

FIFTY-FOURTH ORDINARY SESSION

In re AZOLA BLANCO and VELIZ GARCIA (No. 3)

Judgment No. 643

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Southern Observatory (ESO) by Mr. Marcial Azola Blanco and Mr. Tomas Véliz García on 29 March 1984 and corrected on 8 May, the ESO's replies received on 28 June, the complainant's rejoinders of 25 July and the ESO's surrejoinders of 23 August 1984;

Considering that the complaints raise the same issues and should be Joined to form the subject of a single decision;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles LS III.1.04 and LS IV.1.02 of the ESO's Regulations for Local Staff Members;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. In Judgment No. 507 the Tribunal ordered the ESO, among other things, to pay each of the complainants a sum equal to three times the total gross remuneration paid to him for the period from 1 March 1980 to 28 February 1981 "as improved by any retroactive adjustment granted by the organisation", plus interest at 12 per cent per annum from the dates of the complaints. In June 1982 the ESO issued statements of the sums received by each of the complainants in the material period. According to the statements Mr. Azola Blanco had been paid 279,342 pesos and Mr. Véliz García 510,801. By Judgment 570 the Tribunal rejected an application by the ESO for review of Judgment 507. On 25 January 1984 the ESO's Administrator in Chile made payments to each of the complainants in execution of the above-mentioned decision. On 1 February the complainants' counsel replied observing that the ESO had miscalculated the sums paid (1) by allowing as total gross remuneration paid for the material period only 241,117 pesos for Mr. Azola Blanco and 479,057 for Mr. Véliz García, as against the higher sums stated in June 1982 and (2) by failing to apply the retroactive adjustments in salary due to the rise in the cost of living as measured by the Chilean consumer price index (IPC). The Head of Administration wrote on 15 February to explain that the total gross remuneration of Mr. Azola Blanco and Mr. Véliz García did not include "overtime or the compensation for transportation expenses", and these sums had been deducted to give the lower figures; moreover, no IPC adjustments had been retroactively applied to salaries paid for the material period. The discussion which ensued proved of no avail and the complainants filed their complaints.

B. The complainants submit that because the ESO has taken the lower figures as their gross remuneration for the period they have been underpaid by three times the amount of the difference between those and the larger figures in the June 1982 statements: Mr. Azola Blanco has thus lost 148,418 pesos and Mr. Véliz García 123,265. They submit that the ESO is wrong to deduct items described as "overtime" and "transportation expenses"; no such separate items appeared in the statements, and in any event the Chilean Labour Code defines remuneration as any sum paid to the employee. Secondly, they submit that the ESO has failed to apply the IPC increases to the amounts they have received, though the Tribunal clearly intended it should. Nor has it taken account of the decline in the value of the peso, from 34 to the United States dollar at the date of Judgment 507 (3 June 1982) to 84 at that of Judgment 570 (20 December 1983). The ESO's application for review, declared devoid of merit, delayed execution and has caused the complainants financial loss, which Mr. Azola Blanco estimates at 3,837 United States dollars and Mr. Véliz García at \$7,017. They ask the Tribunal to order the ESO to take account of the full remuneration paid to each of them during the material period and to apply the retroactive IPC adjustments up to the date of Judgment 570 and pay each of them compensation in the amounts in dollars set out above for the delay in execution of Judgment 507, or else apply the retroactive IPC adjustments from the dates of the original complaints up to the date of that Judgment. They also seek costs.

C. The ESO replies that the claims are unfounded. As to the first claim, it submits that total gross remuneration does not include sums paid only in special circumstances, such as compensation payable for overtime under Article III.1.04 of the Local Staff Regulations or reimbursement of travel expenses due under IV.1.02: all it includes is

basic salary, the special "gratifications" known as "aguinaldos", the vacation bonus, the language allowance and the head-of-family allowance. The statements issued in June 1982 gave total income, not total remuneration. Besides, whatever errors there may have been in the statements, they created no obligation to pay more than the Tribunal had required. As to the other claims, the ESO observes that there was no negotiated general retroactive rise in salaries, the only kind that it need take into account. There is nothing in Judgment 507 to require compensation for inflation. There is no sound reason for awarding compensation on the grounds of the decline of the peso as against any foreign currency.

D. In their rejoinders the complainants enlarge on their pleas and press their claims, alleging that the ESO has failed to execute Judgment 507 correctly.

E. In its surrejoinders the ESO submits that there is nothing in the rejoinders to refute the arguments it put forward in its replies. It again submits that the amounts of the complainants' remuneration were correctly calculated and that there are no grounds for any adjustment for inflation.

CONSIDERATIONS:

1. On 3 June 1982 the Tribunal delivered Judgment No. 507 deciding the matters then in issue between the complainants and the organisation.

Paragraph 2 of this decision is as follows:

"The Tribunal, finding reinstatement to be impossible or inadvisable, orders that the organisation pay to each complainant as compensation for wrongful dismissal a sum equal to three times the total gross remuneration paid to him in respect of the period 1 March 1980 to 28 February 1981 and as improved by any retroactive adjustment granted by the organisation."

Paragraph 11 of the considerations explains the above reference to retroactive adjustment and is as follows:

"The complainants say that as a result of collective bargaining a salary study is made annually and followed by a general improvement in the salary levels. They do not, however, allege that there is any contractual obligation on the organisation to increase salaries in this way. The organisation agrees that, if any improvement is made, it must be paid to all, including the complainants, in the same position. The compensation payable to the complainants for their wrongful dismissal should be assessed accordingly."

2. Immediately after the decision was given Mr. Azola Blanco and Mr. Véliz García asked for and obtained from the organisation certificates showing the total of their gross remuneration as specified in the decision. The organisation has paid the amounts shown on the certificates only after making deductions of 140,418 and 123,265 pesos respectively. The complainants now claim to be paid the sums deducted.

3. The organisation contends that the certificates are incorrect in that they wrongly included two items. It is to cover these two items that the deductions have been made. The first relates to overtime. The Tribunal does not accept the organisation's argument that overtime is not part of the total gross remuneration; accordingly the deduction in respect of this item is unjustified. The second item consists of the aguinaldo falling due in March 1980. The organisation does not in its argument explain why it is wrong to include the aguinaldo for March 1980; it may be noted that the compensation is clearly intended to be calculated on the basis of annual remuneration and that the exclusion of March 1980 would reduce the basic period to 11 months. This second deduction is also unjustified.

4. The complainants further claim that the organisation has failed to include in the certificate or to pay any sum in respect of an improvement of salaries by retroactive adjustment. They do not allege that any retroactive adjustment has actually been made, but contend in effect that it ought to have been. Paragraph 11 of the considerations in Judgment No. 507 as quoted above provides that it is only if an improvement is made that it has to be paid to the complainant.

Accordingly this claim fails.

DECISION:

For the above reasons,

It is ordered

1. That the organisation pay forthwith to the first complainant the sum of 148,418 pesos with interest thereon as ordered in paragraph 4 of the decision in Judgment No. 507 and to the second complainant the sum of 123,265 pesos with interest thereon as aforesaid; and
2. That the other complaints be dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 December 1984.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner