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

SEVENTY-EIGHTH SESSION

In re MEYLAN, SJÖBERG, URBAN and WARMELS

Judgment 1419

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Georges Meylan, Mrs. Britt Sjöberg, Mr. Ullrich Urban and Mr. Rein Warmels against the European Southern Observatory (ESO) on 27 October 1993, the Observatory's reply of 10 August 1994, the complainants' rejoinder of 28 September and the ESO's surrejoinder of 3 November 1994;

Considering the applications to intervene filed by:

H.-M. Adorf

B. Aitken

M. Albrecht

E. Allaert

M. Anciaux

W. Ansorge

H. Attersjö

G. Avila

D. Baade

I. Ballemans

K. Banse

T. Bedding

J. Beletic

P. Biereichel

P. Bouchet

J. Breysacher

P. Bristow

J. Brynnel

R. Büttinghaus

B. Buzzoni

D. Clements

M. Comin

R. Conzelmann

P. Crane

J. Cuby

M. Cullum

C. Cumani

A. da Costa Campos

S. D'Odorico

M.-H. Demoulin-Arp

R. De Roos

R. De Ruijsscher

H. Dekker

B. Delabre

C. Dichirico

P. Dierckx

P. Dierickx

O. Dietl

A. Doms

M. Duchateau

P. Duhoux

W. Eckert

D. Enard

W. Eng

L. Engelbart

C. Euler

M. Fendt

D. Ferrand

G. Filippi

G. Finger

G. Fischer

P. Fischer

R. Fischer

F. Franza

H. Gemperlein

B. Gilli

A. Gilliotte

E. Giraud

P. Goudfrooij

P. Grosbol

P. Günther

R. Guha

C. Guirao Sanchez

B. Gustafsson

K. Hansen

M. Hess

H.-H. Heyer

S. Hill

R. Hinterschuster

T. Höög

M. Hoffmann-Remy

R. Hook

E. Hoppe-Lentner

G. Hubert

N. Hubin

J. Huizinga

G. Huster

O. Iwert

E. Janssen

H. Käufl

H. Kasten

E. Kerk

K. Kjär

J. Knudstrup

F. Koch

B. Koehler

H.-J. Kraus

M. Kraus

G. Kretschmer

E. Kunstein-Hackbarth

M. Lamadie

H. Latsch

P. Le Saux

J.-L. Lizon a l'Allemand

A. Magana

M. Maugis

S. Mayr

M. Meyer

A. Michel

S. Milligan

D. Minniti

A. Moorwood

J.-M. Moresmau

L. Mortensen

S. Moureau

H. Neuville

G. Nicolini

C. Nieuwenkamp

L. Noethe

B. Ounnas

C. Ounnas

F. Palma

M. Peron

G. Persson

B. Pirenne

E. Pomaroli

M. Quattri

J. Québatte

J. Quentin

G. Raffi

B. Rasmussen

M. Ravensbergen

R. Reiss

V. Reyes Perez

J. Rodriguez

J. Rönnback

F. Rombout

G. Rupprecht

M. Sarazin

M. Schneermann

E. Schumann

P. Shaver

A. Silber

E. Siml

R. Slater

J. Spyromilio

S. Stanghellini

C. Stoffer

G. Strigl

E. Swinnen

M. Tarenghi

K. Teschner

S. Teupke

G. Thimm

A. Treumann

J. van de Spreng

A. Van Dijsseldonk

E. Völk

O. von der Lühe

A. Wallander

J. Wampler

I. Weber

U. Weilenmann

R. West

G. Wiedemann

G. Wieland

K. Wirenstrand

M. Ziebell

V. Ziegler

A. Zijlstra

E. Zuffanelli

Considering Articles II, paragraph 5, VII and VIII 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 complaints being identical and having been treated as such by the parties, they may be formally joined for the purposes of this judgment;

Considering that, the substantive purpose of the present complaints being the quashing of a decision by the ESO to reduce by one-third the salary adjustment according to the rules of the Co-ordinated European Organisations and hitherto accepted by the defendant as the basis for its own pay scheme, the parties' claims are as follows:

The complainants:

1. To quash the impugned decision insofar as it affected their pay slips;

2. to give all due effect in law to such quashing by awarding the complainants as from 1 July 1992 the full amount of the yearly adjustment;

3. to order the ESO to meet the complainants' costs.

