

EIGHTY-NINTH SESSION

In re Dierickx (No. 2) and Franza (No. 2)

Judgment No. 1997

The Administrative Tribunal,

Considering the second complaints filed by Mr Philippe Dierickx and Mr Francis Franza against the European Southern Observatory (ESO) on 18 December 1998 and corrected on 24 March 1999, the ESO's reply of 30 September, the complainants' rejoinder of 13 December 1999 and the Observatory's surrejoinder of 17 March 2000;

Considering Article II, paragraph 5, 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 facts of the case and the pleadings may be summed up as follows:

A. The evolution of the ESO policy on staff pay and facts relevant to this case are set out under A in Judgments 1419 (*in re* Meylan and others) and 1821 (*in re* Allaert and Warmels No. 3) delivered respectively on 1 February 1995 and 28 January 1999.

In November 1995 the ESO Council decided to amend Article R IV 1.01 of the Staff Regulations so that the index calculated by the Coordinating Committee on Remuneration of the Coordinated Organizations⁽¹⁾ would henceforth serve only as an "orientation" in reviewing the salaries and allowances paid to the ESO staff and that "the economic, budgetary and social situation prevailing both in the Organisation and in the member states" would be taken into account by the Council "[w]hen assessing whether or to which extent this index [shall] be applied".

For 1998 the Coordinating Committee recommended adjusting pay by 2.4 per cent in Germany. Having considered that recommendation as well as the ESO's financial difficulties and the substantial loss of earnings to staff resulting from the 1996 and 1997 adjustment policy, on 21 April 1998, the Working Group of the Finance Committee proposed applying an adjustment of 1.7 per cent as from 1 January 1998. At its meeting of 18 and 19 May 1998 the Finance Committee did not vote on the matter. On 11 and 12 June the Council decided to adjust pay for 1998 by 1.2 per cent. The head of Administration so informed staff in an internal memorandum of 2 July 1998.

On 27 August 1998 the complainants wrote to the Director General challenging their pay slips for July 1998, received on 17 July, as being the first individual decisions applying the Council's general decision. They asked him to waive the internal appeal procedure. By a letter of 22 September 1998 - the impugned decision - the head of Administration authorised them on the Director General's behalf to put their case directly to the Tribunal, thereby rejecting their appeals by implication.

B. The complainants allege an error of fact: in determining the adjustments for 1998 the Observatory took as a basis the salaries paid in 1997, which were themselves unlawful having been based on the remuneration in 1996, which the Tribunal censured in Judgment 1821. This, they say, "mechanically" affects the lawfulness of the impugned decision. Moreover, the ESO disregarded the principles governing the limits on the discretion of international organisations to set adjustments in staff pay, which the Tribunal recalled in Judgment 1821. In particular, the ESO has neither changed the procedure censured by the Tribunal nor given the reasons for the adjustment. Lastly, in Judgment 1821 under 10, the Tribunal found the ESO to be in breach of Article R IV 1.01 of its own Staff Regulations; and that finding also applies to the impugned decision.

They seek the quashing of the decision and an award of costs.

C. In its reply the ESO observes that in Judgment 1821 the Tribunal recognised that an international organisation is free to choose a system for determining salary adjustments and use its discretion to depart from an external standard provided that it states proper reasons for such departure. In its submission what needs to be determined therefore is whether the ESO Council had proper reasons for applying only in part the Coordinated Organizations index for 1998. It produces documents reflecting the discussions the Finance Committee held on the implementation of the criteria set out in Article R IV 1.01.

It notes that the Council considered the following criteria in coming to its decision: the economic and budgetary situation prevailing in the ESO and its member States; the need to maintain competitive levels of salary; and the need to consider the social situation of staff and maintain the purchasing power of their salaries. First, the Council found that the Observatory's budgetary situation remains critical as the member States are faced with budgetary restraints, which is why it decided to align ESO salaries and allowances with those of other scientific international organisations. Secondly, the Council compared the evolution of ESO salaries with that of German high-tech industries and public research institutes "in order to motivate the staff and to assure the organisation's competitiveness with respect to comparable employment in industry". Thirdly, the Council wanted to reduce the gap between the evolution of inflation in the host country and the evolution of the ESO salaries. The Council's decision was therefore based on proper reasons and warranted.

