

EIGHTY-SIXTH SESSION

In re Storm

Judgment 1783

The Administrative Tribunal,

Considering the complaint filed by Mr. Jesper Storm against the European Southern Observatory (ESO) on 9 October 1997 and corrected on 30 January 1998, the ESO's reply of 9 April, the complainant's rejoinder of 1 July and the Observatory's surrejoinder of 25 August 1998;

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. The complainant is a Dane who was born in 1961. The ESO has its headquarters at Garching, near Munich, in Germany and he joined its headquarters staff in December 1991 as a "fellow". In October 1994 it offered him a one-year contract as an astronomer and "paid associate" at its outstations at Santiago and La Silla, in Chile. Early in 1995 he applied for a post as an astronomer, still in Chile. He got it, and the ESO offered him an appointment as an "international staff member" for three years. He signed his new contract on 6 October 1995.

By a decision of 8 June 1995 the Council of the ESO amended Article R IV 1.03 of the Staff Regulations: as from 1 January 1996 it was to make cost-of-living adjustments in the pay of staff outside Germany so as to give pay in Chile and in Germany the same purchasing power.

By a memorandum of 11 January 1996 the head of Personnel told the staff in Chile that the "cost-of-living differential" between Munich, the city taken for the sake of comparison, and Santiago would not be known until March; so from January the amounts of earnings were provisional; Eurocost, the body that would be reckoning the differential, thought the figures likely to be about 25 per cent lower for Santiago than for Munich.

By a memorandum of 11 July 1996 the head of Personnel announced that the differential was "-30.6%" but would apply to only 60 per cent of basic salary and, if the Council so consented in December 1996, not to allowances in 1996; so monthly amounts of pay as from 1 January 1996 were still provisional. The memorandum went on:

"3.1 Staff members who held a current indefinite contract on the date of the Council approval of this policy, i.e. on 8 June 1995 ... maintain their net emoluments paid according to the basic salary scale and the allowances valid on 31.12.1995 until the [cost-of-living] adjusted salaries exceed these net emoluments.

...

3.2 Staff members who held a current fixed-term contract on the date of the Council approval of this policy, maintain, until the end of their current contract and during future contract extensions, net emoluments not lower than those stipulated under point 3.1 above.

3.3 Staff members who were offered a first contract or a new contract of indefinite duration after the date Council approved this policy, will have their salary adjusted fully ..."

On 4 August 1996 staff members in Chile on contracts signed before June 1995 filed a class appeal against the "freezing of ... net salaries on the level of December 1995". On 5 August the complainant filed an appeal of his own against "the application of the cost-of-living differential" to his salary. On 26 August he and eight others who had signed contracts after June 1995 lodged another class appeal, against the cost-of-living "adjustment of 18.36% to ... basic salaries". [\(1\)](#)

In December 1996 the Council approved the policy of adjustment.

The Director General put the appeals to the Joint Advisory Appeals Board. In its report of 23 June 1997 the Board recommended, among other things, negotiating "a freezing of the salary scale for the international staff in Chile ... until there is parity between the frozen salary scales and the applicable [cost-of-living] index for Chile". By a letter of 11 July 1997, the impugned decision, the head of Administration told the complainant on the Director General's behalf of the rejection of his appeal of 5 August 1996.

B. The complainant submits that the ESO acted in breach of its duty to tell him what his conditions of service would be. At no time from the date of publication of the notice of vacancy for the post of astronomer in Chile up to the date at which he signed his contract did it warn him that his basic salary and allowances might be adjusted to the cost of living. The papers that came with his contract gave no inkling of any such retroactive adjustment, which has cost him over 18 per cent of his earnings. So at the time of signing his contract he lacked "accurate information on the essential and fundamental terms of employment".

The Observatory broke the terms of his contract and several provisions of the Staff Rules and Regulations. His earnings were not as set out in his contract, and the cut amounted to a substantial and unilateral change in its terms. The contract he signed on 6 October 1995 was not his first fixed-term one since he had been with the ESO since 1991; so, according to what the head of Personnel said in his memorandum of 11 July 1996, his net earnings should not have fallen below the amount guaranteed by the scale in force in December 1995.

Citing precedent, he pleads breach of his acquired rights on the grounds that the adjustment brought his basic salary down by 18.36 per cent in 1996 and by 14.1 per cent in the first ten months of 1997. That he sees as breach of Noblemaire - for an explanation of the principle, see Judgment 825 (*in re* Beattie and Sheeran) under 1 to 5 - in that his earnings were not such as to attract and keep in employment the citizens of member States.

In the belief that his post was akin to two held by staff members in Germany, he submits that the impugned decision discriminated against him. The Observatory gave him a lower grade than the one he would have had in Germany because the cost of living was lower in Chile. So by adjusting his pay downwards it has cut his earnings yet again.

He seeks the quashing of the impugned decision and an award of costs.

