119th Session **Judgment No. 3408**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Messrs A. G., H. U. K. and M. Q. against the European Organisation for Astronomical Research in the Southern Hemisphere (ESO) on 6 August 2012 and corrected on 13 November 2012, ESO's reply of 4 March 2013, the complainant's rejoinder of 5 June and ESO's surrejoinder of 8 July 2013;

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 none of the parties has applied;

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

A. The remuneration and allowances of ESO staff are adjusted annually by reference to a salary index based on two components: the German cost-of-living movement, as determined by the German Federal Statistical Office, and the real change in remuneration of central government civil servants in certain member states, as determined by EUROSTAT, the Statistical Office of the European Union. At the end of 2010, the salary index based on provisional data from EUROSTAT stood at minus 1.85 per cent, which implied that in 2011 ESO would have to adjust salaries downwards. However, as it was anticipated that the index would be more favourable in 2012, the ESO Council decided not to adjust remuneration and allowances at all in 2011, i.e. to apply an index of zero per cent, and to incorporate the exact 2011 index, based on the final data from EUROSTAT, in the 2012

adjustment. The staff were notified of this decision by an internal memorandum of 12 January 2011. At its 121st meeting held on 7 and 8 June 2011, the Council approved the final salary index of minus 1.5 per cent for 2011 and confirmed its decision to apply it as of 1 January 2012.

The Council set up in June 2000 a Tripartite Group, composed of members nominated by the Council, the Director General and the Staff Association, respectively, to advise the Council on matters related to employment conditions and remuneration. The Tripartite Group was not able to review the question of the 2012 salary adjustment at its 27th meeting on 11 October 2011 because the EUROSTAT figures necessary for the calculation of the salary index were not available. The provisional figures communicated to ESO by EUROSTAT shortly before the Finance Committee's 132nd meeting on 8 and 9 November 2011 yielded a salary index of 0.4 per cent for 2012. However, as it had been decided that the final 2011 index of minus 1.5 per cent would be applied in 2012, the Finance Committee, which dealt with the matter in a restricted session, recommended for 2012 a negative salary adjustment of minus 1.1 per cent. This recommendation was adopted by the Council at its 122nd meeting held on 7 and 8 December 2011 and the staff were informed of this decision by an internal memorandum of 11 January 2012.

This salary adjustment was reflected in the complainants' salary slips for January 2012. On 7 March 2012 the complainants lodged an appeal with the Director General against the decision to apply to them the new scale of basic salaries and to award them, as a result, a reduced amount in household, children's and supplementary children's allowances. In their letter of appeal they sought authorisation to bring their complaints directly to the Tribunal, in the event that the Director General's decision on their appeal was unfavourable. By a letter of 10 May 2012, which is the impugned decision, the Head of Human Resources notified the complainants of the Director General's decision to grant them leave to proceed directly to the Tribunal, thereby tacitly rejecting their appeal.

B. The complainants assert that the new scale of basic salaries and household and children's allowances is illegal, because it is based on a salary adjustment index which is in itself illegal in several respects. First, there was breach of the consultation obligation provided for in the applicable rules. Indeed, pursuant to Staff Regulation R VII 1.02, as complemented by the Council's decision of June 2000 to set up a Tripartite Group, the Staff Association must be consulted on matters relating to staff remuneration, including salary adjustments. This requirement was not respected, given that the Tripartite Group did not have an opportunity to review the EUROSTAT figures used for the calculation of the ESO salary index before the Finance Committee examined the issue of the salary adjustment at its meeting in November 2011. The complainants emphasise in this regard that, although the Staff Association proposed that the Tripartite Group convene to review said figures before the meeting of the Finance Committee, its proposal was denied. The failure to convene the Tripartite Group effectively meant that ESO contravened the decision taken by the Council in 2000 that "all matters relating to employment conditions and remuneration shall be discussed and reviewed by the Tripartite Group", thereby breaching its obligation to consult the staff representatives.

