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

EIGHTY-EIGHTH SESSION

In re Dekker (No. 2)

Judgment 1916

The Administrative Tribunal,

Considering the second complaint filed by Mr Hans Dekker against the European Southern Observatory (ESO) on 18 August 1998 and corrected on 20 November 1998, the Observatory's reply of 24 February 1999, the complainant's rejoinder of 4 June and the ESO's surrejoinder of 4 August 1999;

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. The complainant, a Dutchman who was born in 1951, joined the staff of the ESO at its headquarters at Garching, near Munich (Germany), on 1 November 1981 under a fixed-term contract. He was granted an indefinite appointment on 19 December 1988.

In 1997, the ESO broached the subject of revising the scale of reimbursements under its health insurance scheme with a view to stabilising the premium rates, achieving savings in the management of the contract concluded with the insurers, represented by the insurance brokers Van Breda, and aligning the level of protection with that of other international organisations (the scheme then in force provided for the full reimbursement of most types of medical expenses).

By an internal memorandum of 29 December 1997, the Head of Administration informed all ESO staff members and pensioners that an agreement had been reached with the insurance companies concerning reimbursements for 1998. The new contract, which provided in particular for a reduction to 80 per cent of the reimbursement rate for certain types of medical expenses and the introduction of annual ceilings, was to be finalised and signed in January 1998. The new reimbursement scheme would enter into force on 1 January 1998.

The complainant's salary statements for the months of January and February 1998 showed an amount of total deductions which was unchanged in relation to the month of December 1997. However, the salary statement for March 1998 bore the following indication: "salary adjusted due to: new health [insurance] rates".

By a letter of 14 May, addressed to the Director General, the complainant lodged an internal appeal against the application to his case of the decision to modify the health insurance scheme, as reflected in his salary statement for the month of March 1998. In a letter of 25 May 1998, which is the impugned decision, the Head of Administration replied, on behalf of the Director General, that his appeal was time-barred and therefore irreceivable.

By an internal memorandum of 2 June, the Head of Administration informed all staff members that copies of the new health insurance contract for 1998 were available. It is indicated on the contract that the insurers only signed it on 23 April 1998.

B. The complainant contends that the impugned decision is unlawful. He says that his salary statement for the month of March 1998 constitutes a measure to apply in his case a decision which was not yet in force, since the insurance contract was not signed by Van Breda until 23 April. This was in breach of the principle of non-retroactivity.

The complainant requests the Tribunal to set aside the Director General's decision of 25 May 1998, to allow all consequent redress and to grant him costs.

C. In its reply the Observatory contests the receivability of the complaint. It argues that, at the end of 1997, the complainant received the memorandum of 29 December 1997 informing him that the new reimbursement scheme would come into effect on 1 January 1998. This general decision was applied to him for the first time in January 1998 on the occasion of the payment of his salary. The complainant's internal appeal, dated 14 May, was not therefore lodged within the statutory time-limit of sixty days. Consequently, his complaint is irreceivable under Article VII of the Statute of the Tribunal.

It adds that the complainant's pleas are devoid of merit. The ESO and the insurance brokers Van Breda had reached agreement on the essential points of the contract at the end of 1997. They were, therefore, contractually bound on 1 January 1998 since a contract is concluded when the parties have reached agreement on the points which they consider to be essential. Furthermore, while the final document was signed on 23 April 1998, in its Article 3 it states that it entered into force on 1 January 1998.

D. In his rejoinder the complainant submits that his complaint is receivable. He contends that the ESO has not provided evidence of the existence of the new contract on 1 January 1998. He argues that, even if ESO appears to base itself on a contractual practice which is fairly common in Germany, under which the parties to a contract subscribe in writing to the points on which they have agreed as the negotiations progress, the above parties are not bound before the conclusion of the contract. The new contract only acquired binding force on 23 April 1998, the date it was signed by Van Breda. The complainant's salary statement for the month of March 1998 therefore constituted the first application in his case of the new health insurance scheme.

The complainant observes that the operating cost of the previous health insurance scheme did not justify the "unavoidable reduction" of reimbursements.

E. In its surrejoinder the ESO contends that it is within its discretion to review the health insurance scheme.

On the question of receivability, the only date that counts is that on which a general decision is communicated to the staff. The contractual practice referred to by the complainant does not exist. German law follows the principle of the contractual freedom of the parties.

In its view, the complainant is merely mounting a general challenge against the application in his case of the new insurance contract and does not claim to be individually affected by the decision.

CONSIDERATIONS

1. The complainant has been a staff member of ESO since 1 November 1981 at its headquarters in Garching (Germany). In this capacity, he benefits from the social security scheme, under Article V 1.01 of the International Staff Rules, which safeguards members of the personnel of ESO and their families against the economic consequences of illness, accidents and disability.

2. Article R V 1.01 of the Staff Regulations states that the social security schemes shall include a health insurance scheme agreement approved by the Council of the ESO, covering all staff members against the economic consequences of illness and accidents. Article R D 2.01 places the obligation on the Organisation to insure all staff members against the contingencies of occupational illness and occupational accidents.

