FIFTY-SECOND ORDINARY SESSION

In re MACCHINO FARIAS

Judgment No. 608

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Southern Observatory (ESO) by Mr. Agustín Macchino Farías on 31 May 1983, the ESO's reply of 15 September, the complainant' rejoinder filed on 15 October and corrected on 27 December and the addendum thereto filed on 18 November 1983, and the ESO's surrejoinder of 15 February 1984;

Considering the applications to intervene dated 8 August 1983 and filed by:

Luis Aguila Vargas,

Ismael Alday Zepeda,

Pedro Alvarez Castellón,

Raul Araos Rodriguez,

Ernesto Araya Troncoso,

José Arce Calderón,

Hugo Arias Rimmelín,

Manuel Bahamondes,

Oscar Bauer Martinez,

Mario Benitez Fernández,

Elly Berliner Golle,

Juan Borquez Ibarra,

Armando Bruna Bruna,

Manuel Cartes Valdes,

Geraldo Carvajal Veliz,

Beatriz Castillo Castillo,

Hector Castillo Castillo,

Jorge Castizaga Caceres,

Florentino Contreras Araya,

Hugo Cortes Vega,

Jorge Diaz Saavedra,

Rainer Donarski Schulz,

Domingo Duran Cortes,

Juan Espinoza Torrejón,

Mila Felis Krause,

Juan Fernández Aguilera,

Juan Fernández De,

Edgardo Figueroa,

Pedro Garagorri Alaña,

Roberto García Ramirez,

Percy Glaves Peters,

Eugenia Gómez Carrasco,

Leonardo González,

Domingo González Leyton,

German González Lira,

José Luis González Ordenes,

Braulio González Vidal,

Sergio Guerra Ardiles,

Samuel Guzmán Acuña,

Helmuth Herborn Videla,

Ramon Huidobro,

Hans Kastowsky Ganser,

Nelson Labrín Gangas,

Octavio Lavin Catril,

Washington Leon Aracena,

Bernardo Leon Morales,

Ramon Leyton Leyton,

Ellerslie Lobos Ruggero,

Ignacio Lopez Vilches,

Pedro Marin Fuentes,

Rolando Medina Zanetta,

Hugo Meneses Guaringa,

Jorge Miranda Mery,

Lucía Montes Miranda,

Juan Molina,

María Molkenbuhr Thornhill,

Jorge Moreno González,

Francisco Naveas,

Herman Nuñez Portilla,

Ernesto Orrego Cisternas,

Oscar Orrego Sandoval,

Patricia Parada Mujica,

Ricardo Parra Paz,

Juan Penafiel Barrera,

Joaquin Pérez Droguett,

José Piatek Ziolo,

Guido Pizarro Aguilera,

Oscar Pizarro Aguilera,

Manuel Pizarro,

Luis Ramirez Portilla,

Miguel Rodriguez,

Norman Rojas Vega,

Gorki Roman Delgado,

Alfredo Rosas Avalos,

Jose Rosas Avalos,

Walter Rosenfeld,

Gregorio Serrano Serrano,

Victoria Tapia Rojas,

Gero Timmermann,

Arturo Torrejón Koscina,

Jorge Torres Ramirez,

Elias Torres Salomon,

Albert Triat Saurat,

Antonio Valera Puelle,

Oscar Varas Mella,

Hugo Vega Berrios,

Hector Vega Santana,

Enrique Vera Diaz,

Juan Vera Torres,

Saul Vidal Lara,

Luis Wendegass Mellado

Jorge Yagnam Vigorena,

Oscar Zamorano Huerta;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles LS IV.1.03, LS VI.1.03 and LS VIII.1.01 of the Regulations for Local Staff Members, and Article R 8.1.01 of the Staff Regulations of the ESO;

Having examined the written evidence and considering oral proceedings to be unnecessary;

