

FIFTY-EIGHTH ORDINARY SESSION

In re TIMMERMANN

Judgment No. 731

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Southern Observatory (ESO) by Mr. Gero Timmermann on 30 April 1985, the ESO's reply of 5 June, the complainant's rejoinder of 16 August and the ESO's surrejoinder of 18 October 1985;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Articles LS IV.1.03, and VI.1.01 to .07 of the Regulations for Local Staff Members of the ESO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a Chilean, has been employed by the ESO in Chile since 1979 and is subject to the Regulations for Local Staff Members. He has his salary and allowances adjusted to the consumer price index in Chile in accordance with Article LS IV.1.03 of the Regulations. The ESO decided to replace monthly adjustments with quarterly ones from February 1982. A complaint was filed challenging the Director-General's final decision of 3 April 1983, and there were 93 interveners, of whom the present complainant was one. The facts of that case and the parties' submissions are summed up in Judgment 608 of 12 April 1984 (in re Macchino Farías). The Tribunal quashed the Director-General's decision and ordered that the case be remitted for a new decision. The Director-General's new decision was set out in a letter of 1 June 1984 addressed to Mr. Macchino Farías and the interveners: in the exercise of his discretion under LS IV.1.03 the Director-General had rejected the request for monthly adjustment of salary and allowances. The ESO has since practised a policy of quarterly adjustment, except that, as for example in December 1984, temporary acceleration of inflation may be offset by the grant of a special adjustment. On 8 January 1985 the complainant wrote to the Director-General alleging that he had not yet taken a new decision in the case of Mr. Macchino Farías and asking that his own salary be adjusted every month; he believed that it should have been so adjusted in the previous two years. By a letter of 29 January 1985 the Head of Administration informed him that in the Director-General's view circumstances did not warrant going back to monthly adjustment. The complainant received that letter on 4 February and it is the decision he is impugning.

B. The complainant submits that he exhausted the internal means of redress by addressing his formal claim to the Director-General on 8 January 1985.

As to the merits, he believes that he has an acquired right under the terms of his appointment to monthly adjustment of his salary and allowances; that the ESO has failed to give full effect to Judgment 608 since it has not decided for how long the policy of quarterly adjustment will remain in force and that it is implicit in the judgment that the Director-General has discretion to return to monthly adjustment when there is a need for it. In 1979 and 1980, when inflation was running at over 30 per cent a year, adjustment was monthly; in 1981 inflation was below 10 per cent and the change to quarterly adjustment was made; but since 1982 it has been above 20 per cent -- 29 by March 1985 -- and the Director-General ought to have gone back to monthly adjustment. If he decides never to go back, he will make LS IV.1.03 meaningless. The complainant invites the Tribunal to quash the decision of 29 January 1985; declare that the decision of 1 June 1984 does not give effect to Judgment 608; order monthly adjustment of his remuneration; award him damages for loss of income amounting to 181,000 Chilean pesos or an amount based on monthly recalculation of his remuneration from November 1982; and award him 1,600 United States dollars as costs. He also seeks declarations of principle regarding the purpose of LS IV.1.03 and the frequency of adjustments.

C. The ESO submits that the complaint is irreceivable. The complainant's application for declarations is irreceivable because he is neither challenging any final decision nor seeking a remedy prescribed by the Statute of the Tribunal. His substantive claims are irreceivable because he has failed to follow the internal appeal procedure laid down in Article LS VI.1.01 and following of the local staff regulations. Insofar as his claims are based on a challenge to the

Director-General's decision of 1 June 1984 he ought to have lodged an internal appeal against that decision within the time limit of 30 days set in LS VI.1.03. Since his internal appeal was not made until 8 January 1985 he was out of time and therefore failed to follow the internal procedure correctly. If, however, his letter of 8 January 1985 is to be treated as a new claim, and the reply of 29 January as a new decision thereon, he again failed to exhaust the internal means of redress because he should have submitted an internal appeal against that new decision in accordance with LS VI.1.07.

D. In his rejoinder the complainant submits that his claims are receivable. It is unfair of the ESO to plead a time bar to any challenge to the Director-General's decision of 1 June 1984, in fact he and other local staff representatives discussed the matter with the Administration throughout the second half of 1984 in the hope of reaching a settlement out of court. To the plea that he failed in other respects to exhaust the internal means of redress he answers that the Head of Administration did not indicate in the decision of 29 January 1985 any intention of referring his claims to the Appeals Committee: he did exhaust all the means of redress at his disposal. As to his application for declarations on various matters, he submits that the final decision he is challenging on those matters is implied.

E. In its surrejoinder the ESO observes that the complainant has not disputed any of the material facts that support its plea of irreceivability. He did not lodge any internal appeal in time against the decision of 1 June 1984 and gives no sound reason for his failure to do so, and he lodged no internal appeal at all against that of 29 January 1985. The ESO develops its arguments on receivability.

CONSIDERATIONS:

Article VII of the Tribunal's Statute provides that a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations. The decision impugned in this case is a decision given by the Head of Administration on 29 January 1985. The complainant has filed his complaint against this decision without first exercising the right of appeal against it given by Article LS.VI of the Regulations for Local Staff Members of the Organisation. For this reason the complaint is irreceivable and as such is dismissed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner