internal appeals procedure to a close. The challengeable decisions, it argues, were the complainants' pay slips issued in August 1993 and, as the complainants are mistakenly impugning an unchallengeable decision, their complaints should be dismissed as irreceivable.

11. The plea fails. In several respects it offends against the rule of good faith that should govern relations between organisation and staff, even when they are in litigation. First, it is inadmissible for the Observatory in its surrejoinder - which it knows the complainants do not have the opportunity of answering - to raise a fresh objection to receivability based on facts it was aware of at the time of filing. The plea is all the more inadmissible for being at odds with the ESO's reply. Secondly, in view of the terseness of the letters of 11 October 1993 the complainants rightly inferred rejection of their claims and filed their complaints against such rejection. Thirdly, even supposing

that the letters of 11 October 1993 could be taken as rejection on the merits, thereby putting an end to the internal appeal, it would still be plain that the time limit for filing could not have started before that date. As to the purpose of the complaint, it does not in the last resort make any difference whether the challenged decision is the pay slip or the rejection of an internal appeal or both together.

12. As to the merits there is one feature of this case, the "parity" component of the five-yearly adjustment, that calls for further comment. The Finance Committee and the Council may be criticised for failing to grasp the true nature of the adjustment, which was by no means a rise but compensation for differences in the cost of living between international duty stations in Europe. The purpose of such an adjustment, which is a feature of all international pay schemes under some name or another, is to maintain or restore parity in purchasing power between staff whatever their duty station may be. By refusing to ensure parity of pay by that means the Council in fact discriminated against staff stationed in Munich. For that reason alone the Council's decision on this particular adjustment must be deemed invalid.

13. The conclusion is that the complainants are entitled to receive the adjustment which they were denied as a result of the Council's decision. Having succeeded in their claims, they are also entitled to costs.

14. The applications to intervene are allowed and, apart from costs, the interveners shall have the same rights as the complainants insofar as they are in the same position.

DECISION:

For the above reasons,

1. The decisions refusing by implication to pay the complainants the 4.1 per cent five-year adjustment in the parity of purchasing power between Brussels and Munich are set aside.

2. The cases are sent back to the Observatory for review of the complainants' and the interveners' consequent entitlements as from 1 July 1992.

3. The ESO shall pay the complainants a total sum of 25,000 French francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
Michel Gentot
P. Pescatore
A.B. Gardner

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