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

A. The complainant, a Chilean citizen, has been employed by the ESO in Chile since 1972 as a laboratory assistant. His written contract of appointment says he is subject to the local staff regulations. He and the interveners, who are also local staff members, have their salary and allowances linked to the official consumer price index (IPC) in Chile. The ESO decided to replace monthly adjustments with quarterly ones from February 1982. There were protests from the staff. On 7 December 1982 the complainant wrote to the Director of the ESO in Chile formally asking that his pay be adjusted every month from February 1982. On 25 January 1983 the ESO's head of administration replied refusing the claim. He quoted Article LS IV.1.03: "To compensate for changes in cost of living, the Organization shall study and may change, if necessary, the salary scale of local staff members every month, on the basis of the official consumer price index published by the competent authority in Chile." He observed that it was the Finance Committee and the Council of the ESO that had approved the quarterly adjustments in 1982. The complainant appealed on 7 March to the Director-General under LS VI.1.03. In his reply of 3 April, the impugned decision, the Director-General refused the claim on the grounds that it was time-barred and in any event without merit.

B. The complainant submits that the decision is in breach of LS IV.1.03, which entitles local staff members to monthly adjustment to offset any inflation, a common practice in Chile. Such adjustments are not at the ESO's discretion. The consistent practice was to make them every month, and the staff have an acquired right to monthly adjustment. It is indeed an implied term of their contracts. The ESO recognised its obligation in an agreement it concluded with the Local Staff Association on 19 July 1978. Clause 1.7 reads: "the Organization will readjust monthly the basic schedule of salaries and other benefits, according to the IPC of the immediately preceding month". It fulfilled that obligation up to February 1982. The complainant seeks the Tribunal's quashing of the decision of 3 April 1983, monthly adjustment of his salary and benefits, compensation for loss of income since February 1982, and costs.

C. In its reply the ESO undertakes to execute the Tribunal's judgment in respect of any other local staff member in the same position as the complainant. It submits that the complaint is irreceivable for failure to exhaust the internal means of redress. LS VIII.1.01 says that "claims relating to the payment of salaries ... may not be raised later than six months from the date on which the local staff member became entitled to raise such claims". The ESO changed its policy in February 1982, but the complainant did not lodge his appeal until 7 December and it was therefore time-barred. The complaint is, besides, devoid of merit. In 1974, when inflation soared to 376 per cent, LS IV.1.03, which till then provided for quarterly adjustment, was amended to provide that the ESO "may" change the salary

scale of local staff every month: it is therefore a matter of discretion. By 1982 inflation had dropped below 10 per cent a year, and the ESO decided in February to go back to quarterly adjustment. Under LS IV.1.03 its only obligation is to "study" the salary scale. It is obliged neither to adjust nor, therefore, to follow any particular system of adjustment. The complainant has no acquired right to monthly adjustment: adjustment is not a matter of right, and the method of calculating an adjustment cannot form the subject of an acquired right anyway. There is no obligation of adjustment implied in the staff's contracts. Salaries were reviewed only because the ESO chose to review them. The adjustment provided for in the 1978 agreement is subject to "the approval of ESO's Finance Committee and Council", and it was these bodies that made the change. Subsidiarily, the ESO submits that the claim is time-barred in so far as it relates to adjustment from February to June 1982 since the complainant did not act until December.

D. In his rejoinder the complainant contends that LS VIII.1.01 does not set a time bar for a claim: at worst it would prevent him only from claiming an adjustment that became due not more than six months earlier. It is not true he did not act until December 1982: the Staff Association protested at once. He develops his arguments on the merits. The ESO' interpretation of LS IV.1.03 robs it of all content: the article serves no purpose if adjustment is entirely a matter of discretion. There is an acquired right to monthly adjustment because such adjustment is a matter of decisive importance to local staff in accepting appointment with the ESO. Offers of appointment made in 1978, 1979 and 1980 promise monthly adjustment, and it is therefore actually a term of the contract.

