EIGHTY-SEVENTH SESSION

In re Macchino Farías (No. 3)

Judgment 1852

The Administrative Tribunal,

Considering the third complaint filed by Mr Agustín Macchino Farías against the European Southern Observatory (ESO) on 4 March 1998 and corrected on 18 March, the ESO's reply of 27 July, the complainant's rejoinder of 24 August and the Observatory's surrejoinder of 27 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. On 18 April 1995, ESO concluded with the Chilean Government an Interpretative, Supplementary and Amending Agreement to the 1963 Convention between the Government of Chile and the European Organisation for Astronomical Research in the Southern Hemisphere for the Purpose of Establishing an Astronomical Observatory in Chile. The First Transitory Article and Article 6 of this Agreement, which came into force on 2 December 1996, obliged the Observatory to harmonise within one year the Regulations for ESO Local Staff in Chile with the essential principles of Chilean labour law.

An expert nominated by the Chilean Government was invited to and attended the meetings of the Working Group of the Finance Committee which was responsible for this harmonisation process. The Local Staff Association was also consulted. The Council of ESO adopted the revised text of the Regulations for Local Staff in Chile on 19 November 1997. On 21 November, the Director General informed the Chilean Minister of Foreign Affairs of the adoption of the text and sent him a copy. On 4 December 1997, he transmitted it to all local staff members in Chile. In both communications, he indicated that the new Regulations would enter into force on 1 January 1998.

The complainant, a Chilean national who was born in 1947, has been a member of the staff of ESO in Chile since 1972. On 30 December 1997, he requested the Director General to declare that the new text would not come into force until the Government of Chile had stated that it was indeed in conformity with the essential principles of Chilean labour law and that it would not affect his acquired rights. By a letter of 16 January 1998, the head of Administration replied on behalf of the Director General that the Regulations had entered into force on 1 January and that any issue concerning the complainant's acquired rights would be decided on a case-by-case basis. This is the impugned decision.

B. The complainant contends that this decision is affected by a procedural flaw since the ESO Staff Regulations and the case law of the Tribunal obliged the Director General to consult the Joint Advisory Appeals Board.

He says that ESO disregarded the objections expressed by the Chilean expert and decided to apply the new text without having obtained the agreement of the host State. However, Article 6(3) of the Agreement provides that the part of the Regulations for Local Staff in Chile which establishes the essential principles of Chilean labour law may not be amended except by agreement between the contracting parties. The complainant adds that the revised text violates this provision by giving the Director General the authority to modify the terms of this part of the text without obtaining the approval of the Chilean Government.

Finally, the complainant argues that the text does not preserve his acquired rights, particularly those which he says he has acquired under several judgments of the Tribunal.

The complainant asks the Tribunal to quash the impugned decision, to declare that the revised version of the Regulations for Local Staff in Chile have not entered into force and that they could not affect his acquired rights. He also claims costs.

C. In its reply, the Observatory submits that the complaint is irreceivable on the grounds that the internal means of

redress have not been exhausted. The request of 30 December 1997 could not be considered as an appeal, since the complainant did not challenge a decision, but requested the Director General to take two individual decisions by means of a general statement. Furthermore, even if the memorandum of 4 December 1997 was interpreted as implying a decision, such a decision would be of a general character, and has not as yet adversely affected the complainant.

Subsidiarily, the Observatory recalls that an expert from the Chilean Government participated in the procedure for the revision of the Regulations for Local Staff in Chile and that the Chilean Government did not oppose the text before its entry into force on 1 January 1998. The revised Regulations state that the Director General is competent internally for an amendment of the Regulations, and they do not address the issue of the Observatory's obligations with its host State.

Finally, respect for the acquired rights of the staff is a general principle of international civil service law, which is protected even without a specific provision in the Regulations. The Observatory notes that the complainant does not even indicate which acquired rights have been violated by the entry into force of the new Regulations.

D. In his rejoinder, the complainant contends that his request dated 30 December 1997 was indeed an internal appeal and that the Observatory had understood it as such since the head of Administration in his reply stated that "I should like to confirm the receipt ... of your request (apelación) ...".

On the substance, the complainant submits that the agreement of the Chilean Government could not be inferred from its silence. He produces a letter from the Minister of Foreign Affairs dated 23 January 1998, indicating that the expert appointed had observed that several provisions contradict the essential principles of Chilean labour law and requesting explanations. Finally, he contests the authority of the Observatory to take decisions on a "case-by-case" basis on the preservation of his acquired rights.

E. In its surrejoinder, the Observatory reaffirms its pleas and maintains its conclusions. It submits that the Spanish term "apelación" is not sufficient to give the complainant's request the quality of an internal appeal and that its diplomatic relations with its host State are not a subject to be discussed before the Tribunal.

CONSIDERATIONS

1. Although neither the complainant nor ESO has produced a copy of the complainant's original internal appeal to the Director General, dated 30 December 1997 (the document apparently not being in either of the Tribunal's official languages), it is clear, both from the Observatory's response and from the complainant's own submissions in support of his complaint, that his aim was to prevent the repeal of the former Combined Rules and Local Staff Regulations by the new Local Staff Regulations as of 1 January 1998.

2. The complainant does not identify any ESO decision which affects him directly. He seeks only to prevent the enforcement of the new Regulations, apparently from fear that their application might affect his acquired rights.

3. Manifestly, the complaint is irreceivable. The Tribunal's case law[(1)] is consistent to the effect that a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to him. This is a general attack which is not tied to any particular application of the impugned rules to the complainant. It will not therefore be considered by the Tribunal.

4. The complaint must accordingly be dismissed as irreceivable.

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 arroll
James K. Hugessen

Catherine Comtet

1. See Judgment 764 (*in re* Berte No. 2), 1329 (*in re* Ball and Borghini) and 1423 (*in re* Saunders No. 11).

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