In addition, the complainants argue that by implementing the 2012 salary adjustment, ESO breached the principle that any methodology of adjustment must ensure that the results are "stable, foreseeable and clearly understood". Indeed, the Finance Committee dealt with the salary adjustment issue in a restricted session and the Staff Association was not allowed access to the minutes of this meeting. Therefore, the results of a methodology yielding a negative salary adjustment could not be "clearly understood" by the complainants.

Furthermore, in implementing the new salary adjustment, ESO relied mainly on data received from external authorities. However, in so doing, it failed to check the validity of such data and thereby violated its obligation to ensure the lawfulness of the external elements it decided to incorporate into its legal order. As a result, not only did it use an incorrect EUROSTAT figure regarding the remuneration of German civil servants, but it also used data in its annual review of staff

remuneration which entailed a double counting of changes in social contributions. This double counting constituted a methodological deficiency resulting in an error of fact.

The complainants ask the Tribunal to set aside the Director General's decision of 10 May 2012 and to draw all legal consequences therefrom. In particular, they request that the matter be sent back to the Organization in order for it to go through the procedure correctly and to pay them as from 1 January 2012 the pay to which they are entitled. They also claim costs.

C. In its reply ESO rejects the complainant's assertions. Noting that staff consultation in matters concerning remuneration, including salary adjustments, takes place informally within the Tripartite Group, it submits that the staff were effectively consulted on the 2011 index through the participation of staff representatives in that Group. It denies any responsibility for the failure by the Tripartite Group to review the EUROSTAT data before the meeting of the Finance Committee in November 2011, emphasising that it received the figures one day before that meeting and immediately forwarded them to the members of the Tripartite Group. In any event, it notes that at the meeting of the Finance Committee in November 2010, where it was agreed to carry over the negative 2011 index to the 2012 salary adjustment, both the President and one other representative of the Staff Association present at the meeting supported this recommendation. Subsequently, after reviewing the final data for 2011 at its meeting in March 2011, the Tripartite Group agreed with the recommendation of the Finance Committee, i.e. to apply the 2011 index to the salary adjustment for 2012 together with the EUROSTAT provisional index for 2012.

ESO also argues that in establishing the 2012 salary adjustment, it relied on the methodology provided for in its statutory texts and it gave staff ample opportunity to understand the index applied. It emphasises in this regard that two members of the Staff Association were present when the adjustment was discussed during the restricted session of the Finance Committee in November 2011 and the

complainants cannot therefore argue that the staff were not given the opportunity to understand the index applied for 2012.

With regard to the plea regarding its alleged failure to check the legality of the EUROSTAT data, ESO submits that it must fail for the following reasons. First, because a consideration of the cost of compulsory national health insurance contributions is in conformity with ESO's salary index formula, which takes into account "the real change in the net remuneration of central government civil servants" and, second, because it implies an obligation on its part to verify the EUROSTAT data on the changes in the net remuneration of civil servants before establishing the resulting salary index. ESO explains in this regard that it does not have the expertise required for establishing such data and that it therefore relies on recognised statistical institutions. It considers it very improbable that the Tribunal would impose such an obligation upon an international organisation.

D. In their rejoinder the complainants press their pleas. They reject the assertion that at the meeting of the Tripartite Group in March 2011 the staff representatives agreed with the recommendation that the salary adjustment index of minus 1.5 per cent should apply to the salary adjustment for 2012. They add that the Staff Association could not have clearly understood, reviewed or approved the results of the salary adjustment methodology, since the minutes of the Finance Committee meetings of November 2010 and 2011 were provided to it for the first time together with ESO's reply to the present complaints. They note that in its reply ESO does not deny that the EUROSTAT figures used for the calculation of the salary adjustment index were erroneous. In their opinion, an international organisation cannot evade its responsibility for having incorporated in its legal order unlawful elements emanating from an external authority.