E. In its surrejoinder the ESO maintains that the complainant and the interveners are barred from claiming monthly adjustment by their failure to respect the time limit in LS VIII.1.01. Besides, LS IV.1.03 plainly puts no obligation of monthly adjustment on the ESO, which has correctly exercised its discretion under that provision. The complainant's contract does not provide for monthly adjustment. Only 15 local staff, including 11 of the interveners, have such a contract, but it merely reflects the practice obtaining at the time at which it was concluded and cannot derogate from the clear terms of the local staff regulations. Subsidiarily, the ESO invites the Tribunal to take the case of the 11 interveners separately and hold that they had no acquired right under their contracts which could be infringed by the change to quarterly adjustment and that the ESO never recognised any obligation of monthly adjustment in regard to them.

CONSIDERATIONS:

1. Local Staff Regulation IV.1.03 reads as follows: "To compensate for changes in cost of living, the Organization shall study and may change, if necessary, the salary scale of local staff members every month, on the basis of the official consumer price index published by the competent authority in Chile. The variation percentage to be applied for the readjustment of the salaries may then correspond to that of the month preceding the month in which the salaries are paid." On 4 December 1981 the Council of the Organisation decided that the salaries of local staff should be adjusted quarterly and not monthly. This decision was communicated to the local staff on 1 February 1982. No amendment was made to the regulation. The complainant states that the decision was immediately denounced by the Staff Association. It was at any rate made clear by 16 February 1982 that the decision would not be accepted without discussion, for on that day an agreement was signed between the management and the Local Staff Association in which the matter was expressly excepted from a general provision that the staff would not during 1982 raise with the management any discussion concerning salary studies and/or salary changes. On 7 December 1982 the complainant, who was a leading member of the Staff Association, wrote to the Head of Administration requesting the monthly adjustment of his salary and on 25 January 1983 his request was rejected. Likewise on 3 April 1983 the Director-General rejected an appeal and his decision to do so is the decision impugned.

2. The Organisation denies that LS IV.1.03 imposes any obligation upon it to adjust salaries either at monthly intervals or at all. It bases this contention on the use of the word "may" which, it argues, is permissive and not mandatory and gives the Organisation an absolute discretion either to adjust or not to adjust as it pleases. It is true that the word "may" is as a matter of grammar permissive and not mandatory, but it is not always used in a strict grammatical sense. It is the duty of the Tribunal to ascertain the intent of the regulation and, while the intent is to be found in the language used, it is not invariably to be found in a strict grammatical construction of the language used. The nature and purpose of the regulation must be considered; also its history and the manner in which it has been applied.

3. As to its nature, a regulation designed to give protection against inflation is aimed at fixing the amount of the salary in real terms. It is unnatural for a regulation fixing salary to leave the amount or any part of it to be settled in

the discretion of the employer. It is unlikely also that it would be framed in a manner which would permit the employer to reduce the wage if the index fell, while not requiring him to increase the wage if the index rose. Economically it was doubtless unlikely in 1974 in Chile that the index would fall, but a document settling the terms of a legal relationship must provide for the unlikely as well as for the likely event.

4. As to the history, LS IV.1.03 was not the first to deal with inflation. It was enacted in 1974 as an amendment to an earlier regulation. The full text of the earlier regulation is not in the dossier, but it is stated by the Organisation and not disputed that the new version made only two changes in the old. One change was to substitute monthly for quarterly adjustments. The other was to change the pre-1974 text, which read "shall study and change the salary scale" into "shall study and may, if necessary, change the salary scale". So the word "may" is qualified by "if necessary", bu t the argument on neither side throws much light on what could be intended by the qualification. The Organisation has drawn attention to a study it commissioned of the practices of the 28 best-paying local employers and has pointed out that only one of them adjusts for inflation as frequently as once a month. For some the criterion is a percentage change in the index, e.g. there is to be an adjustment of salary whenever there is a change in the index of 10 per cent or more. It is obvious that the increased speed of change in the index must in 1974 have created the necessity for reducing the interval from three months to one. Maybe the words "if necessary" were designed to allow the Organisation to return to quarterly intervals when the speed of inflation had subsided. They have not, however, influenced the Organisation into formulating any interpretation less wide than that it is under no obligation whatsoever to make any adjustment at all, which means that the addition to the wage to compensate for inflation is to be treated as a gratuity or bonus which the Organisation can grant or withhold as it pleases. The Tribunal will first express its opinion on the interpretation advanced by the Organisation and then return to the words "if necessary".