The defendant:

1. To dismiss the complaints as irreceivable for want of a challengeable decision;

2. in any event, to dismiss as irreceivable their claim to the full amount of the adjustment inasmuch as it exceeds the competence vested in the Tribunal by Article VIII of its Statute;

3. failing that, to dismiss the complaints as devoid of merit.

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

A. The complainants, officials at grades 7 to 9, belong to the ESO's international staff stationed at headquarters at Garching, near Munich. On 2 December 1982 the ESO's Council decided to base periodic adjustments in the salaries and allowances of international staff on the procedures for adjustment followed in the Co-ordinated European Organisations. Such practice was codified with the adoption of Article R IV 1.01 of the Staff Regulations. The Co-ordinated Organisations decided to give effect to an adjustment of salaries on 1 July 1992 but, on 1 April 1993, the Council took the decision to grant only two-thirds of the adjustment. The complainants lodged appeals against their pay slips for April 1993. In letters dated 4 August the Administration gave them leave to put their case directly to the Tribunal.

B. The complainants submit that the impugned decision is in breach of Article R IV 1.01 of the Staff Regulations. In their view the Council was not free to scuttle a policy it had previously adopted without an express amendment to that effect. The ESO infringed the rule against retroactivity by choosing in 1993 not to apply in full an adjustment due for a period that had already lapsed. It failed to discharge its duty to give reasons for its decision. A desire to save money did not suffice in itself to warrant the Council's decision.

C. In its replies the ESO questions that the complaints are receivable and submits that the impugned decisions merely relieve the complainants of having to exhaust the internal means of appeal. On the merits it observes that the Council has not waived its authority to determine salaries and is not bound by recommendations of the Co-ordinated Organisations. There was no breach of the rule against retroactivity.

D. In their rejoinders the complainants point out that the letters of 4 August 1993 reject their claims by implication and so allow them to go to the Tribunal. As for the Council's allegedly unfettered authority to decide on staff pay, they contend that the Observatory had agreed to the procedures followed by the Co-ordinated Organisations.

E. In its surrejoinders the ESO maintains that the complaints are irreceivable and restates its position on the merits.

CONSIDERATIONS:

1. The complainants, who serve on the Observatory's staff at headquarters at Garching (Munich) and hold grade 7, 8 or 9, seek the quashing of the implied rejection of their claims. They put those claims to the Director General on 14 June 1993 after receiving their pay slips for April 1993. They are objecting to the ESO's refusal, in keeping with a decision the ESO Council took on 1 April 1993, to grant them the full amount of the salary adjustment decided by the Co-ordinated European Organisations.

The issues of fact and of law

2. According to the evidence the ESO decided because its staff were few to follow the policy of other international organisations on staff pay instead of having a policy of its own. Until 1982, when it was in Switzerland, it modelled pay policy on that of the European Organization for Nuclear Research (CERN). Since transferring its headquarters to Germany it has decided to follow the same procedure for adjustment as the Co-ordinated Organisations in Germany, albeit without formally joining the system.

3. The ESO Council so decided at its session of 2 December 1982 and the key passage records its intent -

"With regard to salaries ... to periodically decide on the adjustments of ESO salaries and allowances, based on the adjustment procedure of the Co-ordinated Organizations".

By the same decision the Council delegated to the Finance Committee authority to determine salary adjustments in future according to that criterion, as indeed it has. The Council also asked the Director General to propose to the Finance Committee and to itself the corresponding changes in the Combined Staff Rules and Staff Regulations. The Staff Rules come within the sole competence of the Council, whereas it is the Director General who, subject to

the Council's approval, makes the Regulations. The decision of 2 December 1982 does not appear to have prompted the adoption of any implementing regulations, but the evidence shows that the Observatory has since regularly applied decisions by the Co-ordinated Organisations to its own staff.