E. In its surrejoinder ESO maintains that at its meeting of March 2011 the Tripartite Group recommended the application of a salary adjustment index of minus 1.5 for the year 2012 and points out that there is no mention in the minutes of the meeting of an objection being raised by the Staff Association. It explains that, as members of the

Tripartite Group and observers in the Finance Committee, the staff representatives were given access to the documents which were available to the Finance Committee and the Council and which showed the figures presented by EUROSTAT and the calculation methodology resulting in the minus 1.5 index. According to ESO, the salary adjustment it applied for the year 2012 was fully in line with the requirement that any methodology of adjustment must ensure that the results are "stable, foreseeable and clearly understood". It adds that any change in the salary adjustment index falls exclusively within the Council's competence. Therefore, should the Tribunal consider that there was a methodological deficiency in the manner used to calculate the index applied for the year 2012, ESO will put the matter to the Council.

CONSIDERATIONS

1. From January 2012, the three complainants' basic salary and other emoluments (household, children and supplementary children allowances) as employees of ESO were reduced by 1.1 per cent. They sought review by the Director General of this decision to pay them amounts which, on their account, were less than the amounts they were entitled to receive. They also requested that they be able to challenge any negative decision directly with the Tribunal rather than going through an internal appeal process. By letter dated 10 May 2012, the complainants were informed that the Director General adhered to the decision to reduce their salary and other emoluments but agreed that the decision could be challenged directly with the Tribunal. Thus, on 6 August 2012, the complainants lodged their complaints with the Tribunal. The complainant Mr G. is the lead complainant with Mr K. and Mr Q. adopting his arguments and evidence.

2. The impugned decision is challenged on the ground that the determination of the salary adjustment index (upon which the 2012 salaries and other emoluments were calculated) was illegal and thus the determination of the salaries and emoluments was illegal. There are three bases on which the determination of the index is said to be

illegal. The first is that the index was determined in breach of ESO's obligations to consult. The second is that the index was determined in breach of the principle whereby any methodology of adjustment must ensure that the results are "stable, foreseeable and clearly understood". The third is that the determination was in breach of ESO's obligation to check the legality of a decision taken by an external authority and incorporated into its legal order.

3. The issue about consultation arises this way. Staff Regulation R IV 1.01 provides that remuneration and allowances for ESO staff are to be reviewed annually using, as a guide an index, "the composition and method of calculation of which is laid down in Annex R A 1". That Annex provides that the annual review is to be undertaken with the aid of a salary index. The Annex also identifies the composition and calculation of the salary index. The index contains two components. One is the German cost-of-living movement (the German figure) for a specified period (July of the preceding year to June). The second is changes in the net remuneration of specified civil servants of certain member states that, at the relevant time, were France, Germany and the United Kingdom (the civil servant figure) again for the same specified period (July of the preceding year to June). This latter figure is based on data from EUROSTAT, Luxembourg. These two figures are then used in a calculation that is detailed in the Annex.

4. The Annex contains a general provision that the adjustments resulting from annual review will normally be presented by the Director General to the Finance Committee in its ordinary session in November and to the Council in its ordinary session in December. This is on the basis that decisions to adjust salaries will normally take effect on 1 January of the following year. In addition to these formal processes, ESO engages in discussions with staff through a Tripartite Group about, amongst other things, salaries adjustments.

5. In 2010, the Council decided at its meeting in December that there would be no adjustment (described as a zero per cent adjustment) to salaries and emoluments for the year 2011. That decision was made

