D. L.

v.

ESO

122nd Session **Judgment No. 3676**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. D. L. against the European Southern Observatory (ESO) on 31 May 2013, ESO's reply of 16 December 2013, the complainant's rejoinder of 21 February 2014 and ESO's surrejoinder of 2 June 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests a modification in the exchange rate averaging methodology for the calculation of his pension contributions.

The complainant joined ESO in November 2005 and on 1 August 2011 he was granted a contract of indefinite duration. As an ESO staff member he is affiliated to the Pension Fund of the European Organization for Nuclear Research (CERN). CERN staff members are paid in Swiss francs and their contributions to the Fund are calculated and paid in the same currency. ESO staff members are paid in euros but their contributions to the Fund are calculated on the basis of a CERN reference salary which is converted to euros.

By memorandum of 10 January 2013 ESO's Head of Human Resources informed staff members that during its meeting of early December 2012 the ESO Council had adopted amendments to certain annexes to the Staff Rules and Regulations, in particular Annex RD 1 concerning the Pension Fund, as from 1 January 2013. The amendment addressed the increasing deviations between the actual and the calculated exchange rate set out in Annex RD 1, which had resulted in substantial additional costs for ESO. ESO staff members' contributions to the CERN Pension Fund are deducted monthly as a percentage – as defined in the Rules of the CERN Pension Fund – of the applicable CERN reference salary converted to euros. Prior to the amendment this conversion was calculated over a longer reference period than is now the case, with transitional arrangements to a shorter reference period being phased in over a period of 5 years from 2013 to 2018.

On 7 March 2013 the complainant, together with other staff members, filed an appeal with the Director General asking him to review the decision to calculate his contributions to the CERN Pension Fund pursuant to the methodology described in the new Annex RD 1. The complainant asserted that the modification introduced by new Annex RD 1 had led to an increase of 1.3 per cent in his pension contribution and that this was reflected in his pay slip of 15 January 2013.

In the letter of appeal the complainant sought agreement to bring his complaint directly to the Tribunal without going through the Joint Advisory Appeals Board in the event that the Director General's decision on his appeal was unfavourable.

By a letter of 11 March 2013, which the complainant identifies on his complaint form as the impugned decision, he was notified that the Director General granted him leave to proceed directly to the Tribunal.

The complainant asks the Tribunal to quash the impugned decision, to award him material damages and to compensate him for the time spent preparing his complaint.

ESO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant is an official of ESO. That organisation has an arrangement with CERN whereby staff of ESO become members of the CERN Pension Fund (the Fund). The arrangement is embodied in an Agreement between CERN and ESO on the admission of ESO staff to the CERN Pension Fund (the Agreement). ESO deducts from the salary payable to its staff an amount representing the staff member's pension contribution and remits to the Fund both that amount and ESO's contribution. The amount deducted from the staff member's salary is determined by a methodology described in Annex RD 1 (the Annex) of the ESO's Staff Rules and Regulations. The amount is a percentage of the applicable CERN reference salary converted to euros. The conversion is required because staff of ESO are paid in euros and, of necessity, any deduction must also be in euros. The CERN reference salary is in Swiss francs.

2. The Annex identifies the exchange rate for the conversion. It is an arithmetical mean of the yearly exchange rate provided by the Deutsche Bundesbank for a specified period. Until recently the period specified in the Annex commenced in 1983 and ran from that year until "the year preceding that in which the index enters into force, normally with effect from 1st January shown in the table 'Scale of CERN Reference Salaries'". However with effect from 1 January 2013 the period was changed and was to be reduced progressively from 10 years to 5 years preceding "that in which the index enters into force". This change was effected by an amendment to the Annex made by the ESO Council during its meeting on 4 and 5 December 2012.

3. This changed methodology of calculating the conversion rate was used to determine the deduction made from the complainant's salary in mid-January 2013. The complainant challenges in these proceedings the Council's decision to amend the Annex by challenging his January pay slip. This is an orthodox method of challenging the implementation of a general decision and no issue is raised by ESO about the receivability of the complaint.

4. The direct practical effect of the amendment is that the exchange rate used is the mean of exchange rates over a much shorter period than hitherto has been the case. Before amendment of the Annex, the average exchange rate was taken over a period of 30 years. After the amendment it will progressively reduce from a period of 10 years to 5 years. The indirect practical effect is that the decline in the value of the euro compared to the Swiss franc from 2009 will have a much greater influence on the exchange rate used than was formerly the case. As a consequence the conversion of a percentage of a salary specified in Swiss francs to euros will increase the amount deducted, in euros, from the complainant's salary and the salaries of other staff of ESO participating in the Fund.

5. The complainant's first argument is based on observations of the Tribunal in Judgment 1265, consideration 27. That case concerned the adoption of new salary scales by the World Intellectual Property Organization which involved, amongst other things, a challenge to the way in which the new scales had been determined by reference to decisions of the International Civil Service Commission (ICSC). In that context the Tribunal said that while it was open to the ICSC to choose methods of determining salaries, the methodology should ensure that the results are stable, foreseeable and clearly understood. In addition, once the method had been chosen the staff could expect it to be followed in all circumstances. In the present case the complainant refers to these observations and argues that while the new methodology for calculating the amount deducted as a pension contribution was clearly understood, it was neither stable nor foreseeable.