4. Such practice was consolidated by the insertion in July 1991 of the following provision, Article R IV 1.01, in the Staff Regulations:

"When reviewing remuneration and allowances, the Council shall use as a guide the relevant decisions of the Co-ordinated Organizations.

The basic salary scales shall correspond to those applied by the Co-ordinated Organizations in Germany. The same applies to the allowances for international staff in Germany.

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

5. In 1992 the Co-ordinated Organisations decided to adjust the base salaries of their staff in Germany as from 1 July 1992. On 18 December 1992 the ESO accordingly submitted a proposal to the Finance Committee for adjusting the staff's basic salary. According to grade the adjustment ranged from 3.9 to 5.7 per cent. The ESO began applying the new salary scales in line with the decision of the Co-ordinated Organisations even before approval from the Observatory's competent bodies had gone through.

6. But the Administration's proposal aroused opposition in the Finance Committee, where some delegates spoke out against full endorsement of the Co-ordinated Organisations' decision. They suggested granting only two-thirds of the adjustment, as indeed CERN had done. The Administration nevertheless pressed its proposal. There seemed to be no way of reaching agreement at the Committee's meeting of 30 March 1993 and the case was therefore referred to the Council. At its session of 1 April 1993 the Council, after a debate in which several delegations took part, upheld the majority view in the Finance Committee and decided, also by a majority, to accept only two-thirds of the adjustment approved by the Co-ordinated Organisations. That is the decision now at issue.

7. The Head of Administration informed the staff of the Council's decision by an internal memorandum of 8 April 1993, which said that the new salary scale would go into effect that month and retroactive corrections would be made in pay for July to recover the overpayments.

8. On 14 June 1993 Mr. Meylan formally appealed to the Director General under Article R VI 1.02 of the Staff Regulations against the Administration's refusal to grant him the full salary adjustment approved by the Co-ordinated Organisations as from 1 July 1992. He also referred to the notification of the Council's decision of 1 April 1993 in the internal memorandum of 8 April and to his own pay slip for April. After a brief explanation of the reasons for his appeal he asked the Director General to waive the procedure of appeal to the Joint Advisory Appeals Board and grant him leave to go straight to the Tribunal. Since his case was mainly about points of law he suggested that going through the Appeals Board "would serve no real purpose". His appeal was countersigned by 119 other staff members.

9. By a letter of 4 August 1993 the Head of Administration informed one of the appellants, Mr. Warmels, that the Director General was willing to waive the internal appeal procedure inasmuch as the facts were not in doubt and in any event the Administration would have had no choice but to confirm the Council's decision and reject an internal appeal.

10. No other decision having come from the Administration during the material time limit, the complainants inferred final rejection of their claims and lodged their complaints on 27 October 1993.

The parties' pleas

11. The complainants' arguments as stated in their internal appeals and developed in the course of these proceedings may be summed up as follows:

(a) breach of Article R IV 1.01 of the Staff Regulations, which codifies the ESO's constant practice concerning pay since 1982, and breach of their acquired rights.

The complainants submit that by deciding in 1982 to follow the salary procedure of the Co-ordinated Organisations and later expressly prescribing the practice in the Staff Regulations the ESO is bound thereby until it amends or repeals the rule. In support they cite Judgment 51 (in re Poulain d'Andecy), which says, under 3, that any authority is bound by its own rules for as long as such rules have not been amended or abrogated (patere legem quam fecisti). The complainants point out that throughout that period the ESO duly applied decisions by the Co-ordinated Organisations, including some that were to the staff's detriment, such as deductions from salary in 1984. It is not free to depart from such practice as long as the decision of 1982 and Article R IV 1.01 of the Staff Regulations remain in effect.

(b) breach of the ESO's duty to state the reasons for decisions that adversely affect its staff.

Citing Judgments 899 (in re Geisler No. 2 and Wenzel No. 3, under 17), 946 (in re Fernandez-Caballero, under 6) and 1054 (in re Chaintreuil and others, under 21) on the nature of the duty to substantiate a decision, the complainants observe that the minutes of the Council's session of 1 April 1993 (document ESO/Cou-479) fail to reveal, either in the report submitted to it by the chairman of the Finance Committee or in the statements by national delegates, any reasons for the decision apart from a desire to save money at the staff's expense, a reason which the Tribunal has already refused to treat as valid: see Judgment 990 (in re Cuvillier No. 3, under 6).

12. The complainants further plead breach of the rule against retroactivity on the grounds that the adverse effects of the Council's decision of 1 April 1993 went back to 1 July 1992, the date at which the adjustment approved by the Co-ordinated Organisations was to come in. The Tribunal takes that to be a subsidiary plea because it is about the effective date of action that must otherwise be treated as valid, a postulate the complainants reject.

13. The Observatory raises two preliminary objections to receivability. The first is that there was no challengeable decision since the one the complainants purport to be impugning - the letter of 4 August 1993 waiving the internal appeals procedure - took no stand on the merits of that case. The other objection is to their claim that the Observatory give "all due effect in law" to the quashing of the Council's decision. That, says the ESO, goes beyond the competence vested in the Tribunal by Article VIII of its Statute, which requires it to choose between setting the decision aside and awarding compensation.

14. On the merits the ESO argues that its legal relations with the staff are exclusively governed by its own internal rules, i.e. the Combined Staff Rules, which the Council adopts, and the Staff Regulations, which are implementing rules made by the Director General with the Council's approval. In the ESO's submission the structure of its legal system is thus in two tiers: the Rules first and then the Regulations. Article IV 1.01 of the Staff Rules, the basic provision on the subject, reads:

"The remuneration scales shall be determined and periodically reviewed by the Council."

So - the argument runs - the ESO's Council has "supreme authority" to set pay levels and is not fettered by the decisions of other international organisations or subsidiary rules like the Staff Regulations.

15. The ESO contends that it was by virtue of such supremacy that the Council decided in 1982 to make periodic adjustment in pay and allowances in accordance with the Co-ordinated Organisations' procedure for that purpose. But since the Observatory has never joined the Co-ordinated Organisations, it is, it maintains, under no duty to apply all their decisions, which are mere "benchmarks"; it may without let or hindrance apply each of them, one by one, as it chooses. Nor - the argument goes on - can the Council's former practice detract from its supremacy. The ESO pleads that Article R IV 1.01 of the Staff Regulations, on which the complainants rely, is a subsidiary provision that cannot derogate from the higher norm in Article IV 1.01 of the Combined Staff Rules, which vests in the Council full and supreme authority to set pay scales.

16. As for Article R IV 1.01, as amended in 1991, the ESO contends that what it means is that the Co-ordinated Organisations' decisions on the subject are to serve merely as "guidelines" for the Council and afford loose pointers; they prescribe no hard-and-fast course of action. So - the Observatory concludes - nothing in its own internal rules and no feature of its relationship with the Co-ordinated Organisations limited the Council's freedom to give only partial effect to the latest adjustment made by those Organisations.

Receivability

17. The Observatory's first objection to receivability betrays misunderstanding of the system of appeal as prescribed

in the Tribunal's Statute.

18. Two points are plain from the curt letter which the Head of Administration sent the complainants on 4 August 1993 and which was all they got by way of reply to their appeals. The first point is that the Administration already had rejection in mind; the second that it therefore saw no point in putting the appeals to the Joint Advisory Appeals Board. That being so, it is idle to speculate as to whether the letter of 4 August 1993 is to be read as express rejection or the Head of Administration's position as setting off the time limit that applies if a decision from the Observatory is wanting. Whichever proposition is the right one, the conclusion is that the parties were agreed that the internal means of redress had been exhausted; the complainants have met the requirements of receivability in Article VII of the Tribunal's Statute; and the Observatory's plea on that score must fail.

19. The ESO puts forward in its surrejoinder a new plea on receivability. It says that the complainants are mistaken in impugning the decisions of 4 August 1993 that brought the internal proceedings to a close; in fact the challengeable decisions were the pay slips that they got for April 1993; and since the complaints impugn the wrong decisions they should be declared irreceivable.