in the face of a provisional calculation that the adjustment determined by applying Annex R A 1 was minus 1.85 per cent. However the Council also decided at the meeting in December 2010 that the adjustment that would otherwise have applied in 2011 would be applied as an "exact adjustment" in 2012. The provisional calculation just referred to, was revised during 2011 and became minus 1.5 per cent (including an adjustment to give effect to a judgment of the European Court of Justice). This final figure was considered by the Tripartite Group at a meeting on 8 March 2011 which recommended the figure's application to the 2012 salary adjustment. In June 2011 the Council approved the application of the 2011 salary adjustment for 2012. That is to say, the negative salary adjustment would be applied to salaries and other emoluments from 1 January 2012. This was subject to the determination and application of the salary index calculated in the normal way during 2011 based on the German figure and the civil servant figure for July of the preceding year to June. There was a Tripartite Group meeting on 11 October 2011. "Salary Adjustment 2012" was on the agenda but withdrawn because the data from EUROSTAT needed to calculate the civil service figure was not available. That data became available one day before the meeting of the Finance Committee on 8 and 9 November 2011. Applying that data, a civil service figure could be calculated which, when applied using the formula in Annex R A 1, gave rise to a salary index of 0.4 per cent. The Finance Committee decided at this meeting to recommend the negative provisional salary adjustment for 2012 as minus 1.1 per cent (being the sum of the earlier minus 1.5 per cent and the 0.4 per cent). This recommendation was followed by the Council at its meeting on 7 and 8 December 2011.

6. The complainants argue that this sequence of events manifests a failure to consult in good faith. They refer to Judgments 1200, consideration 2, 2354, considerations 6 and 7, and 2615, consideration 5. These precedents make clear that an advisory body (that must be consulted by an organisation or decision maker) needs to have relevant information available. If the body does not, this invalidates the consultation. In its reply, ESO did not challenge these general principles

or their application to it. Rather ESO approached this issue on the basis that, as a matter of fact, there had been no failure to consult.

7. In the brief, the complainants assert that at the Finance Committee meeting of 8 and 9 November 2011 the Staff Association representative proposed that the Tripartite Group first review the EUROSTAT figures but that this proposal was denied. In its reply, ESO annexed the minutes of that meeting. In their rejoinder the complainants do not dispute the minutes and indeed rely on them. It is clear from those minutes that the focus of the proposal of Mr F. (an observer representing the Staff Association) involved a revisitation of the 2010 decision to apply the "exact adjustment" (minus 1.5 per cent) particularly having regard to the impact of social costs like pension and health costs. The EUROSTAT figure of 0.4 per cent was, at best, peripheral to the issue raised at the Finance Committee by Mr F. Whether the duty to consult has been met or violated is not to be applied in a vacuum. If, as here, it is alleged information was not provided or not provided in a timely way, the duty to consult is violated with legal consequences only if that information is material to the matter in issue and on which there should be consultation and, additionally, proper consultation is frustrated by its absence. In the present case, the EUROSTAT data was not of that character having regard to what, in truth, was being raised as an issue at the meeting of the Finance Committee. Accordingly, there was no violation of the duty to consult.

8. The next contention of the complainants is that there is a clear principle that any methodology of adjustment of, amongst other things, salaries must ensure that the results are "stable, foreseeable and clearly understood", referring to Judgment 1265, consideration 27, and Judgment 1821, consideration 7. They contend that this principle has been violated, at least in the sense that a methodology yielding a negative salary adjustment could not be "clearly understood" and, presumably, was not clearly understood. The complainants refer to the fact that the Finance Committee meeting in November 2011 was in a restricted session and that the Staff Association was not given access to the minutes of that meeting and that of the Council of December 2011.

In the brief the concluding submission is that "the Staff Association, through its representatives, and consequently the complainants, were not informed of all the data behind the Council's decision and consequently, could not understand the results arrived at". However the die was cast and the method of computation established by the decision of the Tripartite Group at its meeting of 8 March 2011 to recommend, as the minutes record, "[the application of] an exact adjustment for the year 2011 [of minus 1.5 per cent] to the 2012 salary adjustment calculation". It is true that the minutes also record concerns about the quality of the data input, the availability of the data and its (the methodology's) retroactive changes. However, insofar as the adjustment of minus 1.5 per cent is concerned, there was, after March 2011, ample opportunity for the representatives of the staff to consult with the Administration about the calculation of the minus 1.5 per cent. Moreover, the jurisprudence the complainants rely on concerns methodology, not the minutiae of particular data used when applying the methodology. The real grievance is with the result, namely a reduction in salaries and other emoluments. That is not to say that data is always immune from challenge. Indeed, the complainants seek to challenge data on the third basis identified earlier.

