

F.
v.
ESO

139th Session

Judgment No. 4921

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. F. against the European Southern Observatory (ESO) on 1 March 2021, ESO's reply of 22 July 2021, the complainant's rejoinder of 20 October 2021 and ESO's surrejoinder of 21 December 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests ESO's decision not to apply the ceilings defined in its Staff Rules and Regulations to the cost-of-living differential of the monthly household and children's allowances paid to him.

The complainant is an internationally recruited staff member of ESO assigned to a duty station in Chile. As an international staff member who is married, has a dependant child, and is based in a duty station outside Germany, he is entitled to the expatriation, household, and children's allowances.

ESO's Staff Rules and Regulations provide that the remuneration and allowances for staff members serving in duty stations outside Germany shall be adjusted by applying a cost-of-living differential.

At the material time, Annex R A 5, 5.03 of the Staff Rules and Regulations provided, in relevant part:

“The expatriation allowance for the member of personnel covered by Staff Regulations A 5.02 and 5.04 shall be adjusted by applying a cost-of-living differential established by EUROCOST indicating the difference in cost-of-living between the reference town in the country of the duty station and the lead town Munich. If substantial differences in cost-of-living occur within one country, more than one reference town may be determined. In this case, the cost-of-living difference for the reference town which is the nearest to the duty station shall apply. The cost-of-living differential shall be applied by 60% to the respective expatriation allowance. The maximum cost-of-living differential applied to the respective expatriation allowance shall be +/- 13.3% for members of personnel receiving household allowance and +/- 10% for those not receiving household allowance.”

Also, Article R IV 1.12 of the Staff Regulations provided, in relevant part, that “100% of the household allowance for members of personnel with duty station outside Germany shall be adjusted by the cost-of-living differential according to the provisions set out in Annex R A 5, 5.03”. In the same vein, Article R IV 1.13 of the Staff Regulations relevantly provided that “100% of the children’s allowance for members of personnel with duty station outside Germany shall be adjusted by the cost-of-living differential according to the provisions set out in Annex R A 5, 5.03”.

On 12 February 2020, the complainant filed an appeal with the Director General contesting ESO’s decision “not [to apply] the ceilings defined in R A 5, 5.03 to the cost-of-living correction of the [c]hildren[’s] [...] and [h]ousehold [a]llowance[s] [...] for the December 2019 and January 2020 salaries”. Noting that the cost-of-living differential for December 2019 and January 2020 was -16.36% and -15.54% respectively, the complainant argued that ESO had incorrectly applied these values (percentages) in the adjustment of the household and children’s allowances paid to him in December 2019 and January 2020 (as reflected in his respective payslips), because said values (percentages) were outside the +/- 13.3% ceiling (limit) defined in Annex R A 5, 5.03 which applied to him in accordance with Articles R IV 1.12 and R IV 1.13 of the Staff Regulations. The complainant asked the Director General to “revise the calculation of the

December 2019 and January 2020 salaries so that the [cost-of-living] correction [be] limited to the defined ceilings, namely -13.3%”.

On 22 March 2020, the complainant was informed that the Joint Advisory Appeals Board (JAAB) had been convened to examine his appeal. On 10 June 2020, the Administration submitted a statement in response to the complainant’s appeal in which it sought to explain, by reference to the historical background and decisions of the ESO Financial Committee since 2004, the reasons why it correctly applied the ceiling for the cost-of-living differential, defined in Annex R A 5, 5.03 exclusively to the expatriation allowance but not to the household and children’s allowances.

Having held a hearing on 9 September 2020, the JAAB submitted its report and recommendation to the Director General on 7 October 2020. The JAAB held that the Staff Rules and Regulations, together with the letter of appointment, defined the terms of the contractual relationship between ESO and its staff members and, although Financial Committee documents were official ESO documents, they did not form part of that relationship, and staff members should not be expected to consider context and intention based on documents which they might not be aware of and which they might not have access to. The JAAB found it reasonable for a reader to assume that the ceiling mentioned in Annex R A 5, 5.03 was applicable to the allowances provided for in Articles R IV 1.12 and R IV 1.13. While acknowledging that ESO’s intention might have been for the cost-of-living differential ceiling to apply only to the expatriation allowance, the JAAB cautioned that the wording of the Staff Rules and Regulations was insufficiently explicit regarding the intention behind the rules and concluded that what was contained in the Staff Rules and Regulations was applicable and ought to prevail. The JAAB also urged ESO to consider a comprehensive review of the Staff Rules and Regulations and the applicable Administrative Circulars with a view to provide clarity of the intention behind the rules, to eliminate obsolete rules and to reduce the possibility for divergent interpretations.

By a decision of 5 December 2020, the Director General informed the complainant that he rejected his appeal, as he considered that the JAAB's recommendations were not consistent with the Tribunal's principles regarding the interpretation of rules and were based on a wrong understanding of the purpose of the ceiling defined in Annex R A 5, 5.03. The Director General noted that the reasons for the Administration's decision, provided to the complainant with the Administration's 10 June 2020 response to his appeal, remained fully valid. The Director General took due note of the JAAB's recommendation to consider a comprehensive review of the ESO Staff Rules and Regulations and applicable Administrative Circulars. On 1 March 2021, the complainant filed the present complaint with the Tribunal impugning the 5 December 2020 decision.