D. In their rejoinder the complainants question the goodwill of the Observatory and accuse it of resorting to dilatory tactics. In their view, the documents produced cannot be regarded as evidence since they came from the Finance Committee and not the decision-making body, which is the Council. The positions - and even more so the reasons - that delegations put forward may vary depending on whether they are on the Finance Committee or the Council. The complainants observe that the document produced does not show that the Council took its decision on the 1998 adjustments on the basis of the arguments put forward in the reply. Furthermore, the ESO said that the member States expressed their positions in restricted sessions and meetings for which there were no complete minutes or records. That prevented the Tribunal from fulfilling its role as a review body. They add that there are limits to the discretionary authority that the Tribunal allows the governing bodies of international organisations.

In subsidiary pleas the complainants contend that the arguments the ESO submitted in its reply as being the ones which led to the adoption of the decisions indirectly challenged afford no legal basis for those decisions. First, they contest the assertions concerning the ESO's financial situation. In their view, the argument that member States wished to align the ESO salaries with those of other scientific international organisations is not "legally admissible" and besides, it was based on wrong figures. Secondly, they object that comparisons were made only with German employers whereas Article R IV 1.01 stipulates that the situation in the member States must be considered. Furthermore, the national civil servants to whom they are compared have job security, are not generally expatriates and do not have to work in one or more foreign languages and a multicultural environment. The ESO produced only abridged versions of the studies to which it refers; in particular, it omitted the passages indicating that expatriate compensation was lower at the ESO than in German industry and that the limited duration of contracts at the ESO was disadvantageous. The fact that staff have challenged all salary adjustments since 1996 shows that the objective of "motivating the staff" has not been attained. Thirdly, the Observatory's reply states clearly that the Council wished to index the adjustment of the ESO staff pay to the evolution of inflation in Germany, yet the rules in force make no such provision and in any event, the 1998 adjustment was lower than the inflation rate in Germany which was 1.7 per cent, the figure on which the Finance Committee based its recommendation.

They conclude that in taking the decision on pay adjustment for 1998 the ESO used no methodology which would "produce results that are stable, foreseeable and clearly understood" as the Tribunal requires.

E. In its surrejoinder the ESO gives an account of the constraints it has been under in resolving pay adjustment disputes since 1996. It considers that it has given a satisfactory explanation of its decisions, particularly in its reply to the present complaint which "truly expresses the position of the ESO Council". It submits that the application of the criteria set out in Article R IV 1.01 necessarily involves recognition of the Council's discretionary authority.

In response to the complainants' pleas, the Observatory notes that scientific personnel employed by German public research institutions do not have security of employment as they are not civil servants and that the ESO compensates expatriate staff by entitling them to an expatriation allowance. Lastly, it denies that its arguments are based on wrong figures and that the only criterion it considers is the evolution of inflation in Germany, though, it

adds, that criterion does afford protection against the erosion of the staff's purchasing power.

CONSIDERATIONS

1. The facts of this case are much the same as those of the case on which the Tribunal has ruled in Judgment 1996 (*in re Dierickx and others*) delivered this day and to which it refers.
2. The complainants are challenging the individual application to them of a decision taken by the ESO Council to adjust staff pay for 1998 by only 1.2 per cent in spite of the fact that the Coordinating Committee on Remuneration in the Coordinated Organizations recommended an adjustment of 2.4 per cent and the German consumer price index had risen by 1.7 per cent.
3. These complaints raise much the same issues as the one ruled on in Judgment 1996 mentioned above, and the parties arguments are the same in both cases.
4. Accordingly, for the reasons it gave in the above mentioned judgment, the Tribunal concludes that the ESO's decision to adjust the pay of its staff by 1.2 per cent for 1998 must be set aside and the cases sent back to the Observatory for recalculation of the adjustment of their remuneration for 1998.
5. The complainants are entitled to an award of costs which the Tribunal sets at 15,000 French francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The cases are sent back to the Observatory for recalculation of the adjustment of the complainants' remuneration for 1998 in accordance with Article R IV 1.01 of the Staff Regulations and in the light of this judgment.
3. The ESO shall pay the complainants an overall amount of 15,000 French francs in costs.

In witness of this judgment, adopted on 12 May 2000, 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 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

1. They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).