9. The challenge to the data is based on the principle, as described in the brief, that "international organisations are bound under law to check that the decision of an external authority is legal, before incorporating it within their own legal order". The complainants refer to Judgments 382, consideration 6, 825, consideration 18, 1000, consideration 12, 1265, considerations 21 and 24, 1713, consideration 3, 2303, consideration 7, and 2420, consideration 11.

10. Before considering the details of the argument, it is instructive to recall the terms of Annex R A 1. As noted earlier, the salary index consists of two components. The second component is described in the following terms:

> "(b) The real change in the net remuneration of central government civil servants of France, Germany and Italy [now the United Kingdom] in a 12 month period (data of the Statistical Office of the European Communities

> – EUROSTAT –, Luxembourg) from July of the year preceding the current year to June of the current year, namely the year preceding that in which the approved index enters into force, normally with effect from 1st January, taking the index for the month of July in the year preceding the current year as bases = 100."

It can be seen that this component requires identification of "the real change in the net remuneration".

11. The complainants identify two alleged deficiencies in the data used. The first is that in relation to German civil servants the EUROSTAT data identified a figure of minus 4.9 per cent as the change to their net salary for the period 2009-2010. This figure fed into the calculation of the minus 1.5 per cent which was carried over and determined the quantum of the salary reduction effective 1 January 2012. The complainants argue that this figure contains an element that, in reality, should be discounted. The argument is that the minus 4.9 per cent is based on an assumption that a new law requiring civil servants to take out additional insurance for health purposes required German civil servants to pay an additional amount which had the effect of reducing their net remuneration. Both the complainants and ESO made detailed submissions about how the German law operated. But this is a matter the Tribunal does not need to resolve. According to the complainants, approximately minus 4.2 per cent of the minus 4.9 per cent can be accounted for as the amount payable under this law. However the complainants say that the vast bulk (approximately 99.2 per cent) of the officials to whom this computation relates, did not need to take out, and therefore pay for, the additional insurance. The complainants argue that in the result, the impact of the health insurance on the net remuneration of German civil servants was very much less than minus 4.9 per cent. Accordingly, the use of the minus 4.9 per cent distorted the calculation of the minus 1.5 per cent.

12. The second deficiency concerns what the complainants describe as double counting. The gravamen of this argument is that the net remuneration of the civil servants who are comparators is depressed by amounts these civil servants are required to pay as "social contributions". The negative influence of the payment of these

social contributions suppresses the amount by which the salaries of ESO staff increase. Yet this is occurring in circumstances where similar demands are made on ESO staff for increased social contributions. The complainants described this as a "methodological deficiency which clearly results in an error of fact". They point to safeguards introduced by other international organisations, and the European Patent Organisation in particular, to avoid this "double counting of social contributions".

13. However, these arguments, while raised by reference to the principle that international organisations are bound under law to check that the decision of an external authority is legal, before incorporating it within their own legal order, are really about the way Annex R A 1 is interpreted and applied. The expression "real change in the net remuneration" might be thought to be a reference to actual changes, in a demonstrable and concrete sense, to net remuneration of civil servants from the three countries which provide the comparators. However the concept of "real" changes in average remuneration appears to be a concept used by EUROSTAT as a term of art as part of a statistical methodology it uses. The indirect adoption of this statistical methodology is obviously intended to provide a means of calculation which is demonstrably objective. Accordingly, the way Annex R A 1 is framed (as being based on data from EUROSTAT) means that the formula in the Annex, which uses the salary index calculated by reference to the remuneration of certain government civil servants, perpetuates any deficiencies (if they be deficiencies) in the calculations of, and ultimately the data provided by, EUROSTAT. Any unfairness which may arise from the terms of Annex R A 1 has to be addressed by changes to the Annex. However there is not, in the Tribunal's view, any illegality about the way it presently is applied.

14. Accordingly, the complainants' challenge to the salary they were paid in January 2012 fails and the complaints should be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 31 October 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