After the filing of the complaint, ESO offered to pay the complainant the sum of 26.99 euros (corresponding to his alleged loss, i.e. the amount withheld from the household and children's allowances paid to him for the months of December 2019 and January 2020) in final settlement of the dispute. The complainant rejected this proposal and offered to withdraw the complaint on the condition that the Director General withdraw the impugned decision, that ESO adjust all salaries as from December 2019, and that it pay him all costs incurred. In the event, no settlement was reached and, on 23 June 2021, the Director General decided to pay the complainant the difference between the amounts of the household and children's allowances claimed and those actually paid for the months of December 2019 and January 2020. On 2 July 2021, in execution of this decision, the amount of 26.99 euros was transferred to the complainant's account.

The complainant asks the Tribunal to annul the impugned decision dated 5 December 2020, along with his all his payslips as from 1 December 2019 implementing the impugned decision, and to order ESO to provide him with new revised payslips as from that date. He also asks the Tribunal to order ESO to pay him costs in an amount to be specified at the end of the proceedings before the Tribunal.

ESO asks the Tribunal to dismiss the complaint as moot and irreceivable or, otherwise, as unfounded.

CONSIDERATIONS

1. The complainant centrally claims that, in conflict with the provisions of the Staff Rules and Regulations, ESO's Finance Department calculated his household and children's allowances for the months of December 2019 and January 2020 wrongly and thereby deprived him of monies that were due to him for those allowances. At the material time, the complainant was an internationally recruited staff member of ESO working at its duty station in Chile and, as he was married and had a dependent child, he was entitled to receive those allowances, pursuant to Annex R A 5, 5.03 of the Staff Rules and Regulations and Articles R IV 1.12 and R IV 1.13 of the Staff Regulations.

2. The complainant states, in this complaint, that he submitted his internal appeal to the Director General in February 2020 against ESO's failure to apply the ceiling applicable to the cost-of-living differential for his household and children's allowances. According to him, he took this action after his payslips for the months of December 2019 and January 2020 revealed that, contrary to the provisions of the three aforementioned Staff Rules and Regulations, those allowances had been adjusted by -16.36% for the month of December 2019 and -15.54% for the month of January 2020. He argues that ESO thereby failed to apply the required ceiling for the cost-of-living differential for the two allowances in accordance with the Staff Rules and Regulations, which provided that those allowances "shall be adjusted by the cost-of-living differential according to the provisions set out in Annex R A 5, 5.03". This provided that "[t]he maximum cost-of-living differential applied to the respective expatriation allowance shall be +/- 13.3% for members of personnel receiving household allowance and +/- 10% for those not receiving household allowance". He submits that on the clear wording of the three Staff Rules and Regulations, the ceiling, "the maximum cost-of-living differential", should apply not only to the expatriate allowance, as ESO has by practice done, but also to the household and children's allowances, since there are no provisions

which derogate from the clear words of Annex R A 5, 5.03 that it applies for the purpose of calculating those two allowances.

3. The foregoing submissions accord with the Tribunal's case law, stated, for example, in consideration 3 of Judgment 4639, that it is a basic rule of interpretation that words are to be given their obvious and ordinary meaning and that words must be construed objectively in their context and in keeping with their purport and purpose, but that should an ambiguity remain in the relevant provision after this method of construction is applied, the regulations or rules of an international organisation must in principle be construed in favour of the interests of its staff and not those of the organisation itself. As the Joint Advisory Appeals Board (JAAB) correctly concluded, the Tribunal holds that the complainant's submission that the abovementioned operative words in Annex R A 5, 5.03 of the Staff Rules and Regulations are clear and unambiguous. Those words defined the applicable ceiling for the cost-of-living differential for the complainant's household and children's allowances, which should have been reflected in the complainant's payslips for the months of December 2019 and January 2020. The Director General erred by rejecting the JAAB's recommendation that they were applicable. ESO's central submission to the effect that its unchallenged practice not to apply the ceiling expressly provided for in Annex R A 5, 5.03 to household and children's allowances, applying thereto instead the full cost-of-living differential, since 2005 without objection from staff, does not appreciate that a practice, no matter how long-standing, cannot replace or derogate from the clear and unambiguous words of a rule. As the Tribunal has reiterated, in consideration 6 of Judgment 4026, a practice cannot become legally binding where it contravenes specific rules which are already in force.

4. Based on the foregoing, ESO's decision to reimburse the complainant the additional sums he has claimed on his payslips for the months of December 2019 and January 2020 was correct. To that extent, this complaint is moot, as ESO submits. So too is the complainant's claim that the Tribunal orders ESO to provide him with new revised payslips for December 2019 and January 2020. Inasmuch

as, in his internal appeal, the complainant only contested his December 2019 and January 2020 payslips and only asked for a revision of the calculation made in them, this complaint is irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, to the extent that he requests the Tribunal to order ESO to annul all subsequent payslips in which the contested decision was implemented. The Tribunal is however confident that ESO will, in the interest of fairness and equity, ensure the complainant receives the full benefits of its finding in consideration 3 of this judgment.

5. Inasmuch as it was only after the complainant filed his complaint with the Tribunal that ESO reimbursed him the additional sums he has claimed on his payslips for the months of December 2019 and January 2020, ESO will be ordered to pay him costs in the amount of 10,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. ESO shall pay the complainant costs in the amount of 10,000 euros.

In witness of this judgment, adopted on 22 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER