Registry's translation, the French text alone being authoritative.

EIGHTY-THIRD SESSION

In re Aschenbrenner, Grand Kammer and Haeberli

Judgment 1659

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Gerhard Aschenbrenner and by Mr. Heinz Haeberli against the European Free Trade Association (EFTA) on 12 February 1996 and corrected on 30 April;

Considering the complaint filed by Mrs. Nicole Grand Kammer against the Association on 14 February 1996 and corrected on 30 April;

Considering EFTA's replies of 14 August 1996, the complainants' rejoinders of 30 October and the Association's surrejoinders of 4 April 1997;

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

Having examined the written evidence and decided not to order hearings, which none of the parties has applied for;

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

A. Mr. Aschenbrenner, an Austrian who was born in 1941, joined the staff of EFTA in September 1971. In 1982 the Association granted him a permanent appointment. At the material time he held a grade P.4 post in the Legal Affairs Department. Mrs. Grand Kammer, who is Swiss and was born in 1944, joined the Association in September 1978 and got a permanent appointment in 1990. Her final grade was G.5, although she had a special post allowance corresponding to G.6, and she worked in the typing pool. Mr. Haeberli, who was born in 1938 and is also Swiss, joined EFTA in July 1967, got a permanent appointment in 1975 and was in charge of the Finance Section at grade P.3.

Meeting in Helsinki on 22 June 1994, the ministers representing the seven member States of the Association took note of the accession of Austria, Finland and Sweden to the European Union and of their consequent withdrawal from the Association as from 31 December 1994. The changes since made in the Association's structure are described in Judgment 1596 (*in re* Leicht and others) under 2 and 3. At a meeting on 12 December 1994 the Council of the Association instructed the Secretary-General to give notice of termination as from 30 June 1995 to holders of permanent appointments. On 13 and 14 December 1994 the Council set up a working group to make proposals for establishing a new secretariat.

By letters of 14 December 1994 the Secretary-General informed the complainants that, by reason of the Council's decision to "wind up" the secretariat and on the Council's instructions he was terminating their appointments as from 30 June 1995 under Staff Regulation 12.2(c).

In February 1995 the Council endorsed the working group's proposals. On 22 February the Association issued several notices of vacancy for the recruitment of staff under fixed-term appointments. Each of the complainants applied for one or more posts. On 17 May the Secretary-General told them that he could offer them no employment in the new secretariat.

On 29 June 1995 the complainants filed internal appeals with the Advisory Board of EFTA against termination. In letters of 14 November 1995 the Secretary-General told them that there had been failure to constitute the Board and that the material rules therefore allowed direct appeal to the Tribunal. Those are the impugned decisions.

B. The complainants contend that the secretariat was never "wound up". The only change that occurred after 30 June 1995 was that staff were laid off and some terms of service, such as the grant of permanent appointments, were struck from the Staff Regulations and Rules.

In their submission the termination of their appointment has no proper basis in law since it was in breach of Staff Regulation 12.2(b). That provision requires the Association, where posts are abolished or staff reduced, to grant priority for employment, on certain conditions, to holders of permanent appointments. So the dismissals are null and void.

The complainants plead abuse of the procedure on the grounds that by the time they were given notice of dismissal the decision had already been taken to keep the secretariat going. Yet it was the "winding-up" of the secretariat that the letters of 14 December 1994 gave as the grounds for dismissal. Although the secretariat was supposedly being wound up it started up the very next day under the same name and with the same legal personality and terms of reference. The purpose of the whole exercise was to dodge the safeguards granted to the staff and the precepts of international civil service law.

The complainants seek the quashing of the decisions terminating their appointments at 30 June 1995 and their reinstatement in EFTA under permanent appointments as from 1 July 1995 and in the Association's Pension Fund or, failing that, awards of damages for loss of employment up to the date of retirement. They seek costs.