3. To give effect to the above obligations, the ESO concluded with a group of insurance companies, acting through the insurance broker Van Breda, a group insurance contract covering staff members against the above risks.

The yearly premium rates are calculated in percentages of the basic salary of the insured persons. These premiums are paid in monthly instalments. One-third is borne by the insured staff members and two-thirds by the Observatory. The premiums paid by staff members are deducted from their monthly pay. The related sums appear on their monthly salary statements under the heading "total deductions", which also comprise staff members' contributions to the pension fund.

The group contract was concluded on 5 April 1974 for a duration of one year and could be extended by tacit agreement or amended. The contract provided that the premium rates would be subject to annual adjustment. This adjustment is calculated taking into account the reimbursement costs incurred by the insurers during the preceding years.

4. The contract had been amended several times on the occasion of the successive annual renewals up to 1996. The ESO governing bodies subsequently requested the Administration to renegotiate the contract with the insurers with a view to obtaining a 20 per cent reduction in the annual premium.

At the end of 1997, after discussions which commenced in March 1997, the ESO and Van Breda reached an agreement on the essential terms of a new contract and decided, by an exchange of letters of 23, 29 and 30 December 1997, to set the date for the coming into force of the new contract as of 1 January 1998.

The above contract contained provisions relating, in particular, to the new scheme for the coverage of insured staff members, i.e. the level of benefits and reimbursements. On some points requiring the clarification of issues of a technical and administrative nature, it was agreed between the parties that the final contractual formulations would be adopted at the beginning of 1998.

The staff of the ESO was informed by an internal memorandum of 29 December 1997 that the new reimbursement scheme would enter into force on 1 January 1998.

The new contract was signed by the ESO on 18 March 1998 and by Van Breda on 23 April 1998.

5. The complainant received a salary statement on 16 March 1998 which, for the first time since 1 January 1998, bore the indication "salary adjusted due to: new health [insurance] rates". He considered that this constituted the first individual decision in his case of the application of the new health insurance system. On 14 May 1998, he lodged an internal appeal against this salary statement.

6. By a letter of 25 May 1998, the Head of Administration informed the complainant that his appeal had been dismissed by the Director General, who considered that it had not been lodged within the required time limit for internal appeals.

This letter of 25 May is impugned in the complaint filed with the Tribunal on 18 August 1998.

7. The complainant contends that the impugned decision is unlawful on the grounds that the salary statement for March 1998 constitutes a measure applying a decision which was not in force at the date of the notification of the above measures.

He also submits that the impugned decision is unlawful because it was in breach of the general principle that detrimental administrative decisions may not have retroactive effect. He says that a decision which came into effect on 23 April 1998, the date of the signature of the contract by Van Breda, which was therefore only applicable from the month of May, was in fact applied in the previous months.

8. The complainant argues that the new contract was concluded on 23 April 1998, the date on which it was signed by Van Breda, and that it could not therefore come into force before that date, nor be applied to situations before that date.

The Tribunal does not agree with the complainant. A contract is concluded when there is a firm and definitive unity of intentions between the contracting parties; it generally takes the form, particularly where, as in this case, it consists of a contract by correspondence, of an offer made by one party followed by the acceptance of the offer by the other party.

Such unity of intentions must in principle cover all the clauses of the contract, which did not happen in the present case. But in certain instances, the contract may be held to be concluded, by interpretation of the intentions of the parties, even in the absence of agreement on the subsidiary points.

The intention of the parties, the ESO and Van Breda, to consider the essential points of the new contract as being concluded by exchange of correspondence has been clearly established. The parties were within their rights to set 1 January 1998 as the date for the coming into force of the contract. It only remained to clarify

certain points of a technical and administrative nature, which could not jeopardise the essential provisions relating to the new insurance scheme for staff members and the premium rates to be paid. The contract must be presumed to have been concluded at the latest on 30 December 1997, the date on which Van Breda acknowledged receipt of the ESO's acceptance of the offer.

This contract, concluded prior to 1 January 1998, could enter into force on that date in respect of the essential provisions agreed upon between the parties.

The personnel of the ESO was duly informed so that it would be aware of the reimbursement scheme which would be applied in 1998 and the premium rates which it would have to pay as of 1 January 1998.

It matters little, as emphasised by the Observatory, that the written confirmation from Van Breda reached the ESO only on 30 December 1997, that is one day after the distribution of the internal memorandum informing the personnel of the new system which would come into force on 1 January 1998. The ESO, which had accepted an offer made by the insurance brokers Van Breda on 29 December 1997, was entitled to consider that the latter's confirmation was assured.

9. It cannot, therefore, be argued that the salary statements for March and April 1998 constitute measures applying a decision which was not yet in force. In practice, these salary statements were drawn up taking into account an insurance contract which came into force on 1 January, in accordance with the intentions of the contracting parties. The provisions of the contract had been previously brought to the knowledge of staff members of the ESO.

Nor can it be claimed that the application to staff members in March 1998 of the provisions of a contract which entered into force on 1 January 1998 is in breach of the general principle that detrimental administrative decisions may not have retroactive effect.

The claims having failed on the merits, it is not necessary to rule on the ESO's plea of irreceivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

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