

## SEVENTY-NINTH SESSION

### *In re* MACCHINO FARIAS (No. 2)

#### Judgment 1428

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Agustín Macchino Farías against the European Southern Observatory (ESO) on 5 August 1994, the ESO's reply of 24 October, the complainant's rejoinder of 25 November 1994 and the Observatory's surrejoinder of 2 January 1995;

Considering Article II, paragraph 5, 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. Under Article LS III 1.04 of the Regulations for Local Staff of the European Southern Observatory in Chile the rate of compensation for each hour of overtime done by someone in grade A or B is one-and-a-half times the basic rate. Up to 31 December 1989 Annex 16 to the Regulations said that "All Local Staff Members are entitled to receive 5 basic salaries per year as a special gratification". According to the amended version of that provision which came into force on 1 January 1990 staff members appointed from then on shall get four such "gratifications", or aguinaldos; others have an "acquired right" to five.

The complainant, a Chilean, joined the local staff of the ESO in 1972 as an electronics technician. He holds grade B3 and has been assigned since 1975 to the astronomic observatory at La Silla, in the Andes.

By a letter of 15 March 1994 to the staff the Director of the ESO in Chile announced that "the payment of overtime will be calculated taking into account the basic salary plus the proportion of 4 aguinaldos".

In a memorandum dated 12 May 1994 to the Director General the complainant objected to the reckoning of his overtime pay for April by reference to a "basic hourly rate" that left out one of the five aguinaldos that his salary comprised.

By a memorandum of 22 June 1994 the head of Personnel rejected on the Director General's behalf his "appeal" of 12 May on the grounds that acquired rights were intended to safeguard only "important matters" whereas the effect of reckoning his overtime payments on the basis of four aguinaldos instead of five was "minor". The "important" principle of equal treatment, he said, prevailed over such a "minor" difference in pay. That is the decision the complainant impugns.

B. The complainant submits that the ESO's reckoning of his overtime payments as from April 1994 is unlawful. As the Tribunal held in Judgment 1311 (*in re* Guerra Ardiles), all five aguinaldos, which are an item of regular pay, must be included in the reckoning of "basic salary".

He alleges breach of his acquired right to payment of the five aguinaldos. The loss to him was not "minor": it came to 6.25 per cent of his overtime pay. If the difference really was minor and the Observatory did care about equal treatment it had only to take account of five aguinaldos for all local officials.

He asks the Tribunal to quash the impugned decision and to order the ESO to include five aguinaldos in the reckoning of his overtime payments as from 15 March 1994. He seeks costs "as stated in the Local Staff Regulations".

C. In its reply the Observatory denies breach of his acquired rights. According to the case law an acquired right is one in which any change impairs the balance of contractual obligations or the essential terms that induced consent to the offer of appointment. But not until March 1994 did the ESO take account of any aguinaldos at all in reckoning the basic hourly rate. From the time of his recruitment until then the applicable rate was based on only twelve monthly "basic salaries". So the complainant might not expect the survival of a benefit he had never had.

D. In his rejoinder the complainant observes that the ESO is bound by its own rules. Since the Administration itself declared that staff appointed before 1990, like the complainant, had an "acquired right" to the fifth aguinaldo it was not free to disregard a regular item of pay when reckoning basic salary.

E. In its surrejoinder the ESO says that it acknowledged the complainant's acquired right to payment of the fifth aguinaldo so as to ensure that even on transfer to another duty station he would still get some of the "mountain compensation" it paid staff at La Silla. But the Observatory did not deprive him of any benefit he had had before it started reckoning four aguinaldos in overtime payments.

#### CONSIDERATIONS:

1. The ESO employs the complainant as an electronics technician at La Silla in the Chilean Andes. It has a system of supplementing basic salary by paying additional aguinaldos (The term is translated as "gratifications" in the English version of its rules). Up to 31 December 1989 Annex 16 to the Regulations for ESO Local Staff in Chile read as follows:

"All Local Staff Members are entitled to receive 5 basic salaries per year as a special gratification.

These gratifications shall be paid in February, July, September and December of every year.

In addition, Local Staff Members working on La Silla shall receive one basic salary as a mountain compensation in December each year."

2. As a consequence of Judgment 1311 (in re Guerra Ardiles) the Observatory amended Annex 16 as from 1 January 1990 to provide for the payment of four "basic monthly salaries" instead of five and of another two as "mountain compensation" instead of one. But it recognised that local staff who had been receiving five aguinaldos up to the date of the amendment had an acquired right to a fifth.

3. Before Judgment 1311 the ESO treated all aguinaldos as essentially different from salary. It did not count them towards the amount of basic salary that was relevant for the purpose of reckoning the service indemnity due under Annex 3 to the Regulations. In that judgment the Tribunal held, under 10, that "5 basic salaries" must be added to the yearly total paid according to the salary scales for the purpose of determining the basic salary relevant in reckoning the indemnity. But the Tribunal further held, under 11, that the "mountain compensation" was a special allowance within the meaning of Article 1.01 of Annex 3 and "therefore irrelevant in reckoning the indemnity".

4. The ESO decided on 15 March 1994 to count the four aguinaldos, together with basic salary, so as to establish rates of pay for overtime in accordance with Article LS III 1.04, which prescribes entitlement to one-and-a-half times the basic rate. The mountain compensation was not included in the calculation. The complainant appealed against that decision and the Director General's final decision, taken on 22 June 1994, was to reject his appeal.

5. The complainant argues that, since Judgment 1311 ruled that the five aguinaldos must be added for the purpose of determining the basic salary relevant in reckoning the service indemnity, the same principles should apply in reckoning the payment of overtime too. He claims an acquired right to the payment of five aguinaldos and says that the ESO may not unilaterally reduce the number to four.

6. The ESO recognises the acquired right to payment of a fifth aguinaldo but interprets it to mean that a local staff member stationed at La Silla should retain entitlement to such payment if transferred from La Silla but should not have it count towards overtime pay. It argues that there would be inequality of treatment if the fifth aguinaldo had to be taken into account for that purpose. It contends that because it did not until March 1994 take account of any aguinaldos in reckoning the basic rate the complainant could not have expected the survival of a benefit he had never had and that there was therefore no breach of his acquired right.

7. The plea fails. The acquired right to a fifth aguinaldo comprises all the entitlements which any aguinaldo conferred. One of those entitlements was the right to have it included as part of basic salary: see Judgment 1311. In determining the amount of basic salary, as against the special allowances, what counts is sums actually paid in salary, whatever they may be called and whatever method of accounting may be applied. Because the fifth aguinaldo formed part of basic salary until it was eliminated, it follows that the fifth aguinaldo must count in reckoning the basic rate of payment of overtime for anyone who has the acquired right.

8. The inequality which the Organisation fears will result from that ruling is inevitable when some staff members have an acquired right and others do not.

DECISION:

For the above reasons,

1. The Director General's decision of 22 June 1994 is quashed.
2. The ESO shall count five aguinaldos in reckoning the payments due to the complainant for overtime.
3. The case is sent back to the ESO for recalculation of the payments due to him for overtime as from 15 March 1994.
4. The ESO shall pay him 1,000 United States dollars in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas  
Mella Carroll  
Mark Fernando  
A.B. Gardner