

## **EIGHTY-EIGHTH SESSION**

### ***In re* Allaert (No. 2) and Warmels (No. 5)**

**(Application for execution and Interlocutory order)**

**Judgment 1908**

**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, the reply of 8 October from the European Southern Observatory (ESO), the complainants' rejoinder of 25 October and the Observatory's surrejoinder of 4 November 1999;**

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

**Having examined the written submissions;**

### **CONSIDERATIONS**

**1. In Judgment 1821 delivered on 28 January 1999 the Tribunal ruled on complaints filed by Mr Allaert and Mr Warmels against decisions taken by the Director General of the ESO on 13 May 1997 refusing to modify the 0.7 per cent adjustment applied to their pay as from 1 January 1996. The Tribunal quashed those decisions, considering that the Observatory had failed to give an adequate explanation of the discrepancy between the adjustment rate it had set and the index of 1.3 per cent established by the Coordinated Organizations which was to be used "as an orientation". It ordered the ESO to recalculate the adjustment of salary for its staff in accordance with Article R IV 1.01 of the Staff Regulations and in the light of that judgment.**

**2. Having noted that, at its meeting of 21 and 22 June 1999, the Council of the ESO had taken no steps to execute the judgment, the complainants filed an application for execution on 2 August 1999. Since then, following discussions between the Observatory and staff representatives which produced no positive results, the ESO has indicated in its reply that the Council decided on 23 September 1999 to maintain the 0.7 per cent adjustment rate. In their rejoinder the complainants submit that that decision fails to execute Judgment 1821 and press their initial claims to the Tribunal to order the Observatory to pay the amounts due under the judgment.**

**3. To ascertain the scope of the complaint, it is necessary to recall the provisions of Article R IV 1.01 of the Staff Regulations as amended in 1995:**

**"When reviewing remuneration and allowances, the Council shall use as an orientation an index which shall correspond to the adjustment rate calculated according to the salary adjustment procedure of the Coordinated Organizations with respect to adjustments of the basic salary scales of the Coordinated Organizations in Germany.**

**When assessing whether or to which extent this index shall be applied as the actual salary increase, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organizations and in the member states.**

**The basic salary scales and the allowances for international staff in Germany and Chile shall be approved by the Council.**

**\* The remuneration and allowances for members of the personnel at duty stations outside Germany shall be adjusted by applying a cost of living differential in order to obtain equal purchasing power using Munich as lead town.**

**\*) Applicable as of June 8, 1995"**

**4. After recalling the principles, established in the case law, governing the limits on the discretion of international organisations to set adjustments in staff pay, the Tribunal held in Judgment 1821 that the ESO**

had failed to give a satisfactory explanation, either before the Joint Advisory Appeals Board or before the Tribunal, of what factors were involved in its decision. Though it asserted, for example, that ESO salaries "should be at a level which is compatible with the German high-tech industries", there was not one iota of evidence before the Tribunal to demonstrate that salaries in that sector were actually compared. Nor was there any evidence that the Council attempted to take account of "relevant criteria" as required by Article R IV 1.01. Since the impugned decision was not based on any method that took account of relevant criteria, the Tribunal found the Observatory to be in breach both of the provisions of Article R IV 1.01 and of the general principles of international civil service law.

5. The complainants state in their brief - and the defendant does not demur - that the body competent to set salary scales is the ESO Council. To their knowledge, they say, no decision had been taken when they filed their application for execution, and in theory the Council was not due to meet before December 1999. In their rejoinder they expressed their surprise to learn from the defendant's reply, registered on 8 October 1999, that a decision had been taken on 23 September 1999 of which they knew nothing although there had been regular meetings between staff representatives and representatives of the Council, the Finance Committee and the Director General. They express "serious doubts" as to the date if not the very existence of the Council's decision and ask the Observatory to produce in its surrejoinder the decision and a statement of the reasons for it.

6. In its surrejoinder the Observatory refutes those arguments and says that it produced the decision and the reasons for it in section III of its reply. It submits to the Tribunal a document sent to the Council for information, bearing the reference ESO/Cou-709 conf., and dated 25 October 1999, to which is attached the "Council decision related to the Salary Adjustment 1996 - taken in the written procedure September 23, 1999". The decision sets out reasons which are a reproduction of section III of its reply; they even contain a number reference to paragraphs, which appeared in the reply submitted to the Tribunal before the Observatory had corrected by a fax of 8 November what it describes as a typing error.

7. The Tribunal observes that at all events the circumstances in which the document was adopted remain unclear. The Observatory says that the Administration had submitted in writing a draft of the decision to Council members "in accordance with the usual and acknowledged practice (Judgment No. 1812, *in re* Argos No. 2 and others, under 4, fourth paragraph)". However, that judgment makes no allusion to any such practice. On the contrary, it states in the context of the execution of a judgment quashing a decision on pay adjustment in another organisation, that "the Council obviously had to meet" and that the Administration quite lawfully waited for the next meeting of the Council before putting the matter to it for a decision.

8. The ESO adds that on 23 September 1999 it was "in possession of the Council's written comments and the requests to amend the draft decision", which appears to imply that the draft had not yet become a decision. The Tribunal has no knowledge of what amendments were submitted or adopted, or of the procedure whereby they were adopted or rejected. The only information from the ESO is that "the final text of the decision was approved by the Chairman of the Council and forwarded to the Council members as part of a Council document dated 25 October 1999". A serious doubt therefore exists as to the process whereby the text was drafted, put to the vote and adopted, and, as matters stand, the Tribunal is not in a position to ascertain the lawfulness of the decision which is supposed to ensure execution of its judgment.

9. In these circumstances, the Tribunal has decided to defer ruling on the merits and, pending such ruling, orders the Observatory to submit, within thirty days following notification of this judgment, 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.

10. The complainants shall submit their observations on the Observatory's brief within thirty days following receipt thereof and the ESO may submit a further brief within fifteen days of receipt of those observations.

## DECISION

For the above reasons,

**The Tribunal orders further submissions in accordance with 9 and 10 above.**

**In witness of this judgment, adopted on 11 November 1999, 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 3 February 2000.**

*(Signed)*

**Michel Gentot  
Mella Carroll  
James K. Hugessen**

**Catherine Comtet**

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