C. The Association replies that the complaints are irreceivable on several grounds. In its submission the Secretary-General's final decisions were in the letters he wrote to the complainants on 14 December 1994, not in those of 14 November 1995, the ones they purport to be challenging in their complaints. Since the complaints were not filed until February 1996 they are out of time. Although the Staff Regulations and Rules set no time limit for appeal to the Advisory Board, the complainants took over six months to file internal appeals. That is not a reasonable time on any reading of the case law. The Regulations and Rules do not set any time limit that is greater than six months. In any event the complaints are time-barred under Article VII(3) of the Tribunal's Statute.

On the merits the Association contends that Regulation 12.2(b) does not apply. When the Council told the Secretary-General to give the complainants notice of dismissal the remaining member States had not yet decided to set up a new secretariat. So at the time there were no posts that the complainants could have been redeployed to. And though the defendant later duly published notices of vacancies in the new secretariat the complainants have not challenged the rejection of their applications for some of those posts.

The Association says that the complainants have produced privileged documents in breach of Regulation 5 and asks the Tribunal to strike out those items.

D. In their rejoinders the complainants reject the Association's objections to receivability. On the merits they submit that their posts were never abolished and that in any event the Association was not free to terminate their permanent appointments without carrying out the reduction-in-force procedure. The purported distinction between old and new secretariats is a mere fiction that has no legal force and does not warrant depriving permanent staff of their jobs and acquired rights. The complainants put at 5,000 Swiss francs each the amount they are claiming in costs.

E. In its surrejoinders the defendant points out that since all jobs with the old secretariat, including the complainants', were abolished, Regulation 12.2(b) was not applicable. There was nothing fictitious about closing down the secretariat on 30 June 1995: it was lawful for the remaining member States to decide, when three had gone, what shape and form the Association should take and what it should be doing.

CONSIDERATIONS

1. The complainants used to hold permanent appointments with the European Free Trade Association. The Secretary-General of the Association told them on 14 December 1994 that he had to terminate their appointments at 30 June 1995. Such was the outcome, he said, of a meeting of the Council of the Association. Several member States having left to join the European Union instead, the Council had decided at that meeting to "wind up" the secretariat, i.e. have it stop work on 30 June 1995. The member States had

resolved -- said the Secretary-General -- to consider later the sort of services the Association would need from the secretariat after that date; but the decisions to end the complainants' appointments were "final".

2. In February 1995 the decision was taken to recruit staff for a smaller secretariat under fixed-term appointments. The complainants applied for the jobs that were on offer but to no avail: in letters of 17 May 1995 the Secretary-General told them that he was "unfortunately not in a position to offer [them] a post in the new EFTA Secretariat".

3. On 29 June 1995, the day before the dismissals were to take effect, the complainants appealed to the Advisory Board that hears individual disputes before appeal will lie to the Tribunal. They challenged the decisions and sought reinstatement or, failing that, damages.

4. On 14 November 1995 the Secretary-General answered that the delegations of the seven former and remaining member States of the Association had "failed to generate a consensus on the constitution of an Advisory Board" as provided for in the rules and that "Under these circumstances, Regulation 41 paragraph (b) ... in force prior to 1 July 1995 allows for an appeal to the ILO Tribunal, as the Advisory Board has failed to transmit to the Secretary-General its opinion or proposals for settlement within sixty days of the receipt" of the appeals.

5. The three complainants filed their complaints on 12 and 14 February 1996. The complaints are joined because the complainants are in like case in law, if not in fact.

6. The defendant pleads that the complaints are irreceivable.

7. Its first argument is that the complainants may not challenge before the Tribunal the decisions of 14 November 1995, which simply told them that they were free to appeal. The "final" decisions appealable under Regulation 41(b) are the dismissals dated 14 December 1994 and notified the next day.