6. However this argument takes the comments of the Tribunal out of context. They were made in relation to a challenge to an outcome, namely, salary scales. The characteristics of the methodology described by the Tribunal concerned the methodology to achieve that outcome. In the present case, the complainant is challenging the lawfulness of the methodology itself. That is to say the methodology in the Annex used to determine the pension-related deduction from salary. In any event, any methodology that is dependent on exchange rates, which have an inherent propensity to fluctuate, will not be stable or foreseeable in the

sense that the outcome is, in advance, predictable. This argument should be rejected.

7. The complainant's second argument is founded on the principle that an organisation cannot breach acquired rights of a staff member and the complainant refers to Judgment 832, consideration 7, and the argument founded on the same Judgment (at consideration 16) that an organization "will act from reasonable motives and avoid causing unnecessary or undue injury". A recent example in which a complainant successfully impugned a change to the amount he contributed to a pension fund is found in Judgment 3571 which, in turn, referred to both Judgment 832 and an earlier judgment, Judgment 61, together with Judgment 986. The basic principle is that an amendment to an official's detriment of a provision governing her or his status constitutes a breach of an acquired right only if it adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on. In the present case the Tribunal accepts that there was an alteration to a term on which the complainant was employed in the sense that the method of calculating his contribution to the pension fund was altered and, at least at the present moment, increased the contribution and, in that regard, it might be said to be an alteration to his detriment. Plainly whether that remained so in the future would depend on the relationship between the euro and the Swiss franc as reflected in future exchange rates.

8. In Judgment 832, consideration 14, the Tribunal identified three tests to determine whether the altered term is fundamental and essential. The second test was the reason for the change. Importantly, the Tribunal recognised that ordinarily there would be no acquired right when a rule or a clause depends on variables such as the value of currency. So the mere fact that a pension contribution might change because of fluctuations in exchange rates would not engage the protection of the principle concerning acquired rights. Of course in this case it is not simply an alteration in the contribution because of fluctuations in exchange rates, but a change in the methodology used to calculate the

alteration by focusing on exchange rates for a shorter and more recent period and, as it turns out, less advantageous to the official. Nonetheless the changes which have occurred to the amount of the complainant's contribution (and any changes into the future) have been a consequence of fluctuations in exchange rates.

9. In addition, the finances of the body that applies the terms of appointment were another element of the second test identified in Judgment 832 that could not, according to the Tribunal, "be discounted". Under Article IV of the Agreement, ESO is obliged to pay the full amount of the contributions (the sum of the staff member's contribution and the organisation's contribution). The monthly ESO payments of those contributions are, it appears, converted from euros to Swiss franc at the yearly exchange rate. Before 2004, ESO Staff Regulations provided that the deduction of the staff member's contribution was a fixed percentage of the staff member's equivalent of the CERN reference salary. The obligation of ESO to pay the full amount of the contributions coupled with this methodology for determining the amount deducted from any individual staff member's salary led to ESO assuming a greater share of the burden in paying the overall contribution to the Fund. This led to an amendment to the methodology incorporating the averaging of exchange rates over 30 years (referred to earlier) but, notwithstanding, the burden on ESO increased and, since 2011, has been about 1.5 million euros per year.

10. ESO does not seek to avoid the fact that this outcome prompted a reconsideration of the methodology and the adoption of the provisions challenged in these proceedings. Moreover, ESO argues it is an outcome at odds with the fundamentals of the pension scheme. ESO says, by reference to the Rules of the Fund, that it is intended that the contributions on behalf of the complainant are to be 34 per cent of his reference salary apportioned between him and ESO at one third and two thirds. This is not disputed by the complainant. ESO argues that under the arrangements for calculating the deduction from his salary existing before the challenged amendments, this ratio of one third and two thirds was disturbed to the detriment of ESO. Again, this is not disputed by the complainant though he does contest that he had "an obligation to share one third of the

exchange rate risk". But that is not the fundamental point ESO is making. It is that, absent the amendments recently made to the methodology, ESO is assuming a disproportionately greater burden of satisfying the requirements under the Fund to pay the total contributions payable in relation to the complainant and other staff. This is a legitimate consideration and militates against a conclusion that the alteration of the methodology used involved an alteration of a fundamental term of employment that would be protected by the principle concerning acquired rights. It also answers the complainant's argument that ESO failed to act on reasonable motives and failed to avoid causing unnecessary or undue injury. The Tribunal rejects the argument of the complainant that there has been a breach of an acquired right and, for the same reasons, rejects the complainant's argument that the protection of acquired rights expressed in the Staff Rules and Regulations has likewise been violated. Also, the complainant's reliance on the Rules of the Fund protecting acquired rights is misplaced in the sense that the protection is limited to "rights to benefits". The Tribunal is not, in this case, concerned with benefits payable by the Fund.

11. The complainant developed his pleas in various ways both in his brief and rejoinder. The preceding analysis deals with the substance of the arguments he advanced and it is unnecessary to deal with some specific arguments which depend upon the acceptance of propositions which the Tribunal has rejected in the preceding analysis. Accordingly the complainant has failed to demonstrate that the amendment to the Annex is unlawful. His complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

ANDREW BUTLER