20. The plea fails. In several respects it offends against the rule of good faith that should govern relations between organisation and staff, even when they are in litigation. First, it is inadmissible for the Observatory in its surrejoinder - to which it knows the complainants do not have the opportunity of answering - to raise a new objection to receivability on the strength of facts it was aware of at the time of filing. The plea is the less acceptable for being at odds with the ESO's reply. Secondly, in view of the terseness of the letter of 4 August 1993 the complainants rightly inferred rejection of their claims and filed their complaints against such rejection. Thirdly, even supposing that the letter of 4 August 1993 might be construed as rejection on the merits, thereby putting an end to the internal appeal, it would still be plain that the time limit for filing could not have started any earlier. As to the purpose of the complaint, it does not in the last resort make any difference whether the challenged decision is the pay slip or the rejection of an internal appeal or both together.

21. The defendant further pleads that the complainants' claims are irreceivable insofar as they are asking that it be required to give all due effects in law to any quashing of the impugned decision, i.e. to pay the staff the adjustment in full in accordance with the decision of the Co-ordinated Organisations. In the ESO's submission such claims go beyond the scope of the competence vested in the Tribunal by Article VIII of its Statute.

22. Article VIII, one of the basic provisions of the Statute, reads:

"In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him."

23. The first sentence of Article VIII, which reflects the common law on administrative disputes, means that where the Tribunal sets a decision aside the defendant organisation is bound to take any action required to give full effect to the wording and reasoning of the judgment. When the dispute is about financial liability the Tribunal may in the full exercise of its competence either state the amount for which the defendant is liable, if a sufficiently exact figure can be put on it, or else, where execution calls for further calculation or the play of discretion, send the case back to the organisation so that it may act on the rulings in the judgment.

24. Contrary to what the Observatory seems to think, the second sentence of the article does no more than allow an alternative, to which the Tribunal may resort as it deems fit, in the particular case where there is difficulty over discharging some non-financial obligation. The reference in the article to the possibility of awarding "compensation for the injury caused" does not preclude the Tribunal's determining, in exercise of the competence conferred by the first sentence, the financial consequences of an organisation's failure to abide by its staff regulations or to discharge its contractual obligations.

The lawfulness and justification of the partial adjustment

25. The Observatory's plea is that its governing body, the Council, has "supreme authority" to set staff pay. There is already a ruling in Judgment 1118 (in re Niesing No. 2 and others) on a similar plea by another organisation. That judgment said, in 9 and 10, that though an international organisation may freely determine conditions of service

and the structure of its secretariat, it has a duty as employer, once its structure has been established, to ensure that the policy- making and administrative bodies in charge of personnel management abide at all times by the general principles of the international civil service.

26. The Observatory itself explains that, having few staff, it decided not to make its own administrative arrangements but to follow the practice of other international organisations, CERN at the outset and from 1982 the Co-ordinated Organisations. It is quite right in saying that, having never actually joined those Organisations, it has no external obligation to comply with their decisions. But on 2 December 1982 it decided that it would in future adjust staff pay in keeping with the procedure followed in the Co-ordinated Organisations. It thereby assumed a duty to its staff which, in the absence of rules of its own, is now one of the safeguards of their administrative position.

27. To evade that duty it makes light of its own rules: in its submission all that its Council's decision of 1982 meant was that adjustment was to be "based" on the procedure in the Co-ordinated Organisations and under Article R IV 1.01 of the Staff Regulations that procedure afforded a mere "guide" and as such was not binding.

28. The Tribunal rejects the plea, which is an attempt to render void in law the ESO's decisions on staff pay and to refuse its staff the safeguard of stability they may properly expect from their status and contracts of service. Contrary to what its constant use of the term "pay policy" seeks to suggest, taking the procedure of the Co-ordinated Organisations as its point of reference plainly incorporated into its internal rules legal criteria that it would otherwise have had to put in binding provisions of the Staff Rules. That indeed is the legal thinking that underlies the practice it has consistently followed since taking over in 1982 the procedure of the Co-ordinated Organisations as the "basis" of its pay system.