8. The complainants are challenging, not the rejection of their applications for new jobs, but the refusal of their claims to reinstatement, and they are thereby challenging the lawfulness of the Secretary-General's decisions of 14 December 1994. Regulations 40 and 41 in force at the time must be read together: only after referral to the Advisory Committee may those decisions be treated as "final" and challenged in complaints before the Tribunal. Although they were described as "final" the complainants were not then free to go straight to the Tribunal; they had to appeal to the Advisory Board first.

9. The defendant pleads, secondly, that they ought to have acted in time: they did not go to the Board until 29 June 1995, six-and-a-half months after they had had notice of dismissal. The plea would no doubt succeed if the rules set a time limit for appeal, but they do not. It is perhaps a pity that the complainants tarried until the very eve of dismissal. But they did expressly reserve their rights when acknowledging receipt of notice of dismissal, and they were hoping until the last day for a satisfactory outcome. So it is hardly arguable that some time limit which was not even in the rules was running against them. They were therefore still free on 29 June 1995 to appeal to the Board against the decisions of 14 December 1994.

10. The Association's third plea is that, if they were still free to go to the Board, they ought to have inferred rejection after sixty days. They then had ninety days under Article VII(2) of the Tribunal's Statute in which to file complaints. Since two of them did not do so until 12 February 1996 and the third not until 14 February, or over 150 days after the notification of their appeals to the Board, they were out of time. The plea again fails. Although there was no report from the Board within the sixty days, the reason was that it had never been set up. Actually it never was. As was held in Judgment 1596 (*in re* Leicht and others) of 30 January 1997, the time limit of ninety days began only at 16 November 1995: that was the date at which they received the Secretary-General's letters of 14 November 1995 telling them that the Board could not be set up and they were free under Regulation 41(b) to appeal to the Tribunal. The complaints are therefore not out of time.

11. Though receivable, the complaints are devoid of merit. The complainants argue that there were no grounds in law for dismissing them since the "winding up" of the secretariat was not a valid reason under Regulation 12.2. Moreover, the Association made no effort to assign them to suitable jobs in the new secretariat as from 1 July 1995. In their submission the whole exercise was an abuse of process.

12. After Austria, Finland and Sweden had left, the Association had to carry on with only four member States on a working budget that was but a fraction of what it had been before. It was therefore only reasonable for it to consider overhauling the secretariat and go ahead with the abolition of units and then of posts. As was said in Judgment 1614 (*in re* Morelli) of 30 January 1997 --

"As circumstances change so must an organisation reform its structure, and that may mean doing away with posts. Even if abolition is not expressly provided for, no organisation can be required to abide for evermore by the same approach to what it has to do."

It was the EFTA Council of seven member States that resolved to wind up the secretariat, pay off the permanent employees and let fixed-term appointments run out. It saw that as the only proper course because of political uncertainty and lack of money to pay the staff after 30 June 1995. The seven States also wanted to safeguard the freedom of the four remaining members to set up a smaller secretariat which matched the smaller membership. There was no mistake of law in the Council's reasoning. Though understandably upset at the immediate birth of a smaller secretariat they did not belong to, the complainants did not expressly contest the rejection of their applications for the jobs available. They plead breach of Regulation 12.2(b) which confers priority for re-employment on permanent employees whose posts had to be abolished. But since all the posts were abolished the Association had no choice in the matter and nothing to offer the redundant staff but the opportunity of applying for jobs in the new secretariat. At all events the decision taken by the four remaining members in February 1995 to set up the new secretariat shows no abuse of authority. The complainants' plea on that score cannot be sustained.

13. The conclusion is that their claims to the quashing of the impugned decisions, to reinstatement and to awards of damages cannot but fail.

14. The defendant strongly objects to the complainants' producing privileged documents which it says they should never have disclosed without leave from the Secretary-General and which should therefore be discounted. The complainants explain that when still on the staff they were regularly sent such documents. So it is hard to see what is wrong with their relying thereon in pleadings that are confidential anyway. The Tribunal also refers to what it said on the issue in Judgment 1596 under 28 to 33.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

William Douglas
Michel Gentot
Mella Carroll
A.B. Gardner

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