C. In its reply the ESO acknowledges no duty to give full details of the terms of recruitment, even such an important one as the amount of monthly pay. All that the Staff Regulations say is that the contract of service shall set out such essential terms as basic salary, housing allowance and other regular allowances. The complainant's contract did so. Though he lost some 18 per cent of basic salary, he knew when he signed what the adjustment would entail, the staff in Chile having thrashed out the subject.

The defendant denies breaking any term of his contract, which actually cited Article R IV 1.03 as amended by the Council. The text he signed in October 1995 was a new contract, not an extension of the old one, since his status shifted from "paid associate" to "international staff member". So he was not entitled to the protection of acquired rights that the head of Personnel's memorandum bestowed.

He knew as early as January 1996 that the figure of his earnings was only provisional and he could then have worked out what the adjustment would mean. So the doctrine of acquired rights cannot apply. Nor was there any breach of equal treatment, a principle that has nothing to do with the impugned decision. His post was not like the other two.

D. In his rejoinder the complainant submits that the material issue is not whether he was aware of the policy of adjustment before he signed his contract but whether he was able to reckon the effect of it on his earnings. The ESO "pulled a fast one". It would be unfair to refuse protection of his acquired rights on the pretext of a change in his status: he had, after all, been with the ESO since 1991.

E. In its surrejoinder the defendant points out that when the complainant signed his contract he knew full well that his pay was to be linked to the cost of living. Though able to work out what that would mean, he "accepted the uncertainty as to the exact amount of his monthly net remuneration". So he has no reasonable cause for dismay about the outcome.

CONSIDERATIONS

1. The ESO recruited the complainant on 1 December 1991 as a "fellow" under an appointment for one year and renewed it twice. In 1994 it again appointed him for one year, from 1 October 1994 to 30 September 1995, as a "paid associate". It assigned him to Santiago and La Silla, in Chile. On 1 October 1995 it gave him an appointment for three years as an international staff member, still in Chile. He left the ESO in October 1997.
2. By a memorandum of 11 July 1996 the Observatory told him that it was applying a new policy in line with the amended text of Article R IV 1.03 of the Staff Regulations, which its Council had adopted on 8 June 1995. The amendment brought in a "cost-of-living differential" to be applied to 60 per cent of the basic pay of international staff outside Germany. The differential that was applied to the complainant's basic salary as from 1 January 1996 was "-30.6%", and so he suffered a cut of $18.36 - 60 \times 30.6$ - per cent in pay.
3. On 5 August 1996 he lodged an internal appeal of his own with the Director General against the decision in the memorandum of 11 July 1996. On 26 August he and other staff members filed a class appeal.
4. On 10 January 1997 he got an administrative circular setting out again the terms of the memorandum of 11 July 1996 about the adjustment.
5. The appeals went to the Joint Advisory Appeals Board. In its report of 23 June 1997 it recommended, among other things, a temporary freeze of salary. The Director General rejected the complainant's appeal on 11 July 1997, and that is the decision, notified to him on 15 July 1997, which he is impugning. He pleads breach (1) of the duty to tell him beforehand of the terms of his employment; (2) of contract; (3) of acquired rights; and (4) of equal treatment in employment. There being no need to rule on all his pleas, the Tribunal will take up only the second one insofar as he is pleading breach of the terms of the memorandum of 11 July 1996.
6. Points 3.1 and 3.2 of the memorandum are reproduced in A above. The complainant submits that those rules applied to him and that by adjusting his net earnings fully and retroactively the ESO brought his pay below the figure guaranteed under the scales in force at 31 December 1995 and so broke its own commitments under its policy of adjustment.
7. The Observatory replies that the complainant was not covered by the safeguard in points 3.1 and 3.2 because the contract it offered him on 4 October 1995 was a new one within the meaning of point 3.3:

"Staff members who were offered a first contract or a new contract of indefinite duration after the date Council approved this policy, will have their salary adjusted fully ..."
8. The complainant is right to demur. The contract which he was offered on 4 October 1995, and which he signed on the 6th, was not his first fixed-term contract, since he had begun at the ESO in 1991 under a fixed-term one that it had renewed more than once. Nor was it a new, indefinite contract, since, as was said in 1 above, his last contract was a fixed-term one for three years. Under his earlier contracts he was a staff member within the meaning of Article I 2.01 of the Staff Rules. Points 3.1 and 3.2 of the memorandum, which benefit not just international staff, entitled him to keep his "net emoluments paid according to the basic salary scale and allowances" as at 31 December 1995 until his pay went above that figure by dint of adjustment to the cost of living.
9. The impugned decision is unlawful because it denied him the safeguard he enjoyed under 3.1 and 3.2. It cannot stand. The ESO must pay him the amounts it wrongfully withheld from 1 January 1996 to 31 October 1997.

DECISION

For the above reasons,

1. The Director General's decision of 11 July 1997 is set aside.
2. The ESO shall pay the complainant the amounts it wrongfully docked from his emoluments from 1 January 1996 to 31 October 1997.
3. It shall pay him 10,000 French francs in costs.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner

1. *sc.* 30.6 per cent of 60 per cent.