29. Article R IV 1.01 of the Staff Regulations cannot weaken the force of the policy decision that was taken in 1982. The first clause says that the Organisation "shall use as a guide" the relevant decisions of the Co-ordinated Organisations when reviewing remuneration and allowances, and again the second clause that the basic salary scales "shall correspond" to those applied by the Organisations in Germany. In their context in the Staff Regulations those provisions are plainly binding in law. The words "shall use as a guide" do allow some latitude inasmuch as a decision by the Co-ordinated Organisations is to be incorporated mutatis mutandis into the ESO's own scales, but they cannot be read as leaving the ESO free to adopt such a decision only in part, or not at all.

30. The ESO might no doubt change the reference mark or the arrangements provided that it abided by the procedures and forms prescribed for the purpose in its own rules and regulations. But so long as the present arrangements hold good its staff are entitled to the safeguards of objectivity and stability they afford. The ESO may not remove such safeguards because of prevailing circumstances or a mere wish to do so. On that score there is a passage worth recalling in Judgment 1265 (in re Berlioz and others), about a "methodology" applied in the common system of the United Nations, under 25 to 30, and more particularly 27: "The methodology is an important factor in ensuring that the results are stable, foreseeable and clearly understood". There was similar reasoning in Judgment 936 (in re Geisler No. 2 and Wenzel No. 3) about a case concerning the Co-ordinated Organisations and more particularly some provisions the defendant had put in its own rules although, like the ESO, it had not formally joined the Organisations. The gist of that judgment, in 15 and 16, is that the provisions of the Co-ordinated Organisations "remain in force until [the defendant] replaces them with others" and "The rule of law, the stability of legal relations and the legitimate expectations of [the] staff demand that as long as [the relevant rule] is in force the Organisation abide by the method prescribed therein for altering staff pay".

31. The foregoing shows up the inadequacy of the explanations offered at the Council's meeting on 1 April 1993 for taking a decision the Director General was strongly opposed to. Indeed the debate reveals some Government delegates as supremely ignorant of the way in which the procedure of adjustment in the Co-ordinated Organisations works. For example, the chairman of the Finance Committee said in support of the Committee's proposal for departing from that procedure that there had been "a great change" since 1982 and there was still aneconomic crisis in many member States. Several delegates concurred, one of them vouchsafing the comment that "the world had considerably changed" since 1982. There were remarks too about the gap in pay between the ESO and national research institutes. But the method of reckoning the amount of adjustment in pay in the Co-ordinated Organisations comprises comparisons of that kind; indeed they are carried out in a much wider context that goes beyond the few science institutes working in the ESO's own province. In striking contrast is the support for the Director General's proposal from one delegation which said that the morale of staff was already low and it was hard to find and keep staff of high calibre.

32. The conclusion is that the Council acted arbitrarily on 1 April 1993 in lowering by one-third the amount of the adjustment that the staff were entitled to by virtue of the decision of the Co-ordinated Organisations. The Council's decision therefore cannot stand, and neither can the individual decisions which the complainants challenge and which applied it to their pay. The case is sent back to the ESO so that it may take new decisions granting complainants and interveners as from 1 July 1992 the difference between the sums they were actually paid and the sums they would have earned had the adjustment been applied in full.

33. Since the complainants have succeeded they are entitled to 25,000 French francs in costs from the Observatory.

34. The applications to intervene being allowed, the interveners shall have the same entitlements as the complainants, save to costs, provided that they are in the same position.

DECISION:

For the above reasons,

1. The decisions refusing by implication to pay the complainants in full the adjustment made in accordance with the procedure of the Co-ordinated Organisations are set aside.

2. The case is sent back to the Observatory so that it may grant the complainants and the interveners as from 1 July 1992 the benefits of the quashing of those decisions.

3. The ESO shall pay the complainants a total sum of 25,000 French francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
Michel Gentot
P. Pescatore
A.B. Gardner

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