5. As to the way in which the regulation was operated in practice, from 1974 to 1982 the Organisation behaved outwardly just as it would if it had an obligation to adjust monthly and in and after 1982 as if it had an obligation to adjust quarterly. It did, however, internally make reservations, indicating that the adjustment must be dependent on its budgetary position; there is no evidence that this view of its obligations was ever communicated to the staff. The indications may have meant either that the Organisation considered itself free to do as it pleased under a permissive regulation or that it considered that the regulation ought to be amended so as to leave it free to pay no more than it thought it could afford. On the other hand, the various statements by the Organisation that it would make adjustments monthly, which are relied upon by the complainant as the recognition of an obligation to do so may be interpreted either as a voluntary grant limited to a particular case or to a defined period.

6. The Tribunal therefore does not derive much assistance from a consideration of the way in which the regulation was operated. The decisive factors are the history and nature of the regulation. In the Tribunal's opinion the word "may" is not sufficient to change the right to adjustment in accordance with the index, which before 1974 was an integral part of the salary, being the way in which the salary was calculated, into a bonus or gratuity to be given in addition to the salary when the Organisation felt that it could afford to do so. The word "may" is certainly appropriate when a discretion is being conferred, but in a legal document it is rarely so used without accompanying words defining and limiting the area of the discretion. In the rare cases in which it is intended to confer an unfettered discretion words are used which make plain the extent of the power, such as "he may, whenever in his absolute discretion he thinks fit to do so, ...". It is permissible when such words are not used, to treat "may" as meaning "must". The second sentence of the regulation, whose object is to secure that the adjustment of salary corresponds to the change in the index, says that the salaries "may then correspond". But unless "may" is there read as "must", the sentence is meaningless. The Tribunal holds that under LS IV.1.03 the Organisation is obliged to make adjustments in the manner prescribed. The next question is whether the obligation is unqualified or is made conditional by the words "if necessary".

7. No detailed figures are given in the dossier as to the course of inflation between 1974 and 1982, but the Tribunal infers that there was considerable fluctuation. It is reasonable to conclude that the object of the words "if necessary" was to give the Director-General a discretion to substitute monthly for quarterly adjustments when in his opinion the more frequent adjustment was necessary for keeping pace with inflation. It follows that he must have a similar discretion to return to quarterly adjustments when he considers that the need for greater frequency is past. There is however no evidence in the dossier that in February 1982 he exercised any discretion: on the contrary, he must have proceeded upon the erroneous assumption that he was under no obligation to make any adjustment at all and so could do what he liked about the frequency. The Tribunal must therefore quash the decision impugned as proceeding from an error of law and remit the case to the Director-General to reach a new decision based on the correct interpretation of LS IV.1.03. This new decision is to be taken as in the circumstances existing in

November/December 1981 when the decision to return to quarterly adjustments was taken by the Organisation's Finance Committee and Council and is to take effect in substitution for that decision. Whether or not the complainant is entitled to any of the relief claimed must depend upon the terms of the new decision.

8. As to the applications to intervene, the Organisation does not object to them and undertakes to apply the Tribunal's judgment in this case to all members of its local staff whose position is identical to that of the complainant.

DECISION

For the above reasons,

The appeal is allowed, the decision of the Director-General of 3 April 1983 is quashed, and it is ordered:

1. that the case be remitted to the Director-General to take a new decision in accordance with the terms of paragraph 7 above;

2. that the Organisation pay US$ 1,000 to the complainant as costs.

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 well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 April 1984.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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